COURT OF APPEAL FOR ONTARIO

CITATION: O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385
DATE: 20210607
DOCKET: C68215

Roberts, Zarnett and Sossin JJ.A.

BETWEEN

William O'Reilly

Plaintiff (Respondent)

and

ClearMRI Solutions Ltd., ClearMRI Solutions Inc., Jeff Hassman, Jae Kim, Stefan Larson, David Stopak, Tornado Medical Systems, Inc., Arsen Hajian, Jeff Courtney and Gordon Cheung

Defendants (Appellants)

Ted Brook and Paul Macchione, for the appellants Tornado Medical Systems, Inc. and Jae Kim

Jacqueline Horvat and Alexandria Chun, for the respondent

Heard: January 29, 2021 by videoconference

On appeal from the judgment of Honourable Justice Jane Ferguson of the Superior Court of Justice, dated February 11, 2020, with reasons reported at 2020 ONSC 938.

Zarnett J.A.:

I. INTRODUCTION

[1] This appeal concerns the scope and application of two avenues of recourse that are potentially available when employment entitlements have not been honoured.

[2] One avenue exists under the doctrine of common employer liability. This common law doctrine[1] recognizes that an employee may simultaneously have more than one employer. If an employer is a member of an interrelated corporate group, one or more other corporations in the group may also have liability for the employment obligations. However, and importantly, they will only have liability if, on the evidence assessed objectively, there was an intention to create an employer/employee relationship between the employee and those related corporations.

[3] A second avenue exists under the provisions of s. 131 of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"). This section imposes liability on corporate directors, in favour of a corporate employee, for up to six months' unpaid wages and up to twelve months' vacation pay. That liability is subject to specific conditions.

---

[1] Only the common law doctrine of common employer liability was invoked by the respondent in this case. Section 4 of the *Employment Standards Act*, 2000, S.O. 2000, c. 41 provides for circumstances in which separate persons are treated as one employer. It is not necessary to comment on how the section might have applied in this case, a point on which the parties did not agree.

[4] The appellant, Tornado Medical Systems, Inc. (“Tornado”) stood at the top of a corporate group. It was the majority shareholder of ClearMRI Solutions Ltd. (“ClearMRI Canada”) which itself had a wholly owned subsidiary, ClearMRI Solutions, Inc. (“ClearMRI US”).

[5] The respondent, William O’Reilly, served as the Chief Executive Officer (“CEO”) of ClearMRI Canada and ClearMRI US (together, “ClearMRI companies”). His written employment agreement was with ClearMRI US, but he reported to, and his performance goals were set by, the board of directors of ClearMRI Canada.

[6] When his employment ended, Mr. O’Reilly was owed substantial sums for salary and other entitlements. He brought an action seeking recovery of all outstanding amounts from the ClearMRI companies and Tornado. While Mr. O’Reilly did not have a formal position or written agreement with Tornado, he alleged that it, along with the ClearMRI companies, were his common employers. The action also sought recovery from the directors of Tornado and ClearMRI Canada, including the appellant, Jae Kim (“Dr. Kim”), for six months’ unpaid wages and twelve months’ vacation pay under s. 131 of the *OBCA*.

[7] Mr. O’Reilly obtained default judgment against the ClearMRI companies. He subsequently moved for summary judgment against the other defendants. His motion was successful.

[8] Tornado appeals the judgment against it, arguing that the finding of the motion judge that it was liable to Mr. O'Reilly as a common employer is flawed. Tornado argues that the motion judge misconstrued the common employer doctrine, effectively finding it liable only because of its corporate affiliation to Mr. O'Reilly's contractual employer.

[9] Dr. Kim appeals the judgment finding him liable as a director of ClearMRI Canada. Dr. Kim contends that the motion judge improperly applied s. 131 of the *OBCA* to hold him liable without evidence that a condition to that liability – execution against ClearMRI Canada having been returned unsatisfied – had been met.

[10] Tornado and Dr. Kim both argue that the motion judge further erred in determining the quantum of their respective liability.

[11] I would allow the appeal by Tornado. The motion judge erred in her articulation and application of the common employer doctrine and thus made an extricable error of law in concluding that Tornado was a common employer.

[12] I would dismiss Dr. Kim's appeal, subject to one variation necessary to respect the *OBCA's* conditions for s. 131 director liability.

[13] Below, I set out my reasons for these conclusions.

II. BACKGROUND

A. Tornado and the ClearMRI Companies

[14] Tornado is an Ontario corporation. In 2010, it acquired licence rights to intellectual property that can be used to facilitate the refurbishment and upgrading of Magnetic Resonance Imaging (“MRI”) machines.

[15] Tornado is the majority shareholder of ClearMRI Canada, which is also an Ontario corporation. ClearMRI Canada was formed in 2012 to develop a business of upgrading and refurbishing MRI machines. For this purpose, Tornado assigned, to ClearMRI Canada, its licence rights to the intellectual property.

