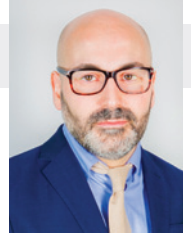


SUMMER 2014

by **Marco P. Falco**

Director of Legal Research / Research and
Opinions Lawyer at Torkin Manes LLP



PRACTICE AREA LINKS

[Family Law](#)

Where Does the Onus Lie Where There are Material Misrepresentations in a Separation Agreement?

THE ONTARIO COURT OF APPEAL HAS RECENTLY HELD THAT IN DETERMINING WHETHER TO SET ASIDE A SEPARATION AGREEMENT, THE COURT SHOULD NOT PUT THE ONUS ON THE SPOUSE SEEKING TO SET ASIDE THE AGREEMENT TO INQUIRE AS TO THE VERACITY OF THE OTHER SPOUSE'S FINANCIAL DISCLOSURE.

In *Virco v. Blair*, 2014 ONCA 392, per Pepall J.A., the appellant wife brought an application to, amongst other things, set aside the separation agreement she entered into with her former husband. The wife was a lawyer and the husband was a business person.

In 2008, the wife and husband entered into a separation agreement. Before entering into the agreement, the husband provided the wife with a net family property statement showing that on the date of marriage, the husband had property totalling \$11,647,390.36. As a result, after certain calculations based on debts, excluded property, and the wife's property, the statement revealed that the wife owed the husband a \$954,150 equalization payment. The husband also provided the wife with audited financial statements for the husband's business. However, he did not provide her with any valuation of the company's main holding, nor any

information regard other major holdings of his company. The wife relied on the husband's disclosure and his representation as to the value of his net family property.

The wife signed the separation agreement without obtaining independent legal advice. The wife also did not discuss the financial terms in the separation agreement with an accountant or anyone with a financial background. The parties signed the separation agreement at their home with no witnesses present. The agreement, amongst other things, released the wife from having to pay her equalization payment and provided her with time-limited spousal support of \$10,000 per month.

After the separation agreement was signed, valuations were provided that disclosed that the husband had significantly overvalued his date of marriage assets.

The wife accordingly brought an application to set aside the separation agreement,

As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

amongst other relief sought. The husband brought a summary judgment motion to dismiss the wife's application.

The motions judge held that the wife was not able to show that her application to set aside the separation agreement had a real chance of success at trial.

In the motion judge's view, the wife had information that should have caused her to question the veracity of the husband's disclosure. Accordingly, she ought to have known that the value her husband attributed to his date of marriage interest in his company was overstated. The wife was in a position and had information that should have caused her to question the value assigned to the company and the husband's interest in it. The motions judge assumed, for the purposes of the motion, that the husband materially misrepresented the value of his date of marriage property. Accordingly, the motions judge granted the husband summary judgment dismissing the wife's application.

On appeal, the Court held, amongst other things, that the motions judge erred in the way she applied the test to set aside a separation agreement.

First, the Court of Appeal noted that under section 56(4) of the *Family Law Act* (the "FLA"), the Court could set aside a domestic contract or a provision in it: (a) if a party failed to disclose to the other significant assets, debts or other liabilities existing when the domestic contract was made; (b) if a party did not understand the nature of the consequence of the domestic contract; or (c) otherwise in accordance with the law of contract.

Section 56(4) of the FLA comprises a two-stage analysis: (i) can the party seeking to set aside the agreement demonstrate that

one or more of the s.56(4) circumstances is engaged? and (ii) if so, is it appropriate for the Court to exercise its discretion to set aside the agreement.

The Court held that the motions judge improperly shifted the onus onto the wife, i.e. the recipient of the financial disclosure. In the motion judge's view, the fact that the wife had information that should have caused her to question the veracity of the husband's disclosure precluded any chance of setting aside the agreement even if the husband had deliberately misrepresented his financial disclosure.

However, according to the Court of Appeal, once the motion judge assumed that there had been deliberate material misrepresentations, she erred in shifting the onus to the wife to inquire as to the veracity of the husband's financial disclosure. In the face of a deliberate material misrepresentation, the "onus is not appropriately placed on the recipient spouse. Rather, the burden is on the party disclosing to establish actual knowledge of the falsehood by the recipient. The respondent [husband] could point to no authority for the proposition that the suggested duty of a spouse receiving financial disclosure in a matrimonial case, to investigate or test the veracity of the information provided, overtakes deliberate non-disclosure by the other spouse".

Furthermore, the motion judge erred in granting summary judgment when relevant facts in this case that required a determination were left unresolved, i.e. the wife's knowledge of her husband's misrepresentations when they entered into the separation agreement. Accordingly, the wife's application was ordered to proceed to trial.