Court of Appeal File No. C68064
Court File No.: CV-18-00608086-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant (Not a party to the Appeal)

- and -

MONEY GATE MORTGAGE INVESTMENT CORPORATION

Respondent on Appeal

FACTUM OF GRANT THORNTON LIMITED in its capacity as Court-appointed receiver of MONEY GATE MORTGAGE INVESTMENT CORPORATION (Respondent on Appeal)

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PART 1 – ISSUES AND OVERVIEW

1. This appeal concerns the following central issues[1]:

i) Did the Motion Judge make palpable and overriding errors in reviewing the evidence on the Motion and concluding, on a balance of probabilities, that the MGMIC Mortgage was valid and enforceable;

ii) Did the Motion Judge make an error of law and fact in concluding that MGMIC was entitled to an equitable mortgage; and

iii) Did the Motion Judge make an error of law and fact by determining the validity of the MGMIC Mortgage on a summary basis in MGMIC's receivership proceeding.

[1] Capitalized terms in this section of the Factum shall have the meaning assigned to those terms in the body of the Factum.

2. The Appellant, 2496050 Ontario Corp. carrying on business as A13MG (“**A13MG**”) takes the position that failure to distribute proceeds from the MGMIC Mortgage to the Borrower’s shareholders in accordance with an alleged agreement to do so invalidates the MGMIC Mortgage.

3. In careful and thorough Reasons, the Motion Judge considered the evidence before her, made findings supported by the evidence and exercised her discretion on correct legal principles. The Motion Judge found that: (i) the MGMIC Mortgage was *prima facie* valid and enforceable; (ii) funds were advanced to the Borrower by MGMIC; (iii) the MGMIC Mortgage was granted as security for those advances; (iv) the registration was properly authorized by the Borrower’s director; (v) the Appellant consented to the MGMIC Mortgage being placed; (vi) the condition to the Appellant’s consent was an agreement between the Borrower’s shareholders and did not impact the validity of the MGMIC Mortgage; and (vii) the Appellant filed no evidence to support its allegations of fraud. To succeed on this appeal, the Appellant must demonstrate that the Motion Judge made palpable and overriding errors of fact and law. The Appellant has failed to do so.

4. The Motion Judge also exercised her discretion to conclude that the Motion could proceed in MGMIC’s receivership proceeding on a summary basis. In making this decision, the Motion Judge made the following findings of fact: (i) there was sufficient evidence on the record to determine the issue before the Motion Judge; (ii) the Motion was brought in MGMIC’s receivership proceeding on the instruction of the Commercial Court and with the Appellant’s consent; and (iii) there is no other active proceeding where the issues on the Motion could have been determined. The A13MG Action is a nullity against the MGMIC Receiver as it was commenced without leave as required by the Receivership Order.

5. The Motion Judge's analysis and conclusions were entirely correct, and she exercised her discretion based on the evidence before her and the proper application of legal principles. There was no error that would warrant reversal on appeal.

PART 2 -FACTS

FACTS WITH WHICH THE MGMIC RECEIVER AGREES

6. Grant Thornton Limited in its capacity as Court-appointed receiver (the "**MGMIC Receiver**") of Money Gate Mortgage Investment Corporation ("**MGMIC**") agrees with the facts contained in paragraphs 1, 3, 5, 16, 20, 27-31, 34, 35, 37 and 38 of the Appellant's factum.

FACTS WITH WHICH THE MGMIC RECEIVER DISAGREES

7. The MGMIC Receiver disagrees with the facts contained in the remaining paragraphs of the Appellant's factum.

8. In particular, the MGMIC Receiver disagrees with the allegations of fraud and conspiracy raised at paragraphs 6 (a) to (c), 12 and 78 of the Appellant's factum. As the Honourable Madam Justice Gilmore (the "**Motion Judge**") correctly concluded, the materials filed by the Appellant on the Motion did not mention fraud or conspiracy. The allegations of fraud and conspiracy were nothing more than an invention of the Appellant's counsel which made their first appearance in its responding factum on the Motion. Accordingly, there was no need for the MGMIC Receiver to file any evidence to dispute same.

