Meditrust Healthcare Inc. v. Shoppers Drug Mart, a division of Imasco Retail Inc. et al.

[Indexed as: Meditrust Healthcare Inc. v. Shoppers Drug Mart]

61 O.R. (3d) 786
[2002] O.J. No. 3891
Docket No. C36688

Court of Appeal for Ontario,
Carthy, Weiler and Laskin JJ.A.
October 18, 2002

Corporations -- Rule in Foss v. Harbottle -- Plaintiff operating national pharmacy business through subsidiaries -- Plaintiff alleging that its business was destroyed by variety of economic torts committed by the defendants -- Save for damage to plaintiff's reputation and to its goodwill, plaintiff not showing that it suffered damages independent from and not derivative of the damages suffered by its subsidiaries -- Rule in Foss v. Harbottle applying -- Save for claims with respect to goodwill, plaintiff's claim dismissed on motion for summary judgment.

Meditrust Healthcare Inc. ("Meditrust") owned a national mail-order pharmacy business. To meet the regulatory and statutory requirements across the country that governed the dispensing of drugs, its business was operated through subsidiaries and, in the province of Quebec, through a licensee. In 1997, Meditrust sued Shoppers Drug Mart and the other defendants alleging that they had conspired through false advertising and a phony letter from a fictitious society of pharmacists to destroy Meditrust and to undermine its initial public offering, which had failed. Meditrust alleged that it had suffered damages from a variety of torts, including

conspiracy, intimidation, misleading advertising, injurious falsehood, unfair competition, unlawful infliction of economic harm and intentional interference with economic relations. The subsidiaries and the licensee were not parties to the action. In June 2001, the defendants successfully moved for a partial summary judgment to dismiss most of Meditrust's claims. Molloy J. held that Meditrust had not suffered any direct damages and that the rule in Foss v. Harbottle, which holds that a shareholder does not have a cause of action for wrong done to a corporation, barred Meditrust's claims. Meditrust appealed.

Held, the appeal should be dismissed except for the claim for loss of goodwill, which should be permitted to go to trial.

Under the rule in Foss v. Harbottle, a shareholder of a corporation -- even a controlling shareholder or the sole shareholder -- does not have a personal cause of action for a wrong done to the corporation. The rule does not preclude an individual shareholder from maintaining a claim for harm done directly to it, but to maintain a personal claim, the shareholder must establish all the components of the cause of action alleged. In the present case, one of the components of each of the torts alleged was proof of damages suffered and, therefore, to maintain its action, Meditrust had to put forward some evidence that because of the defendants' conduct, it suffered damages that were not derivative of the damage suffered by the subsidiaries.

Molloy J. properly applied the proper test for summary judgment. As the responding party on the motion for summary judgment, it would not avoid summary judgment by simply raising mixed questions of fact and law. When the facts are not disputed, a motions judge may in a proper case grant summary judgment. Meditrust lost the motion not because it failed to lead all of the evidence on damages it might lead at trial but because it led no evidence at all that it had suffered direct damages flowing from the defendants' conduct. Molloy J. did not err in holding that Meditrust was not the proper plaintiff. Although Meditrust and its [page787] subsidiaries were a single economic entity, they were separate legal entities and the rule from Foss v. Harbottle applied. Further, neither the law of

agency nor the law of contract assisted Meditrust. There was no authority for the proposition that a principal has the right to sue in tort for harm done to its agent, and there was no basis for a contractual claim. Further, a plaintiff responding to a motion for summary judgment must do more than merely assert that it had sustained damages. Save for the claim for loss of goodwill, Meditrust had not shown that it suffered damages independent from and not derivative of the damages suffered by the subsidiaries. In particular, a shareholder has no independent right of action based on an allegation of diminution in the value of its shares caused by damage to the company. The shareholder does not suffer a direct loss; its loss merely reflects the loss suffered by the company. Meditrust's claim for loss of goodwill, however, was sufficiently shown to justify it proceeding to a trial. Goodwill includes reputation and, although Meditrust did not particularize any damage to its reputation, it did put forward cogent evidence that the defendants had embarked on a campaign to destroy it and its national mail-order business.

