Court File No. C69603

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)

FACTUM OF THE RESPONDENT (APPELLANT), JAIMEE LYNN GDAK

July 29, 2021

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PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. The Appellant is Jaimee Lynn Gdak, a respondent in the Application. Ms Gdak is the spouse of the co-Respondent, Mark Gdak. Ms Gdak was notionally a director of the co-Respondent corporations, Trigger Wholesale Inc. ("Trigger"), The En Cadre Group Inc. ("En Cadre") and Jaimak Real Properties Inc.

2. Ms Gdak appeals the Judgment of the Honourable Justice Dietrich (the "Motion Judge") of the Superior Court of Justice, dated May 26, 2021, made at Toronto, Ontario, which judgment declared Ms Gdak liable on a personal guarantee of the debts of Trigger.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

3. The Applicant and Respondent in Appeal, ClearFlow Commercial Finance Corp. ("ClearFlow"), commenced the Application in an effort to recover approximately $48.6 million, which it alleges it lost as result of a scheme principally engineered by Mark Gdak. Though ClearFlow tangentially alleges that Ms Gdak knew of and participated in this scheme, she has steadfastly denied any such knowledge.

4. ClearFlow sought, *inter alia*, the appointment of a Receiver over the assets, property and undertakings of Trigger and En Cadre, and various real property to which Ms Gdak held title. ClearFlow further sought a *Mareva* injunction restraining the Gdaks from disposing of any of their property. Grant Thornton Limited was appointed as Receiver on an interim basis and the *Mareva* injunction was granted by the Order of Justice Gilmore on October 13, 2020. That receivership was converted to a permanent receivership by the Order of Justice McEwen on October 22, 2020.

5. The Application further sought Judgment against En Cadre, Mr Gdak and Ms Gdak pursuant to unlimited and continuing guarantees executed by each of them for the indebtedness owed by Trigger to ClearFlow. It was the specific issue of Ms Gdak's liability on a guarantee dated April 30, 2015 (the "Guarantee") that came before the Motion Judge on March 18, 2021 and April 15, 2021 (Mr Gdak and En Cadre have not defended against the allegation that they are liable under their respective guarantees). ClearFlow and Ms Gdak agreed that the allegations of Ms Gdak's knowledge of the scheme alleged in the Application had no bearing on the question of the enforceability of the guarantee. Ms Gdak denies any involvement with or knowledge of the scheme and she was not cross-examined on that denial (indeed, she was not cross-examined by ClearFlow at all).

6. The Motion Judge—principally on the basis that Ms Gdak was aware of the mushrooming debt and was heavily involved in the day-to-day operations of Trigger—found that the guarantee was enforceable against Ms Gdak.

7. Ms Gdak's position is that the Motion Judge erred in concluding that Ms Gdak had independent legal advice, ignored the inscrutability of the Guarantee, erred in disregarding the gulf in sophistication between Ms Gdak and ClearFlow, ignored the fact that ClearFlow had breached the principal contract of indebtedness, and erred in not applying the relevant law to resolve ambiguity in the guarantee.

8. The Motion Judge further erred in concluding that, as a director of Trigger, Ms Gdak would necessarily have seen the financial statements of Trigger.

9. The Motion Judge did not provide adequate reasons for preferring the evidence of ClearFlow over that of Ms Gdak, which prevents meaningful appellate review, in particular with

respect to the evidence related to Ms Gdak's purported knowledge of the quantum of the debt over time. No cross-examinations were conducted by any party. The only transcript evidence on this appeal is evidence given by Ms Gdak under a cross-examination by the Receiver, which cross-examination was not conducted in the context of the guarantee liability question.

PART III - SUMMARY OF FACTS

10. It is uncontested that Jaimee executed the Guarantee that appears in Exhibit "A" to the Affidavit of Martin Rees (Application Record). Ms Gdak did so without the benefit of independent legal advice. ClearFlow did not provide her with the opportunity to obtain independent legal advice nor did they encourage her to do so. Martin Rees was the principal point of contact between ClearFlow and Trigger. Mr Rees boasts of 35 years of experience in banking and lending in Canada and the United Kingdom. In contrast, Ms Gdak never finished high school.