> Reasons of Madam Justice Gilmore dated February 5, 2020, Tab 1 of the Respondent's Compendium ("**Reasons**"), para. 46

9. The MGMIC Receiver further disagrees with the Appellant's assertion that it does not challenge its evidence that the MGMIC Mortgage (as defined below) was not authorized in writing by the Appellant. On the contrary, the evidence on the Motion clearly indicated that the

MGMIC Mortgage was authorized by the Appellant in writing. As the Motion Judge correctly concluded:

> "Statements in the emails such as "we will proceed with the Dovercourt transaction…We immediately apply a second mortgage," and "2nd Mortgage on Dovercourt in favour of MGMIC, using current MGMIC's capital." could not be clearer on their face."
> Reasons at para. 48

ADDITIONAL FACTS RELIED UPON BY THE MGMIC RECEIVER

The Business of MGMIC

10. MGMIC carried on business as a mortgage investment corporation. MGMIC raised approximately $11 million from approximately 155 investors through sale of preferred shares from August 2014 to April 2017. The investments were pooled by MGMIC and were used to make loans to borrowers secured by mortgages against the borrowers' property

> Third Report of the Receiver dated October 18, 2018, Respondent's Compendium, Tab 2 (the "**Third Report**") (without appendices) at paras. 2 - 3

11. Morteza Katebian, also known as Ben Katebian ("**Ben**") and Payam Katebian ("**Payam**") were each a director and officer of MGMIC.

> Third Report at para. 5

12. On November 6, 2018, on an application by the Ontario Securities Commission ("**OSC**") under sections 126 and 129 of the *Securities Act*, R.S.O. 1990, C.S.5 ("***Securities Act***"), as amended, the MGMIC Receiver was appointed over all of the assets, undertakings and properties of MGMIC, including any and all real property charges in favour of MGMIC, pursuant to the terms of the Receivership Order.

> Third Report, paras. 1 and 18.
>
> Order of the Honourable Mr. Justice Hainey, dated November 6, 2018 (as amended), Respondent's Compendium, Tab 3 (the "**Receivership Order**")

The Borrower and A13MG

13. 2546456 Ontario Inc. (the "**Borrower**") was incorporated on November 16, 2016. Payam was originally the sole shareholder of the Borrower. On or about May 24, 2017, A13MG acquired 50% of the Borrower's shares from Payam. The Borrower is the registered owner of the property municipally known as 558 Dovercourt Road, Toronto, Ontario (the "**Dovercourt Property**").

> Third Report, paras. 13 and 40

14. In May 2017, A13MG acquired the shares in the Borrower in trust on behalf of Curah Capital Corporation ("**Curah**") using Curah's funds. Jonathane Ricci ("**Ricci**") is the sole officer and director of A13MG. Glenn Estrabillo ("**Glenn**") and Dominik Kawa are the directors of Curah. Mohammed Moshin Jiwani, who used the alias Sai Mohammed ("**Sai**") and James Destephanis ("**James**") are consultants to Curah. In its proceeding against Payam and Ben, the OSC concluded that Sai was an undisclosed principal of MGMIC and exercised increasing and considerable control over the affairs of MGMIC.

> Third Report, para 31 and 37
>
> Transcript of the Cross-Examination of Jonathane Ricci held on December 23, 2019, Respondent's Compendium, Tab 4 ("**Ricci Transcript**"), qq. 25, 26 and 29 and 47-54
>
> Relevant Excerpts from *In the Matter of Money Gate Mortgage Investment Corporation (Re)* 2019 ONSEC 40, Respondent's Compendium, Tab 5, paras 3, 106, 237 and 306-313

MGMIC's Loan to the Borrower

15. Pursuant to a commitment letter dated May 25, 2017 between MGMIC and the Borrower (the "**Commitment Letter**"), MGMIC agreed to loan $611,000 to the Borrower to be secured by a second mortgage registered in favour of MGMIC in the principle amount of $611,000 (the "**MGMIC Mortgage**"). The Commitment Letter and the MGMIC Mortgage were executed by

Rouzbeh Behrouz ("**Rouzbeh**"), a director of the Borrower who also provided a personal guarantee.

Third Report, paras. 14 and 16

Commitment Letter, Respondent's Compendium, Tab 6

16. On May 29, 2017, MGMIC transferred $611,000 from its bank account to the bank account for the Borrower's solicitors. A13MG does not dispute that funds were advanced to the Borrower.

