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# The Boomerang Effect: Summary Judgment in a Fiduciary Duty Dispute

As a litigant, perhaps the most ill-advised litigation strategy is bringing a tactical summary judgment motion to delay and avoid accountability, especially when your own conduct may not withstand judicial scrutiny. When you bring a motion for summary judgment to try to validate a scheme to earn a secret profit built on deceit and nondisclosure, you should not be surprised when your motion boomerangs right back at you.

In *Macgillivray v Poirier*, the defendants, Ronald J. Poirier and Tullio Provenzano, brought a summary judgment motion (a request that the court decide the case without a full trial) that backfired. Justice R. Dan Cornell of the Ontario Superior Court of Justice granted boomerang judgment in favour of the plaintiff, Roy D. Macgillivray, after finding breaches of fiduciary duty, deceit, and unlawful means conspiracy.

## Practical Lessons for Partnership Disputes

The decision offers three practical lessons for partnership disputes, particularly cases involving alleged breaches of fiduciary duty and deceit:

1. Fiduciary duties in a partnership will almost always be presumed to continue until all of the partnership's assets have been disposed of.
2. Partners cannot rely on an agreement procured by incomplete disclosure or deceit to deprive another partner of their share of partnership property.
3. Litigants should use caution when using early summary judgment motions to defeat claims of deceit or breach of fiduciary duty because adverse evidence on cross-examination can lead to boomerang summary.

## Background: The Dispute

Macgillivray and Poirier had been law partners for nearly 20 years and jointly owned commercial properties in Thunder Bay for even longer. In later years, their partnership became less amicable, and although they discussed parting ways, they could not agree on how to sell or divide their properties.

A third-party purchaser delivered an offer to Poirier to purchase one of those properties for \$1.25 million. Poirier failed to disclose the offer to Macgillivray. Instead, he told Tullio

Provenzano, a mutual acquaintance turned co-conspirator, and dispatched him to call Macgillivray and persuade him to sell his half-interest for \$450,000 so that Poirier could walk away with \$800,000. Provenzano succeeded, intentionally omitting the existence of the purchase offer and misleading Macgillivray, including about how much the property's potential sale price might fetch, and the amount Poirier would receive.

Poirier and Provenzano then tried to conceal their deceit. They procured Macgillivray's signature on an agreement limiting his entitlement to \$450,000, without disclosing the purchase price and without committing that Poirier would receive the same amount. In addition, they persuaded Macgillivray to grant Poirier power of attorney, which allowed them to complete the transaction without giving Macgillivray a any opportunity to discover the fraud.

Poirier ultimately walked away from the sale with almost double what Macgillivray received. Macgillivray discovered the fraud months later and promptly commenced proceedings.

### **The Summary Judgment Motion**

Rather than using the typical defendant's playbook to delay as much as possible, the defendants made the tactical decision to bring an early pre-discovery motion for summary judgment on an extremely broad basis. They put all of Macgillivray's claims in issue and argued that the agreement he signed foreclosed any claims against them. They also argued Macgillivray and Poirier had never been partners and, even if a partnership had existed, any fiduciary duties had ended by the time of the sale.

The defendants relied heavily on jurisprudence establishing that, in exceptional circumstances, fiduciary obligations between partners will cease when both partners have shifted into purely self-interested bargaining. The Court rejected that argument after closely reviewing the facts.

This was not a case where sophisticated commercial partners independently pursued third-party purchasers and dealt with each other as commercial adversaries. Macgillivray continued to trust Poirier, had no knowledge of the offer made to Poirier, took no independent steps to find a purchaser, and believed that any wind-up of the partnership would happen on mutually agreed terms.

### **Fiduciary Duties Do Not End When a Partnership Breaks Down**

The Court emphasized that fiduciary duties between partners continue where one partner has no opportunity to negotiate independently, lacks knowledge of what a purchaser might pay, and believes any sale will occur on equal terms.

The logic is straightforward: where one partner remains vulnerable and uninformed, the other partner cannot exploit that imbalance by claiming the relationship has shifted to arm's-length dealing. A unilateral declaration that the partnership is over – or even genuine acrimony between partners – does not eliminate the duty to disclose material facts about partnership property.

### **Deceit Undermines the Agreement**

The Court also held that Macgillivray's signature of the agreement limiting his entitlement had been obtained by deceit and could therefore not be relied upon in any way to diminish Poirier's fiduciary duties or to limit Provenzano's liability.

The Court relied on established law that agreements obtained through deceit are unenforceable and subject to rescission. It also relied on Macgillivray's uncontradicted evidence that he would never have signed the agreement or granted Poirier power of attorney had he known about the pending offer to purchase the property.

The agreement, which the defendants sought to wield as a complete defence, instead became further evidence of their fraud. The Court described it as "part of a plan [...] to deceive Mr. Macgillivray" and "of no assistance to the defendants."

### **The Boomerang**

The Court did not simply dismiss the defendants' motions for summary judgment and refer the matter for trial. Instead, it granted boomerang summary judgment on liability, requesting further submissions from the parties only on the quantum of damages and costs.

This outcome deserves special attention and carries a warning for any litigants seeking to use summary judgment to avoid scrutiny of their commercial conduct. While boomerang summary judgment remains relatively rare, it is available where the Court is satisfied that the evidence on the record is sufficient to establish the defendants' liability.

The decision illustrates the strategic risk defendants assume when bringing a summary judgment motion, particularly in cases involving allegations of non-disclosure and deceit. By inviting the Court to scrutinize the entire record at an early stage, the party who filed the motion may create the very outcome it hoped to avoid. If cross-examinations expose

damaging evidence, the Court may find that the facts so clearly favour the responding party that judgment should issue without the time and expense of a trial.

### **Key Takeaways**

*Macgillivray v Poirier* should put to rest any suggestion that partners can treat the end of their relationship – whether through acrimonious disputes, unilateral declarations, or even formal dissolution – as an opportunity to mislead another partner, conceal material facts, and pocket undisclosed gains from partnership property.

The Court has made clear that so long as partnership assets remain to be divided, and absent truly exceptional circumstances, partners will continue to owe each other fiduciary duties, including a duty of complete disclosure.

Lenczner Slaght's Zachary Rosen was counsel to Roy D. Macgillivray, the successful plaintiff.