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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

-and-

MONEY GATE MORTGAGE INVESTMENT CORPORATION

Moving Party on Motion/Respondent on Appeal

APPLICATION UNDER

Sections 126 and 129 of the *Securities Act* as Amended

FACTUM OF THE APPELLANT

April 27, 2020

DJD LAW
PROFESSIONAL CORPORATION
1186 Eglinton Avenue West
Toronto, Ontario M6C 2E3

Eli Karp (LSO #54317P)
Tel: (416) 769-4107
Fax: (416) 352-7638
Email: ek@djdlaw.ca

Lawyer for the non-party Appellant,
2496050 Ontario Inc.

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FACTUM OF THE APPELLANT, 2496050 ONTARIO CORP.

PART I: NATURE OF THIS APPEAL/CONTEXT OF THE ORDER UNDER APPEAL

1. The Appellant appeals from the Order of the Honourable Madam Justice C. Gilmore of the Commercial List in Toronto ("the Motion Judge") with reasons for decision dated February 5, 2020 ("The Reasons and the Order").[1] The Order is final as it upheld the validity of the Mortgage (as defined in the Reasons)[2] and allowed the funds attributable to the same to be released to the Receiver on behalf of MGMIC.[3]

2. The Order under Appeal was issued by the Motion Judge in connection with a motion brought by Grant Thornton Limited ("GTL") in its capacity as Court-Ordered Receiver over the assets of Money Gate Mortgage Investment Corporation ("MGMIC") (the "Receivership"). The

[1] Reasons on Motion of Justice Gilmore, dated February 5, 2020 (the "Reasons"), found at Tab 3 of the Appellant's Appeal Book and Compendium (the "Compendium") (pp 11-23).
[2] The Reasons, at para 67 (pp 21-22 of the Compendium).
[3] *Ibid.*

Motion brought by GTL was for advice and directions; it was not a motion for summary judgement.[4]

3. The MGMIC Receivership was granted under s. 129 of Ontario's *Securities Act*, on application by the Ontario Securities Commission ("OSC").[5] This Motion was not brought in the context of an insolvency and, as such, section 34 of the *Bankruptcy and Insolvency Act* does not apply. The OSC's application for Receivership was based on allegations of fraud and self-dealing against Payam and Morteza "Ben" Katebian, (collectively the "Katebians"). The allegations of Fraud and self-dealing against the Katebians were sustained by the OSC in Reasons for Decision released December 17, 2019.[6]

4. The Appellant, 2496050 Ontario Corp. ("249"), is a 50% shareholder of the mortgagor, 2545657 Ontario Ltd. and whose consent was required prior to granting the MGMIC Mortgage and the same was never given.

PART II: OVERVIEW

5. The Katebians were each directors of MGMIC. There were no other directors of MGMIC other than the Katebians. Payam Katebian was a director of 2545657 Ontario Ltd. ("254"), and was also a 50% shareholder in 2545657 Ontario along with the Appellant 2496050 Ontario Corp. ("249"). 249 had no director position at 254.

6. In this case, the Katebians perpetrated a fraud on 249 in that the Katebians knowingly and intentionally, and **knowing it was wrongful** (a) granted themselves a "loan" using MGMIC's funds, (b) took 100% of the loan proceeds, (c) failed to repay the loan, and (d) left MGMIC to

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[4] Notice of Motion, found at Tab 4 of the Compendium (pp 24-28).
[5] Order of Justice Hainey, dated November 6, 2018, found at Tab 18 of the Compendium (p 136).
[6] *Money Gate Mortgage Investment Corporation (Re)*, 2019 ONSEC 40, found at Tab 11 of the Appellant's BOA.

collect its loan from the Property in which the Katebians were only 50% owners and in which 249 is a 50% owner. The Katebians knew that the same was prohibited by the OSC Freeze Order, and the Unanimous Shareholder Resolution.

7. The last email to the Katebian sent by an associate of the Appellant stated:

> **I think what we need to do, is issue the 2nd mortgage, get us the 375 back and the liquidate the property – because the intent was a 700k mortgage instead of the extra 89k that would be from the 2nd there will be an extra 89k in cash once we liquidate that we can use to balance out the differential of the mortgage... in the meantime we really need that 375 back as we agreed upon**.[7]

8. It is clear on its face that there was no consent to grant a mortgage on the property absent a return of funds to the Appellant. It is clear that the Katebians in mortgaging the property to MGMIC and taking the funds perpetrated a fraud on the Appellant.

9. The Motion Judge erred in law and in fact and upheld the Mortgage over the Appellant's objections, granting what amounted to partial Summary Judgement, (on a motion that was not brought under Rule 20) against the Appellant, in the face of evidence of the Appellant's witness that he and 249 were victims of fraud *which evidence was not challenged by the Respondent, and without any evidence at all from the Katebians*. The Motion Judge's erroneous holding arose, *inter alia*, from a slew of errors of law, including fundamental errors in which she treated the Katebians as separate from MGMIC, did not apply SCC guidance for corporate attribution, and treated MGMIC as "pass-through", resulting in her decision treating the Money Gate's Preferred Shareholders as if as if they are not legally distinct from MGMIC. In fact, they are.

10. Furthermore, in granting MGMIC's motion on a summary basis, the Motion Judge overstepped her authority by making factual finding on conflicting evidence on a motion that was

[7] Email from James DeStephanis to Payam Katebian, dated June 1, 2017, found at Tab 13 of the Compendium (p 87).

not brought under Rule 20, and, therefore, where the court's expanded powers were not available. If the Motion *had* been brought under Rule 20, it still as not appropriate to grant Summary Judgement, as this case amounts to partial summary judgement and it would not have been appropriate due to the obvious risk of inconsistent results and overlapping issues still be determined at trial. This was an error of law.

11. The Motion judge further erred in making factual findings on a paper record, based on her own "common sense" inferences from emails, which "common sense" inferences were adverse to the Appellant, and not grounded in evidence, and where MGMIC did not have any first hand evidence before the court. These were errors of law.

12. The Court made palpable and overriding errors of fact in interpreting the email cited above.

13. If this proceeding had been properly conducted as a trial of an issue, and had MGMIC tendered no evidence, the Appellant would have prevailed.