Third Report, paras. 19 and 22

Receipts re Transfer of Funds to Mentis Law, Respondent's Compendium, Tab 7

17. On June 5, 2017, the MGMIC Mortgage was registered on title to the Dovercourt Property.

Third report, para. 18

Dovercourt Mortgage, Respondent's Compendium, Tab 8

Receivership of the Dovercourt Property

18. On July 30, 2018, Ira Smith Trustee & Receiver Inc. was appointed as receiver over the Dovercourt Property (the "**Dovercourt Receiver**").

Third Report, para. 24.

19. In December 2018, the Dovercourt Receiver served a motion seeking court approval of the sale of the Dovercourt Property and a distribution of the net sale proceeds to the first mortgagee of the Dovercourt Property and to the MGMIC Receiver on behalf of MGMIC as second mortgagee.

Third Report, para. 25.

20. On January 7, 2019, 18 months after the MGMIC Mortgage was registered, A13MG for the first time raised an objection to the validity of the MGMIC Mortgage. On January 23, 2019,

the Commercial Court approved the sale of the Dovercourt Property and ordered that net sale proceeds be paid to the MGMIC Receiver and held in trust pending a distribution motion in MGMIC's receivership proceeding (the "**Dovercourt Distribution Order**").

> Third Report, paras. 26-27
>
> Order and Endorsement of the Honourable Mr. Justice McEwan dated January 23, 2019, Respondent's Compendium, Tab 9

21. Pursuant to the terms of the Dovercourt Distribution Order, the MGMIC Receiver received two distributions from the Dovercourt Receiver totalling $556,078.59 (the "**Dovercourt Funds**") from the Dovercourt Receiver and the Dovercourt Receiver has been discharged.

> Supplement to the Third Report of the Receiver dated January 23, 2020 (without appendices), Respondent's Compendium, Tab 10, paras. 5-7.

22. The amount outstanding under the MGMIC Mortgage exceeds the amount of the Dovercourt Funds, such that MGMIC's investors will suffer a shortfall on MGMIC's loan to the Borrower.

> Third Report, para. 29

A13MG's Claim that the MGMIC Mortgage is Invalid

23. Prior to A13MG's acquisition of shares in the Borrower, Payam executed a shareholder resolution dated May 15, 2017 (the "**Resolution**"), which amended the Borrower's articles to restrict the Borrower's ability to, among other things, borrow money and encumber the Dovercourt Property without the written consent of all shareholders.

> The Resolution, Respondent's Compendium, Tab 11

24. The MGMIC Mortgage was registered on June 5, 2017. A13MG alleges that it did not approve the MGMIC Mortgage as required by the Resolution. A13MG further claims that Payam as the shareholder of the Borrower and the director of MGMIC was aware that the

Borrower had no authority to execute the MGMIC Mortgage without A13MG's consent and as a consequence the MGMIC Mortgage is invalid.

25. In support of its position on the Motion, A13MG filed a four-page affidavit from Ricci sworn December 5, 2019 (the "**Ricci Affidavit**"). In the affidavit Ricci states:

> "9. I would not have consented to [the Borrower] encumbering its assets in which [A13MG] had an indirect 50% interest for any financing under which [A13MG] did not receive the benefit of 50% of the borrowed funds.
>
> 10. I did not consent to the MGMIC loan before it occurred, nor did I consent to the same once I learned it had occurred."[2]

Ricci Affidavit, without exhibits, Respondent's Compendium, Tab 12

26. A13MG did not file any evidence to support Ricci's bald allegations. These statements were directly contradicted by the email correspondence for the time period commencing May 10, 2017 and ending June 1, 2017, produced by Ricci as part of his answers to undertakings at the Motion which made it clear that a second mortgage on the Dovercourt Property was approved by A13MG.

Answers to Undertakings of Jonathane Ricci, Respondents' Compendium, Tab 13 ("**Answers to Undertakings**") at p. 178-179, 189-190, 192, 206-208, 214, 217 and 226

Reasons at para. 53

27. Furthermore, in August 2017, Payam and A13MG representatives exchanged emails discussing a potential refinancing or assignment of the MGMIC Mortgage, and the Borrower granting a third mortgage over the Dovercourt Property. These emails are wholly inconsistent with A13MG's claims of fraud.