Cases referred to

642947 Ontario Ltd. v. Fleischer (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) 182, 47 R.P.R. (3d) 191, 16 C.P.C. (5th) 1 (C.A.), affg (1997), 9 R.P.R. (3d) 261 (Ont. Gen. Div.); Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1; DiFlorio v. Con. Structural Steel Ltd., [2000] O.J. No. 340 (Quicklaw) (S.C.J.); Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189; Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, 247 N.R. 97, 49 B.L.R. (2d) 68, [2000] I.L.R. 1-3741, 39 C.P.C. (4th) 100; Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, 115 Man. R. (2d) 241, 146 D.L.R. (4th) 577, 211 N.R. 352, 139 W.A.C. 241, [1997] 8 W.W.R. 80, 31 B.L.R. (2d) 147, 35 C.C.L.T. (2d) 115; Hi-Tech Group Inc. v. Sears Canada Inc. (2001), 52 O.R. (3d) 97, 11 B.L.R. (3d) 197, 4 C.P.C. (5th) 35 (C.A.); Johnson v. Gore Wood & Co., [2001] 1 All E.R. 481; Martin v. Goldfarb (1998), 41 O.R. (3d) 161, 163 D.L.R. (4th) 639, 44 B.L.R. (2d) 158, 42 C.C.L.T. (2d)

271 (C.A.) [Leave to appeal to S.C.C. refused (1999), 239 N.R. 193n], revg in part (1997), 31 B.L.R. (2d) 265 (Ont. Gen. Div.); Rogers v. Bank of Montreal (1986), 9 B.C.L.R. (2d) 190, [1987] 2 W.W.R. 364 (C.A.), affg (1985), 64 B.C.L.R. 63, [1985] 5 W.W.R. 193, 30 B.L.R. 41 (S.C.); Salomon v. Salomon & Co. Ltd., [1897] A.C. 22, 66 L.J. Ch. 35, [1895-9] All E.R. Rep 33, 75 L.T. 426, 45 W.R. 193, 13 T.L.R. 46, 41 Sol. Jo. 63, 4 Mans 89 (H.L.), Walters v. Royal Bank (2000), 130 O.A.C. 188, [2000] O.J. No. 702 (Quicklaw) (C.A.)

Statutes referred to

Drug and Pharmacies Regulation Act, R.S.O. 1990, c. H.4, ss. 142, 144(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 20.04(1)

APPEAL from a judgment of Molloy J. (2001), 15 B.L.R. (3d) 221 (S.C.J.) granted on a motion for summary judgment.

Ronald D. Manes, David M. Golden and
Duncan N. Embury, for appellant.
Mark A. Gelowitz, for respondent Shoppers Drug Mart.
Ed Morgan, for respondent Lawrence Rosen. [page788]
Rochelle Fox, for respondent Sam Hirsch.
Cheryl M. Woodin, for respondent Canadian Pharamaceutical Association.

The judgment of the court was delivered by

LASKIN J.A.: --

A. INTRODUCTION

[1] This appeal turns on the application of the rule in Foss

v. Harbottle (1843), 2 Hare 461, 67 E.R. 189, which holds that a shareholder does not have a cause of action for a wrong done to the corporation.

[2] The appellant, Meditrust Healthcare Inc., owned a national mail-order pharmacy business, which it operated through a number of subsidiaries. Meditrust has alleged that Shoppers Drug Mart Limited and the other respondents conspired to destroy its mail-order business.

[3] The respondents brought a motion for partial summary judgment to dismiss most of Meditrust's claims. The motions judge, Molloy J., granted the motion (at (2001), 15 B.L.R. (3d) 221). She held that for the claims in question, any damages suffered by Meditrust were not suffered by it directly, but were derivative of damages suffered by the subsidiaries. In her view, the rule in Foss v. Harbottle barred these claims.

[4] Meditrust appeals. It advances these four submissions:

1. The motions judge failed to apply the proper test for summary judgment under Rule 20 [Rules of Civil Procedure, R.R.O. 1990, Reg. 194].