[16] In addition to the incidents of corporate control over ClearMRI Canada that flowed from its majority shareholding, Tornado had certain specified rights under a Unanimous Shareholder Agreement that related to ClearMRI Canada: Tornado’s consent was required for certain dividends, large capital expenditures, the sale of ClearMRI Canada’s business, any amalgamation with another corporation, or any winding-up, reorganization, or dissolution. Tornado’s consent rights did not, however, extend to changes in management of ClearMRI Canada or its subsidiaries, employment agreements, or dealing with loans from non-arms-length

persons – the Unanimous Shareholder Agreement required only the approval of the board of ClearMRI Canada, or a committee of the board, for these matters.[2]

[17] To some extent, the boards of directors of Tornado and ClearMRI Canada overlapped; ClearMRI Canada's board consisted of five directors, two of whom were also directors of Tornado. Dr. Kim was a director of both Tornado and ClearMRI Canada.

[18] ClearMRI US is a Delaware company, wholly owned by ClearMRI Canada. It was formed in May 2012 to obtain American regulatory approval of the ClearMRI technology and to develop the MRI upgrading and refurbishing business in the United States.

B. Mr. O'Reilly's Roles and Written Employment Agreement

[19] Mr. O'Reilly served as CEO of ClearMRI Canada from approximately the time of its formation. He was also one of its directors. When ClearMRI US was formed, he also became its CEO and sole director. Mr. O'Reilly did not hold any formal position with Tornado.

[20] On May 22, 2012, Mr. O'Reilly and ClearMRI US signed an agreement confirming the terms of his employment. The agreement named ClearMRI US as Mr. O'Reilly's employer. The agreement specified that Mr. O'Reilly was to serve as

[2] The motion judge described this latter category of decision as falling within Tornado's consent rights at para. 13 of her reasons, but this appears to misread sections 2.12 and 2.13 of the Unanimous Shareholder Agreement.

its CEO and was to be paid an annual base salary of $153,000 USD in 2012, increasing to $210,000 USD in 2013. He was also entitled to benefits including paid vacation and to specific payments if he was terminated without notice or cause. He was also eligible to earn a performance bonus of $80,000 USD and to receive other compensation.

[21] Although ClearMRI US was named in the written agreement as the employer, the motion judge found that Mr. O'Reilly was also employed by ClearMRI Canada and Tornado. Her reasons for doing so are discussed below.

C. Deferral of Salary, Non-Payment of Employment Obligations, and the Termination of Mr. O'Reilly's Employment

[22] Cash flow problems inhibited the successful launch of the MRI upgrading and refurbishment business. Mr. O'Reilly took certain steps to overcome that problem. To assist with the required funding, he agreed to defer his full salary commencing in 2013 until ClearMRI Canada started to earn revenue; the deferral continued in 2014. The motion judge found that Mr. O'Reilly had not agreed to defer his salary indefinitely, only temporarily, and that he received assurances from ClearMRI Canada and Tornado that ClearMRI Canada was committed to bringing its product to market. I return to the arrangements for the deferral and the assurance in more detail below.

[23] In December 2013, Mr. O'Reilly also made a $50,000 USD loan to ClearMRI Canada. To avoid the appearance of a conflict of interest, he resigned as a director

and CEO of both ClearMRI Canada and ClearMRI US. However, the motion judge noted that in reality he continued in the CEO role. This loan was not repaid.

[24] In April 2014, Mr. O'Reilly secured a regulatory clearance from the U.S. Food and Drug Administration. The motion judge found that this step entitled him to a performance bonus of $80,000 USD. However, the performance bonus was never paid.

[25] By the spring of 2014, it was apparent that ClearMRI Canada was no longer committed to bringing their product to market. On August 6, 2014, Mr. O'Reilly took the position that he had been constructively dismissed. His lawyer demanded payment from ClearMRI Canada and ClearMRI US of $281,315 USD in unpaid salary, and of the $50,000 USD loan.

D. The Action

[26] In October 2014, Mr. O'Reilly commenced this action against ClearMRI Canada, ClearMRI US, Tornado, and individual directors of ClearMRI Canada and Tornado, including Dr. Kim.

[27] The claims against the individuals were for six months' wages and twelve months' vacation pay under s. 131 of the *OBCA*. The corporations were each sued (as common employers) for all unpaid wages and employment entitlements. ClearMRI Canada and ClearMRI US were sued for the unpaid loan.

[28] On September 2, 2015, Mr. O'Reilly obtained default judgment against ClearMRI Canada and ClearMRI US for deferred salary, vacation pay, the performance bonus, and the unpaid loan, totalling $381,103.84 USD, plus costs.

[29] The default judgment was not satisfied, and Mr. O'Reilly moved for summary judgment against the remaining defendants.

E. The Motion Judge's Decision

[30] The motion judge was satisfied that this was an appropriate case for summary judgment.