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[2] The motion record filed by the MGMIC Proceeding on a motion included as an Appendix to the Third Report Ricci's Affidavit (without exhibits) sworn February 5, 2019 in the Fraud Action. The MGMIC Receiver respectfully submits that until leave is granted for A13MG to proceed with the Fraud Action, this action is a nullity as against the MGMIC Receiver.

Answers to Undertakings, Respondent's Compendium, Tab 13 at p. 141, 144-146, 149, 152-154

28. Despite A13MG's admitted knowledge in August 2017 of the MGMIC Mortgage, no steps were taken to challenge the MGMIC Mortgage for 18 months until the sale of the Dovercourt Property by the Dovercourt Receiver.

Reasons at para. 55

29. A13MG's position on the Motion was further undermined by Ricci on cross-examination where he changed his position and stated that A13MG and Curah understood and consented to the MGMIC Mortgage but that it was done on the condition that 50% of the funds advanced by MGMIC to the Borrower would be re-directed by the Borrower to A13MG.

> "61. Q. But you understood that there would be a second mortgage being placed on the property?
> A. Yes, there was -- we definitely understood that there would be a second mortgage placed on the property with conditions.
>
> 74. Q. And -- and this -- based on your knowledge from -- of this arrangement, did you understand that Glenn and -- and Sai and -- and kind of James Destephanis, that all the Curah representatives were on board with the second mortgage going on based on the conditions you -- as you understood them?
>
> A. Based on the conditions, yes."

Third Report, paras. 42-49
Ricci Transcript, qq. 61-63 and 74

The A13MG Action is a Nullity

30. After the Dovercourt Distribution Order was issued, A13MG commenced a proceeding against the Borrower, Payam, the MGMIC Receiver and Rouzbeh (the "**A13MG Action**") by issuing a Statement of Claim on January 28, 2019.

Statement of Claim dated January 28, 2019, Respondent's Compendium, Tab 14

31. The A13MG Action was commenced in contempt of the Receivership Order which expressly stated that no proceeding can be commenced against the MGMIC Receiver without the written consent of the receiver or leave of the Commercial Court.

> Receivership Order at para. 9

32. Leave was not sought by A13MG before the A13MG Action was commenced against the Borrower or the MGMIC Receiver. The MGMIC Receiver advised A13MG that the A13MG Action is a nullity and that it will not be responding to this proceeding until leave to commence the action is obtained by A13MG.

> Affidavit of Sam Rappos sworn January 29, 2020, Respondent's Compendium, Tab 15 (the "**Rappos Affidavit**") at para. 8
>
> Exhibit A to the Rappos Affidavit, Respondent's Compendium Tab 15 at p. 254

33. As at the date of this factum, A13MG has not taken any steps to obtain leave to proceed with the A13MG Action.

Scheduling of the Motion

34. On September 19, 2019, counsel for the MGMIC Receiver wrote to all parties who have asserted a claim to the Dovercourt Funds, including A13MG, and advised that it intends to bring a motion for advice and directions in the MGMIC receivership proceeding regarding the distribution of the Dovercourt Funds.

> Email dated September 19, 2019, Respondent's Compendium, Tab 19

35. On October 2, 2019, counsel for the MGMIC Receiver and counsel for A13MG, among others, attended at a chambers appointment and agreed that the issue of all parties' claims to the Dovercourt Funds will be determined on a motion before this Court in the MGMIC receivership proceeding. This agreement is reflected in the Endorsement of the Honourable Mr. Justice Penny dated October 2, 2019.

Endorsement of the Honourable Mr. Justice Penny dated October 2, 2019, Respondent's Compendium (the "**Scheduling Endorsement**"), Exhibit B to the Rappos Affidavit, Respondent's Compendium Tab 15 at p. ●

PART 3 - ARGUMENT AND LAW

Standard of Review

36. As noted by the Supreme Court of Canada in *Housen v. Nikolaisen* ("***Housen***"), the standard of review for all factual conclusions made by a judge is "palpable and overriding error". Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent such error. Questions of mixed fact and law, which involve the application of a legal standard to a set of facts, are also subject to a standard of palpable and overriding error. A palpable error is an error that is readily or plainly seen.

Housen v. Nikolaisen, 2002 SCC 33 ("*Housen*"), Respondent's Brief of Authorities, Tab 1 at paras. 5-6, 10 and 25-36.