2. The motions judge erred in holding that Meditrust was not the proper plaintiff. Meditrust submits that it is a proper plaintiff for several reasons, including that it suffered personal damages not derivative of the damages to its subsidiaries;

3. The motions judge erred in failing to hold that Meditrust carried on the mail-order pharmacy business;

4. The motions judge erred in refusing to let Meditrust's conspiracy claim go to trial.

[5] For the reasons that follow, I substantially agree with the motions judge. I would dismiss the appeal except for one claim, Meditrust's claim for damages for loss of goodwill, which I would let go to trial. [page789]

B. BACKGROUND

[6] In 1992, Meditrust began a national mail-order pharmacy business. Its goal was to provide prescription services at a lower cost than the standard dispensing fees of other retail pharmacies. To meet provincial legislative and regulatory requirements, Meditrust operated the business through a number of subsidiaries, which it either owned or controlled, and in the Province of Quebec through a licensee. These subsidiaries and the licensee provided dispensing services and prescription drugs to the public.

[7] In this action, Meditrust alleges that Shoppers Drug Mart and the other respondents embarked on a global campaign to destroy Meditrust and eliminate it as a competitor in the Canadian retail pharmacy market. According to the statement of claim, the respondents waged this campaign in several ways, including false advertising and wrongful interference with Meditrust's suppliers and potential customers. The most serious complaint, however, is the respondents' admitted complicity in publishing a phoney letter in October 1996, written on behalf of a fictitious society of pharmacists and alleging that Meditrust's business was unsafe for patients and investors. The purpose of the letter was to undermine Meditrust's then ongoing initial public offering ("IPO"). The IPO failed completely.

[8] Meditrust began this action in 1997. None of the subsidiaries or the Quebec licensee -- the operators of the business -- is a plaintiff in the action. The lengthy statement of claim alleges that the respondents committed a long list of economic torts that in some way caused economic harm to Meditrust. These torts include conspiracy, intentional interference with contractual relations, intimidation, unfair competition, unlawful infliction of economic harm, misleading advertising and injurious falsehood. Because of these alleged torts, Meditrust claims that it sustained damages for loss of revenue, for loss of competitive advantage, and for missed corporate opportunities and other business, and that it suffered damage to its goodwill.

[9] In January 1999, nearly two years after it had begun this

action, Meditrust sold its mail-order pharmacy business to Pharma Plus Drug Mart. Meditrust now contends that the main purpose of this litigation is to recover the difference between what it claims the sale price would have been, but for the respondents' conduct, and the actual sale price to Pharma Plus.

[10] In June 2001, the respondents moved for partial summary judgment to dismiss most of Meditrust's claims. The respondents acknowledged that Meditrust's allegations of interference with its IPO (paras. 121-38 of the statement of claim) raised a triable [page790] issue, but argued that the remainder of Meditrust's claims (paras. 1-120 and 139-60 of the statement of claim) disclosed no genuine issue for trial. Molloy J. agreed. She held that these other claims could be asserted only by the subsidiaries; the companies that operated the mail-order business. She, therefore, granted the partial summary judgment requested by the respondents.

C. THE LEGAL CONTEXT FOR THE APPEAL

[11] The legal context for this appeal has three important aspects: the rule in Foss v. Harbottle; the components of a cause of action for the economic torts alleged by Meditrust, each of which requires proof of damages; and the provincial regulatory scheme, which provides that only a pharmacist or a corporation run by a majority of pharmacists can own or operate a pharmacy.

[12] The rule in Foss v. Harbottle provides simply that a shareholder of a corporation -- even a controlling shareholder or the sole shareholder -- does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See Salomon v. Salomon & Co. Ltd., [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.). A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation.

[13] The rule in Foss v. Harbottle also avoids multiple lawsuits. Indeed, without the rule, a shareholder would always

be able to sue for harm to the corporation because any harm to the corporation indirectly harms the shareholders.

[14] Foss v. Harbottle was decided nearly 160 years ago but its continuing validity in Canada has recently been affirmed by the Supreme Court of Canada in Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577 and by this court in Martin v. Goldfarb (1998), 41 O.R. (3d) 161, 163 D.L.R. (4th) 639 (C.A.).