[31] The motion judge described the common law doctrine of common employer liability as one that requires the court to "look past the immediate bilateral contractual relationship…and recognize that an employee may be employed by a number of different companies at the same time". A group of companies identified as "concurrent employers" will have "joint and several liability with respect to the rights and entitlements of the employee". The motion judge identified three factors that should be considered: the employment agreement itself; where the effective control over the employee resides; and whether there was common control between the different legal entities.

[32] The motion judge then addressed whether ClearMRI Canada was a common employer of Mr. O'Reilly. She concluded that it was, noting that the issue was not really in dispute and there was already a judgment against it. She found

that Mr. O'Reilly reported to the ClearMRI Canada board, which set his performance goals, and that, "[i]n practice, effective control over [Mr.] O'Reilly did reside with ClearMRI Canada"; she further remarked that ClearMRI Canada wholly owned ClearMRI US, and had incorporated it for a specific purpose. She was satisfied they "both had a single relationship with [Mr.] O'Reilly".

[33] The motion judge next considered the liability of the individuals who were directors of ClearMRI Canada, including Dr. Kim. She referred to the source of directors' liability for wages, s. 131 of the *OBCA*, which provides, in relevant part, as follows:

> **Director's Liability to employees for wages**
>
> (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.
>
> **Limitation of liability**
>
> (2) A director is liable under subsection (1) only if,
>
> > (a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or
> >
> > (b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy and Insolvency Act* (Canada), or a receiving order under that Act

> is made against it, and, in any such case, the claim for the debt has been proved. 2002, c. 24, Sched. B, s. 27 (1).
>
> **Idem**
>
> (3) Where execution referred to in clause (2) (b) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution. R.S.O. 1990, c. B.16, s. 131 (3).

[34] She found that the ClearMRI Canada directors were jointly and severally liable under s. 131 of the *OBCA* to Mr. O'Reilly for "six months of…unpaid wages and twelve months of…vacation pay, specifically $153,400 USD." As Mr. O'Reilly was also a director, she found that he shared in that liability.

[35] Next, the motion judge considered whether Tornado was a common employer using the three factors she identified. She stated that it was not determinative that there was no employment agreement with Tornado. She found that Tornado exercised "a sufficient amount of control" over Mr. O'Reilly, as both Tornado and ClearMRI Canada had accepted his offers to defer his salary and to loan funds to ClearMRI Canada, both had assured Mr. O'Reilly that ClearMRI Canada was committed to bringing its product to market, and both shared the business objectives that Mr. O'Reilly was employed to achieve. She found common control between the different legal entities because Tornado had incorporated ClearMRI Canada to develop a specific business; Tornado had a majority controlling shareholder interest; Tornado had consent rights under the Unanimous Shareholder Agreement; there was an overlap in directors; and when

it came time to replace a director of ClearMRI Canada, Dr. Kim wished to discuss the replacement with Tornado. Accordingly, she found that Tornado was a common employer, jointly and severally liable for the employment related amounts of the default judgment – everything except the unpaid loan and interest on it.

[36] Finally, she held that if Tornado did not satisfy the judgment against it, the Tornado directors individually named in the action would share in the liability of the ClearMRI companies' directors for the six months' wages and twelve months' vacation pay.[3] She said that the judgment against the Tornado directors "is to remain in abeyance until and unless Tornado does not satisfy the judgment against it." There was no similar statement regarding the judgment against the ClearMRI companies' directors.

[37] The formal judgment indicated that the parties could return to the Court for directions concerning the liability of the two Tornado directors if execution against Tornado was returned unsatisfied. No similar provision appeared in the judgment concerning the liability of the ClearMRI Canada directors, including Dr. Kim.

[3] The motion judge subsequently varied her judgment to delete one of the individuals (Stefan Larson) as he had not been a director of either Tornado or ClearMRI Canada at the relevant time.

III. ANALYSIS

A. Was Tornado Properly Found to be a Common Employer?

The Arguments

[38] Tornado argues that although the motion judge mentioned effective control over the employee as part of the common employer test, nothing that she referred to showed any effective control by Tornado over Mr. O'Reilly as an employee. Tornado submits that the motion judge effectively treated Tornado's corporate relationship with the ClearMRI companies as rendering it liable, which is insufficient in law for a corporation to be liable for another's obligations.

[39] Tornado also argues that the motion judge gave no real consideration to the presence of a written employment agreement which specified Mr. O'Reilly's employer, and to the absence of an employment agreement with Tornado. It submits that it was necessary to consider whether Mr. O'Reilly had a reasonable expectation that Tornado was his employer – the written employment agreement and Mr. O'Reilly's senior role in the ClearMRI companies shows he could not have reasonably held such an expectation.

[40] Tornado also argues that the common employer doctrine only applies to wrongful dismissal claims, and that claims for unpaid salary against a corporation related to the employer must be made under s. 4 of the *Employment Standards*

Act, which was not invoked by Mr. O'Reilly. Further, it challenges how the motion judge arrived at the quantum of its liability.

[41] Mr. O'Reilly argues that the motion judge made no reversible error in reaching the conclusion that Tornado was a common employer, in holding it liable for unfulfilled employment obligations, and in determining the quantum of that liability.