37. Absent palpable and overriding error, an appellate court may not upset a fact-finder's findings of fact. It is not the role of an appellate court to second-guess the weight assigned to evidence. An appellate court errs if it interferes with a factual finding where its objection stems from a difference of opinion over the weight assigned to the evidence by the lower court.

Nelson (City) v. Mowatt, 2017 SCC 8, Respondent's Brief of Authorities, Tab 2 at para. 38.

38. In *Re Sally Creek Environs Corp.*, this Court noted that the Supreme Court has made clear that the term palpable and overriding error "was not intended to displace the earlier formulations of 'unreasonableness', 'clearly wrong', or 'unsupported by the evidence'."

Re Sally Creek Environs Corp., 2010 ONCA 312, para. 69, citing L. (H.) v. *Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.), Respondent's Brief of Authorities, Tab 3 at para. 56.

39. The Motion Judge's factual determinations that led to the conclusion that the MGMIC Mortgage is valid are owed deference in the absence of palpable and overriding errors of fact. The Motion Judge's decision as to whether to proceed with the Motion on summary basis is a question of mixed fact and law and also subject to a standard of palpable and overriding error.

> *Country Wide Homes Upper Thornhill Estates v. Ge*, 2020 ONCA 400, Respondent's Brief of Authorities, Tab 4 at para. 4
>
> *Housen* at paras. 26-28

The Motion was properly heard in MGMIC's Receivership Proceeding on a Summary Basis

40. The Motion concerned the property of MGMIC subject to the Receivership Order. The Receivership Order expressly empowers and authorizes the MGMIC Receiver, among other things, to receive, preserve and protect the property of MGMIC, to administer any mortgages registered in the name of MGMIC and to commence proceedings in the name of MGMIC. The Receivership Order also authorizes the MGMIC Receiver to apply to the Commercial Court for advice and directions in the discharge of its powers and duties under the Receivership Order.

> Receivership Order, paras. 3, 3(f), 3(g), 3(i) and 29

41. The Motion was brought by the MGMIC Receiver in accordance with the endorsement of the Commercial Court and with the consent of A13MG, and other counsel asserting a claim to the Dovercourt Funds.

> The Scheduling Endorsement

42. The Motion Judge correctly concluded that although the Motion was not a motion for summary judgment, it was a motion for a final decision which, by analogy, Rule 20.04(2.1) provides some assistance in determining whether a trial of an issue was required. On the Motion, the Motions Judge may: (i) weigh the evidence; (ii) evaluate the credibility of a deponent; and

(iii) draw any reasonable inferences from the evidence unless it is in the interest of justice for such powers to be exercised only at a trial or with oral evidence.

> *Polywheels Inc. (Re)* 2010 ONSC 1265 (Ont. S.C.J. [Com. List], Respondent's Brief of Authorities, Tab 5 at para. 6
>
> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 20.04(2.1)

43. A13MG's allegations of fraud are without merit. As the Motion Judge correctly noted, there was no evidence of fraud or conspiracy before her beyond bald allegations in A13MG's factum.

> Ricci Affidavit
>
> Reasons at para. 46

44. A13MG's complaints that the Motion proceeded without evidence from Payam and Ben are similarly without merit. Ben and Payam were not parties to the Motion and there was nothing stopping A13MG from calling them as witnesses on the Motion.

The A13MG Action is a Nullity against the MGMIC Receiver

45. A13MG takes the position that the issue of the validity of the MGMIC Mortgage must be decided in the A13MG Action and that the effect of the Motion is to grant partial summary judgment in the A13MG Action.

46. The MGMIC Receiver is not a party to the A13MG Action, since the action was commenced in contempt of the Receivership Order and without leave of the Commercial Court. A13MG has taken no steps to seek leave to proceed against the MGMIC Receiver since January 2019 when the Statement of Claim was issued. The Motion Judge did not commit any palpable error in concluding that the A13MG Action was a nullity as against the MGMIC Receiver.

47. A13MG's claim that the Motion Judge's findings amount to the granting of a partial judgment in the A13MG Action is also without merit. If, as alleged by A13MG, Payam and Rouzbeh diverted the funds advanced by MGMIC for their personal benefit, that gives rise to an action against the Borrower, Payam and Rouzbeh, not MGMIC.

