

The Duty of Honesty In Contractual Performance

A Discussion of the SCC Decision in *Bhasin v. Hrynew et al.*

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Agenda

- Introduction
- *Bhasin v. Hrynew et al.*
- Post-Bhasin application
- Practical Tips

2



***Bhasin v. Hrynew et al.*,
2014 SCC 71 (CanLII)**

Facts

- Dispute between Can-Am Financial Corp. and Harish Bhasin over a dealership agreement between the parties
- Bhasin's competitor, Larry Hrynew, took steps to force a merger of their businesses
- Bhasin's refusal to merge with Hrynew led to Can-Am threatening to terminate the dealership agreement and ultimately giving notice of non-renewal

3

Trial Decision

- Can-Am breached the duty of good faith owed to Bhasin through its actions in misleading Bhasin regarding a merger with Hrynew
- Hrynew intentionally induced Can-Am to breach its contract with Bhasin
- Both liable for damages of ~\$381,000

Court of Appeal

- Appeal allowed; Bhasin’s claim dismissed
- Pleadings insufficient re: breach of duty of good faith
- Trial judge made an error by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause

“Two Incremental Steps”

- General Organizing Principle of Common Law
- Common Law Duty to Act Honestly in the Performance of Contractual Obligations

Bhasin v. Hrynew et al.

General Organizing Principle of Common Law

- Must perform contractual duties honestly and reasonably, not capriciously or arbitrarily
- Have appropriate regard for the other party's interests

Bhasin v. Hrynew et al.

Common Law Duty to Act Honestly in the Performance of Contractual Relations

- Must not lie or knowingly mislead the other party about matters directly linked to the performance of the contract
- Not a duty of loyalty, disclosure, or a requirement to forgo advantages flowing from the contract

The Duty of Honesty in Other Jurisdictions

- *Bhasin* in keeping with developments in England
- England one of few jurisdictions that did not recognize an implied duty of good faith between contracting parties

The Duty of Honesty in England

- Could have good faith in fiduciary relationships
- Could have good faith as a specifically agreed upon contractual term
- General rule: no implied good faith duty in commercial contract

Yam Seng v. International Trade Corp.

- Duty of honesty extends beyond not knowingly making untrue statements
- Depending on context, might include avoid answering a question or giving an evasive answer
- Might create a positive obligation to volunteer information relevant to contract

Duty has been found to exist

- *Osteria Da Luca Inc. v. 1850546 Ontario Inc.*, 2015 ONSC 5606 (lease renewal)
- *Lavrijsen v. Reville*, 2014 ONSC 5302 (share purchase)

Duty has not been found to exist

- *Royal Bank of Canada v. 4445211 Manitoba Ltd.*, 2015 SKQB 261 (default on loans)
- *Transamerica Life Canada v. Oakwood Associates Advisory Group*, 2015 ABQB 600 (failure to report wrongdoing in fraud case)
- *Empire Communities Ltd. et al. v. HMQ et al.*, 2015 ONSC 4335 (sale of land for redevelopment)

Practical Tips

- Duty to act honestly and in good faith applies to contractual dealings, whether the contract specifically says so or not
- Can't opt out of these duties
- Can't lie
- Can't knowingly mislead the other side

Practical Tips

- Misleading can occur by omission/failure to disclose
- Do NOT have to consider opposing party's interests over your own
- Self-interest is permitted
- Question is one of degree: permissible self dealing v. dishonesty

Practical Tips

- Can't rely on duty of good faith to create obligations where none exist/as an excuse for carelessness
- If you want to rely on it, have to specifically plead it

Questions/Comments
