

CASE UPDATE

DIRECTOR FOUND PERSONALLY LIABLE FOR PROCURING COMPANY'S TORTIOUS ACT

Thode Gerd Walter v Mintwell Industry Pte Ltd & Ors [2009] SGHC 44

This case illustrates the circumstances in which a court will find a director personally liable for procuring a tortious act by the company of which he is a director.

Facts

The first defendant, Mintwell Industry Pte Ltd ("**D1**"), owned Mintwell Building (the "**Property**"). D1 mortgaged the Property to a bank (the "**Mortgagee**").

The second and third defendants ("**D2**" and "**D3**" respectively) were directors of D1.

The mortgage prohibited D1 from letting out any part of the Property without the Mortgagee's written consent. D1 defaulted on the mortgage repayments. The Mortgagee sued D1. On 25 January 2001, the Mortgagee obtained judgment in default of appearance against D1. An order for possession of the Property was obtained on 2 September 2002 (the "**Order for Possession**"). However, the Order of Possession was not enforced until nearly 4 years later on 30 June 2006.

In the intervening period, on 16 February 2005, D1 leased one of the units in the Property to the plaintiff (the "**Plaintiff**") without the Mortgagee's consent. On 30 June 2006, the Mortgagee enforced the order for possession and a Writ of Possession was filed on the same day.

On 6 July 2006, an eviction notice was served by the Mortgagee on each tenant of the Property. However, an eviction notice was not served on the Plaintiff. On 1 August 2006, D1 leased yet another unit in the Property to the Plaintiff again, without the Mortgagee's consent. The Plaintiff did not have notice of the Writ of Possession or the eviction notices until 2 August 2006.

The Mortgagee sought to enforce the Order of Possession against the Plaintiff. The Plaintiff opposed the enforcement but was unsuccessful. The Plaintiff eventually had to give up both tenancies. The Plaintiff blamed the Defendants for the loss of his tenancies.

He sued D1 for:

- (a) breach of contract;
- (b) negligence; and
- (c) negligent or fraudulent misrepresentation.

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He also sued D2 and D3 personally for:

- (a) breach of duty;
- (b) negligent or fraudulent misrepresentation; and
- (c) procurement of the tort of deceit or negligent misrepresentation by D1.

D1 found liable for negligent misrepresentation

The court found that, by offering to let the premises and entering into negotiations with the Plaintiff, D1 had represented to the Plaintiff that the existing state of affairs was such that he could, in the ordinary course, have quiet use and enjoyment of the premises for the duration of the tenancies.

The court further found that D1 had no reasonable grounds to believe that the Plaintiff would be able to have quiet use and enjoyment of the premises for the duration of the tenancies because:

- (a) when the tenancies were granted, there existed an unsatisfied judgment against D1, who had all but ceased business and D1 was required by the terms of the order of possession to deliver up possession to the Mortgagee.
- (b) As such, D1's occupation of the premises was precarious as it could be evicted at any time.

Accordingly, the court held that D1 had made a negligent misrepresentation by implication to the Plaintiff.

D2 found liable for procurement of D1's tortious act

The Plaintiff had argued that the corporate veil should be lifted to impose personal liability on D2 and D3 for the contractual breach, and for D1's failure to obtain the Mortgagee's written consent before leasing out the premises. The court declined to do so as it was of the view that there were no exceptional circumstances to warrant the lifting of the corporate veil.

However, the court found that D2 was personally liable for the tort of procuring and inducing D1 to make the negligent misrepresentation.

The court referred to the English Court of Appeal decision in *Standard Chartered Bank v Pakistan National Shipping Corporation* [2000] 1 Lloyd's Law Rep 218, where it was held that "a director could be capable of becoming a joint tortfeasor by procuring and inducing the company for which he works to carry out a tortious act".

In that case, Aldous LJ acknowledged that, while companies are separate legal entities from their shareholders, directors and employees, directors or employees could nonetheless be

liable for tortious acts committed during the course of their employment in three circumstances, namely, where:

- (a) the employee commits the tort himself;
- (b) he assumes a personal liability when carrying out his duties for the company; or
- (c) when the director procures and induces the company to commit the tort.

In the circumstances, the court found that D2's conduct fell within the third category and as such, D2 was personally liable as a joint tortfeasor with D1. The court held that:

- (a) D2's involvement in the transactions *"went beyond what would be appropriate for a mere intermediary acting on behalf of D1"*;
- (b) D2 had deliberately made the misrepresentations with the intention of securing the Plaintiff as a tenant. As a director of D1 and a guarantor of D1's indebtedness to the Mortgagee, D2 knew that D1 was in no position to cover the indebtedness owing to the Mortgagee and that the premises were susceptible to enforcement;
- (c) D2 was the *"puppet master"* of D1 and was in a position to control D1's affairs; and
- (d) D2, as D1's guarantor, had a *"personal interest"* in securing the tenancies and therefore assumed personal liability for the lettings.

As such, the court found that D2 had procured and induced D1 to commit a tortious act and was therefore personally liable to the Plaintiff.

Comment

Directors of companies should take note of this case as it illustrates the circumstances in which a director could be held personally liable for tortious acts committed by the company. It underscores the director's responsibility and duty to ensure that the company of which he is a director acts lawfully and in compliance with its contractual and tortious obligations.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact litigation and dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

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