14. The Motion Judge's decision ought to be reversed and a trial of an issue ordered with costs throughout.

Part III: Facts/Background

A13MG's Interest in 245

15. On or about April 3, 2017, 254 purchased the Property at 558 Dovercourt Road in Toronto, Ontario (the "Property").[8] Ben and Payam then offered 249 an opportunity to purchase 50% of the Property as "a favor to 249".[9] At the time the Property was purchased by 254, Payam was the sole

[8] Parcel Abstract found at Tab 5 of the Compendium (p 30).
[9] Affidavit of Jonathane Ricci, sworn February 5, 2019, found at Tab 2 of the Appellant's Exhibit Book, at para 11 (p 32) and email exchange found at Tab 11 of the Compendium (p 69).

director and shareholder of 254.[10] After a long string of emails and negotiations between Ben and Payam Katebian on one side and representatives of Curah on the other, 249 purchased 50% of the shares of 254 on or about May 16, 2017 for $375,000.[11]

16. At all material times, Payam was also a director of MGMIC along with Ben Katebian.[12]

17. It is clear from the email communications between the parties that: (1) Ben Katebian was included in the negotiations and was aware of the Parties' agreements;[13] (2)Ben Katebian was intimately involved in the negotiations of the share sale; (3) Ben and Payam each understood that it was important for Rouzbeh Behrouz to be appointed for the purposes of concealing the fact that MGMIC was making a related-party loan, which was prohibited by the OSC Freeze Order; (4) 249 proceeded with the Dovercourt share purchase on the condition that their funds would be repaid immediately with a loan financed by MGMIC;[14] and (5) Both Ben and Payam were aware of the above.

18. It is also somewhat noteworthy that the funds paid by 249 for the 50% shares of 254 were made payable to 2399029 Ontario Inc., which was found by the OSC to be Ben Katebian's corporation (as opposed to Payam's).[15]

19. As a (ultimately unsuccessful) risk mitigation measure, and as a way to ensure that Payam would not encumber the Property without 249's consent, 249 insisted, and Payam agreed, that as

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[10] Affidavit of Jonathane Ricci, found at Tab 2 of the Appellant's Exhibit Book, at para 9 (p31) and Exhibit B found at Tab 6 of the Compendium (p 33).
[11] Affidavit of Jonathane Ricci, found at Tab 2 of the Appellant's Exhibit Book, at para 11 (p 32) and Exhibit D found at Tab 8 of the Compendium (pp 44-45).
[12] Affidavit of Jonathane Ricci, found at Tab 2 of the Appellant's Exhibit Book, at para 10 (p 32) and Exhibit C found at Tab 7 of the Compendium (p 42).
[13] *Supra* note 7 (Ben Katebian is copied on all the emails and Payam says who are WE negotiating with as sellers of the shares to 249).
[14] Email exchange found at Tab 11 of the Compendium (pp 68-69).
[15] Affidavit of Louisa Fiorini, found at Appendix A to the Motion Record of the Receiver, found at Tab 17 of the Compendium (p 126-127).

a prerequisite to 249 purchasing 50% of the shares of 254, that 245 pass a Unanimous Shareholders Special Resolution (the "Special Resolution") that restricted the ability of 254 to: (a) **borrow any sums of money**; (b) sign, execute and endorse documents as may be required to evidence such indebtedness; (c) discount or rediscount any bills receivable owned by 254; (d) apply for and obtain letters of credit, and execute agreements related thereto; (e) **pledge and/or mortgage any moneys, bonds, stocks, shares, receivable, real estate and/or other property of 254**; (f) secure the payment of any indebtedness, liability, or obligation of 254 whether now due or to become due and whether existing or hereafter incurred; (g) withdraw and/or substitute any property held at any time as collateral; and (h) generally do and perform and all acts and/or sign any and all agreements, obligations, pledges, and/or other instruments necessary, required and/or needed by 254 in any manner thereto without the signature of both shareholders.[16]

20. The Special Resolution was signed by Payam on May 15, 2017 and sent to 249 care of Ricci cc'ing Ben Katebian on May 23, 2017.[17]

Payam and MGMIC Devise the Fraudulent Scheme

21. Notwithstanding: (1) That the Special Resolution prohibited 254 from borrowing funds or using the Property as security; (2) That Payam and MGMIC (through its directors, Payam and Ben) had actual knowledge that 254 did not have the corporate authority to borrow funds or use the Property as security without the written approval of 249; and (3) That Payam and MGMIC each knew that 249 did not approve the Mortgage from MGMIC to 254 without their written authorization and had only had agreed to consent to the Mortgage on the condition that they receive their funds back from the loan (but did not actually consent), Payam and MGMIC and Behrouz

[16] Affidavit of Jonathane Ricci, found at Tab 2 of the Appellant's Exhibit Book, at para 13 and 14 (p 32) and Exhibit F found at Tab 9 of the Compendium (pp 48-49).
[17] *Ibid.*; Email exchange found at Tab 11 of the Compendium (p 67).

took a $611,000 loan from MGMIC and granted MGMIC a mortgage on the Property without advising 249, without their permission and diverted the funds to the benefit of the Katebians.[18]

22. This was a fraud and amounts to oppressive conduct that is reversible under section 248 of the OBCA.

The Property Goes Into Receivership/ The Receivership is concealed from 249

23. On July 30, 2018, on application of MGMIC (really, the Katebians), and supported by the Affidavit of Morteza (Ben) Katebian, Justice Dunphy appointed Ira Smith Trustee and Receiver Inc. ("Ira Smith") as receiver over the Property.

24. The application was served on 254 on a separate address than that listed on the 254 bank statements. 249 was not provided with notice of the proposed receivership, despite Morteza Katebian's knowledge that 249 indirectly owned 50% of the Dovercourt Property through its 50% shareholdings in 2546456 Ontario Inc.

25. The application did not come to the attention of 249 until after the Receivership over the Property was granted.

26. Had the narrative stopped there, and had MGMIC not been put into receivership by the OSC on the basis of fraud and self-dealing by Ben and Payam[19] then MGMIC would have been forced to litigate its entitlement to the mortgage funds with 249 directly, and in order to obtain the funds attributable to the MGMIC mortgage against the property would need to litigate the Fraud Action to judgement.