The Motion Judge Did Not Make Any Palpable Errors of Fact in Concluding that the MGMIC Mortgage Was Valid and Enforceable

48. It was not disputed on the Motion that MGMIC and the Borrower were parties to the loan agreement, MGMIC advanced $611,000 to the Borrower, the Borrower was the registered owner of the Dovercourt Property at the time the mortgage was granted, and the MGMIC Mortgage was registered on title to the Dovercourt Property.

49. Pursuant to sections 78(4), 78(4.1) and 93 of the LTA, a registered mortgage is effective according to its nature and intent to charge an interest in land unless it is a "fraudulent instrument".

> *Land Titles Act*, R.S.O. 1990, c. L.5 ("***LTA***"), ss. 78(4), 78(4.1) and 93
>
> *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada* 2016 ONSC 7094 (Ont. Div. Ct.) ("***CIBV v. Computershare***"), Respondent's Brief of Authorities, Tab 6 at paras. 46 and 61

50. In their factum on the Motion, A13MG alleged that the MGMIC Mortgage was a fraudulent instrument but did not file any evidence or law in support of this argument.

51. The LTA defines a "fraudulent instrument" and a "fraudulent person."

> "fraudulent instrument" means an instrument,
>
> (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
>
> (b) that is given under the purported authority of a power of attorney that is forged,
>
> (c) that is a transfer of a charge where the charge is given by a fraudulent person, or

> (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument.
>
> "fraudulent person" means a person who executes or purports to execute an instrument if,
>
> (a) the person forged the instrument;
>
> (b) the person is a fictitious person; or
>
> (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land and affected by the instrument.

52. O. Reg. 690, R.R.O. 1990 s. 63 under the LTA provides that:

> An instrument perpetrates a fraud for the purposes of clause (d) of the definition of "fraudulent instrument" in section 1 of the Act if,
>
> (a) it is a cessation of a charge or of an encumbrance; and
>
> (b) the person who purports to register it is a fraudulent person.

53. In *CIBC v. Computershare*, the Divisional Court held that the definitions of "fraudulent person" and "fraudulent instrument" would not apply to any kind of real estate fraud. Rather, the fraud had to relate directly to whether the party held valid title to the lands which they purported to convey or mortgage.

> *CIBC v. Computershare* at paras. 52 and 53
>
> *1168760 Ontario Inc. v. 6706037 Canada Inc.* 2019 ONSC 4702 (Ont. Div. Ct.), Respondent's Brief of Authorities, Tab 7 at para. 29

54. There was no evidence before the Motion Judge that supported A13MG's position that the MGMIC Mortgage was a fraudulent instrument or that Rouzbeh, who signed the MGMIC Mortgage in his capacity as director of the Borrower was a "fraudulent person". In fact, A13MG did not dispute that Rouzbeh, as the director of the Borrower, had the authority to execute the mortgage on behalf of the Borrower.

> Answers to Undertakings, Respondent's Compendium, Tab 13 at p. 162-163, 167, 171, 182-183, 235

55. Even if the Motion Judge were to find that Payam defrauded A13MG by diverting the proceeds from the MGMIC Mortgage, such fraud would not render the MGMIC Mortgage a fraudulent instrument under the LTA.

56. The Motion Judge did not make any palpable or overriding error in finding that the MGMIC Mortgage was valid and enforceable. The Motion Judge correctly concluded that the MGMIC Mortgage was *prima facie* valid and that A13MG did not file any evidence in support of its allegations of fraud or conspiracy. As noted by the Motion Judge in the Endorsement:

> While A13MG complains that the MGMIC Receiver has not put its best foot forward, A13MG has not called Payam, Glenn or Ben as witnesses. It provided a four-page affidavit from Ricci. Further, there is nothing in the Ricci affidavit that mentions a fraud or conspiracy. While A13MG infers that the MGMIC Receiver is somehow participating in the fraud by seeking to distribute money to MGMIC's investors, there is no actual evidence of fraud. MGMIC did not deal with any allegations of fraud in its materials because it only learned of A13MG's allegations of fraud in its January 28, 2020 factum.
>
> Reasons at paras. 16 and 46

57. The only fraud complained of by A13MG relates to the use of proceeds from the MGMIC Mortgage. The Motion Judge correctly concluded that even if A13MG was successful in proving that the Borrower and Payam misappropriated the funds advanced by MGMIC, such conduct would not invalidate the MGMIC Mortgage.

