Court File No. CV-20-00649154-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant

- and -

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

Respondents

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

RESPONDING PARTY'S FACTUM (JAIMEE LYNN GDAK)

(Applicant's motion to determine individual liability on guarantee, returnable March 17, 2021)

March 12, 2021

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TO: **SERVICE LIST**

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RESPONDING PARTY'S FACTUM

PART I - OVERVIEW

1. This is the Factum of the Respondent, Jaimee Lynn Gdak ("Jaimee"), on the specific issue of her individual liability on a Guarantee delivered to the Applicant in 2015, which purports to provide an unlimited guarantee of the indebtedness owing by Trigger Wholesale Inc. ("Trigger") to the Applicant, Clearflow Commercial Finance Corp. ("ClearFlow").

2. Jaimee is a stay-at-home mother of two children, one of whom has significant health issues. Jamiee never completed high school. She has no source of income.

3. At the time Jaimee signed the Guarantee, the maximum indebtedness owing under the Guarantee was $1.4 million. Yet, five years later, when this Application was commenced, ClearFlow alleged that nearly $50 million was owing under the Guarantee.

4. Though ClearFlow alleges Jaimee had knowledge of and participated in the scheme set out in the Application Record – an allegation that she wholly denies and has not been tested in court – for the purposes of this hearing, the Applicant has agreed that the issue is strictly limited to whether Jaimee is liable under the Guarantee for the debts of Trigger and that the determination of that issue is irrespective of the allegations made against Jaimee in the pleadings and other materials filed in the Application and the Receivership. The position and argument set out herein therefore do not address those allegations.

PART II - SUMMARY OF FACTS

a) The Guarantee

5. It is uncontested that Jaimee executed the Guarantee that appears in Exhibit "A" to the Affidavit of Martin Rees (Application Record). Jaimee did so without the benefit of independent legal advice. ClearFlow did not provide her with the opportunity to obtain independent legal advice nor did they encourage her to do so.

> Affidavit of Jaimee Lynn Gdak, sworn February 2, 2021 ("**Gdak Affidavit No. 2**") at para 5, Supplementary Responding Application Record, February 3, 2021.

6. This is a woman who did not finish high school education.

> Transcript of the examination of Jaimee Lynn Gdak, November 16, 2020, p. 6-7, Q. 21 ("**Gdak Transcript**").

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

> **Gdak Affidavit No. 2** at para 6.

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

> **Gdak Affidavit No. 2** at paras 3-4.

9. Meanwhile, by the time ClearFlow brought its *ex parte* Application, the principal indebtedness was alleged to have skyrocketed to $48,625,279.75.

Notice of Application, para 1(d).

10. In a section entitled *The Nature of Your Liability*, in a font size that might be 8 point at best, the Guarantee reads as follows:

3. THE NATURE OF YOUR LIABILITY
Your liability under this Guarantee is CONTINUING, absolute and unconditional. It will not be limited, reduced, or otherwise affected by any one or more of the following events:

- the unenforceability of the Obligations, any security, or any of our other rights against the Customer or any other person
- any change in the terms or amount or existence of the Obligations

Application Record, October 9, 2020, Affidavit of Martin Rees, sworn October 9, 2020, Exhibit "A" ("**Rees Affidavit**").

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

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

b) ClearFlow's Release of the Guarantee

12. ClearFlow, via Martin Reese, signed a "Proposal Letter," which was delivered to Mark Gdak of Trigger on or about May 2, 2019.

Affidavit of Jaimee Lynn Gdak, sworn November 13, 2020 ("**Gdak Affidavit No. 1**") at Exhibit "L", Responding Application Record, November 13, 2020.

13. The following terms appear in the section entitled "Additional Information and *Agreement*" (emphasis added):

(a) "No Personal Guarantees moving forward from Jaimee Gdak."

(b) "The foregoing Proposal does not constitute an offer, commitment or binding agreement *to enter the Amended Credit Facilities* …" (emphasis added).

14. The "Amended Credit Facilities" are set out in a section above the "Additional Information and Agreement" header.

15. The undisputed evidence is that both ClearFlow and Trigger (via Mark Gdak) executed this document on May 6, 2019.

16. Further still, correspondence between Trigger and ClearFlow, and ClearFlow's subsequent behaviour, confirmed that the parties considered themselves bound to the 2019 financing.

17. On May 16, 2019, Martin Rees (ClearFlow) e-mailed Mark Gdak (Trigger) enclosing the 2019 renewal documentation for signature. On July 2, 2019, Mike Nero (Trigger) e-mailed the signed documentation back to Martin Rees.

Gdak Affidavit No. 2 at paras 11-12 and associated exhibits.

18. On July 3, 2019, Martin Rees e-mailed Trigger and wrote "Yes I will prepare a letter of confirmation that the Guarantee of Jaime (sic) has been cancelled." This was notable as the statement was retrospective, not prospective. Then, on July 8, 2019, Martin Rees e-mailed Mark Gdak and indicated that "Glenn [President of ClearFlow] will sign off the original legal documents when next in Toronto."