[18] Affidavit of Jonathane Ricci, found at Tab 2 of the Appellant's Exhibit Book, at para 22 (p 35).
[19] Third Report of the Receiver, found at Tab 3 of the Appellant's Exhibit Book, at para 1 (p 198), wherein the receiver states that the "circumstances that give rise to the Receiver's appointment were set out in detail in the Affidavit of Louisa Fiorini" who discusses the self-dealing and fraud.

27. However, on November 6, 2018, the Ontario Securities Commission made an application to the Ontario Superior Court of Justice for an Order appointing Grant Thornton Limited ("GTL") as receiver over the assets, undertakings and properties of Money Gate Mortgage Investment Corporation ("MGMIC"), on the grounds that included, *inter alia*, allegations of malfeasance on the part of Payam and Morteza Katebian in the operation of MGMIC and further included allegations of self-dealing and acting in conflict of interest.

28. Justice Hainey appointed GTL as the receiver of the property and undertakings and assets of MGMIC on November 6, 2018.

The Sale of the Property/Funds Held by the Receiver

29. On December 21, 2018 the Dovercourt Receiver brought a motion returnable on short notice to sell the Dovercourt Property.[20]

30. On January 23, 2019, the Court approved the sale of the Property and a distribution to the first mortgagee in the full amount owing under its mortgage.[21] The Closing Date for the Property Sale was to be January 30, 2019.

31. On January 28, 2019 the Respondent issued a statement of claim (the "Claim")[22] and served the Receiver with a motion for an injunction to freeze the funds attributable to the MGMIC mortgage. Importantly, the Claim also claims relief from Rouzbeh Behrouz.

[20] *Supra* note 19, at para 25 (p 202).
[21] Order of Justice McEwen, dated January 23, 2019, found at Tab 19 of the Compendium (pp 153-156).
[22] Statement of Claim, found at Tab 20 of the Compendium (p 157-168).

32. Rather than litigate the Injunction Motion on short notice, the Parties (MGMIC, through the Receiver, and 249) agreed that the funds from the sale of the Dovercourt Property would be held by the Receiver and not distributed without notice to the Respondent.[23]

33. As such, on consent, the Court ordered that the net sale proceeds be paid to GTL, to be held in trust pending a distribution motion.[24]

34. As of December 12, 2018, the MGMIC Mortgage amounted to $768,161.45.

35. GTL is currently holding $556,078 in respect of the proceeds of sale of the Dovercourt Property.

36. The Order under appeal arises from the motion brought by the receiver to distribute the Mortgage Funds to itself, which are attributable to the Mortgage that was placed against the Property prior to the sale.

Key Admissions by the Respondent

37. The Receiver admits that 249 is a 50% owner in 254.[25]

38. The Receiver admits that 254 signed the Special Resolution prohibiting borrowing without 249's consent.[26]

39. The Receiver does not challenge 249's evidence that the MGMIC mortgage was not authorized in writing by 249 or that 249 did not receive any funds from the Mortgage loan. The Receiver states that it appears that at least $475,000 was deposited into 2399029's account.[27]

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23 Order of Hainey J., found at Tab 18 of the Compendium (p 144).
24 *Ibid.*
25 Third Report of the Receiver, found at Tab 3 of the Appellant's Exhibit Book, at para 40 (p 205).
26 *Ibid.*
27 *Supra* note 25, at para 22 (p 201).

PART IV: ISSUE ON THIS APPEAL

40. Should the Order be reversed and the matter sent to trial? Was it in the interest of Justice for the Motion Judge to determine the matter summarily?

a. Did the court have authority to grant summary judgement using expanded powers in Rule 20, on a motion brought for advice and direction and that was not brought under Rule 20?

b. What is the standard the Motion Judge was to follow in determining the issue on the Motion?

c. Did this motion amount to partial summary judgement; and if so, was this matter suitable for partial summary judgement (i.e. was this the clearest of cases)?

d. Did the Motion Judge Apply the Correct Standard?

e. Did the Motion have an evidentiary basis for the Order?

f. Should the Motion Judge have accepted the Appellant's evidence as correct given it was not challenged by the Respondent?

g. If the Motion Judge had accepted the Appellant's evidence as correct, did she err at law in granting the Order?

h. If the Motion Judge was not required to accept the Appellant's evidence as correct, should she have sent the matter to trial or ordered viva voce evidence? Was there is a credibility issue that could not have been determined on the record before her?

i. Did the Motion Judge err, in treating MGMIC as a pass through, and treating the MGMIC investors as indistinguishable from Money Gate.

j. Did the Motion Judge err in ailing to attribute the Katebian's actions to MGMIC?

Law and Analysis

Basic Principles Applicable to Summary Judgement

41. The court cannot grant summary judgement **under Rule 20** unless there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial where the written record allows the court to reach a fair and just determination on the merits.[28]

42. In *Flesch*,[29] the Court of Appeal directed that contested motions for summary judgment require a two-part analysis:[30]

> a) First, the motion judge must determine the threshold issue of "whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record".
>
> b) Then, if the motion judge is satisfied that the "full appreciation" test can be met, he or she may apply "the powers in rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences" to determine whether summary judgment should be granted. The second stage of the test remains a matter of judicial discretion.

43. The full appreciation test requires the motion judge to "assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case". The Court of Appeal has cautioned that "[s]imply being knowledgeable about the entire content of the motion record is not the same as *fully appreciating* the evidence and issues in a way that permits a fair and just adjudication of the dispute".[31]

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28 *Hryniak v. Mauldin*, 2014 SCC 7 as cited by Penny J. in *Trade Capital Finance Corp. v. Cook*, 2019 ONSC 4950, found at Tab 15 of the Appellant's BOA, at para 40.

29 *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, found at Tab 2 of the Appellant's BOA.

30 *Supra* note 29, at paras 74 and 75.

31 *Supra* note 29, at paras 53 and 54.

