

COURT OF APPEAL FOR ONTARIO

CITATION: Clearflow Commercial Finance Corp. v. Gdak, 2022 ONCA 242

DATE: 20220322

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Trotter, Coroza and Favreau JJ.A.

BETWEEN

Clearflow Commercial Finance Corp.

Applicant (Respondent)

and

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

Respondents (Appellant)

Benjamin G. Blay, for the appellant

Jeffrey J. Simpson, for the respondent

Heard: February 17, 2022 by videoconference

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice,
dated May 26, 2021, with reasons reported at 2021 ONSC 3421.

REASONS FOR DECISION

[1] This appeal arises from an order enforcing a Guarantee executed by the appellant, Jaimee Lynn Gdak. Ms. Gdak guaranteed the full amount of the indebtedness of Trigger Wholesale Inc. (“Trigger”) in favour of Clearflow Commercial Finance Corp. (“Clearflow”). The motion judge found that the Guarantee was valid, binding and enforceable. Ms. Gdak appeals this order.

[2] At the conclusion of the hearing, we dismissed the appeal with reasons to follow. These are our reasons.

Background

[3] Clearflow provides financing services to Ontario businesses. Trigger, one of Clearflow’s clients, was in the business of importing and distributing firearms and ammunition in Canada. Mark and Jaimee Lynn Gdak are the sole shareholders, directors, and officers of Trigger. Clearflow alleges that Mr. Gdak orchestrated a massive fraud over a number of years against Clearflow, amounting to tens of millions of dollars in losses. The proceedings below and this appeal relate solely to the enforceability of the Guarantee.

[4] In April 2015, Clearflow extended three separate credit facilities to Trigger: factoring of accounts receivable (Clearflow’s main method of financing); purchase order financing; and discrete advances for business purposes. The details were set out in three

Credit Agreements. As part of this arrangement, on April 30, 2015, Mr. and Ms. Gdak jointly executed an unlimited and continuing Guarantee of the full amount of the indebtedness of Trigger in favour of Clearflow. The Gdaks are also officers and directors of The En Cadre Group – they both signed similar guarantees on behalf of En Cadre.

[5] When Ms. Gdak executed her guarantee, the total maximum indebtedness shown on the Credit Agreements was \$1.4M. By 2020, the actual debt had skyrocketed to \$48M.

[6] In 2019, before the allegedly fraudulent activities of Mr. Gdak and Trigger came to light, Mr. Gdak, on behalf of Trigger, approached Clearflow to restructure the then-existing credit facilities that would soon expire. He sought to renegotiate the Credit Agreements and have Ms. Gdak released from the Guarantee. As a result of the negotiations, Clearflow issued a proposal that would see Ms. Gdak released from the Guarantee. This was also reflected in drafts of the proposed financing documentation. However, this was all contingent on Mr. Gdak providing current financial statements. The negotiations dragged on into late 2020. The statements that were produced were not acceptable to Clearflow. Moreover, a field audit conducted on behalf of Clearflow uncovered the alleged fraudulent activities. Consequently, the deal fell apart. Clearflow refused to sign back the re-financing documents prepared by Trigger. Clearflow issued a written demand for all amounts owing. In the end, Clearflow never signed a document confirming that Ms. Gdak's Guarantee had been cancelled or released.

[7] In October 2020, Clearflow brought an application to recover \$48.6M it alleges it lost as a result of a fraudulent scheme engineered by Mr. Gdak and Trigger. Clearflow sought the appointment of a receiver over the assets, property, and undertakings of Trigger, En Cadre, and the Gdaks' real property, as well a Mareva injunction restraining the Gdaks from disposing of their property. The Mareva injunction was granted and Grant Thornton Ltd. was appointed as receiver in October 2020. While Mr. Gdak did not dispute the fraud claims, Ms. Gdak denies knowledge or participation in the scheme.

[8] Within the context of its application, Clearflow brought a motion to enforce the Guarantee and sought a finding of liability against both Mr. and Ms. Gdak. Mr. Gdak did not dispute liability pursuant to the Guarantee; he did not file any materials on the motion. Ms. Gdak vigorously resists enforcement.

[9] The Guarantee in question is a single-page document. It was signed by Mr. Gdak as "President" of Trigger; Ms. Gdak signed as "V.P." Under the heading "THE NATURE OF YOUR LIABILITY", the following condition is found:

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

...