[15] In Hercules, La Forest J. described the rule and its rationale in these words at pp. 211-12 S.C.R.:

> The rule in Foss v. Harbottle provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in Prudential Assurance Co. v. Newman Industries Ltd. (No. 2), [1982] 1 All E.R. 354, at p. 367, as follows:
>
> > The rule [in Foss v. Harbottle] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and [page791] torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a

> shareholder the scope and consequences of such further rights require careful consideration.
>
> To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

[16] The rule in Foss v. Harbottle does not, of course, preclude an individual shareholder from maintaining a claim for harm done directly to it. Again, in Hercules, La Forest J. explained the limit of the rule at p. 214 S.C.R.:

> One final point should be made here. Referring to the case of Goldex Mines Ltd. v. Revill (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in Foss v. Harbottle.

(Emphasis in original)

[17] But he stressed that, to maintain a personal claim, a shareholder must establish all the components of the cause of action alleged:

> Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder qua individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

[18] In the present case, one of the components of a cause of action for each of the torts alleged by Meditrust is proof of

damages suffered. The tort of conspiracy -- the main tort relied on by Meditrust -- is typical. In Canada Cement LaFarge Ltd. v. B. C. Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, at pp. 471-72 S.C.R., pp. 398-99 D.L.R., the Supreme Court of Canada affirmed that tort law recognizes a claim of conspiracy where either the predominant purpose of the defendant's conduct [page792] is to injure the plaintiff or where the defendant's conduct is directed towards the plaintiff, is unlawful and the defendant should know that the plaintiff is, thus, likely to be injured. But, in either case, "there must be actual damages suffered by the plaintiff". Therefore, Meditrust cannot maintain its action simply by showing that the respondents' predominant purpose was to harm it or by showing that the respondents engaged in unlawful conduct directed toward it. Meditrust also has to put forward some evidence that, because of the respondents' conduct, it suffered damages; damages that are not derivative of the damage suffered by the subsidiaries.

[19] Yet, because of the prevailing provincial regulatory scheme governing pharmacies, Meditrust could not legally own and operate its national mail-order business. To comply with provincial laws, Meditrust had to incorporate subsidiaries to run the business in each province where it wished to locate.

[20] Ontario was one such province. Under s. 142 of Ontario's Drug and Pharmacies Regulation Act, R.S.O. 1990, c. H.4, no corporation can own or operate a pharmacy unless the majority of its directors are pharmacists and a majority of each class of its shares is owned by and registered in the name of pharmacists. And, under s. 144(1) of the Act, "[n]o person other than a pharmacist or a corporation complying with the requirements of section 142 shall own or operate a pharmacy." Only a corporation meeting these statutory requirements could compound and dispense medications -- the core function of the mail-order business -- and derive revenues from them. Meditrust did not meet these statutory requirements. Thus, it had to incorporate a subsidiary that did. Indeed, Mr. Paul, the president and chief executive officer of Meditrust, acknowledged in his affidavit that Meditrust operated its mail-order pharmacy business through its subsidiaries and

licensees.

[21] I turn now to the issues on the appeal.

D. ANALYSIS

1. Did the Motions Judge Fail to Apply the Proper Test for Summary Judgment Under Rule 20?

[22] Meditrust contends that the motions judge did not apply the proper test for summary judgment under Rule 20. It advances two submissions: the motions judge granted summary judgment even though Meditrust raised questions of mixed fact and law that can only be decided after a trial; and the motions judge wrongly held that Meditrust was required to lead all of the evidence on damages that it might lead at trial. I do not agree [page793] with these submissions. In my view, the motions judge properly applied the Rule 20 jurisprudence.