44. In assessing whether a full appreciation of the evidence is possible, the motion judge must be satisfied that he or she can accurately weigh and draw inferences from the evidence without the benefit of the traditional trappings of a trial and its "forensic machinery", including the structured narrative that comes out of a trial, the opportunity to hear witnesses speak in their own words, the experience of the first-hand fact-finding process, including measuring witnesses' evidence under cross-examination, and the assistance of counsel as the judge examines the record in chambers.[32]

45. The Court of Appeal has identified several circumstances in which summary judgment is not appropriate, all of which apply in this case:

> a) cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, where different theories of liability are advanced against different defendants;[33]
>
> b) cases where there are multiple defendants and, if the action against one must go to trial "inevitably many of the issues canvassed on the summary judgment motions will have to be canvassed again";[34] and
>
> c) cases where bringing a summary judgment motion, prior to formal discovery, deprives the respondent of the opportunity to "put their best foot forward". It is not in the interests of justice to force a responding party to build a record through affidavits and cross-examinations which will only anticipate and replicate what should happen in a more orderly and efficient way through the usual discovery process.[35]

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32 *Supra* note 29, at paras 53-55.
33 *Supra* note 29, at paras 51, 146 and 148.
34 *Supra* note 29, at para 151.
35 *Supra* note 29, at para 57.

46. Furthermore, the Court of Appeal has noted that the more important credibility disputes are to determining key issues, the harder it will be to fairly adjudicate those issues solely on a paper record.[36]

Motions for Summary Judgements in Fraud Cases

47. Deciding a matter on a summary judgment basis is particularly difficult in matters where fraud is alleged, as "fraud is a serious matter and proof of civil fraud requires a rigorous examination of the totality and quality of the evidence as a whole", which requires an assessment of the credibility of witnesses.[37]

Motions for Partial Summary Judgement

48. The principles relating to partial summary judgment have recently been summarized by Justice Glustein in *Singh v. RBC Insurance Agency Ltd.*, which are:[38]

> (i) Partial summary judgment should not be granted when the answer to the questions before the court "are inextricably connected to the dealings that took place" with the remaining parties, since "[o]ne simply cannot separate those dealings into discrete compartments and pretend that a determination of one does not have any impact on the others" (*Mason v. Perras Mongenais*, 2018 ONCA 978 ("*Mason*"), at paras. 37-38);
>
> (ii) The advisability of partial summary judgment must be considered in the context of the "litigation as a whole" (*Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438 ("*Baywood Homes*"), at para. 35), and the motions court should not make summary determinations if doing so "risks inconsistent findings and substantive injustice" (*Baywood Homes*, at paras. 36-37); and
>
> (iii) Partial summary judgment "should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner" given the risks involved with partial summary judgment which include (a) delay and the possibility of an appeal (b) expense, (c) increased judicial resources for "judges, who already face a significant responsibility addressing the increase in summary judgment motions", and (d) the "likely" less expansive record on the motion than would be available at trial (*Butera*

[36] *Supra* note 28, at para 53, wherein Penny J. cites from Cook v. Joyce, 2017 ONCA 49, at para 92.
[37] *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, found at Tab 1 of the Appellant's BOA, at para 477.
[38] 2020 ONSC 182, found at Tab 13 of the Appellant's BOA, at para 25.

v. Chown, Cairns LLP, 2017 ONCA 783, at paras. 30-34 ("*Butera*"), cited at *Mason*, at para. 22).

Key Findings of the Motion Judge Relevant to this appeal

49. The Reasons of the Motion are particularly sparse with respect to any factual findings, and do not provide sufficient clarity and specificity to allow for meaningful appellate review.

50. For example, the court notes at para 19 of the Reasons (in the context of setting out the Receiver's positions), that Ricci's (A13MG) evidence (on cross examination) was that it did authorize the mortgage but with conditions. The court does not explicitly say whether or not it accepts that evidence as correct. Given there is no evidence to the contrary, in the Appellant's submission this evidence must be accepted. The Motion Judge notes in para 20 that according to MGMIC it is odd that if that was the case there was never an accusation of fraud. It is therefore not clear if the Motion Judge accepts the evidence of Ricci that the A13MG's consent was limited to the conditions noted in his cross examination.

51. At para 23 of the Reasons the court says "even if there was no compliance with the Resolution, that would not invalidate the mortgage". The exchange of emails between representatives of A13MG and Payam to immediately apply for a second mortgage constitute such an "approval". It is not clear if the court is saying that the emails are an approval for the purposes of fulfilling the Shareholders' Resolution or if the approval was not necessary.

52. At para 34 of the Reasons, in the context of dealing with the issue of whether the Motion is a motion for partial summary judgment, the court says that the action is a nullity against 254 and GTL. The court does not find that the action is a nullity against Behrouz, who is a defendant. It is not clear whether or not the court determined it was not a motion for partial summary judgement because the action was a nullity against the Receiver (despite the fact that the claim would continue

against Behrouz) or the court found that despite the fact that it is a motion for partial summary judgement given that the action was a nullity against the receiver, the principles do not apply.

53. At para 35 of the Reasons, the court states that A13MG attended the October 2 scheduling appointment and that it was aware that Justice Penny had scheduled the motion for January 30, 2020. The Court goes on to say at para 36 that it agrees with MGMIC that A13MG "should have made it clear that it objected to the forum of the Motion". It appears that the Motion Judge made a finding that A13MG implicitly, or explicitly, agreed that the matter was suitable for summary determination at a 9:30 scheduling appointment. There was no evidence before the court about whether or not A13MG agreed that the matter could be summarily determined or what was said to Justice Penny. Perhaps A13MG advised Penny J. that, in its view, the matter was not suitable for summary determination, and Penny J. scheduled the Motion for adjudication. It is also not clear whether or not the court relied on that finding in determining that the matter could be determined summarily.

54. At para 38, the Motion Judge notes that Ricci's evidence in his affidavit was that "he didn't consent to the mortgage either before or after it was registered". The Motion Judge goes to say that Ricci deposed that he definitely understood that there would be a mortgage with conditions. The court does not explicitly say whether or not it understands the cross examination evidence to contradict Ricci's evidence in his affidavit. The court does not explicitly find that it rejects Ricci's affidavit evidence or that it accepts his evidence on cross examination or that it had reconciled the conflict in some way. The Reasons make it impossible to determine what evidence the court accepted. The court did not make note of plausible ways to reconcile the evidence, such as finding that Ricci's evidence in his Affidavit that he didn't authorize the mortgage is consistent with his

cross examination evidence due to the fact that the conditions of the mortgage approval were not fulfilled and that therefore the mortgage was not authorized.

