

focus

on

Insolvency Law

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FRASER MILNER CASGRAIN LLP

FRAUD CLAIMS THAT SURVIVE BANKRUPTCY

In *Toronto Dominion Bank v. Merenick* (2007), B.C.S.C 1864 Mr. Merenick was a financial consultant who was approached, via unsolicited emails, by two purported Nigerian doctors who asked him to help them transfer money out of Nigeria for their use in retirement. After resisting the “doctors” for eight months, Mr. Merenick agreed to conduct two transactions through his own account at the Toronto Dominion Bank. To this end, he received and deposited a cheque for more than \$82,000.00 and the following day directed his bank to wire a similar sum from his account to an account in Honk Kong in a name provided by one of the doctors.

The cheque turned out to be counterfeit and the bank was unable to recover the funds transferred to the Hong Kong account. Upon learning of these events, Mr. Merenick resigned from his job, reported the situation to the police, and declared bankruptcy.

At issue before the court was whether, when Mr. Merenick deposited the cheque and directed the wire transfer, he engaged in “false pretences or fraudulent misrepresentation” within the meaning of s.178(1)(e) of the *Bankruptcy and Insolvency Act* (the “BIA”). If he did, then his debt to the bank would survive his discharge from bankruptcy.

The Court first recognized that for a debt or liability to fall within the scope of s.178(1)(e), the property need not have been obtained by the bankrupt, but may pass directly from the creditor to a third party at the bankrupt’s direction or on his or her behalf.

The Court then examined Mr. Menerick’s conduct and found that his failure to tell the bank about the suspicious circumstances surrounding the two transactions did not constitute either false pretences or fraudulent misrepresentation. Mr. Menerick was under no affirmative duty to disclose to the bank the circumstances in which he received the cheque. The Court found that while he was unwise and careless in allowing himself to be made a victim of the scam, the evidence did not establish that he was untruthful or otherwise acted deceitfully in his dealings with the bank.

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