[42] I begin by discussing the relationship between the concept of corporate separateness, under which corporations are not liable for debts and obligations of affiliated or subsidiary corporations, and the common employer doctrine, which may impose liability on related corporations. I also discuss the role of an employment agreement in that analysis. I then address why the common employer doctrine applies to claims beyond those for wrongful dismissal. Against that backdrop, I explain why I conclude that the motion judge erred in granting summary judgment based on her finding that Tornado was a common employer. In light of that conclusion, it is unnecessary to examine Tornado's arguments about quantum.

Corporate Separateness

[43] A corporation is a distinct legal entity with the powers and privileges of a natural person: *OBCA*, s. 15. These powers and privileges include owning assets

in its own right, carrying on its own business, and being responsible only for obligations it has itself incurred.

[44] The fact that one corporation owns the shares of or is affiliated with another does not mean they have common responsibility for their debts, nor common ownership of their businesses or assets. A corporation's business and assets are not, in law, the business or assets of its parent corporation: *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1 at paras. 57-58, leave to appeal refused, [2018] S.C.C.A. No. 255; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 at para. 34. Similarly, a parent (shareholder) corporation is not liable, as such, for the debts and obligations of a subsidiary: *OBCA*, s. 9

[45] The fact that corporations are related and coordinate their activities does not, in and of itself, change this paradigm. Ontario law rejects a "group enterprise theory" under which related corporations that operate closely would, by that very fact, be considered to jointly own their businesses or be liable for each other's obligations. Although the group might, from the standpoint of economics, appear as a unit or single enterprise, the legal reality of distinct corporations governs: *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (C.A.) at paras. 29-31; *Yaiguaje*, at paras. 76-77.

[46] Corporate separateness has exceptions – the court may pierce the corporate veil and hold a parent corporation liable for obligations nominally incurred by a subsidiary corporation that is a mere façade:

> …in order to ignore the corporate separateness principle, the court must be satisfied that: (i) there is complete control of the subsidiary, such that the subsidiary is the "mere puppet" of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity: *Yaiguaje*, at para. 66. [Citations omitted].

[47] As the test for piercing the corporate veil makes clear, control by one corporation over another, on its own, does not make the controlling corporation liable for the obligations of the controlled corporation; a fraudulent or improper purpose must also be present.

[48] It is not suggested in this case that there are grounds to pierce the corporate veil of any of the relevant corporations. Accordingly, the basis on which the common employer doctrine operates to hold related corporations liable, while remaining consistent with the concept of corporate separateness, is important.

The Common Employer Doctrine

[49] The common employer doctrine does not involve piercing the corporate veil or ignoring the separate legal personality of each corporation. It imposes liability on companies within a corporate group only if, and to the extent that, each can be said to have entered into a contract of employment with the employee: *Sinclair v.*

Dover Engineering Services Ltd., 49 D.L.R. (4th) 297 (B.C.C.A.) *("Sinclair (BCCA)")*, at para. 9.

[50] Thus, consistent with the doctrine of corporate separateness, a corporation is not held to be a common employer simply because it owned, controlled, or was affiliated with another corporation that had a direct employment relationship with the employee. Rather, a corporation related to the nominal employer will be found to be a common employer only where it is shown, on the evidence, that there was an intention to create an employer/employee relationship between the individual and the related corporation: *Gray v. Standard Trustco Ltd.* (1994), 8 C.C.E.L. (2d) 46 (Ont. Gen. Div.), at para. 3; *Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario* (2001), 54 O.R. (3d) 161 (C.A.), at paras. 31, 40, leave to appeal refused, [2002] 3 S.C.R. vi (note); *Rowland v. VDC Manufacturing Inc.*, 2017 ONSC 3351, at paras. 12-13.

[51] As illustrated by the issue in this case, where Mr. O'Reilly alleges that Tornado is liable for specific employment obligations, the common employer question is one of contractual formation – did the employee and the corporation alleged to be a common employer intend to contract about employment with each other on the terms alleged? When such an intention is found to exist, no violence is done to the concept of corporate separateness because the corporation is held liable for obligations it has undertaken.

[52] To determine whether the required intention to contract was present, the parties' subjective thoughts are irrelevant. Nor need the intention necessarily have been reflected in a written agreement. The common law's approach to contractual formation is objective; intention to contract can be derived from conduct. As the Supreme Court has stated in a similar common law contractual formation context, what is relevant is "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, 450 D.L.R. (4th) 105, at para. 33.

[53] A variety of conduct may be relevant to whether there was an intention to contract between the employee and the alleged common employer(s). As they bear upon this case, two types of conduct are important. One is conduct that reveals where effective control over the employee resided. The second is the existence of an agreement specifying an employer other than the alleged common employer(s).