> Affidavit of Jaimee Lynn Gdak, sworn February 2, 2021 ("**Gdak Affidavit No. 2**") at para 5, Supplementary Responding Application Record, February 3, 2021,[1] Appeal Book and Compendium ("ABC") at Tab 5.
>
> Affidavit of Martin Rees, sworn October 9, 2020, at paras 2 and 9, Application Record, October 9, 2020 ("**Rees Affidavit**"), ABC at Tab 6.
>
> Transcript of the examination of Jaimee Lynn Gdak, November 16, 2020, p. 6-7, Q. 21 ("**Gdak Transcript**"), ABC at Tab 13.

11. When the Guarantee was signed in 2015, the maximum principal indebtedness (and therefore the maximum indebtedness under the guarantee) was $1.3 million.

> **Gdak Affidavit No. 2** at para 6, ABC at Tab 5.

[1] This Affidavit is referred to as "No. 2" as it was second in time. Ms Gdak's first Affidavit was sworn November 13, 2020 but is not referred to in this Factum.

12. The principal financing was apparently renewed in 2017 and 2019, though ClearFlow disputes the latter. Jaimee did not participate in either of these renewals in any way, nor was she afforded legal advice or an opportunity to obtain legal advice.

> **Gdak Affidavit No. 2** at paras 3-4, ABC at Tab 5.

13. Meanwhile, by the time of the first return of ClearFlow's *ex parte* Application, the principal indebtedness was alleged to have skyrocketed to $48,625,279.75.

> **Notice of Application**, para 1(d), ABC at Tab 4.

14. In a section entitled *The Nature of Your Liability*, in a font size that might be 8 point at best, the Guarantee reads as follows (this is reproduced exactly as it appears in the Application Record):

> 3. THE NATURE OF YOUR LIABILITY
>
> Your liability under this Guarantee is CONTINUING, absolute and unconditional. It will not be limited, reduced, or otherwise affected by any one or more of the following events:
>
> - the unenforceability of the Obligations, any security, or any of our other rights against the Customer or any other person
> - any change in the terms or amount or existence of the Obligations

> **Rees Affidavit**, Exhibit "A", ABC at Tab 6.

15. The "Obligations" are defined in equally inscrutable text, which appears to read:

> … all present, and future lease payments and obligations, conditional sale installments and obligations, and any other debts and liabilities (collectively, the "Obligations") …

Ms Gdak's Lack of Knowledge of the Debt

16. In argument before the Motion Judge, ClearFlow pointed to five e-mails as evidence of Ms Gdak's involvement and knowledge of the ever-increasing accounts receivable. Of note, Ms Gdak was not a recipient of three of these e-mails and the other two pre-date the Application by four years.

> **Affidavit of Martin Rees**, sworn November 26, 2020, Supplementary Application Record, Exhibits I, J, K, and L, ABC at Tab 7.

17. In its Factum on the motion, ClearFlow also raised for the first time the proposition that Ms Gdak *must* have had continual awareness of the quantum of Trigger's indebtedness since, as a director, she would have been required to sign Trigger's financial statements.

> **Factum of the Applicant, ClearFlow Commercial Financial Corp. (**on the motion) at para 72, ABC at Tab 8.

18. While ClearFlow asserted that Ms Gdak would have known of the quantum of indebtedness through her access to a computer system called "Cadence," Ms Gdak's evidence was that her access to this system was limited and on the rare occasion that she did need to access the system, she has no recollection of seeing the screen that purportedly showed the current balance owing by Trigger to ClearFlow.

> **Affidavit of Sandy Kanichis**, sworn March 9, 2021 at paras 7-8, Second Further Supplementary Reply Application Record, ABC at Tab 9.

> **Affidavit of Jaimee Lynn Gdak**, sworn March 15, 2021 at paras 4-5, Reply to Second Further Supplementary Reply Application Record, ABC at Tab 10.

19. No financial statements signed by Ms Gdak are in evidence. In fact, no financial statements, signed or otherwise, were in evidence at all.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

20. The Appellant respectfully submit that the following are the issues in appeal:

(a) What is the applicable standard of review?

(b) Did the Motion Judge err in reversing the onus of proof, placing the onus on Ms Gdak to prove that the retainer between Trigger and lawyer Brian Kelly did not extend to representation of Ms Gdak?

(c) Did the Motion Judge err in finding that Brian Kelly had provided independent legal advice to Ms Gdak?

(d) Did the Motion Judge err in law by paying no heed to the inscrutability of the guarantee?

