

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant
(Respondent in Appeal)

- and -

JAIMEE LYNN GDAK, TRIGGER WHOLESALE INC., THE EN CADRE
GROUP INC., MARK GDAK and JAIMAK REAL PROPERTIES INC.

Respondents
(Appellant)

ORAL HEARING COMPENDIUM

(APPELLANT, JAIME LYNN GDAK)

Appeal to be heard February 17, 2022

February 10, 2022

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Overview

1. Jaimee Gdak is the spouse of the alleged mastermind of a scheme to defraud ClearFlow Financial; she denies any involvement or knowledge.
2. The parties agreed that liability under her personal guarantee was a separate issue from the allegation that Ms Gdak participated in the scheme.

Issue (a): Standard of Review

3. The standard of review is well-known: *Housen*
4. Regarding the guarantee, the standard is correctness because the guarantee is in standard form: *Ledcor*

Issue (b): Reversing the onus re: ILA

5. Ms Gdak's evidence is that she did not have ILA; she was not cross-examined on this.
6. It was an error of law to reverse the onus—i.e., to require that Ms Gdak must prove that the corporate lawyer was not her lawyer

Issue (c): Existence of ILA

7. The Motion Judge's conclusion that Jaimee had ILA was predicated on (1) the signature of a lawyer as a witness to the guarantee (no retainer was ever produced) and (2) Ms Gdak's use of the words "our lawyer" when examined.¹
8. "Our lawyer" was a natural term to use considering that she and her husband both worked at Trigger.
9. The error was compounded by the finding that Ms Gdak was sophisticated; Ms Gdak's evidence was that she was an accounting clerk who occasionally took photos for Trigger's web site; in contrast, Mr Rees (ClearFlow) had 35 years of experience in international banking. This is not a case where both parties were "sophisticated businesspeople".²

Issue (d): Inscrutability of Guarantee

10. The Guarantee appears, as produced by ClearFlow, at **Tab 6** of ABCO, including its inscrutable text.
11. It was an error to not take the inscrutability into account in the unconscionability analysis.³

¹ Reasons at para 94, ABC at Tab 3.

² See recent case of this Court: *Intercap Equity Inc. v. Bellman*, 2022 ONCA 61 (CanLII), at para 8, <https://canlii.ca/t/jm19m#par8> (released after the present appeal was perfected).

³ *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para 89, <https://canlii.ca/t/j8dvf#par89>.

Issue (e): Requirement for director sign-off on financials

12. Any director can approve financial statements.⁴ It was an error to conclude that Ms Gdak “would have been required to sign off”.⁵

Issue (f): Fact that Ms Gdak did not sign the financials

13. No financials signed by Ms Gdak are in evidence.

Issue (g): Adequacy of reasons

14. Ms Gdak denies knowing of the mushrooming debt and denied ever seeing the screen ClearFlow says would have shown the current state of the debt.
15. ClearFlow could have cross-examined Ms Gdak on this but chose not to.
16. The Motion Judge offered no reason for preferring ClearFlow’s evidence over Ms Gdak’s.

Issue (h): Respondent’s breach of underlying agreement

17. The agreement appears as at ABCO, Tab 12, exhibits B and C; the limit of all debt at the time the guarantee was signed was \$1.22 M
18. This is not a matter of ClearFlow amending terms of principal indebtedness; it is a matter of breaching the contract altogether.
19. By *Pax*, that breach discharged Ms Gdak from the guarantee.⁶

Issue (i): Application of *Conlin*

20. *Conlin* stands for the proposition that a guarantor is entitled to have the guarantee construed against the person who drafted it.⁷
21. It is not a circumstantial test; it is predicated on the fact that the lender is almost invariably the drafter.

Issue (j): Application of *contra proferentum* and *ejusdem generis*

22. The Guarantee reads “... all present, and future lease payments and obligations, conditional sale installments and obligations, and any other debts and liabilities (collectively, the “Obligations”) ...”
23. Applying *ejusdem generis*, the “other debts” are read to only be debts of the same nature and kind as those preceding.

⁴ *Business Corporations Act*, R.S.O. 1990, s. 159(1).

⁵ Reasons at para 61, ABC at Tab 3.

⁶ *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, 1992 CarswellBC 513 at para 38

⁷ *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182 (SCC), [1996] 3 SCR 415, at para 8, <https://canlii.ca/t/1fr61#par8>.

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