[54] The conduct most germane to showing an intention that there was an employment relationship with two or more members of an interrelated corporate group is conduct which reveals that effective control over the employee resided with those members[4] : *Downtown Eatery*, at paras. 32-33. This is consistent with

[4] This is a different question from the question of corporate control, which, at its most basic, refers to the ability of a shareholder to elect the majority of a corporation's board of directors: *OBCA*, s. 1(5). The fact that one corporation controls a second corporation does not equate to control by the first corporation over the second corporation's employees.

how the law distinguishes employment from other types of relationships. Control over such matters as the selection of employees, payment of wages or other remuneration, method of work, and ability to dismiss, can be important indicators of an employer/employee relationship: *Baldwin v. Erin District High School Board*, 1961 O.R. 687, at para 11, aff'd 36 D.L.R. (2d) 244 (SCC); see also *Bagby v. Gustavson International Drilling Co. Ltd.*, 1980 ABCA 227, 24 A.R. 181, at paras. 48-50.

[55] A written agreement that specifies an employer other than the corporation(s) alleged to be the common employers may also be relevant. The extent of its relevance depends on how the existence and terms of the written agreement, in light of the facts, informs the question of whether there was an intention that others were also employers.

[56] These points are illustrated in this court's leading decision on common employer liability, *Downtown Eatery*, and the case law which has followed.

[57] In *Downtown Eatery*, the employee was the manager of a nightclub called "For Your Eyes Only". The nightclub was operated together by a "highly integrated or seamless group of companies". One corporation owned the premises; a second owned the trademark and held the liquor and entertainment licences; a third owned the chattels and equipment; and a fourth was the paymaster: at para. 34. The

employee's contract was with the business name For Your Eyes Only, which itself was not a legal entity: at paras. 38-40.

[58] The court held that an individual may be found to be an employee of more than one corporation in a related group of corporations, as long as the evidence shows an intention to create an employer/employee relationship between the individual and the respective corporations within the group: at para. 31. To determine that issue, the operative question raised by the facts was "where effective control over the employee resides": at paras. 32-33.

[59] In *Downtown Eatery*, the answer to that question was that each of the commonly controlled corporations that was integrally and directly involved in owning and operating the nightclub, was exercising control over, and was therefore a common employer of, the manager.

[60] The court stated at para. 40:

> In conclusion, Alouche's true employer in 1993 was the consortium of Grad and Grosman companies which operated *For Your Eyes Only*. The contract of employment was between Alouche and *For Your Eyes Only* which was not a legal entity. Yet the contract specified that Alouche would be "entitled to the entire package of medical extended health care and insurance benefits as available in our sister organization". The sister organization was not identified. In these circumstances, and bearing in mind the important roles played by several companies in the operation of the nightclub, we conclude that Alouche's employer in June 1993 when he was wrongfully dismissed was all of Twin Peaks, The Landing Strip, Downtown Eatery and Best

> Beaver. This group of companies functioned as a single, integrated unit in relation to the operation of *For Your Eyes Only*. [Emphasis added.]

[61] The two emphasized passages deserve amplification.

[62] First, the written contract of employment in *Downtown Eatery*, by not naming a legal entity, did not indicate a choice of one entity over another in terms of identifying the employer. Rather, it indicated the employer was the nightclub, a business operated by the four corporations. Although there was a written agreement, it begged, rather than answered, the question of who the parties intended the employer to be.

[63] Second, each of the corporations found to be a common employer was directly involved in the operation of the nightclub that employed the manager. The nightclub was each of their business. Each was thus in a direct relationship of control with the employee who had been hired to manage their business. None were held to be employers simply because they had a relationship with another corporation that was directly involved with the employee. As Hourigan J.A. noted in *Yaiguaje*, the conclusion in *Downtown Eatery* "rested more on the plaintiff's relationship to the group of companies rather than the relationships among the companies in the group": at para. 69.

[64] In other cases, a common employer allegation has failed due to the presence of a written employment agreement that specified that only one company within the corporate group was the employer: *Dumbrell v. The Regional Group of*

Companies Inc., 2007 ONCA 59, 85 OR (3d) 616, at para. 83; *Mazza v. Ornge Corporate Services,* 2015 ONSC 7785, 52 B.L.R. (5th) 51 ("*Mazza (ONSC)*"), at paras. 93-99, aff'd 2016 ONCA 753, 62 B.L.R. (5th) 211 ("*Mazza (ONCA)*"). In each of these cases, the facts were such that the court could conclude that the employee knew the only entity to whom he could look for fulfillment of employment obligations: *Dumbrell*, at para. 83; *Mazza (ONSC)* at paras. 90, 93-94. As this court explained in *Mazza (ONCA)*, the common employer claim was precluded because "[t]he Employment Agreement identified only one employer and contained an express release of claims against affiliated corporations": at para. 8. In other words, the written agreements in those cases, in light of all the facts, did not permit the conclusion that there was an intention to create an employer/employee relationship with anyone beyond the employer specified in the written agreement.

