

November 9, 2016

Appealing Commercial Decisions: Where To?

Businesses need to be able to resolve disputes quickly and effectively. For that reason, the Ontario *Business Corporations Act* (the “OBCA”) provides that any appeal of an order made under the OBCA lies to the Divisional Court (a special branch of the Superior Court of Justice), instead of the Court of Appeal. In theory, appeals to the Divisional Court are resolved more quickly than appeals to the Court of Appeal.

A question frequently arises: when is an order made “under the Act” entitling and requiring an appeal to the Divisional Court instead of the Court of Appeal? Do all appeals in proceedings involving the OBCA go to the Divisional Court?

In short, no. Beyond that, few generalizations can be made.

The Court of Appeal had occasion to comment on when an appeal in a proceeding involving the OBCA lies to the Divisional Court as opposed to the Court of Appeal in *Buccilli v Pillitteri*.

Buccilli involved a motion to quash an appeal of a decision of the Superior Court of Justice made to the Court of Appeal instead of the Divisional Court.

The order under appeal determined that the defendants had deprived the plaintiffs of their interest in several corporations and required the defendants to make certain interim payments to the plaintiffs, pending a later trial to determine what further remedies the plaintiffs were entitled to.

That motion invoked both Section 248(3)(j) of the OBCA (which allows the Court to make an order compensating an aggrieved person where the defendant has acted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the plaintiff) and Rule 20 of the *Rules of Civil Procedure* (which allows a party to move for summary judgment of all or part of a claim).

The judge on the underlying motion did not identify whether his order was made pursuant to Section 248 or Rule 20. The Court of Appeal held that the order was not made “under the Act”, and therefore the appeal properly lay to the Court of Appeal.

In so deciding, the Court of Appeal reiterated that the test is whether, in making the order, the judge was exercising a power “sufficiently ‘close’ to a legislative source under the [Act]”. Put another way, the question is whether the “source of the

authority” for the order is the common law or equity, as opposed to a statutory power created by the OBCA.

Applied to the facts of the case, the Court of Appeal determined that the source of the judge’s authority was the common law and equity, not the OBCA, because the decision was rooted in findings of undue influence, unconscionability, misrepresentation and breach of fiduciary duty, causes of action existing at common law and equity.

The *Buccilli* decision does little to clear up the confusion that can exist when attempting to determine whether an order in a proceeding involving the OBCA is made “under the Act”. While the doctrines of undue influence, unconscionability, misrepresentation and breach of fiduciary duty are causes of action at common law and equity, conduct giving rise to a breach of these duties generally will also make out the statutory cause of action of oppression in section 248 of the OBCA as well. Absent a clear indication by the judge, assessing the “source of authority” of an order sought and that could be granted pursuant to the OBCA will more often than not devolve into a fact-specific, case-by-case assessment.

While such a case-by-case approach allows flexibility, it diminishes the certainty necessary to deliver the fast and effective appeal process envisioned by the OBCA and may impose a significant cost on litigants who ‘get it wrong’ given that the statutory deadlines for commencing an appeal will typically have passed by the time a decision is made as to where the appeal properly lies, increasing the importance of having good counsel to ‘get it right’ when launching the appeal.

The Court of Appeal seemingly acknowledged this risk and the concomitant importance of a flexible approach, holding that even if the underlying decision had been grounded in the OBCA, the Court of Appeal would nonetheless have jurisdiction to hear the appeal because the order was a final order that, although appealable to the Divisional Court, could be joined to the parts of the order not rooted in the *Act* for which an appeal properly lies to the Court of Appeal.

With notes from Camilla Draycott