A13MG Consented to the MGMIC Mortgage

58. The Motion Judge did not make a palpable or overriding error in concluding on the basis of the evidence before her that A13MG consented to the MGMIC Mortgage as required by the Resolution. The evidence on the Motion was abundantly clear that Payam and A13MG, as

shareholders of the Borrower, consented to the Borrower borrowing funds and granting a second mortgage over the Dovercourt Property, in accordance with the company's by-laws.

59. The Resolution states that the Borrower may be permitted to borrow money only upon the consent of the shareholders by resolution **or** by consent in writing. The Motion Judge correctly concluded that the exchange of emails between representatives of A13MG and Payam, including the email instructing Payam to "immediately apply for a second mortgage" "couldn't be clearer on their face" and constituted such approval.

> Reasons, para. 48
>
> Resolution
>
> Answers to Undertakings, Respondent's Compendium, Tab 13 at p.178-179, 189-190, 192, 206-208, 214, 217 and 226

MGMIC Is Entitled to an Equitable Mortgage

60. The Motion Judge did not make any palpable or overriding errors in concluding that if the MGMIC Mortgage was invalidated, MGMIC was entitled to an equitable mortgage over the Dovercourt Property.

61. An equitable mortgage is a mortgage that:

> i) "creates an equitable charge on the property";
>
> ii) is founded in the equitable maxim "equity looks on that as done which ought to be done";
>
> iii) was used by the courts of equity "to prevent an injustice that would otherwise arise from the strict application of the law"; and
>
> iv) "seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law."
>
> *Elias Markets Ltd., Re*, 2006 CarswellOnt 5597 (C.A.), Respondent's Brief of Authorities, Tab 8, paras. 63-65.

62. A13MG claims that that Motion Judge erred in finding that MGMIC is entitled to an equitable mortgage by failing to properly apply the doctrine of corporate attribution. These claims are without merit and are unsupported by the evidence before the Motion Judge. The Motion Judge correctly concluded based on the evidence before her that it was a common intention of all parties that $611,000 of the funds raised from MGMIC's investors be loaned to the Borrower and that a mortgage against the Dovercourt Property be granted to MGMIC as security for such loan.

Reasons at para. 62

Failure by the Borrower's Shareholders to Approve the MGMIC Mortgage does not invalidate the mortgage

63. The effect of sections 17 and 19 of the *OBCA* is to prohibit a company from relying on its own internal procedural failures to nullify a transaction with a third party, unless the third party is in a relationship with the corporation such that the failure was or should have been known. The Motion Judge correctly concluded that sections 17(3) and 19 of the *OBCA* prohibit A13MG from relying on the Borrower's procedural failures to nullify the MGMIC Mortgage.

Business Corporations Act, R.S.O. 1990, c. B16 ("**OBCA**"), sections 17(3) and 19

64. The Motion Judge correctly concluded that Payam's knowledge of whether the loan transaction and the MGMIC Mortgage were properly authorized was of little consequence. The evidence before the Court was clear that A13MG knew that the funds advanced were those of MGMIC's investors and that the investors required that a mortgage against the Dovercourt Property be granted to secure those advances.

The Issue of Oppression Remedy Was Not Raised On the Motion

65. On the appeal, A13MG raises an issue for the first time of whether the MGMIC Mortgage ought to be invalidated on the basis of the oppression remedy. This issue was not raised before the Motion Judge on the Motion.

PART 4 – ADDITIONAL ISSUES

66. The MGMIC Receiver raises no additional issues with respect to the appeal of the Motion Judge's order by A13MG.

PART 5 - RELIEF REQUESTED

67. The MGMIC Receiver respectfully requests that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of November, 2020

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(Respondent on Appeal)

SCHEDULE “A” - LIST OF AUTHORITIES

Case Law

1. *Housen v. Nikolaisen*, 2002 SCC 33
2. *Nelson (City) v. Mowatt*, 2017 SCC 8
3. *Re Sally Creek Environs Corp.*, 2010 ONCA 312
4. *Country Wide Homes Upper Thornhill Estates v. Ge*, 2020 ONCA 400
5. *Polywheels Inc. (Re)* 2010 ONSC 1265 (Ont. S.C.J. [Com. List])
6. *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada* 2016 ONSC 7094 (Ont. Div. Ct.)
7. *1168760 Ontario Inc. v. 6706037 Canada Inc.* 2019 ONSC 4702 (Ont. Div. Ct.)
8. *Elias Markets Ltd., Re*, 2006 CarswellOnt 5597 (C.A.)