[65] Nonetheless, as *Downtown Eatery* shows, a written agreement will not always preclude a finding of common employers. It depends on the terms of the written agreement, and the other facts of the case. The circumstances must reasonably permit the inference that there was an intention that the alleged common employers were also parties to the employment agreement. The inference is not available simply because the corporations are related: As Morgan J. explained in *Rowland*, at paras. 12-13:

> In order to establish that two or more legal entities are his common employer, the Plaintiff must demonstrate that he

> had a reasonable expectation that the Defendants were each a party to his employment contract…
>
> Where the employee is aware that he was employed by a single employer, the fact of interlocking shareholders with his formal employer does not itself establish a common employer. The onus is on the Plaintiff to demonstrate that there was "effective control over the employee" by all of the alleged common employer companies. There must be evidence of an actual "intention to create an employer/employee relationship between the individual and the respective corporations within the group". [Citations omitted.]

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.

To Which Claims Does the Common Employer Doctrine Apply?

[66] Tornado argues that the common employer doctrine applies only to wrongful dismissal claims. In my view, this argument must be rejected.

[67] Although the common employer doctrine has traditionally been applied to wrongful dismissal claims, there is no reason in principle to so limit it. Whether a corporation is a common employer is a function of whether it is properly considered a party to the employment agreement with the employee. Therefore, any claims that could be brought by reason of that agreement can be made against the common employer. This includes claims for a breach that consists of not paying salary, bonus, or other entitlements as much as it includes claims for a breach that consists of dismissing the employee without notice or cause.

[68] Against that backdrop, I turn to a consideration of the approach taken by the motion judge.

The Standard of Review

[69] Whether a common employer relationship exists is a question of mixed fact and law, as it involves the application of a legal standard to a set of facts. Appellate deference is generally warranted, but intervention is justified when the judge commits an extricable error of law, such as the formulation and application of the wrong test, or makes a palpable and overriding error of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2. S.C.R. 235, at para. 36.

The Motion Judge Did Not Articulate or Apply the Correct Test

[70] The test to determine whether corporations are common employers may be stated in several ways that are in substance the same. For example, as articulated by Wallace J.A. in *Sinclair (BCCA)*: “The issue…reduces itself to determining which company or companies entered into a contract of employment with [the employee] pursuant to which he would provide services in return for his salary and benefits”: at para 8. Or, as adopted in *Downtown Eatery*, “One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group”: at para. 31.

[71] Mr. O’Reilly contended that Tornado owed him the same obligations as ClearMRI US under the written employment agreement – the same salary, benefits, and other employment entitlements. For that contention to succeed, it was necessary to find that Tornado and Mr. O’Reilly intended to contract with each other on those terms.

[72] As discussed below, the motion judge did not address that question. Although she referred to three factors that are relevant to determining whether a common employer relationship exists, she did not articulate the actual test, namely, whether there was an intention that Tornado was a party to the employment agreement with Mr. O’Reilly on the terms alleged. Nor did she apply

that test to the factors she considered. In other words, she did not ask, or answer, the right question.

[73] I deal, in turn, with the three factors the motion judge considered through the lens of the test.

The Effect of an Employment Agreement

[74] The first factor the motion judge discussed was Tornado's absence from Mr. O'Reilly's employment agreement. She held that this was not determinative. She said: "It is true that O 'Reilly's employment contract does not mention Tornado, and that Tornado did not pay him, but the factor of a contractual relationship is not determinative, or else it would be too simple for employers to evade their obligations towards their employees."

[75] To the extent that the motion judge suggested that there did not need to be any contractual relationship between Tornado and Mr. O'Reilly in order to consider Tornado a common employer, she erred. The whole point of the common employer inquiry was to determine whether Tornado was a party to an employment agreement imposing the obligations that Mr. O'Reilly sought to enforce. That did not require a written agreement with Tornado, but it did require a determination that a contractual relationship with Tornado on the terms alleged had been formed. The motion judge never adverted to that question.

[76] The motion judge cited *Downtown Eatery* for the proposition that a contractual relationship is not a decisive factor. However, the passage the motion judge cited spoke to the relevance of a written agreement that did not specifically name the common employers; the court was not suggesting that a corporation can be a common employer without a finding that it and the employee intended to be parties to an employment agreement with each other.

[77] To the extent that the motion judge was addressing the effect of the written agreement specifying only ClearMRI US as the employer, her consideration was incomplete. She did not address the agreement's fundamental difference from that in *Downtown Eatery* which, unlike the agreement in this case, neither selected an entity as the employer, nor implicitly excluded any others from consideration. Here, the written agreement specifically named a corporation for which the appellant actually worked.

[78] It was accordingly necessary to assess how the written agreement bore on the question of whether there was an intention that Tornado was a party to the employment agreement with the same obligations as ClearMRI US. This analysis would have to be made in light of all of the evidence.

[79] The motion judge did not, however, undertake this required analysis.

Tornado's "Control" Over Mr. O'Reilly As an Employee

[80] The second factor the motion judge considered was whether Tornado exercised "a sufficient amount of control" over Mr. O'Reilly. She held that it did, but her conclusion is tainted by her failure to relate the facts to the proper test.