(e) Did the Motion Judge err in law in concluding that Ms Gdak would have been required to sign off on the financial statements for the corporate Respondents?

(f) Did the Motion Judge err in fact in concluding that Ms Gdak had signed off on the financial statements?

(g) Did the Motion Judge err 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?

(h) Did the Motion Judge err in fact in taking Ms Gdak's position as being predicated, in part, on ClearFlow's breach of the Guarantee and, by extension, err in law in failing to apply the Supreme Court of Canada case, *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*?

(i) Did the Motion Judge err in law in her interpretation and application of the principles set out in *Manulife Bank of Canada v. Conlin*, in particular in finding that a narrow interpretation of the Guarantee was "not warranted"?

(j) Did the Motion Judge err in law in refusing to apply the interpretive principles of *contra proferentum* and *ejusdem generis*?

Issue (a) What is the applicable standard of review?

21. Questions of fact are reviewable on a standard of palpable and overriding error; questions of law are reviewable on a standard of correctness.

> *Housen v. Nikolaisen*, 2002 SCC 33 at paras 8-10, [2002] 2 S.C.R. 235, Book of Authorities at Tab 1 ("**BOA**").

22. With respect to misapprehension of evidence, appellate intervention is warranted when that misapprehension goes to the very core of the outcome.

> *Waxman v. Waxman*, 2004 CanLII 39040 at paras 296-97, 186 OAC 201, leave to appeal refused, [2004] S.C.C.A. No. 291, BOA at Tab 2.

23. With specific respect to the Motion Judge's interpretation of the Guarantee, while typically contracts are subject to deferential review, in instances of standard form contracts, the standard of review is correctness.

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., 2016 SCC 37 at para 24, BOA at Tab 3.

Issue (b) Did the Motion Judge err in reversing the onus of proof, placing the onus on Ms Gdak to prove that the retainer between Trigger and lawyer Brian Kelly did not extend to representation of Ms Gdak?

24. In the context of her treatment of the issue of independent legal advice, the Motion Judge relied on the fact that there was "no documentary evidence … with respect to the nature and extent of Kelly & Co's retainer."

Reasons at para 94, ABC at Tab 3.

25. First, this improperly reverses the onus, requiring Ms Gdak to prove a negative. Secondly, if such documentary evidence existed, it would be in the Receiver's hands as a consequence of the Receivership (or Trigger's subsequent bankruptcy, which occurred on November 27, 2020).

Issue (c) Did the Motion Judge err in finding that Brian Kelly had provided independent legal advice to Ms Gdak?

26. The Motion Judge concluded that Ms Gdak had the benefit of legal advice since (1) the Guarantee had been signed in the presence of a lawyer (Trigger's lawyer, Brian Kelly) and; (2) Ms Gdak had referred to Kelly & Co. as "our lawyers".

Reasons at para 94, ABC at Tab 3.

27. Ms Gdak submits that the Motion Judge's error in this regard is twofold: first, if Mr Kelly was Trigger's lawyer (which is not contested), then by definition Mr Kelly could not have provided *independent* legal advice to Ms Gdak; secondly, it is unreasonable to conclude that reference to "our lawyers" implied that Ms Gdak was acknowledging that she had retained Mr Kelly. The

ambiguity of the use of the word "our" in a proceeding with corporate and individual respondents is all the more clear in that counsel examining Ms Gdak repeatedly—though notably not in the context of "our lawyers"—asked Ms Gdak to clarify who "our" referred to.

> See, e.g., **Gdak Transcript** at questions 205 (p. 45), 217 (p. 47), and 247 (p. 51), ABC at Tab 14.

28. Having erred with respect to the issue of independent legal advice, the Motion Judge compounded this error in finding that Ms Gdak was sufficiently sophisticated, in contrast to the sophistication of ClearFlow's point of contact, Martin Rees. The Motion Judge's reasoning was that the "only real evidence" of Ms Gdak's lack of sophistication was that she had not completed high school.

> **Reasons** at para 62, ABC at Tab 3.

29. There was, in fact, other evidence of Ms Gdak's lack of sophistication—in particular with respect to financial concepts. She had difficulty understanding the concept of a "charge" and "extent of [a] mortgage."

> **Gdak Transcript** at p. 33, q. 138-140, ABC at Tab 15.