Gdak Affidavit No. 2 at paras 13 and 15.

19. On July 2, 2019, Jaimee transferred title of the matrimonial home from joint title with Mark to her name alone because she had been "told that everything personal should be in [her] name and business should be separate."

> **Gdak Transcript** at p. 34, q. 146-147.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

20. The issues are as follows:

(a) Is the Guarantee enforceable against Jaimee?

(b) If the Guarantee was enforceable, did ClearFlow release Jaimee from the guarantee?

a) Is the Guarantee enforceable against Jaimee?

i. Material change in principal indebtedness

21. A well-established principle of the law of guarantee is that a guarantor will be released from liability where the creditor and the principal debtor agree to a material change in the terms of the contract of debt without the guarantor's consent. The parties are at liberty to contract out of that protection.

> *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182 at paras 2, 4 (SCC), [1996] 3 SCR 415, https://canlii.ca/t/1fr61#par2 [*Conlin*].

22. A creditor may not, however, impose a materially different risk on a guarantor in a manner that breaches the contract of principal indebtedness. The guarantor is entitled to be absolutely discharged in such circumstances.

Pax Management Ltd. v. Canadian Imperial Bank of Commerce, 1992 CanLII 27 (SCC), [1992] 2 SCR 998, Link to case; click ▼ to jump to citation.

23. In the present instance, ClearFlow breached the contract of principal indebtedness by making advances to Trigger far in excess of the amounts that it contractually agreed not to exceed. ClearFlow relies on the 2015 Master Purchase and Sale Agreement ("2015 MPSA") and the 2015 Master Purchase Order Financing Agreement ("2015 MPOFA"). The 2015 MPSA provides for a "Total Maximum Facility" of $900,000.00 (Exhibit "B", page 181, cited below). The 2015 MPOFA reads that "ClearFlow's aggregate outstanding funding pursuant to this Agreement … shall not at any time exceed the sum of Three Hundred and Twenty Thousand Canadian Dollars ($320,000 CAN)" (Exhibit "C", page 187, cited below). Taken together, the maximum amount ClearFlow agreed to advance under these two facilities was $1.22 million ($320,000.00 + $900,000.00).

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

24. Jaimee respectfully submits that in breaching the principal contract of indebtedness, ClearFlow has disentitled itself to claim against her under the Guarantee.

25. Even if that were not so, any waiver of material change in the underlying debt will be read narrowly. As Justice Cory set out in *Conlin*, this is to protect guarantors in circumstances such as those at hand, where the guarantor is a family member and unsophisticated.

Conlin, *supra*, at para 7 *et seq*, https://canlii.ca/t/1fr61#par7.

26. The interpretive maxim of *ejusdem generis* provides that where a class of things is modified by general wording that expands the class, it will generally only expand as far as things of a like class.

27. For example, when the Ombudsman of Ontario was asked to commence an investigation into whether the provincial Election Compliance Audit Committee ("ECAC") had complied with a public hearing requirement in the *Municipal Act*, the question arose as to whether the ECAC fell within the statutory definition of "local board." That definition included the phrase "or any other board, commission, committee, body or local authority…." In finding that the ECAC did not fall within the definition, the Court of Appeal held that "[a]pplying *ejusdem generis* to the definition of 'local board', we are satisfied that the general language at the end of the definition does not include entities which cannot be said to carry on the operations of the municipality."

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

28. In defining the "Obligations" that ClearFlow alleges Jaimee guaranteed, the Guarantee reads "all present, and future lease payments and obligations, conditional sale installments and obligations, and any other debts and liabilities …." By *ejusdem generis*, "any other debts and liabilities" is not read broadly and should be read narrowly to include only debts of the same class or kind (i.e., debts of a similar nature to lease payments and conditional sale installments). ClearFlow has led no evidence that the indebtedness it now claims falls into that class.

29. Jaimee therefore submits that the waiver relied on by ClearFlow is of no force and effect and that the Guarantee is unenforceable against her.

ii. Lack of independent legal advice / unconscionability

30. The lack of independent legal advice, on its own, is not fatal to claim on a guarantee, absent undue influence, unconscionability, fraud, misrepresentation or evidence supporting a defence of *non est factum*.

> *RBC v. 164393*, 2019 ONSC 5145 at para 54 (CanLII), citing *Bank of Montreal v. Featherstone*, 1989 CarswellOnt 164 (CA), https://canlii.ca/t/j2hqh#par54.

31. Jaimee submits that unconscionability applies. A party asserting unconscionability must make out an inequality of bargaining power and a resulting improvident bargain.

> *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para 65 (CanLII), https://canlii.ca/t/j8dvf#par65 [*Uber*].

