

Court of Appeal File No. _____
Court File No. CV-20-00649154-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant
(Respondent in Appeal)

- and -

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

Respondents
(Appellant)

APPLICATION UNDER Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*,
R.S.C.1985, c. B-3, Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule
40.01 of the *Rules of Civil Procedure*

NOTICE OF APPEAL

THE RESPONDENT (APPELLANT), JAIME LYNN GDAK APPEALS to the Court of
Appeal from the Judgment of The Honourable Justice Dietrich dated May 26, 2021, made at
Toronto.

THE APPELLANT ASKS that the Judgment be set aside and judgment be granted as
follows:

1. A declaration that the Guarantee executed by the Respondent, Jaimee Lynn Gdak (“**Ms Gdak**”), in favour of the Applicant, ClearFlow Commercial Finance Corp. (“**ClearFlow**”), dated April 30, 2015 (the “**Guarantee**”), is of no force and effect;
2. Costs of this appeal and the original motion payable by ClearFlow to Ms Gdak; and
3. Such further and other relief as to this Honourable Court sees fit.

THE GROUNDS OF APPEAL are as follows:

1. The Guarantee, when signed in 2015, guaranteed indebtedness of no more than \$1.4 million. When ClearFlow commenced proceedings, the alleged principal indebtedness had skyrocketed to nearly \$50 million. Despite Ms Gdak having no independent legal advice, despite the gulf in sophistication between Ms Gdak and ClearFlow, despite the contract of principal indebtedness being renewed without Ms Gdak's participation, despite ClearFlow breaching the contract of underlying indebtedness, and despite ambiguity in the Guarantee, the Motion Judge concluded that Ms Gdak was liable on the Guarantee. The Motion Judge erred in so doing as set out below.
2. The Motion Judge erred in law in reversing the onus of proof, placing the onus on Ms Gdak to prove that the retainer between the Respondent, Trigger Wholesale Inc. ("**Trigger**"), and lawyer Brian Kelly did not extend to representation of Ms Gdak in her individual capacity.
3. The Motion Judge erred in fact in finding that Brian Kelly provided independent legal advice to Ms Gdak.
4. The Motion Judge erred in law in paying no heed to the inscrutability of the Guarantee.
5. The Motion Judge erred in law in concluding that Ms Gdak "would have been required to sign off on the financial statements for [the Respondents Trigger and The En Cadre Group Inc.]".
6. The Motion Judge erred in fact in concluding that Ms Gdak had signed off on the financial statements.

7. The Motion Judge erred in law in failing to provide adequate reasons for preferring the evidence of ClearFlow over Ms Gdak, which error, *inter alia*, prevents meaningful appellate review.
8. The Motion Judge erred in fact in taking Ms Gdak's position as being predicated, in part, on ClearFlow's breach of the Guarantee when in fact Ms Gdak's position was that ClearFlow had breached the principal contract of indebtedness. By extension, the Motion Judge erred in law in failing to apply the Supreme Court of Canada case of *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, 1992 CanLII 27 (SCC), [1992] 2 SCR 998.
9. The Motion Judge erred in law in her interpretation and application of *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182, 4 (SCC), [1996] 3 SCR 415, in particular in finding that a narrow interpretation of the Guarantee was "not warranted."
10. The Motion Judge erred in law in refusing to apply the interpretive principles of *contra proferentum* and *ejusdem generis*.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990 c.43.
- (b) The Judgment appealed from is final.
- (c) Leave to appeal is not required.

June 23, 2021

COHEN HIGHLEY LLP

Lawyers
One London Place
255 Queens Avenue, 11th Floor
London ON N6A 5R8

Benjamin G. Blay (62688Q)

blay@cohenhighley.com
Tel: 519-672-9330
Fax: 519-672-5960

Lawyers for the Respondent / Appellant in
Appeal, Jaimee Lynn Gdak

TO: **TORKIN MANES LLP**
Barristers and Solicitors
151 Yonge Street
Suite 1500
Toronto ON M5C 2W7

Jeffrey J. Simpson (39663M)

Tel: 416-777-5413
Fax: 1-888-587-9143
jsimpson@torkinmanes.com

S. Fay Sulley

Tel: 416-777-5419
Fax: 1-888-587-5769
fsulley@torkinmanes.com

Tel: 416-863-1188
Fax: 416-863-0305

Lawyers for the Applicant / Respondent in Appeal

AND TO: **LERNERS LLP**
Barristers and Solicitors
130 Adelaide Street West
Suite 2400
Toronto ON M5H 3P5

Jason Squire (431830)

Tel: 416-867-3076

Fax: 416-867-9192

jsquire@lerners.ca

Domenico Magisano

Tel: 416-601-4121

Fax: 416-601-4123

dmagisano@lerners.ca

Tel: 416-867-3076

Fax: 416-867-9192

Lawyers for the Respondents

Trigger Wholesale Inc., The En Cadre Group Inc., Mark Gdak and Jaimak Real Properties Inc.

AND TO: **BORDEN LADNER GERVAIS LLP**
Barristers and Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Suite 3400
Toronto ON M5H 4E3

Roger Jaipargas

RJaipargas@blg.com

Tel: 416-367-6000

Fax: 416-367-6749

Lawyers for the Receiver, Grant Thornton Limited

AND TO: **GRANT THORNTON LIMITED**
200 King Street, 11th Floor
Toronto ON M5H 3T4

Jonathan Krieger

Jonathan.Krieger@ca.gt.com

Fax: 416-360-4949

AND TO: **SERVICE LIST**

Court of Appeal File No. _____
Court File No. CV-20-00649154-00CL

CLEARFLOW COMMERCIAL FINANCE CORP.

-and-

TRIGGER WHOLESALE INC. et al.

Applicant (Respondent)

Respondents (Appellant)

ONTARIO
COURT OF APPEAL

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

COHEN HIGHLEY LLP

Lawyers

One London Place

255 Queens Avenue, 11th Floor

London ON N6A 5R8

Benjamin G. Blay (62688Q)

blay@cohenhighley.com

Tel: 519-672-9330

Lawyers for the Appellant

Jaimee Lynn Gdak