30. In any event, in *Deswal v. ADT LLC (ADT Security Services)*, this Court considered the parties' level of education in concluding that the appellants were both sophisticated: one being a litigation lawyer and the other holding a Master's Degree in Finance. Ms Gdak submits that it is likewise proper to conclude that someone who has not finished high school is unsophisticated where, as here, there is no evidence to the contrary.

Deswal v. ADT LLC (ADT Security Services), 2021 ONCA 475 at para 8, https://canlii.ca/t/jgn5t#par8 , BOA at Tab 4.

31. Mr Rees has 35 years of experience in banking and lending in Canada and the United Kingdom. ClearFlow purports to be a company in the business of providing financing to medium-sized business in Ontario, typically through factoring accounts receivable. In contrast: Ms Gdak—a high school drop-out.

Rees Affidavit at paras 2 and 9, ABC at Tab 6.

32. Ms Gdak respectfully submits that the Motion Judge erred in concluding that there was no "gulf in sophistication" between Ms Gdak and ClearFlow and, when properly considered, given the absence of independent legal advice, ought to have led the Motion Judge to set aside the Guarantee as unconscionable.

Uber Technologies Inc. v. Heller, 2020 SCC 16 at para 93, https://canlii.ca/t/j8dvf#par93 [*Uber*], BOA at Tab 5.

Issue (d) Did the Motion Judge err in law by paying no heed to the inscrutability of the guarantee?

33. The Supreme Court has specifically referred to readability as a consideration in the unconscionability analysis:

> … The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented. For example, they are drafted by one party without input from the other and *they may contain provisions that are difficult to read* or understand …

Uber at para 89 (emphasis added), BOA at Tab 5.

34. In argument, Ms Gdak specifically referred to the inscrutable text of the Guarantee, which was self-evident on the record. The Motion Judge erred in failing to take this into account.

> **Responding Party's Factum (Jaimee Lynn Gdak) (on the motion)** at paras 10-11, ABC at Tab 11.

Issue (e) Did the Motion Judge err in law in concluding that Ms Gdak would have been required to sign off on the financial statements for the corporate Respondents?

35. The Motion Judge concluded that Ms Gdak "would have been required to sign off on the financial statements for [Trigger and En Cadre]."

> **Reasons** at para 61, ABC at Tab 3.

36. This conclusion was an error of law. Subsection 159(1) of the Ontario *Business Corporations Act* provides as follows:

> The financial statements shall be approved by the board of directors and the approval shall be evidenced by the signature at the foot of the balance sheet of *any director* authorized to sign and the auditor's report, unless the corporation is exempt under section 148, shall be attached to or accompany the financial statements.
>
> ***Business Corporations Act***, R.S.O. 1990, c. B.16, s. 159(1) (emphasis added).

37. Ms Gdak was not required to sign off on the financial statements. If indeed Trigger was compliant with the *Business Corporations Act*, any director could have signed. Further still, some other director signing the financials is consistent with Ms Gdak's evidence that she had only an administrative role at Trigger and with her oral evidence that she did not realize she was a director.

> **Gdak Transcript** at p. 11, q. 44, ABC at Tab 16.

Issue (f) Did the Motion Judge err in fact in concluding that Ms Gdak had signed off on the financial statements?

38. Ms Gdak was again being tasked with proving a negative. No signed financial statements have been produced; if a signed financial statement existed, it would be in the Receiver's hands; it was therefore an error to conclude (or imply) that Ms Gdak signed financial statements.

Issue (g) Did the Motion Judge err 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?

39. The Motion Judge's unconscionability analysis turned on evidence that ClearFlow led purporting to demonstrate Ms Gdak's "senior" role at Trigger.

40. The Motion Judge erred in law by failing to provide adequate reasons for her conclusions. The Supreme Court of Canada summarized the duty to provide adequate reasons in *F.H. v McDougall*. Courts have a duty to give adequate reasons to justify and explain the result, to tell the losing party why he or she lost, to provide for informed consideration of the grounds of appeal, and to satisfy the public that justice has been done.

> ***F.H. v. McDougall***, [2008] 3 SCR, 2008 SCC 53 at para 98 [***McDougall***], BOA at Tab 6.