[81] The motion judge relied on several facts which she said she took from Mr. O'Reilly's uncontested evidence: that Tornado and ClearMRI Canada "both agreed to accept [Mr.] O'Reilly's offer to defer his salary"; that Tornado and ClearMRI Canada both agreed to accept his offer to loan funds to ClearMRI Canada; that Tornado and ClearMRI Canada had assured Mr. O'Reilly that both were committed to bringing the ClearMRI products to market; and that Tornado shared business objectives that Mr. O'Reilly was employed to achieve. There are several problems with these findings.

[82] Beginning with the offer to defer salary, the motion judge misapprehended Mr. O'Reilly's evidence. Mr. O'Reilly did not say his offer to defer his salary was accepted by Tornado. Rather, he said that "[t]he Board of Directors [of ClearMRI Canada] discussed and approved of the arrangement to defer my salary 'until we are receiving revenue' at its meeting of February 27, 2013…" This evidence does not indicate that Tornado was exercising control over Mr. O'Reilly as an employee.

[83] Second, with respect to the loan, the motion judge did not relate her reliance on this to her later conclusion that the loan was "a private commercial debt and not

a debt related to employment duties". The motion judge did not explain, nor is it apparent, why Tornado's involvement in agreeing to the loan, which she found to be unrelated to employment duties, was relevant to whether it was exercising control over Mr. O'Reilly as an employee. For similar reasons, Tornado's offer that Mr. O'Reilly take shares in ClearMRI Canada in satisfaction of the loan – an offer Mr. O'Reilly did not accept – does not assist in showing that effective control over Mr. O'Reilly, as an employee, resided with Tornado.

[84] Third, Mr. O'Reilly's evidence about an assurance was that at the time he offered to defer his salary, he "was reassured by ClearMRI, Clear MRI's directors, Tornado and Tornado's directors, and had no reason to doubt that ClearMRI [Canada] was committed to bringing the product to market and subsequently earning significant revenue". The motion judge did not explain, and it is not apparent, why the provision of this assurance about what his employer, ClearMRI Canada, was committed to do, constituted Tornado exercising control over Mr. O'Reilly as an employee.

[85] The fourth fact the motion judge relied on, shared business objectives between Tornado and the ClearMRI companies, impermissibly strayed across the boundaries of corporate separateness. A shareholder's objectives may be aligned with that of the corporation, in that the corporation's success may accrue to the benefit of the shareholder. However, the business remains that of the corporation. An employee of a corporation is not controlled by a shareholder of that corporation

simply because the employee is working for the success of the corporation, and the shareholder hopes that such success will occur.

[86] Stepping back from the specific findings, the key question was whether there was evidence of an intention to create an employment agreement between Tornado and Mr. O'Reilly containing the obligations Mr. O'Reilly sought to enforce. The motion judge did not relate the evidence about control over Mr. O'Reilly to this critical question. She did not consider whether the evidence about control showed an intention that Tornado was one of Mr. O'Reilly's employers at the time Mr. O'Reilly commenced employment in 2012, or that Tornado was somehow added as one of his employers at a point after that.

Corporate Relationships

[87] The third factor the motion judge considered was whether there was a sufficient relationship between Tornado and the ClearMRI companies to apply the common employer doctrine. She found that there was, relying on Tornado's majority ownership and incidents of corporate control, Tornado's consent rights under the Unanimous Shareholder Agreement, and a desire of Dr. Kim to consult Tornado about a proposed replacement to ClearMRI Canada's board of directors.[5]

[5] Neither the director being replaced, or the replacement, was Mr. O'Reilly.

[88] That corporations to which the common employer doctrine is applied are related to each other, members of a corporate group, or commonly controlled, is a feature of the case law. It might usefully be described as a necessary, but not a sufficient, factor for the application of the common employer doctrine. The corporate interrelationships in this case were such that the common employer doctrine qualified for consideration. But the corporate interrelationships do not, on their own, justify applying the doctrine. If they did, the common employer doctrine would lose its consistency with the concept of corporate separateness.

[89] In some cases, the corporate set-up may shed light on with whom the employee has contracted, because it brings into sharper focus where effective control over the employee resided. For example, in *Downtown Eatery*, all of the commonly controlled corporations were directly operating the business that employed the manager. In *Sinclair*, the employee was required to work for two companies even though on the payroll of only one. Or the employee may have been transferred from company to company within a group in a manner that may indicate the employment agreement was with the parent corporation: *Bagby*, at para. 46.

[90] These features were not present here. The motion judge did not consider or explain why the aspects of the corporate relationship between Tornado and the ClearMRI companies indicated an intention that Tornado was a party to the employment agreement with Mr. O'Reilly. In the absence of something that shows

such an intention, share ownership and its incidents, including the power to elect directors and the alignment of financial objectives between parent and subsidiary corporations, are insufficient to establish common employer status on the parent. The motion judge referred to an overlap in directors, but there was no suggestion of confusion about the capacity in which directors were acting when they interacted with Mr. O'Reilly concerning employment. And while the motion judge relied on Tornado's consent rights under the Unanimous Shareholder Agreement, those rights did not extend to employment agreements or changes in senior management – matters reserved to the ClearMRI Canada board.