- any change in the terms or amount or existence of the Obligations.

...

- any event whatsoever that might be a defence available to the Customer for its obligation or a defence to you under this Guarantee, all of which are hereby waived.

[10] Ms. Gdak does not dispute signing the guarantee. Nor does she allege duress. Moreover, a lawyer who represented Trigger at the time, Brian Kelly, witnessed Ms. Gdak's signature on the Guarantee.

The Motion Judge's Decision

[11] Ms. Gdak resisted the enforcement of the Guarantee on a number of bases. As the motion judge said in para. 6 of her reasons:

Ms. Gdak denies liability on her Guarantee on the basis that there was an undisclosed material change in the principal amount of the indebtedness covered by the Guarantee, and because she did not have the opportunity to obtain independent legal advice. Alternatively, she asserts that the applicant, through its words and conduct, released her from her Guarantee.

[12] In thorough reasons, the motion judge rejected each of these submissions.

[13] The motion judge held that Ms. Gdak was not released from liability under the Guarantee as a result of a material change to the contractual arrangements between Clearflow and Trigger (i.e., the increasing extension of credit to Trigger, growing to \$48M). She rejected Ms. Gdak's claim that her liability was limited to \$1.4M.

[14] The motion judge recognized 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: see *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415. However, it is equally clear that it is open to parties to contract out of this protection. The motion judge found that Ms. Gdak did just that – she contracted out of this protection. The one-page document states in capital letters that her liability is "CONTINUING" and will not be limited, reduced, or otherwise affected by any change in the terms or the amount of the debt. The motion judge found that the advances were specifically contemplated and did not result in a materially different risk than the one to which Ms. Gdak agreed.

[15] The motion judge did not accept the submission that the Guarantee must be read narrowly to protect Ms. Gdak because she was a family member (the wife of Mr. Gdak) and because she was unsophisticated or vulnerable. There was no evidence that she signed the Guarantee as a matter of accommodation or as a favour for Mr. Gdak. The motion judge found that Ms. Gdak signed in her capacity as an officer and shareholder of Trigger.

[16] The only argument advanced by Ms. Gdak in support of her claim of unsophistication was that she did not finish high school. The motion judge held that, "[I]ack of a high school diploma, in my view, does not equate to a lack of sophistication. Nor does it...indicate a lack of intelligence or an inability to read and comprehend a one-page guarantee." The motion judge further found that Ms. Gdak was significantly involved in running the business.

[17] The motion judge found that, even if she had found that the Guarantee should be interpreted narrowly, this would not assist Ms. Gdak. She found that the definition of the word "Obligations" in the Guarantee ought not to be limited in the manner submitted by Ms. Gdak. It was clear that she guaranteed debts arising from all three credit facilities, and in particular, the factoring of accounts receivable (the credit facility that generated the vast majority of the outstanding debt to Clearflow).

[18] The motion judge rejected Ms. Gdak's claim that the Guarantee was unenforceable because she did not receive independent legal advice. The motion judge observed that the Guarantee was signed in the presence of (indeed, witnessed by) Trigger's lawyer, and Ms. Gdak was a director of Trigger. Moreover, the motion judge found that there was no evidence of undue influence, unconscionability, fraud, or misrepresentation. Again, this aspect of Ms. Gdak's position amounted to a claim of a lack

of sophistication, already rejected by the motion judge. She rejected Ms. Gdak's claim that she did not know that she was a director of Trigger. The motion judge engaged in a detailed review of Ms. Gdak's day-to-day involvement in the business in reaching this conclusion.

[19] Lastly, the motion judge did not accept Ms. Gdak's submission that Clearflow released her from her Guarantee through its words and conduct and was thereby estopped from asserting that the negotiations were never consummated. The motion judge found that the Guarantee provides that it shall be binding unless a release of the guarantor is expressly made in writing by Clearflow and authorized by its Board of Directors. It was not. The negotiated release was conditional on Trigger providing the requested financial statements. They were not provided in an acceptable form; moreover, the field audit revealed alleged fraud. The motion judge found that Ms. Gdak was not released.

Discussion

[20] On appeal, Ms. Gdak repeats the same arguments that were made before the motion judge in the hope of a different result. However, she has failed to identify an error of law or principle, nor any palpable and overriding error of fact.