[23] This court and the Supreme Court of Canada have wrestled with different formulations of the summary judgment test under Rule 20. But two principles have consistently been applied. First, the moving party has the burden of showing that the claim or defence does not raise a genuine issue for trial. But, second, because of rule 20.04(1), the responding party ordinarily has an evidentiary burden to put forward some evidence in support of its position -- it "must lead trump or risk losing". In High-Tech Group Inc. v. Sears Canada Inc. (2001), 52 O.R. (3d) 97, 4 C.P.C. (5th) 35 (C.A.), after discussing the previous Rule 20 case law, Morden J.A. set out these two principles at pp. 104-05 O.R.:

> These two Ontario decisions, Dawson more fully than Irving Ungerman, make it clear that: (1) the legal or persuasive burden is on the moving party to satisfy the court that there is no genuine issue for trial before summary judgment can be granted (this is what rule 20.04(2) says); and (2), by reason of rule 20.04(1), there is an evidential burden, or something akin to an evidential burden (because the motions judge does not find facts), on the responding party to respond with evidence setting out "specific facts showing that there is a

> genuine issue for trial". Failure of the responding party to tender evidence does not automatically result in summary judgment. The "evidential burden" is described by this court (Catzman, Austin, and Borins JJ.A.) in Lang v. Kligerman, [1988] O.J. No. 3708 in paras. 8 and 9 and by the High Court (Griffiths J.) in Kaighin Capital Inc. v. Canadian National Sportsmen's Show (1987), 58 O.R. (2d) 790 at p. 792, 17 C.P.C. (2d) 59.
>
> The short point is that the motions judge, having considered all of the evidence and the parties' submissions on it, must be satisfied that there is no genuine issue for trial before he or she may grant summary judgment. This is the legal burden resting on the moving party and it never shifts. I do not think that Guarantee Co. of North America intended to detract from this.

(Footnotes omitted)

[24] In granting partial summary judgment, the motions judge applied these two principles and the approach to a Rule 20 motion that underlies them. Meditrust's two arguments that she did not do so are misconceived. A responding party to a Rule 20 motion does not automatically avoid summary judgment by raising mixed questions of fact and law. Where the facts are not disputed -- as Molloy J. found -- a motions judge may, in a proper case, grant summary judgment on these questions. See Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1.

[25] Moreover, Meditrust lost the summary judgment motion not because it failed to lead all of the evidence on damages it might lead at trial, but because, in the view of the motions judge, it led no evidence at all that it had suffered direct damages flowing from the [page794] respondents' conduct. As the motions judge said, though damage was an essential component of the causes of action alleged, "no evidence was filed as to any direct damages sustained by Meditrust."

[26] Accordingly, I would not give effect to this ground of appeal.

2. Did the Motions Judge Err in Holding that Meditrust Was Not the Proper Plaintiff?

[27] The motions judge's decision rested on her view that the subsidiaries, not Meditrust, had the right to assert most of the claims advanced in the statement of claim. The subsidiaries, however, are not plaintiffs in the action. Meditrust has sold them and, therefore, no longer controls them.

[28] Still, Meditrust maintains that it is the proper plaintiff. It puts forward four separate bases on which it claims to have the right to maintain this action: (1) the business was a single economic entity; (2) principal and agent; (3) it had a contractual right to sue; and (4) it suffered damages personally. I will discuss each of these.

(1) Single economic entity

[29] Meditrust submits that, because it was at the apex of a single economic entity, the rule in Foss v. Harbottle does not preclude it from maintaining this action. Meditrust points out that it completely controlled the subsidiaries, that its control of them was augmented by the unanimous shareholders' agreement, and was reflected in the consolidated financial statements for the business.

[30] This submission shows the difference between economic reality and legal reality. The economic reality of the mail-order business was a single economic enterprise. But the legal reality was separate corporate entities. And the rule in Foss v. Harbottle is a corporate law rule, not an economic rule. A parent company that owns all the shares of its subsidiaries may exercise complete and constant control over them. That control, however, does not clothe the parent with the right to sue for the subsidiaries.

[31] In rare cases, a court may disregard separate corporate entities for the benefit of innocent third parties. The court may "pierce the corporate veil" when the corporate structure

has been used by the corporation's principals as a sham or to perpetrate a fraud. See, for example, 642947 Ontario Ltd. v. Fleischer (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) 182 (C.A.). But here, Meditrust must be held to the corporate structure that it created. It created a structure in which it operated the business through subsidiaries. It must take not only the benefits of that structure, but also the burdens. The motions judge, thus, properly characterized [page795] Meditrust's attempted disregard of this structure as an attempt "to pierce its own corporate veil". Like her, I see no merit in Meditrust's single economic entity argument.

