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The Ontario Court of Appeal Provides a Clear Solution to the Common Employer Doctrine

June 21, 2021

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In *O'Reilly v ClearMRI Solutions Ltd*.[1], the Ontario Court of Appeal clarified when the "common employer doctrine" will ascribe liability to a corporation in respect of an individual employed by another corporation that is controlled by or affiliated with it.

In *O'Reilly*, the Court held that a corporation is not a common employer merely because it 'owned, controlled or was affiliated with another corporation that had a direct employment relationship with the employee',[2] and that the doctrine of common employer cannot be applied if there is no intention to create an employer/employee relationship between the individual and the related corporation.

Background:

William O'Reilly served as the CEO for both ClearMRI Solutions Ltd. ("ClearMRI Canada") and ClearMRI Solutions, Inc. ("ClearMRI US", together with ClearMRI Canada, the "ClearMRI Companies"). Mr. O'Reilly's written employment agreement was with ClearMRI US, a wholly own subsidiary of ClearMRI Canada, although he reported to, and his performance goals were set by, the board of directors of ClearMRI Canada.

Another corporation, Tornado Medical Systems, Inc. ("Tornado"), was a majority shareholder in ClearMRI Canada. Mr. O'Reilly had no formal position with Tornado. Under a Unanimous Shareholder Agreement, Tornado had specified rights relating to ClearMRI Canada, but these rights did not extend to changes in the management of ClearMRI Canada or its subsidiaries and employment agreements.

In 2013, Mr. O'Reilly loaned money to ClearMRI Canada, and agreed to defer his salary to remedy the company's cash flow problems on ClearMRI Canada's promise that it would bring its product to market and earn revenue. In 2014, it became evident to Mr. O'Reilly that ClearMRI Canada was no longer committed to bringing its product the market. Mr. O'Reilly claimed that he was constructively dismissed and demanded a payment of $281,315.00 USD from the ClearMRI Companies, Tornado and the directors of ClearMRI Canada and Tornado for unpaid salary and the loan payment. Mr. O'Reilly sought to hold Tornado liable under the common employer doctrine.

On a motion for summary judgment the motion judge, Justice Ferguson, concluded that Tornado was a common employer and was jointly and severally liable for the employment related amounts of the judgment. Justice Ferguson identified three factors that triggered the common employer doctrine and concluded that Tornado exercised 'a sufficient amount of control'[3] over Mr. O'Reilly and that there was common control between the different legal entities because Tornado had incorporated ClearMRI Canada to develop specific business.

The Appeal Decision:

On appeal, Justice Zarnett, writing for a unanimous panel of the Court of Appeal, noted that the motion judge failed to apply the correct test, and accordingly overturned the lower court's decision and held that Tornado was not liable under the common employer doctrine. The Court of Appeal expressed favour for the concept of corporate separateness and reiterated that a corporation is a distinct legal entity with its own rights, powers, and privileges, and as such, should not be responsible for obligations it did not incur itself.[4]

Instead, the doctrine of common employer is triggered only if, and to the extent that, the purported common employer can be said to have entered into a contract of employment with the employee, determined either through a written agreement or conduct between the individual and the corporation, viewed objectively. It is not sufficient that the purported common employer is owned, controlled, or was affiliated with another corporation that had a direct employment relationship with the employee.[5]

Justice Zarnett provides a helpful summary of the common employer doctrine at paragraph 65 of his reasons:

To summarize, the doctrine of common employer liability exists consistently with the principle of corporate separateness because it holds related corporations liable for obligations they actually undertook to perform in favour of the employee. It does not hold them liable simply because they have a corporate relationship with the nominal employer. Whether the related corporations actually undertook to perform those obligations is a question of contractual formation — did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged? Of central relevance to that question is where effective control over the employee resided. The existence of a written agreement specifying an employer other than the alleged common employer(s) will also be relevant; the extent of the relevance will depend on the terms and the factual context.[6]

In this case, because Mr. O'Reilly sought to hold Tornado responsible for *specific* employment obligations (i.e. outstanding amounts owed to him under his employment agreement) he had to demonstrate that he and Tornado objectively intended to contract about employment with each other on the terms alleged. Given that Tornado's name was absent from Mr. O'Reilly's employment agreement and given that Tornado's limited degree of involvement with and control over Mr. O'Reilly could not be linked to any intention to create an employment agreement with him, the Court of Appeal concluded that Tornado was not a common employer and therefore was not liable to him.

In summary, a corporation will not be held liable simply because they have a corporate relationship with a subsidiary or nominal employer. The appropriate test is whether the corporation objectively acted in a manner that showed an intention to create an employment contract, and therefore to perform the employment obligations. For businesses operating through multiple entities, this decision provides a measure of comfort that the court will be reluctant to hold interconnected entities jointly and severally liable for obligations owing to employees of one of the entities in the absence of any objective evidence that a specific corporate entity and the individual intended to be parties to an employment contract with each other. If separation between multiple entities can be proved, and intention to contract can cannot be established, the court will likely not extend liability to such entities.

[1] *O'Reilly v ClearMRI Solutions Ltd*., 2021 ONCA 385.

[2] *Ibid* para 50

[3] *Ibid* para 35

[4] *Ibid* at paras 43-45.

[5] *Ibid* at para 50.

[6] *Ibid* at para 65.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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