41. In *Dovbush v. Mouzitchka*, this Court held that appellate intervention is justified when the insufficiency of reasons prevents meaningful and effective appellate review. This court summarized this exercise as follows:

> [A]ppellate courts will take a contextual and functional approach to addressing whether reasons meet this standard. The exercise has been variously described as one of determining whether the reasons demonstrate: "the path taken by the trial judge through confused or

> conflicting evidence"; or that "the trial judge came to grips with the issues and explained sufficiently his ... conclusions and the reasons and basis for them"; or, the "what" and the "why" of the result.
>
> ***Dovbush v. Mouzitchka***, 2016 ONCA 381 at para 23, 2016 CarswellOnt 7937 (citations omitted), https://canlii.ca/t/grs3q#par23 [*Dovbush*], BOA at Tab 7.

42. In *Dovbush*, the trial judge's reasons regarding a central credibility issue simply stated that the judge preferred one party's evidence over the other party's evidence. This court found that "generic boiler-plate findings of credibility of that nature are not helpful" and that "a trial judge owes the losing party an explanation for rejecting the evidence of a key witness or witnesses (particularly when the key witnesses are, themselves, the losing parties)."

> ***Dovbush*** at para 29, https://canlii.ca/t/grs3q#par29 , BOA at Tab 7.

43. In the case on appeal, the Motion Judge made similar generic boiler-plate findings of credibility. At paragraph 74, the Motion Judge stated "I do not accept Ms Gdak's evidence that she did not have a title at Trigger or that she took on only administrative roles there." In this statement, the Motion Judge is simply preferring ClearFlow's characterization of the evidence to that of Ms Gdak. The Motion Judge owed Ms Gdak (a key witness and the losing party) an explanation for rejecting her evidence—and this is all the more so since Ms Gdak's evidence in examination was largely consistent with the findings of the Motion Judge. While Ms Gdak did describe her role as "administrative," she went on to say that she took photos, built a web site, filed papers, entered receipts given to her by Mr Gdak, sent credit card payments and made deposits (again at Mark's direction). Ms Gdak freely admitted that ClearFlow's contention that Ms Gdak had exchanged "literally hundreds of emails" was likely accurate, but that those emails would have been for purposes of dealers making credit card payments. However, there was no evidence before

the Court that any aspect of those activities related to knowledge of the indebtedness as between ClearFlow and Trigger nor that her involvement rose to the level one would expect of a director.

> **Reasons** at para 74, ABC at Tab 3.
>
> **Gdak Transcript** at q. 57-67, p. 14-17, ABC at Tab 17.

44. At paragraph 88 the Motion Judge held that, "[o]n a balance of probabilities, I find that while Ms Gdak may not have known that Trigger's indebtedness had grown to over $48 million, it is more likely than not that she knew the indebtedness was considerably greater than $900,000." The Motion Judge failed to give sufficient reasons to support this finding as they did not articulate the basis for this finding or how this conclusion was reached. Aside from the evidence referred to above, the principal evidence that the Motion Judge cited to support this finding was that Ms Gdak had access to a computer system that contained the details of the debt owed by Trigger to ClearFlow.

> **Reasons** at para 88, ABC at Tab 3.

45. The fact that information detailing the level of indebtedness was available to Ms Gdak is not enough to establish, on the balance of probabilities, that Ms Gdak knew the extraordinary quantum of the indebtedness. In *McDougall*, the Supreme Court of Canada held that in order to satisfy the burden of proof on a balance of probabilities, evidence must be sufficiently clear, convincing and cogent. The mere availability of the debt information on the computer system does not amount to clear, convincing, or cogent evidence that Ms Gdak *knew* the information contained in it—especially when Ms Gdak flatly denied seeing the information in question. As a result, the

reasons given by the Motion Judge do not allow for meaningful and effective appellate review, which is a reversible error of law.

McDougall at para 46, BOA at Tab 6.

46. Had sufficient reasons been delivered to support the Motion Judge's conclusion that Jaimee's involvement in Trigger precluded reliance on unconscionability, Ms Gdak might understand the "what" and the "why" of the result of the motion. As it stands, she does not, and the failure to give those reasons is a reversible error.

Reasons at para 95, ABC at Tab 3.

Issue (h) Did the Motion Judge err in fact in taking Ms Gdak's position as being predicated, in part, on ClearFlow's breach of the Guarantee and, by extension, err in law in failing to apply the Supreme Court of Canada case, *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*?