The Standard of Review

[21] The appellant insists that the Guarantee is a standard form contract that must be interpreted on a standard of correctness: see *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23.

[22] The respondent disputes this characterization, submitting that, in order for the correctness standard to apply, the following three requirements must be met: (i) the appeal must involve the interpretation of a standard form contract; (ii) the interpretation at issue is of precedential value; and (iii) there is no meaningful factual matrix that would assist in the interpretation of the contract: see *Ledcor*, at para. 24.

[23] We agree with the respondent that elements (ii) and (iii) are not satisfied in this case. The motion judge's interpretation of the Guarantee will have no precedential value, mainly because the factual matrix between the parties was critical to the motion judge's interpretation of the Guarantee. Consequently, the appellant cannot justify the application of the exception to the Supreme Court's holding in *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, that contractual interpretation is a question of mixed fact and law and subject to deferential review on appeal. Even if it could be said that the correctness standard is applicable, we see no error in the motion judge's analysis.

No Independent Legal Advice

[24] The appellant submits that the motion judge erred by casting the onus of proof on her to establish that she did not receive independent legal advice. The appellant submits that she was put in the impossible position of having to prove a negative. We do not accept this submission. The appellant sought to resist the enforcement of the Guarantee based on a number of putative defences, one being her failure to receive independent legal advice. Clearly, she carried the onus on this issue.

[25] In any event, the motion judge found that independent legal advice was not required in the circumstances. She found that Ms. Gdak was an officer and director of Trigger and that she signed the Guarantee in that capacity. Ms. Gdak had the opportunity to consult with a lawyer, Mr. Kelly, who witnessed the signatures of both Mr. and Ms. Gdak. She could have asked him for advice about the Guarantee.

Lack of Sophistication and Unconscionability

[26] The appellant submits that the motion judge erred in failing to find that the appellant lacked sophistication and that this resulted in a serious inequality of bargaining power in relation to Clearflow. In making this submission, counsel placed great emphasis on the fact that Ms. Gdak did not complete high school.

[27] We do not accept this submission. We agree with the motion judge that a failure to complete high school does not equate with a lack of sophistication. In any event, the motion judge took into account a number of circumstances in rejecting the submission that Ms. Gdak lacked sophistication, including evidence that demonstrated the extensive and important roles she played in the day-to-day operation of the business. Although Martin Rees (the partner of Clearflow with whom the Gdaks were dealing) may have had considerable experience in commercial transactions, this did not render Ms. Gdak unsophisticated. Moreover, we see no basis to disturb the motion judge's conclusion that Ms. Gdak had failed to establish unconscionability or undue influence.

"Inscrutability" of the Document

[28] The appellant submits that the motion judge paid no attention to the "inscrutability" of the Guarantee. In other words, she submits that the print on the document was too small.

[29] In our view, this is not a legitimate basis to render the document unenforceable. The document is a single page in length. Although the print is small, it is readable. This is self-evident. There was no expert evidence adduced on the application on this issue. In the absence of evidence of improper tactics on the part of Clearflow, and there is none, the size of the print of the document is not a basis for refusing to enforce the Guarantee.

Error as to the Appellant's Role in the Company

[30] The appellant submits that the motion judge erred in making the following statement, at para. 61: "[a]s a director, Ms. Gdak would have been required to sign off on the financial statements for these companies. The annual financial statements would have reflected the indebtedness to the applicant, which would have been easy for her to track year over year." As the appellant points out, s. 159(1) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("the *OBCA*") requires that the financial statements of an Ontario company be "approved by *the board of directors* and the approval shall be evidenced by the signature at the foot of the balance sheet of *any director authorized to sign*" (emphasis added).

[31] Mr. and Ms. Gdak were the sole directors of the company. Whether or not Ms. Gdak provided the signature evidencing the approval of the board, she was obliged by the *OBCA* to exercise "the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (s. 134(1)) and she was required to comply with all provisions of that act (s. 134(2)).

[32] In our view, the motion judge made no error in concluding that Ms. Gdak had legal obligations as one of two directors of Trigger. This was merely one factor that informed the motion judge's conclusion that she was aware of Trigger's ballooning indebtedness to Clearflow.