SCHEDULE "B" - TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Land Titles Act*, R.S.O. 1990, c. L.5**

1. In this Act,

"fraudulent instrument" means an instrument,

(a) under which a fraudulent person purports to receive or transfer an estate or interest in land,

(b) that is given under the purported authority of a power of attorney that is forged,

(c) that is a transfer of a charge where the charge is given by a fraudulent person, or

(d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument; ("acte frauduleux")

"fraudulent person" means a person who executes or purports to execute an instrument if,

(a) the person forged the instrument,

(b) the person is a fictitious person, or

(c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument.

Effect of registration
78. (4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

Exception
(4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.

…

Charges
93 (1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale.

Statement of principal
(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures.

Effect of charge when registered
(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

R.R.O. 1990, Reg. 690: PROCEDURES AND RECORDS

63. An instrument perpetrates a fraud for the purposes of clause (d) of the definition of "fraudulent instrument" in section 1 of the Act if,
(a) it is a cessation of a charge or of an encumbrance; and
(b) the person who purports to register it is a fraudulent person.

***Business Corporations Act,* R.S.O. 1990, c. B16**

Corporate power

17 (1) It is not necessary for a by-law to be passed in order to confer any particular power on the corporation or its directors. R.S.O. 1990, c. B.16, s. 17 (1).

Power limited by articles, etc.
(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles. R.S.O. 1990, c. B.16, s. 17 (2).

Acting outside powers
(3) Despite subsection (2) and subsection 3 (2), no act of a corporation including a transfer of property to or by the corporation is invalid by reason only that the act is contrary to its articles, by-laws, a unanimous shareholder agreement or this Act. R.S.O. 1990, c. B.16, s. 17 (3).

Where notice is not deemed
18 No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed with the Director or is available for inspection at an office of the corporation. R.S.O. 1990, c. B.16, s. 18.

Indoor management rule
19 A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,

(a) the articles, by-laws or any unanimous shareholder agreement have not been complied with;

(b) the persons named in the most recent notice filed under the Corporations Information Act, or named in the articles, whichever is more current, are not the directors of the corporation;

(c) the location named in the most recent notice filed under the Corporations Information Act or named in the articles, whichever is more current, is not the registered office of the corporation;

(d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;

(e) a document issued by any director, officer or agent of a corporation with actual or usual authority to issue the document is not valid or not genuine; or

(f) a sale, lease or exchange of property referred to in subsection 184 (3) was not authorized,

except where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect.

***Rules of Civil Procedure* , R.R.O. 1990, Reg. 194**

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

FACTUMS REQUIRED

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 14.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 4.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 4.

(4) Revoked: O. Reg. 394/09, s. 4.

DISPOSITION OF MOTION
General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4).

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).

WHERE TRIAL IS NECESSARY
Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. O. Reg. 438/08, s. 14.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court’s directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs. O. Reg. 438/08, s. 14.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice. O. Reg. 438/08, s. 14.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration. O. Reg. 438/08, s. 14.

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs. O. Reg. 438/08, s. 14.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss

the action, strike out the statement of defence or make such other order as is just. O. Reg. 438/08, s. 14.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default. O. Reg. 438/08, s. 14.

Court of Appeal File No. C68064
Court File No.: CV-18-00608086-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant (Not a party to the Appeal)

- and -

MONEY GATE MORTGAGE INVESTMENT CORPORATION

Respondent on Appeal

CERTIFICATE

We estimate that 50 minutes will be needed for oral argument of the appeal. An order under 61.09(2) (original record and exhibits) is not required.

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(Respondent on Appeal)

DATED AT Toronto, Ontario this 12th day of November, 2020.

ONTARIO SECURITIES COMMISSION -and- MONEY GATE MORTGAGE INVESTMENT CORPORATION
Applicant Respondent on Appeal

Court of Appeal File No. C68064
Court File No. CV-18-00608086-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO, ONTARIO

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