55. At para 41, the court finds that the threshold for the evidence is a higher one, but that there is sufficient evidence to do what the receiver asks i.e. deal with a priority dispute in relation to funds held by court order. The court does not explicitly say whether it makes that finding on the test for partial summary judgement, and whether determining the matter summarily is fair and just in the circumstances. There is no finding on either of those two items.

56. At para 45 of the Reasons, the court rejects the contention that the fraud action should be allowed to proceed against the Receiver. However, the court does not aver to the test for an action to proceed against a receiver, which is an arguable case (said another way, is the action frivolous or vexatious).[39] The court does not make any finding that the Appellant does not have an arguable case of fraud against MGMIC. The court says that the matter has been dormant for over 1 year. The court already noted that the matter had been scheduled by the Receiver as a motion in October.

57. At para 46 in the Reasons, the court notes that the Appellant complained that MGMIC did not put its best foot forward, but it also noted that A13MG did not call Ben or Payam as a witness. The court is not explicit as to who would bear the burden of proving the case.

58. At para 53 in the Reasons, the Motion Judge says that the actions of the Parties belie any reliance on the Resolution. The court is not clear if the reason for its conclusion is because the Parties did not rely on the Resolution or why it would matter.

[39] *Gallo v. Beber*, 1998 CanLII 907 (ON CA), found at Tab 6 of the Appellant's BOA, at para 7.; *United Food & Commercial Workers, Local 175 v Sofina Foods Inc.*, 2015 CanLII 32446 (ON LRB), found at Tab 16 of the Appellant's BOA, at para 16.

59. At para 53 in the Reasons, the Motion Judge says that "*the second issue is whether the condition mentioned by Ricci in his cross examination would negate the consent reached through email communication*". The Reasons go on to say that the Court is unable to unravel why A13MG would be repaid its security in Dovercourt, but says that that the question does not need to be answered in the context of the motion. The court says that the fact that the money was not paid back to A13MG creates an issue between A13MG and Payam. The court does not directly address the issue it raised itself, which is whether the condition mentioned by Ricci in his Examination would negate the consent by email, or, more to the point, whether the consent was limited to the explicit case where the funds would be repaid to the Appellant, as in fact is clear on its face.

60. At para 56, the court finds that there was consent to register the mortgage; however, the court seemingly does not connect that finding to the finding that the mortgage was conditional on A13MG's funds being repaid or reconcile it in some way.

Reasons Are Silent on Key Evidence

61. There is no finding, or otherwise any analysis of, the Motion Judge reconciling her finding that there was consent for the mortgage, absent getting back the funds expected by the Appellant, with the last email in the Record before the Mortgage was issued on June 5, 2017 where DeStephanis said:

> Hi Payam – Glenn told me about the appraisal coming in today.
>
> **I think what we need to do, is issue the 2nd mortgage, get us the 375 back and the liquidate the property – because the intent was a 700k mortgage instead of the extra 89k that would be from the 2nd there will be an extra 89k in cash once we liquidate that we can use to balance out the differential of the mortgage… in the meantime we really need that 375 back as we agreed upon** - I think the market is going to turn in the other direction more rapidly than we think so lets see if we can get 2.5 for dovercourt – there will be 2.061M worth of debt which leaves 439k which will give us all some additional liquidity that we can use to further dig out of this conundrum.

Can we get this strategy rolling please?

JD [40]

Errors of the Motion Judge

62. Errors of the Motions Judge:

Procedural Legal Errors/Errors of Principle in Applying Test for Summary Judgement

1) The Motion Judge was not entitled to determine a matter summarily, and/or to use expanded powers to determine credibility and to make inferences from the evidence on a motion for advice and directions. These are to be used in limited circumstances under Rule 20.02 of the *Rules of Civil Procedure*.[41] They are not available to be used on every motion.
2) The Motions Judge's Reasons do not allow for appellate Review, as it is difficult to extricate the court's findings of fact from her determination of law and standards applied.
3) The Motion Judge failed to appreciate that the Motion was for Partial Summary Judgement and applied the wrong test.
4) The Motion Judge did not accept the uncontradicted evidence of Ricci that the Mortgage was not authorized and instead relied on inferences from the emails and or the Defendants conduct.
5) The Motion judge erred at law in making findings of fact on contradictory evidence (evidence of Ricci she found contradicted her finding) on summary judgement without any analysis of how she made the finding and not sending the matter for an oral hearing.

[40] Email of James DeStephanis to Payam Katebian, found at Tab 13 of the Compendium (p 87).
[41] *Rules of Civil Procedure*, RRO 1990, Reg 194.

6) The emails attached to MGMIC motion material are hearsay. The Court based its decision on inferences from those emails, when the emails were adduced by the MGMIC with no affidavit from Ben and Payam and the Responding Party did not have the opportunity to cross examine them. The Motion Judge erred in reversing the onus that ought to have been on the moving party, and placed the onus on the Appellant to call the Katebians as witnesses, rather than recognizing that adducing hearsay evidence without an affidavit or justification for the same, leads to an adverse interest against the Moving Party.[42]

Substantive Legal Errors

7) The Motion Judge erred at law in:

   a. finding that MGMIC was to be treated like a pass-through; and

   b. separating Ben and Payam from MGMIC,[43] resulting in her erroneously finding that even if Ben and Payam had stolen the money, that was only an issue between 249/254 and Ben and Payam, but not an issue between 254 and MGMIC, and, further, making the erroneous determination that the "innocent investors" had a claim for an equitable mortgage.[44]

8) The Motion Judge's failure to properly attribute the Katebian's knowledge and actions to MGMIC also led the Motion Judge to err in determining that MGMIC could rely on the indoor management rule, which is not applicable where the party seeking to assert the

[42] *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447, found at Tab 5 of the Appellant's BOA, at paras 21-24.
[43] Reasons at 46,62 and 65 (pp 19 and 21).
[44] *Ibid.*, at 65 (p 21).

indoor management rule had actual knowledge that the corporate actions were ultra vires, as occurred in this case.[45]

Court of Appeal Cases Reversing Summary Judgement Decisions

63. It would appear that this Court has recently determined that the trend in the Superior Court towards granting Summary Judgements in the wake of *Hryniak* has swung too far in favor of granting summary judgment. In at least 8 cases released in 2019 this Court has reversed Summary Judgement decisions and remitted the cases back to trial.

