

Loss of Limited Liability Protection

Risks When Corporate Status is not well Communicated

By Maralynne A. Monteith and Diana Yeung

One of the advantages of incorporating a business, in the ordinary course, is that liabilities relating to the operation of the business would be limited to the value of the assets held by the corporation, with the owner's personal assets out of reach from the business' creditors. However, in order to benefit from this limited liability protection, the owner must take steps to ensure that members of the public are aware that they are dealing with a corporation, rather than the owner personally.

In a recent case heard by the Ontario Court of Appeal - *Kobes Nurseries Inc. v. Convery*, 2011 ONCA 662 - the Court upheld the lower court's finding that the defendant failed to communicate to the plaintiff that the business was no longer being carried on by a sole proprietorship, but by a corporation. Consequently, the defendant was unable to sustain a defence that a debt owing to the plaintiff was owed by his corporation, rather than by him personally.

Facts

In that case, the defendant had been doing business with the plaintiff since 1993 and used the style "Maple Lane Landscaping & Nursery" throughout. On January 31, 2003, the defendant decided to incorporate a numbered company, "1553022 Ontario Ltd.", to continue to operate his business. However, after considering the following facts, the Court found that the plaintiff's contractual relationship continued to be with the defendant personally notwithstanding that incorporation:

- The invoices from the plaintiff to the defendant were all addressed to Maple Lane Landscaping & Nursery to the attention of Darren Convery (the defendant).
- A cheque payable to the plaintiff dated February 3, 2006, was signed by Mr. Convery and marked simply as "Maple Lane Nurseries and Landscape". None of the cheques used set out the corporate identity as "1553022 Ontario Limited".
- A facsimile transmission sheet dated April 2, 2008, was sent from Maple Lane Nurseries and Landscape to the plaintiff, without any reference to the numbered company.
- An Ontario Retail Sales Tax Purchase Exemption Certificate dated May 11, 2006, was provided to the plaintiff, which identified the business name as "Maple Lane & Nurseries" without any reference to the numbered company.
- An Ontario Retail Sales Tax Purchase Exemption Certificate dated February 8, 2003, set out the name of the business as "Maple Lane Nurseries & Landscape Division 1553022 Ontario Ltd.". However, the

plaintiff claimed that he did not receive this Certificate and only received the 2006 Certificate. The Court accepted the plaintiff's claim that the 2003 Certificate may not have been transmitted to the plaintiff.

- Prior to incorporating the business, the defendant informed the plaintiff that he was considering incorporating the business. However, the Court noted that a conversation indicating one's intent to incorporate does not communicate the fact that incorporation has actually occurred.
- The defendant posted in the retail area of his business a vendor permit dated October 24, 2005, which set out the corporation's name. However, the defendant admitted that he could not be certain that the plaintiff ever saw the permit on one or more of his visits to the defendant's premises. The Court did not consider the posting of the vendor permit to be sufficient notice of incorporation to the plaintiff.

Always Clearly Communicate Your Corporate Status

This case serves as an important reminder, particularly for those using registered business names for continuity, that incorporating one's business by itself is not enough to ensure limited liability protection. One must also ensure that customers, suppliers and members of the public are aware that they are dealing with a corporation by communicating this fact clearly and consistently in all communications (e.g. letterhead, invoices, cheques, published contact information, etc.).

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