[91] Thus, on the key question of whether there was an intention that Tornado was a party to the employment arrangement with Mr. O'Reilly – even accepting the finding that the written agreement was not dispositive – the motion judge's conclusions about control over Mr. O'Reilly as an employee did not address the correct test and were thus legally insufficient to support summary judgment. The corporate interrelationships could not fill that gap.

Conclusion on Common Employer Liability

[92] Accordingly, I would set aside the summary judgment against Tornado, and substitute an order dismissing the motion for summary judgment against it.

B. Dr. Kim's Appeal

[93] In her reasons, the motion judge found Dr. Kim liable for six months' wages and twelve months' vacation pay on the basis that he was a director of ClearMRI Canada. Although he was also a director of Tornado, the formal judgment only addresses his liability as a director of ClearMRI Canada.

[94] Dr. Kim's primary argument on appeal is that even though ClearMRI Canada had not paid the judgment against it, the conditions to his liability in s. 131(2) of the *OBCA* are quite specific, and there was no evidence they were fulfilled. There was no evidence that ClearMRI Canada was in liquidation, ordered to be wound-up, or was formally bankrupt as contemplated by s. 131(2)(b). Nor was there evidence that an execution against ClearMRI Canada was returned unsatisfied as contemplated by s. 131(2)(a).

[95] The issue is how s. 131 is to be interpreted in this case, given that it contemplates the director and the corporation being sued in the same action, yet provides that a director's liability is conditional on, for example, an execution against the corporation being returned unsatisfied, a step that would occur after judgment.

[96] In a case where the issue of liability of both the corporation and the directors comes up for consideration at the same time, and judgment is given against the corporation, any judgment against the director may have to be conditional on the

occurrence of a subsequent event. That was how the motion judge, having found Tornado to be liable, approached the matter in respect of the Tornado directors. She directed the parties to return to address the responsibility of two Tornado directors (but not Dr. Kim) if execution against Tornado was returned unsatisfied.

[97] Mr. O'Reilly obtained judgment against ClearMRI Canada sometime before he brought a motion for summary judgment against Dr. Kim. Dr. Kim argues that Mr. O'Reilly could have included evidence in the summary judgment motion that execution had been returned unsatisfied against ClearMRI Canada if that were the case. Since he did not, Dr. Kim argues that no judgment at all should have been given against him. In any event, the judgment does not reflect that Dr. Kim's liability is conditional on s. 131(2) events occurring.

[98] I reject the argument that no judgment at all should have been granted against Dr. Kim. Nothing in s. 131 of the *OBCA* puts a time limit on when the conditions in s. 131(2) can be fulfilled. But the formal judgment should be amended to provide that the liability of Dr. Kim in para. 3 is conditional on an execution against ClearMRI Canada being returned unsatisfied, or one of the events referred to in s. 131(2)(b) occurring in relation to ClearMRI Canada. The parties should have leave to return to the motion judge for directions if any issue arises on this point.

C. Quantum Issues

[99] The appellants made various arguments regarding the quantum of the judgments against them. Given the disposition of Tornado's appeal, I address two that could apply to Dr. Kim.

[100] First, they argue that the motion judge did not consider the fact that Mr. O'Reilly resigned in December 2013, and that this should affect the quantum of his entitlement. I would reject that argument. The motion judge found that, notwithstanding the formal resignation, Mr. O'Reilly continued to work as CEO "in reality". This reality governs his compensation entitlement.

[101] Second, it is argued that the agreement to defer specified the circumstance under which payment would resume, namely, the business earning revenue, and this never occurred. Mr. O'Reilly gave evidence, however, that revenue was earned. In my view, there was evidence on which the motion judge could properly view the deferral as non-permanent, such that the entitlement to claim salary and other entitlements was not waived and was in place when the revenue was earned.

[102] Finally, it is argued that the motion judge simply accepted the amounts in the default judgment. There was evidence before the motion judge on the quantum of Mr. O'Reilly's entitlements as they pertained to Dr. Kim's liability. As well, his liability is derivative of that of ClearMRI Canada, which had been determined by judgment. I would not interfere with the quantum of the judgment against Dr. Kim.

IV. CONCLUSION

[103] Subject to the variation noted in para. 98 above, I would dismiss the appeal of Dr. Kim. I would allow Tornado's appeal and set aside the summary judgment against it.

[104] The parties made submissions on costs but did not specifically address the mixed result I have arrived at. If the parties cannot agree on costs, they should make written submissions limited to three pages each, within ten days of the release of these reasons.

Released: June 7, 2021 "L.R."

"B. Zarnett J.A."
"I agree. L.B. Roberts J.A."
"I agree. Sossin J.A."