64. The following principles can be distilled from the recent Appellate guidance of this Court reversing summary judgement granted by Superior Court judges:

a. It is not open to a motion judge to simply prefer one affidavit over another in the absence of explanatory reasons for the preference that permit appellate review.[46]

b. Every finding made by the court with respect to evidence critical for the determination for the resolution must be adequately explained by the Court in its reasons and based on evidence or other permitting finding.[47]

c. However, if there is any conflict in the evidence, **even if the conflict in the evidence would not seem to be prima facie determinative of the issue,** the **court cannot simply decide the issue, without a mini trial** under the Rules, and cannot simply accept evidence without explaining the basis for it.[48]

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45 Reasons at 63-65 (p 21).
46 *Gordashevskiy v. Aharon*, 2019 ONCA 297, found at Tab 7 of the Appellant's BOA, at paras 5-7.
47 *Ibid.*
48 *Ibid.*

d. A Motion Judge **must consider** whether oral evidence is necessary where there is conflicting evidence or issues of credibility.[49]

e. A finding by a Motion Judge that the record is sufficient for the determination of the issue under review is not binding on the Court of Appeal, and can be reversed if there is NO Evidence in the record that the court of appeal would find necessary to determine the issue.[50]

f. If the court of appeal does not believe the record is sufficient to determine the issue summarily, summary judgement will be reversed without a determination of a palpable and overriding error.[51] Where a court finds that an inference using fact finding powers under Rule 20.02 is not supported in the evidence, that is a reversible error.[52]

g. Even where a court makes explicit findings on credibility adverse to the appellant where that finding creates a risk of inconsistent findings being made in the balance of the action, summary judgment will be reversed. The court does not treat the issue as res judicata or subject to issue estoppel for the balance of the action.[53]

h. A court should *not* grant summary judgement in an effort to give effect in the shift in culture directed by the Supreme Court, without giving due weight to the interest

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49 *Vandenberg v. Wilken*, 2019 ONCA 262, found at Tab 17 of the Appellant's BOA, at para 14.

50 *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2019 ONCA 201, found at Tab 14 of the Appellant's BOA, at para 8. (Note that in this case the Court of Appeal writing per curiam did not explicitly state whether or not the error of the motion judge with respect to the insufficient record was an error of law, or misapplication of a standard. Therefore, the Appellant submits that it is not necessary for the Appellate Court to find that that the Motion Judge made a palpable and overriding error.)

51 *Ibid.*

52 *Downey v. Arey*, 2019 ONCA 450, found at Tab 4 of the Appellant's BOA, at para 15.

53 *Supra* note 49, at para 8.

of justice inquiry and an explicit consideration of the context of the litigation as a whole. [54]

i. The principles that guide whether partial summary judgment is appropriate are, more complex than those that apply to summary judgment motions generally. If used imprudently, partial summary judgment can cause delay, increase expense, and increase the danger of inconsistent findings at trial made on a more complete record.[55]The Motion Judge is required **to consider** whether in granting partial summary judgement there was a risk of duplicative or inconsistent finding at the trial. Furthermore, a summary judgement motion will **not be cost effective, judicious or expeditious** if the balance of the issues will proceed to trial in any event, and the issues at trial overlap with the issues determined. [56]

j. It is an error in principle to underestimate the risk of overlapping evidence.[57]

k. It is a reversible error for a Motion Judge to grant what amount to partial summary judgement, and not explicitly and overtly addressing the particular issues of partial summary judgment.[58]

l. While hearsay is admissible on summary judgement motions, failure of the party moving for summary judgement to adduce an affidavit from someone with knowledge of the facts can give rise to an adverse inference. A court admitting hearsay evidence without a justification for the same is a reversible error.

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[54] *Ibid.*, at para 10.
[55] *Service Mold + Aerospace Inc. v. Khalaf,* 2019 ONCA 369, found at Tab 12 of the Appellant's BOA, at para 14.
[56] *Ibid.*
[57] *Ibid.*, at 15.
[58] *Ibid.*, at 15-16.

Standard of Review

65. Errors of law of the motion judge are reviewable on a correctness standard. Errors of fact are reviewable on a palpable and overriding error standard. Errors of principle with respect to the application of the summary judgement standard are not entitled to deference. Errors of mixed fact and law are on a spectrum.[59]

Application

Error 1- The Motion Judge exercised expanded Rule 20.02 powers at a Motion For Advice and Directions.

66. The Motion Judge agreed with the Appellant that the Motion if granted would result in "a form of summary judgement if granted".[60] She averred to the test in Hryniak for granting summary judgement under Rule 20.[61] It is clear from *Hryniak* however that the court's guidance broadening the availability of summary judgement, was made in the context of interpreting an expanded Rule 20 of the Rules of Civil Procedure. The jurisdiction of the court to summarily determine matters derives from Rule 20.04 of the Rules which provide for the expanded powers.

67. In this case, the Motion Judge fell into legal error in relying on *Hryniak* for the support that she could determine a matter summarily, in the context of a motion that had not been brought under Rule 20.

68. Summary Judgement under Rule 20 generally may only be brought after a party files a defense, and caselaw requires the moving party to file first hand evidence on the motion. This matter was not brought under Rule 20, the court does not have expanded powers to determine

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59 *Housen v. Nikolaisen*, 2002 SCC 33, found at Tab 8 of the Appellant's BOA, at paras 8 and 28.
60 Reasons at 41 (p 18).
61 Reasons at 40 (p 18).

credibility of witnesses or to make inferences from the evidence on a motion for directions. It is clear that the court is not intended to have these powers unless otherwise granted under rule 20 which are specifically only granted in motions for summary judgement.[62]

69. At para 44 of the Reasons, the court finds that the Receiver had the jurisdiction to bring the Motion for advice and directions. Indeed, the Receiver had the jurisdiction to bring the motion for advice and directions of the court, however the jurisdiction to bring a motion for advice does not grant the court expanded powers that are expressly and explicitly limited in their application. Treating this motion as a Motion for Summary judgment with the implication of using the expanded powers is an reversible error of law.

Error 2, 4, 5 The Motion Judge's findings do not allow for appellate review and are not supported in the Record.

70. Perhaps because the Motion Judge was alive to the fact that she had no jurisdiction to determine contested matters and or make inferences of fact from the record other than through the expanded powers in Rule 20, she did not explicitly explain her findings of fact as deriving from her expanded powers, which she did not have, and the Reasons do not explicitly provide foundation for the findings.