47. The Motion Judge erroneously stated that "Ms Gdak further asserts that a guarantor can be discharged if the creditor breaches the contract of guarantee." This was not in fact Ms Gdak's position. Ms Gdak's position was set out in her factum on the motion as follows: "A creditor may not, however, impose a materially different risk on a guarantor in a manner that breaches the contract of *principal indebtedness*. The guarantor is entitled to be absolutely discharged in such circumstances."

Responding Party's Factum (Jaimee Lynn Gdak) (on the motion) at para 22 (emphasis added) , ABC at Tab 11.

48. ClearFlow did in fact breach the contract of *principal indebtedness.* It did so by making advances to Trigger far in excess of the amounts that it contractually agreed not to exceed. In the

Application, ClearFlow relies on the 2015 Master Purchase and Sale Agreement ("2015 MPSA") and the 2015 Master Purchase Order Financing Agreement ("2015 MPOFA"). The 2015 MPSA provides for a "Total Maximum Facility" of $900,000.00 (Exhibit "B", cited below). The 2015 MPOFA reads that "ClearFlow's aggregate outstanding funding pursuant to this Agreement … shall not at any time exceed the sum of Three Hundred and Twenty Thousand Canadian Dollars ($320,000 CAN)" (Exhibit "C", cited below). Taken together, the maximum amount ClearFlow agreed to advance under these two facilities was $1.22 million ($320,000.00 + $900,000.00).

> Application Record, October 9, 2020, Affidavit of Alexandra (Sandy) Kanichis, sworn October 9, 2020, at para 4 and Exhibits "B" and "C", starting at page 172 ("**Kanichis Affidavit**") , ABC at Tab 12.

49. Recall, by the time the Application was commenced in October 2020, the indebtedness ClearFlow claimed was nearly $50 million. ClearFlow had thereby breached the contract of principal indebtedness, entitling Ms Gdak, as guarantor, to be discharged entirely.

> ***Pax Management Ltd. v. Canadian Imperial Bank of Commerce***, 1992 CarswellBC 513 at para 38, 1992 CanLII 27, [1992] 2 SCR 998, https://canlii.ca/t/1fs7z [*Pax Management*], BOA at Tab 8.

50. The Motion Judge misstated Ms Gdak's position and then further erred in failing to apply *Pax Management*.

Issue (i) Did the Motion Judge err in law in her interpretation and application of the principles set out in *Manulife Bank of Canada v. Conlin*, in particular in finding that a narrow interpretation of the Guarantee was "not warranted"?

51. The Motion Judge concluded that a narrow reading of the Guarantee was not warranted. This conclusion was based on the Motion Judge's conclusions that Ms Gdak was heavily involved in the operations of Trigger and that she was not unsophisticated. Both of those conclusions are

challenged above; however, even taking these conclusions as correct, Ms Gdak was still entitled to a narrow reading of the Guarantee according to the principles set out in the Supreme Court of Canada case of *Manulife Bank of Canada v. Conlin*.

> **Reasons** at para 63, ABC at Tab 3.

52. In *Conlin*, Justice Cory wrote for the majority:

> In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.
>
> ***Manulife Bank of Canada v. Conlin***, 1996 CanLII 182, [1996] 3 SCR 415 at 425 (para 8 online), https://canlii.ca/t/1fr61#par8 [*Conlin*], BOA at Tab 9.

53. Cory J. went on to quote Professor McGuinness from *The Law of Guarantee*:

> … Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum* rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.
>
> ***Conlin*** at 426 (para 9 online), https://canlii.ca/t/1fr61#par9 , BOA at Tab 9.

54. None of this analysis turns on the guarantor's involvement with the business nor does it turn on the relative sophistication of the parties. Where, as here, the creditor drafts the contract, the guarantor is entitled to have any ambiguity construed against the creditor.

55. Having concluded that Ms Gdak was not entitled to a narrow interpretation of the Guarantee, the Motion Judge went on to reject Ms Gdak's interpretation of the guaranteed "Obligations," which interpretation depended on the interpretive principle of *ejusdem generis*. The Motion Judge characterized this interpretation as "highly technical."

56. Ms Gdak's submission is that a highly technical (that is, narrow) reading of the Guarantee was not only warranted but mandated, per *Conlin*.