Insufficient Reasons

[33] The appellant submits that the reasons of the motion judge are insufficient in that they fail to explain why she preferred the evidence of Clearflow over that of Ms. Gdak. We disagree.

[34] The motion judge provided comprehensive reasons that are more than sufficient to permit appellate review. She evaluated Ms. Gdak's evidence against the whole of the evidence. The motion judge found her evidence lacking on many points, either because it was contradicted by other evidence, or because it was simply not credible. The appellant's complaint is more in the nature of a disagreement with the motion judge's credibility assessments, rather than the manner in which she explained the conclusions that she reached.

Clearflow's Breach of the Agreement

[35] The appellant submits that the motion judge erred in how she addressed the argument that the Guarantee was unenforceable against her because Clearflow breached the agreement. Essentially, the submission is that Clearflow breached the agreement by extending financing facilities in excess of the original projected amounts of \$1.4M (i.e., giving Trigger more money than they originally requested). We do not accept this submission.

[36] As noted in para. 14 above, the motion judge found that Ms. Gdak had contracted out of any protection to which she may have been entitled at common law. By its very terms, the Guarantee was a "continuing guarantee" for all obligations and indebtedness in favour of Clearflow. The terms and conditions of the credit facilities extended to Trigger never changed in a way that was not contemplated by the Guarantee. The motion judge also found that Ms. Gdak knew or ought to have known that her liability had increased over time.

Contra Proferentem and the Eiusdem Generis Rule

[37] Lastly, the appellant submits that the terms of the Guarantee should be construed against the drafter of the document (i.e., Clearflow). However, the *contra proferentem* rule is only applied in the face of an ambiguity in the impugned contract: *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415. As Cory J. held at p. 425, "if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it." We agree with trial judge's refusal to apply the *contra proferentem* rule. The appellant is unable to identify any ambiguity in the Guarantee.

[38] The appellant submits that she should be released from her liability by virtue of the *eiusdem generis* principle. She submits that the motion judge ought to have applied this principle when interpreting the term "Obligations" in the Guarantee. The term is described as "all present and future lease payments and obligations, conditional sale installments and obligations, and any other debts and liabilities." The appellant contends that the debts arising from the credit facilities extended to Trigger, especially the factoring of accounts receivable, are of a different nature than the specific "Obligations" described in the Guarantee. As the reasoning goes, she should not be liable under the Guarantee for these debts.

[39] We do not accept this submission. The factoring of accounts receivable was at the core of the financing relationship between Clearflow and Trigger. It accounts for the lion's share of Trigger's indebtedness to Clearflow, of which all parties, including the appellant, were well aware. We adopt the following passage from paras. 63-64 of the motion judge's reasons:

Accordingly, I find that a narrow interpretation of the terms of the Guarantee is not warranted in this case. Had I decided this point differently, I would nonetheless have rejected Ms. Gdak's interpretation of the definition of "Obligations" in the Guarantee. "Obligations" is defined to include "all present, and future lease payments and obligations, conditional sale instalments and obligations, and any other debts and liabilities." Ms. Gdak submits that the *ejusdem generis* interpretation maxim ought to apply such that "any other debts and liabilities" must be read narrowly to include only debts of the same class or kind, being debts of a similar nature to lease payments and conditional sale instalments, and that the applicant has led no evidence of indebtedness that falls into that class.

I reject this highly technical interpretation. I agree with the applicant that the phrase "other debts and liabilities" covers each of the credit facilities that the applicant offered and provided to Trigger. It would have been obvious to the parties entering into the financing arrangements that the Guarantees were in respect of the funds being advanced in accordance with the April 23, 2015 funding proposal. That proposal specifically refers to the credit being advanced and the Guarantees of each of En Cadre, Mr. Gdak and Ms. Gdak. Trigger's credit facilities did not include lease payments or conditional sale instalments. It is therefore apparent that the Guarantees were intended to cover other debts and liabilities, such as those described in the April 23, 2015 funding proposal and advanced by the applicant. This is the only logical interpretation of the Guarantee considering the factual matrix at the time the credit facility documentation, including the Guarantees, was executed.

Disposition

[40] The appeal is dismissed. As agreed by the parties, the respondent is entitled to its costs on a partial indemnity basis in the amount of \$16,250, inclusive of taxes and disbursements.

"Gary Trotter J.A."

"S. Coroza J.A."

"L. Favreau J.A."