71. At para 53 the court says that the Resolution was signed to prevent the very thing that came to pass, but that the actions of the parties belie any reliance of the resolution. With the greatest of respect to the Motion Judge, the emails of DeStephanis could not be clearer that the mortgage was to be placed against the property only on the condition that 249 receive $375,000 in return. **The**

[62] *Hryniak v. Mauldin*, 2014 SCC 7, found at Tab 9 of the Appellant's BOA, at 52 and 66.

court does not address that email in its reasons at all or explain what it means that actions of the parties belie reliance on the resolution, or explain how that could matter to the issue of consent.

72. The Court goes on to say at 54 that the "second issue" is whether the conditions mentioned by Ricci in his cross examination would "somehow negate the consent". The Motion Judge does not explain where in the record she finds an email that could give rise to consent that does not also reference A13MG having its funds returned. The Motion Judge judge does not address the fact that the final email between the parties explicitly contains conditions limiting the consent or narrows the consent to the explicit terms provides therein. The court's comment in 54 about being unable to unravel why A13MG would have its funds returned, is crucial. Given the court's inability to understand that point, the Motion Judge ignores the fact that the Appellant conditioned its consent to the mortgage on getting a portion of the funds from the refinance, and determines that portion of the emails is meaningless, instead of ordering an oral evidence on the issue. The court's reasons are not capable of meaningful appellate review, and the court's finding about consent divorced from a condition of funds being returned is not sustainable. This is the same error referenced in Appendix A in Errors b- e. The finding in 56 is reversible because it was made through expanded powers (the inferences in 54, and 55) which it did not have, is not sustainable on the record, (Errors b-e), should have been the subject of oral evidence, and does not allow for appellate review (Error b).

Error 3, This is a Motion for Partial Summary Judgement

73. Above paragraph 34 the court states the issue as "Is this Motion for direction really a motion for partial summary judgement (PSJ) if so, does the moving party have sufficient evidence to succeed?

74. In the subsequent paragraph, the Motion judge does not explicitly answer the question as to whether it is a motion for PSJ or SJ. The Motion Judge states at 34 that the action is a nullity as against GTL and 254. At 45 of the Reasons, the Motion Judge "*rejects the contention that this motion must be delayed so that A13MG can proceed with its fraud action...More importantly they have failed to bring a motion for leave as required by the Receivership Order. Given those circumstances there is no reason not to treat that action as a nullity as suggested by the MGMIC Receiver.*"

75. Paragraphs 44 and 45 are not stated in the context of an analysis of whether this was a motion for PSJ or SJ. There is no recognition in the Reasons that the action is also advanced against Rouzbeh Behrouz. There is no recognition in the Reasons that if 2399029 received the Mortgage funds, and the same were later withdrawn by Ben and Payam that a claim may lay against them personally.

76. 249's action is not a nullity against, and will continue against Behrouz the director of 254 who granted the Dovercourt Mortgage. The issue of whether Behrouz is liable to 249 is obviously tied into whether or not there was consent by Ricci for the Mortgage or whether it was ultra vires.

77. There is clearly a risk of a trial court determining that the Mortgage was not authorized and or that the consent in the emails was not sufficient for the purposes of the Special Resolution.

78. The Motion Judge gave no analysis whatsoever to the risk of inconsistent results and did not aver to the test for partial summary judgement. There is no finding in the Reasons that there is no risk of inconsistent results in the continuation of the action against Behrouz, there is no finding that it is not a PSJ, or that it meets the test for a motion for Summary Judgement.

79. The court clearly made findings on this motion for advice and directions that will be revisited at the trial of Behrouz. The court did not apply the test for granting PSJ in her analysis at para 40, or refer to the test in any portion of the Reasons other than as heading.

80. This case is clearly a motion for PSJ and the court applied the test for a normal summary judgement at para 40, even though it was not a motion for summary judgement either. This is a reversible error of law in and of itself aside from the other errors.

Error 5-6 the Motion Judge treated MGMIC as a pass-through/The Court Did Not Properly Apply the Doctrine of Corporate Attribution

81. In 54 of the Reasons the court states that "the fact that the money was not paid back to A13MG does not invalidate the mortgage it creates an issue between A13MG and Payam.

82. The gist of the Motion Judge's finding in that respect is that the Corporation that is, MGMIC is an "innocent party" holding a mortgage, and that the Appellant should take up the issue of the diversion of funds with Ben and Payam who are separate and apart from MGMIC.

83. In *Deloitte & Touche v. Livent Inc. (Receiver of)*,[63] the SCC discussed the doctrine of "corporate attribution" in the context of an analysis of whether or not Deloitte could rely on the "doctrine of illegality" (of Livent) as a defense to the negligence claim brought by Livent.

84. Put another way, the SCC dealt with when a corporation would lose its claim to sue its auditors in negligence for not discovering the fraud of its directors, because the Corporation would be taken to have known about the fraud because of the attribution doctrine.

85. The SCC cited the test for corporate attribution from the case of *Canadian Dredge & Dock Co. v. The Queen*, with approval and held that: "To attribute the fraudulent acts of an employee to

[63] 2017 SCC 63, found at Tab 3 of the Appellant's BOA.

its corporate employer, two conditions must be met: (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the sector of corporate operation assigned to him. For the purposes of this analysis, an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation (pp. 681-82 and 712-13)."[64]

86. The test for corporate attribution is met in this case. MGMIC was in the business of lending funds on mortgages, Ben and Payam were the directing minds of MGMIC. There were no other directors, and they acted within the scope of their authority, the loan was not totally in fraud of the corporation (although it was a fraud on 254) and the loan was by design or result partially for the benefit of the corporation.

87. The knowledge of Ben and Payam is attributed to MGMIC in this case. MGMIC was aware, through the doctrine of corporate attribution, that the consent for the loan was only given under the limited conditions set out in the June 1 DeStephanis email, that is, on the condition that A13Mg would get a benefit from the loan.

88. Furthermore, as this Court held in *Livent Inc. v. Deloitte & Touche*, [65], [there is a] long-recognized principle of corporate law that a corporation is a legal entity separate and apart from its shareholders and stakeholders, and that the corporation alone has the right to sue for wrongs done to it.[66] The above principle derives from the seminal decision in *Foss v. Harbottle*.