57. The Motion Judge therefore erred in rejecting Ms Gdak's submission that the interpretive maxim of *ejusdem generis* applied.

58. *Ejusdem generis* provides that where a class of things is modified by general wording that expands the class, it will generally only expand as far as things of a like class.

> See, e.g., ***Ontario Ombudsman v. Hamilton (City)***, 2018 ONCA 502 paras 9-13 (CanLII), https://canlii.ca/t/hsb9j#par9 (the Court referenced *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, leave to appeal dismissed, 2019 CanLII 7956 (SCC)), BOA at Tab 10.

59. The Guarantee sets out the "Obligations" as "all present, and future lease payments and obligations, conditional sale installments and obligations, and any other debts and liabilities …."

60. Applying *Conlin* and *ejusdem generis*, "any other debts and liabilities" is not read broadly and should be read narrowly to include only debts of the same class or kind (i.e., debts of a similar nature to lease payments and conditional sale installments). ClearFlow led no evidence that the

indebtedness it claims falls into that class—and for good reason: the indebtedness described in the 2015 MPSA and the 2015 MPOFA is not of the same class or kind.

61. In this light, the Motion Judge's conclusion that "… [i]t would have been obvious to the parties entering into the financing arrangements that the Guarantees were in respect of the funds being advanced…" is irrelevant. Once Ms Gdak had identified the ambiguity, it was incumbent upon the Motion Judge to view the Guarantee through a narrow lens.

> **Reasons** at para 64, ABC at Tab 3.

62. Per Justice Cory in *Conlin*: "…the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity."

> ***Conlin*** at para 8, https://canlii.ca/t/1fr61#par8 , BOA at Tab 9.

63. Ms Gdak therefore submits that the Motion Judge erred in concluding that Ms Gdak was not entitled to a narrow reading of the Guarantee, which error was compounded by the Motion Judge's refusal to apply *ejusdem generis* to the definition of the "Obligations" guaranteed.

Issue (j) Did the Motion Judge err in law in refusing to apply the interpretive principles of *contra proferentum* and *ejusdem generis*?

64. As set out in the section above, Ms Gdak's respectful submission is that the Motion Judge erred in refusing to apply the maxims of *contra proferentum* and *ejusdem generis*.

PART V - ORDER REQUESTED

65. The Appellant, Jaimee Lynn Gdak, respectfully requests that this Honourable Court set aside the Judgment as it pertains to her and declare that the Guarantee is of no force and effect.

66. The Appellant, Jaimee Lynn Gdak, seeks her costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of July 2021.

Benjamin G. Blay

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Lawyers for the Respondent (Appellant)
Jaimee Lynn Gdak

Court File No. C69603

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)

CERTIFICATE

I estimate that 1.5 hours will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT London, Ontario this 29th day of July, 2021.

Benjamin G. Blay

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Jaimee Lynn Gdak

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

2. *Waxman v. Waxman*, 2004 CanLII 39040, 186 OAC 201.

3. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37.

4. *Deswal v. ADT LLC (ADT Security Services)*, 2021 ONCA 475, https://canlii.ca/t/jgn5t .

5. *Uber Technologies Inc. v. Heller*, 2020 SCC 16, https://canlii.ca/t/j8dvf.

6. *F.H. v. McDougall*, [2008] 3 SCR, 2008 SCC 53.

7. *Dovbush v. Mouzitchka*, 2016 ONCA 381, 2016 CarswellOnt 7937, https://canlii.ca/t/grs3q.

8. *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, 1992 CarswellBC 513, 1992 CanLII 27, [1992] 2 SCR 998, https://canlii.ca/t/1fs7z .

9. *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182, [1996] 3 SCR 415, https://canlii.ca/t/1fr61 .

10. See, e.g., *Ontario Ombudsman v. Hamilton (City)*, 2018 ONCA 502 (CanLII), https://canlii.ca/t/hsb9j

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 159(1).

Approval by directors

159 (1) The financial statements shall be approved by the board of directors and the approval shall be evidenced by the signature at the foot of the balance sheet of any director authorized to sign and the auditor's report, unless the corporation is exempt under section 148, shall be attached to or accompany the financial statements.

Court File No. C69603

CLEARFLOW COMMERCIAL FINANCE CORP. -and- JAIMEE LYNN GDAK et al.

Plaintiff
(Respondent)

Respondents
(Appellant)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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