(2) Principal and agent

[32] Meditrust also argues that the relationship between it and its subsidiaries was that of principal and agent. Where an agent enters into a contract on behalf of a principal, the principal can sue for its breach. Meditrust seeks to apply this proposition to tort. It submits that it can sue for the torts committed by the respondents against the subsidiaries.

[33] The law of principal and agent is concerned with contract and property, not with torts. Meditrust cites no authority for the proposition that a principal has the right to sue in tort for harm done to its agent. Moreover, Meditrust's claim of a principal and agent relationship with its subsidiaries seems nothing more than an artificial attempt to avoid summary judgment. Its statement of claim contains no allegation that it is claiming as principal the damages suffered by its agents. I would not give effect to this argument.

(3) Contractual right to sue

[34] Meditrust also submits that its security agreements with the subsidiaries enable it to maintain this action. I do not accept this submission either. Again, Meditrust has not pleaded reliance on these agreements in its statement of claim. Moreover, these agreements are simply standard form secured-lending agreements, under which Meditrust, as secured lender, has priority over subsequent secured creditors and all

unsecured creditors in the case of default by the subsidiaries. No default, however, was alleged.

(4) Personal damages

[35] Meditrust's main argument on appeal -- as it was on the motion -- is that it put forward enough evidence to raise a triable issue whether it had suffered damages independent from and not derivative of the damages suffered by the subsidiaries. The motions judge rejected this argument. She concluded that all the losses claimed by Meditrust were simply derivative of the losses allegedly suffered by the subsidiaries.

[36] In submitting that the motions judge erred in her conclusion, Meditrust listed four categories of losses, each of which it asserted were direct and not derivative losses. These are the four categories:

(i) loss of business opportunities and contractual relations; [page796]

(ii) the costs of investments in its subsidiaries;

(iii) loss in the value of its shares in its subsidiaries; and

(iv) loss of goodwill.

[37] For each category of loss, Meditrust alleged in its statement of claim and in the affidavit of Mr. Paul that it had "sustained damages". This incantation, no matter how often asserted, will not, standing alone, stave off a motion for summary judgment. A party responding to a motion for summary judgment must do more. As the Supreme Court of Canada said in Guarantee Co. of North America v. Gordon Capital Corp., supra, at pp. 436-37 S.C.R., p. 12 D.L.R., "a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence."

[38] In my opinion, Meditrust has not filed any evidence showing it may personally have suffered losses in any of the first three categories it relies on, but it has done so in the

fourth category, loss of goodwill.

(i) Loss of business opportunities and contractual relations

[39] Meditrust led evidence that it directly entered into a number of contracts and other business arrangements for the supply of prescription drugs. It contends that the respondents' tortious acts interfered with these contracts and other arrangements, and thus directly harmed Meditrust. For example, Meditrust points to its contract with Sears, which it says was cancelled because of the respondents' ruinous campaign. However, these lost contractual or business opportunities were, in reality, lost opportunities for the subsidiaries, not Meditrust. Only the subsidiaries could operate the mail-order business. They alone could benefit from the business arrangements. Therefore, they alone would be harmed by their cancellation. In his affidavit, Mr. Paul gave no evidence to show that Meditrust had suffered damages in its own right because of lost business opportunities.

[40] The motions judge put it this way in her reasons at p. 233 B.L.R.:

> Meditrust has not filed any evidence of separate damages to it as a result of the failure of any of these contracts or arrangements. The same reasoning applies to cooperative arrangements with other organizations to advertise Meditrust's services. Meditrust has filed no evidence that it would earn any revenue directly from such business. It has merely alleged that the mail order business was harmed. It relies on the loss of the business itself which, as I have already said, is a loss sustained by the subsidiaries.

I agree with this passage. [page797]

(ii) The costs of investments in its subsidiaries

[41] Meditrust submits that it suffered losses from its investment in its subsidiaries. Yet, it did not even claim these losses in its statement of claim. And it led no evidence

that any of its subsidiaries had defaulted on their loans or that it had lost any money as a creditor.