[64] *Supra* note 63, at para 100.
[65] 2016 ONCA 11, found at Tab 10 of the Appellant's BOA.
[66] *Supra* note 65, at para 57.

89. In this case, the Corporation (MGMIC) is a legal entity distinct from its shareholders and only the Corporation has a right to sue on the Mortgage. The innocent investors have no stake in the mortgage and do not have the right to sue on it. In this case, the Corporation, MGMIC knew that the loan was a fraud on 249, and knew that it was ultra vires, and it accordingly cannot enforce a mortgage it knew was obtained by fraud and it contravention of the by-laws of 254.

90. The Motion Judge's errors conflating MGMIC with its shareholders and failing to properly apply the doctrine of corporate attribution, and further failing to apply the principles in *Foss v. Harbottle*, permeated the Motion Judge's decision and led her to erroneously fail to find that the mortgage was fraudulent. This was a legal error and is reversible on appeal.

91. The Motion Judge further fell into additional error in its alternative findings at 57-62 that MGMIC would be entitled to an equitable mortgage. Had the court properly applied the doctrine of corporate attribution, or at least not failed to appreciate that the corporation was legally distinct from its shareholders, it would not have determined that MGMIC had an equitable mortgage as a result of the innocent shareholders.[67]

92. For the same reasons the Motion Judge fell into error at para 64 and 65 holding that the Katebian's knowledge as to whether the transaction was authorized "is of little consequence". As stated above if the court accepts that the Katebian's had knowledge of the inability of the corporation to borrow the funds the Katebian's knowledge is attributed to MGMIC and is of serious consequences indeed.

Further Reasons Why the Motion Judge Fell Into Error and Conclusion

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[67] Reasons at 60-65 (pp 20-21).

93. The facts in this case raise an obvious question of whether the Mortgage ought to be invalidated on the basis of the Oppression Remedy set out in s. 248 of the OBCA.[68] Given that the Oppression Remedy must be raised by a Complainant in a proceeding, it was not open to the Appellant to raise that issue in defense to the GTL's motion for advice and directions.

94. In the circumstances of this case, where it is obvious that the Appellants action will continue against Behrouz, the motion judge ought to have determined that the issue of the validity of the mortgage ought to be determined in one proceeding at the same time as the action against Behrouz. The Motion Judge ought to have also determined that given that the receiver scheduled a motion for affirmation of its mortgage, there is a triable issue as to whether or not the mortgage was valid.

PART V: ORDER REQUESTED

a. An order that the issue of the validity of the mortgage ought to proceed to trial together with the Appellant's claim against Behrouz;

b. An Order granting leave to the Plaintiff/Appellant to bring his action against the Receiver and that the Plaintiff/Appellant shall revise his pleadings within 30 days;

c. An Order that the Parties set a schedule for the balance of the steps in the proceedings, failing which they should re-attend at a 9:30 appointment for the purpose of scheduling same.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of April, 2020

[68] *Business Corporations Act*, RSO 1990, c. B.16.

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

-and-

MONEY GATE MORTGAGE INVESTMENT CORPORATION

Moving Party on Motion/Respondent on Appeal

APPLICATION UNDER

Sections 126 and 129 of the *Securities Act* as Amended

CERTIFICATE

I, Eli Karp, counsel for the Appellant, certify that an order under subrule 61.09 (original records and exhibits) is not required.

I estimate that that I would require two (2) hours for my oral argument, not including my reply.

Eli Karp, counsel for the Appellant

SCHEDULE "A"

AUTHORITIES

Cannon v. Funds for Canada Foundation, 2012 ONSC 399

Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764

Deloitte & Touche v. Livent Inc., 2017 SCC 63

Downey v. Arey, 2019 ONCA 450

Drummond v. Cadillac Fairview Corporation Limited, 2019 ONCA 447

Gallo v. Beber, 1998 CanLII 907 (ON CA)

Gordashevskiy v. Aharon, 2019 ONCA 297

Housen v. Nikolaisen, 2002 SCC 33

Hryniak v. Mauldin, 2014 SCC 7

Livent Inc. v. Deloitte & Touche, 2016 ONCA 11

Money Gate Mortgage Investment Corporation (Re), 2019 ONSEC 40

Service Mold + Aerospace Inc. v. Khalaf, 2019 ONCA 369

Singh v. RBC Insurance Agency Ltd., 2020 ONSC 182

Swampillai v. Royal Sun Alliance Insurance Company of Canada, 2019 ONCA 201

Trade Capital Finance Corp. v. Cook, 2019 ONSC 4950

United Food & Commercial Workers, Local 175 v. Sofina Foods Inc., 2015 CanLII 32446 (ON LRB)

Vandenberg v. Wilken, 2019 ONCA 262

SCHEDULE "B"

STATUTES

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

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

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.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay. O. Reg. 438/08, s. 14.

EFFECT OF SUMMARY JUDGMENT

20.07 A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief. R.R.O. 1990, Reg. 194, r. 20.07.

STAY OF EXECUTION

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just. R.R.O. 1990, Reg. 194, r. 20.08.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 20.09.

Business Corporations Act, R.S.O. 1990, c. B.16

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).

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. R.S.O. 1990, c. B.16, s. 19; 2006, c. 34, Sched. B, s. 3; 2011, c. 1, Sched. 2, s. 1 (4).

Oppression remedy

248 (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).

Idem

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248 (2).

Court order

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue. R.S.O. 1990, c. B.16, s. 248 (3).

Idem

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186 (4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders. R.S.O. 1990, c. B.16, s. 248 (4).

Shareholder may not dissent

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section. R.S.O. 1990, c. B.16, s. 248 (5).

Where corporation prohibited from paying shareholder

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities. R.S.O. 1990, c. B.16, s. 248 (6).

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Applicant — Respondent

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COURT OF APPEAL FOR ONTARIO

FACTUM OF THE APPELLANT

DJD LAW
PROFESSIONAL CORPORATION
1186 Eglinton Avenue West
Toronto, Ontario M6C 2E3

Eli Karp (LSO #54317P)
Tel: (416) 769-4107
Fax: (416) 352-7638
ek@djdlaw.ca

Lawyer for the non-party Appellant,
2496050 Ontario Corp.