32. In the present instance, unconscionability arises in that Jaimee, on the one hand, never completed high school and had difficulty understanding the concept of a "charge" and "extent of [a] mortgage" in the course of examination; on the other hand, ClearFlow purports to be a company in the business of providing financing to medium-sized business in Ontario, typically through factoring accounts receivable, and whose main point of contact (Martin Rees) was someone with 35 years of experience in banking and lending in Canada and the United Kingdom.

> **Gdak Transcript** at p. 33, q. 138-140.
>
> **Rees Affidavit** at paras 2 and 9.

33. As in *Uber*, there is a "significant gulf in sophistication" between the parties.

> *Uber*, *supra*, at para 93, https://canlii.ca/t/j8dvf#par93.

34. Further, as in *Uber*, the subject document is in standard form. In canvassing the difficulties with standard form contracts in the context of the unconscionability analysis, Abella and Rowe JJ specifically adverted to the fact that standard form contracts often contain terms that are difficult to read, as is the case here.

> *Uber*, *supra*, at para 89, https://canlii.ca/t/j8dvf#par89.

35. As to an improvident bargain, Jaimee submits that it is manifestly improvident to hold her accountable as a guarantor when the principal indebtedness mushroomed 3,470% from $1.4 million to over $48 million – all the while with absolutely no input or participation from her.

> **Gdak Affidavit No. 2** at paras 3-4.

iii. Estoppel

36. ClearFlow has taken the position that the 2019 financing negotiations were never consummated. Jaimee submits that ClearFlow is estopped from this assertion.

37. To establish promissory estoppel, the party relying on the doctrine must show that (1) the other party made a promise or assurance, through words or conduct, that was intended to affect the legal relationship between them and was to be acted on; and (2) in reliance on the representation, the representee changed her position.

> *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 SCR 50, Link to case; click ▼ to skip to citation.

38. On multiple occasions, ClearFlow represented, through words and conduct, that it had released Jaimee from the Guarantee:

(a) In what ClearFlow characterizes as a "Proposal Letter", dated May 2, 2019, Martin Rees (ClearFlow) specifically indicated "No Personal Guarantees moving forward from Jaimee Gdak".

Gdak Affidavit No. 1 at Exhibit "M".

(b) On May 16, 2019, Martin Rees (ClearFlow) sent the renewal documentation to Mark Gdak for signature, which was returned to ClearFlow with signatures on July 2, 2019. These documents contained no guarantee from Jaimee.

Gdak Affidavit No. 2 at paras 11-12, Exhibits "B" and Exhibit "C".

(c) On July 8, 2019, Martin Rees advised that Glenn Petersen would sign the documents.

Gdak Affidavit No. 2 at para 13.

(d) Five days earlier, on July 3, 2019, Martin Rees advised that we would prepare a letter confirming that Jaimee's guarantee had been cancelled (past tense).

Gdak Affidavit No. 2 at para 15.

39. Meanwhile, Jaimee changed her position. On July 2, 2019, Jaimee assumed sole title to the matrimonial home at 250 Lions Court. When asked in examination why this was done in, Jaimee answered that she "was told that everything personal should be in [her] name and business should be separate."

Second Report of the Receiver, Appendix 23 (Parcel Register for Lions Court)

Gdak Transcript at p. 34, q. 145-147.

40. Jaimee therefore submits that ClearFlow is estopped from denying that the 2019 agreement was consummated.

b) If the Guarantee was enforceable, did ClearFlow release Jaimee from the guarantee?

41. ClearFlow's "Proposal Letter" reads explicitly "No Personal Guarantee moving forward from Jaimee Gdak." The Proposal Letter was not an invitation to treat, at least insofar as those terms that appear under the subheading "Additional Information and *Agreement*" (emphasis added).

Gdak Affidavit No. 1, Exhibit M (p. 107-111 of the PDF).

42. ClearFlow says that it is not commercially reasonable that it would have released Jaimee unilaterally before Trigger had complied with the additional terms that ClearFlow alleges were preconditions to the new financing. Commercial reasonableness is not the test. The section in question reads "Agreement" and the subsequent caveat reads only that the "Proposal does not constitute an offer, commitment or binding agreement *to enter the Amended Credit Facilities* ..." (emphasis added), the natural implication of which is that the terms *other* than the Amended Credit Facilities (set out on the first three pages of the Proposal) *are* binding. This is all the more clear considering the word "Agreement" appears in the heading of the section where this language appears.

PART IV - ORDER REQUESTED

43. For the foregoing reasons, Jaimee asks that this Honourable Court declare that she is not liable under the Guarantee and she seeks her costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of March, 2021.

Jaimee Lynn Gdak, by her counsel
Benjamin G. Blay (62688Q)

SCHEDULE "A"

LIST OF AUTHORITIES

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

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

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

4. *RBC v. 164393*, 2019 ONSC 5145 (CanLII), https://canlii.ca/t/j2hqh.

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

6. *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 SCR 50, https://canlii.ca/t/1fslb.

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