(iii) Loss in the value of its shares in its subsidiaries

[42] Meditrust also claims that the loss in the value of its shares in its subsidiaries is a direct loss for which it can sue the respondents. This claim, however, runs up against the rule in Foss v. Harbottle and was expressly rejected by this court in Martin v. Goldfarb, where Finlayson J.A. wrote at p. 180 O.R., p. 660 D.L.R.:

> Martin's claim was premised on the loss he suffered as an equity holder in his various corporations because the conduct of Axton ruined the corporations and destroyed the value of his equity in the corporations. There is authority of long standing for the proposition that where a wrong is occasioned to a corporation, a shareholder has no claim for damages in respect of that wrong: see Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189.

See also Rogers v. Bank of Montreal, [1985] 5 W.W.R. 193, 64 B.C.L.R. 63 (S.C.); affd [1987] 2 W.W.R. 364, 9 B.C.L.R. (2d) 190 (C.A.). In other words, a shareholder in a company has no independent right of action based on an allegation of diminution in the value of its shares caused by damage to the company. The shareholder does not suffer a direct loss. Its loss merely reflects the loss suffered by the company.

[43] Meditrust, nonetheless, submits that this principle, which was affirmed in Martin v. Goldfarb, should be reconsidered in the light of recent English case law. I think that submission is untenable for two reasons. First, Canadian appellate jurisprudence has consistently invoked Foss v. Harbottle to reject this kind of claim. Second, the most recent English authority, the House of Lords' decision in Johnson v. Gore Wood & Co., [2001] 1 All E.R. 481, does not support Meditrust's position. In Johnson, Lord Bingham admittedly put a gloss on the rule in Foss v. Harbottle when he stated the following proposition at p. 503 All E.R.: "Where a company suffers loss but has no cause of action to sue to recover that

loss, the shareholder of the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding." But, to rely on this proposition to claim the loss in the value of its shares, Meditrust must at least show that it has a cause of action and the subsidiaries do not. This, Meditrust has failed to do. Therefore, in my view, [page798] Meditrust cannot maintain its claim for damages resulting from the loss in the value of its shares in its subsidiaries.

(iv) Loss of goodwill

[44] Finally, Meditrust submits that it has a personal claim for damages for loss of goodwill. This is the most persuasive of all Meditrust's submissions. In principle, a claim for loss of goodwill is not precluded by the rule in Foss v. Harbottle. A shareholder may suffer personal damages for loss of goodwill, damages that are not derivative of harm to the company. The contentious question on this appeal is whether the evidentiary record supports Meditrust's claim. Although Meditrust's evidence could be stronger, I would permit its claim for harm to its goodwill to go to trial.

[45] Goodwill includes reputation, position in the business community, client base, the expectation of continued public patronage and like considerations. See DiFlorio v. Con. Structural Steel Ltd., [2000] O.J. No. 340 (Quicklaw) (S.C.J.). It is akin to the loss of reputation claim asserted by the shareholder in Martin v. Goldfarb, which this court held could give rise to damages that were direct and not derivative of the damages to the company. As Finlayson J.A. said, at p. 191 O.R., p. 672 D.L.R.:

> I also think that Martin is entitled to something for "the insult", as they say in settlement discussions. He did maintain a certain standard of living before the bankruptcy and he works now as a security guard at a motel in Florida. It may well be that the judge on the assessment would want to consider, if the evidence warrants it, general damages for loss of reputation and credit arising out of the bankruptcy

itself: see Hoskins v. Price Waterhouse Ltd., supra.

[46] The respondents, however, mount a formidable array of arguments that, though Meditrust may in principle have a claim for loss of goodwill, it has not provided any evidence to support it. The respondents point out that, though a claim for loss of goodwill was pleaded in the statement of claim, it was not argued before the motions judge. They also point out that the record contains only brief reference to Meditrust's goodwill, even though Meditrust had been ordered to particularize the damages it allegedly suffered.

[47] These are strong arguments. But there are balancing considerations. The record does show that Meditrust was known publicly as the corporate face of the mail-order business it owned. That public reputation is reflected in the following paragraph of Meditrust's prospectus:

> Management believes that Meditrust will be able to continue to compete effectively in Canada on the basis of its ability to provide national drug containment services, the Company's experience and the reputation of its mail [page799] order pharmacy, its current customer base, its sophisticated pharmacy technology systems and procedures, and the dependable and cost effective manner in which it serves it customers.

[48] Damage to that reputation would be damage to Meditrust personally, not to its subsidiaries. Although Meditrust did not particularize any damage to its reputation, it did put forward cogent evidence that the respondents embarked on a campaign to destroy it and its national mail-order business. It seems to me almost axiomatic that Meditrust would suffer a loss of goodwill from the respondents' alleged wrongful acts. Although I consider it a close decision, I would err on the side of permitting the claim for damages for loss of goodwill to go to trial.

3. Did the Motions Judge Err in Failing to Hold that Meditrust Carried on the Mail-Order Pharmacy Business?

[49] Meditrust submits that the motions judge erred in concluding that the subsidiaries alone carried on the mail-order pharmacy business. Meditrust submits that it did so as well. It contends that the motions judge erred because she focused on the dispensing and selling of prescription drugs, which was done by the subsidiaries. Meditrust asserts that the business was broader than merely filling prescriptions and embraced the organization and operation of an economic enterprise, including marketing, contracting, advertising, banking and purchasing. Meditrust says that it carried on these broader aspects of the business.

[50] Even accepting that Meditrust did so, this ground of appeal must fail for the same reason that Meditrust's second ground of appeal largely failed. It put forward no evidence that it suffered losses from the respondents' interference with these broader aspects of the business. Instead, Meditrust claimed damages only for lost revenues from the dispensing and selling of drugs. But only the subsidiaries (and the licensee) carried on these activities. Thus, the only damages for loss of income that Meditrust claimed to have suffered and on which it led evidence were damages it suffered as a shareholder.

[51] In substance, Meditrust did not carry on the mail-order business. Rather, it owned a group of companies that did. Mr. Paul acknowledged as much in his affidavit when he discussed potential liabilities for the incorrect preparation, labelling and distribution of prescriptions. He said that these liabilities "based upon the structure of the business, are actually liabilities of the pharmacy subsidiaries filling the individual prescriptions." Meditrust cannot have it both ways. It cannot claim to sue for harm [page800] in reality caused to the subsidiaries, yet shelter behind these same subsidiaries for any harm done by them. I would not give effect to this ground of appeal.

4. Did the Motions Judge Err in Refusing to Let the Conspiracy Claim Go to Trial?

[52] Meditrust submits on appeal, as it did before the motions judge, that the rule in Foss v. Harbottle does not

apply to a conspiracy claim. In other words, Meditrust says it can avoid the rule by showing that the respondents' unlawful conduct was directed at it. The motions judge rejected this submission and so do I.

[53] In granting summary judgment on the conspiracy claim, the motions judge held at p. 229 B.L.R. that "the mere fact that Meditrust may have been the direct target of the alleged conspiracy is not sufficient to create a cause of action. Meditrust must have sustained direct injury in its own right (not as a result of injury to its subsidiaries) before it can have a cause of action."

[54] I agree. I add that Meditrust's submission runs counter to principle, to the Supreme Court of Canada's decision in Canada Cement LaFarge and to this court's decision in Walters v. Royal Bank (2000), 130 O.A.C. 188, [2000] O.J. No. 702 (Quicklaw) (C.A.). I see no principled basis for holding that the rule in Foss v. Harbottle applies to other tort claims but not to a conspiracy claim. Moreover, Canada Cement LaFarge, to which I referred earlier, states unequivocally that a plaintiff who alleges conspiracy must suffer direct injury in its own right before it can sue. And in Walters, this court approved the decision of the British Columbia Court of Appeal in Rogers v. Bank of Montreal, which, in turn, affirmed the proposition that an allegation of conspiracy does not affect the application of the rule in Foss v. Harbottle. For these reasons, I would not give effect to this ground of appeal.

E. DISPOSITION

[55] I would allow the appeal only on the claim for damages for loss of goodwill. To that extent, I would set aside the order of the motions judge and dismiss the motion for summary judgment. I would otherwise dismiss the appeal. The parties may make written submissions on the costs of the appeal -- both entitlement and amount -- within 30 days of the release of the court's judgment.

Order accordingly.