TORYS LLP

Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada
Tel 416.865.0040
Fax 416.865.7380

www.torys.com

December 2, 2010

BY COURIER

Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor - 2300 Yonge Street
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

Re: EB-2010-0039 - Motion to Adjourn

We are counsel to Union Gas Limited ("Union").

Enclosed please find the Factum of Union Gas Limited (on motions returnable December 3, 2010).

Yours truly,

Crawford Smith

Tel 416.865.8209
csmith@torys.com

CGS/tm
Enclosure

c: Mark Kitchen/Karen Hockin (Union)
Intervenors

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11229-2080

EB-2010-0039

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15 (Sched. B);

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2010

FACTUM OF UNION GAS LIMITED
(on motions returnable December 3, 2010)

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, ON M5K 1N2

Crawford Smith
Tel: 416.865.8203
Fax: 416.865.7380

Counsel for the Applicant,
Union Gas Limited

TO: Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Kirsten Walli
Tel: 416.481.1967
Fax: 416.440.765

AND TO: All Intervenors

EB-2010-0039

IN THE MATTER OF the *Ontario Energy Board Act,* 1998, S.O. 1998, c. 15 (Sched. B);

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2010

FACTUM OF UNION GAS LIMITED
(on motions returnable December 3, 2010)

PART I - OVERVIEW

1. This is the factum of Union Gas Limited ("Union") in support of Union's motion for an adjournment of the hearing in this matter and in response to the cross-motion by Canadian Manufacturers & Exporters ("CME") for summary judgment. Both motions concern the disposition of two deferral accounts - Account Nos. 179-121 and 179-122 - that were established by the Board to compensate Union's ratepayers for harm arising from the proposed sale of Union's St. Clair Transmission Line.

2. Union seeks an adjournment of the hearing until February, 2011 to allow for the completion of negotiations between Dawn Gateway and its shippers, to conclude an outstanding open season and to negotiate any contracts resulting from that open season.

3. An adjournment will (1) result in the proper evidentiary basis on which the Board can ultimately make a decision with respect to the deferral accounts and (2) not prejudice ratepayers as the deferral accounts accrue interest. In comparison, proceeding with the hearing will result in a waste of time and resources as the necessary facts are unknown and will not become apparent until a decision has been made regarding whether the sale of the St. Clair Line is to proceed.

4. CME opposes Union's motion, and has brought a cross-motion to have the deferral accounts summarily disposed of, without the need for a hearing -- effectively a summary judgment motion. CME's motion is without merit.

5. The stated purpose of the deferral accounts is to compensate ratepayers for harm caused by the sale transaction. That sale has not occurred and it is uncertain whether it will ever occur. In effect, on this motion, CME is anticipating a harm that ratepayers might incur in the future and requesting that the Board depart from its earlier decisions and order Union to compensate ratepayers for that harm, regardless of whether it actually occurs. What CME is asking is for the Board to grant a windfall decrease in rates - to pretend that harm has occurred today when it indisputably has not.

PART II - FACTS

The Background Applications and the Creation of the Deferral Accounts

The Proposed Sale of the St. Clair Transmission Line

6. In May, 2009, Union entered into a Purchase and Sale Agreement with Dawn Gateway Pipelines Limited Partnership ("Dawn Gateway") for the sale of the St. Clair Transmission Line ("the St. Clair Transaction").

> Kitchen Affidavit, para. 3, Motion Record of Union Gas Limited ("MR"), Tab 2, p. 6

7. Dawn Gateway is a joint venture between Spectra Energy Transmission and an unrelated third party, DTE Pipeline Company ("DTE"). Union is a subsidiary of Spectra.

> Kitchen Affidavit, para. 2, MR, Tab 2, p. 6

8. Pursuant to the Purchase and Sale Agreement, Union planned to sell the St. Clair Line to Dawn Gateway, who would integrate the St. Clair line into a new pipeline, to be known as the Dawn Gateway Pipeline, running from the Belle River Mills Compressor Station in Michigan to Union's Dawn Station.

> Affidavit of Mark Kitchen ("Kitchen Affidavit"), para. 4, MR, Tab 2, p. 6

9. The Purchase and Sale Agreement between Union and Dawn Gateway contains a number of conditions precedent. Those in favour of Dawn Gateway, which are for the exclusive benefit of Dawn Gateway and may only be waived by that party, include the following:

(a) a vote of Dawn Gateway's partners in favour of proceeding with the Pipeline System (as defined);

(b) a contemporaneous closing of a lease or purchase between Dawn Gateway Pipeline, LLC and Michigan Consolidated Gas Company; and

(c) regulatory approvals for the operation of the Pipeline System, including from the Michigan authority.

Kitchen Affidavit, para. 5, MR, Tab 2, p. 7

Approval of St. Clair Line Sale, Creation of Deferral Accounts, and Related Submissions

10. **Conditional Approval of the St. Clair Transaction.** On December 23, 2008, Union brought an application before the Board (EB-2008-0411) for approval of its proposed sale of the St. Clair Line to Dawn Gateway.

11. In that proceeding, the Board considered whether the St. Clair Transaction would result in harm to ratepayers.

12. CME participated in that proceeding and argued that the St. Clair Transaction would harm ratepayers:

> CME argued that the harm arises from the fact that ratepayers will derive no benefit from the future revenues earned on the line:
>
> > "This proposal deprives Union's ratepayers of future increased utilization benefits attributable to the St. Clair Line to which they are entitled under the well established regulatory principle requiring utility owner to maximize the value of under-utilized utility assets for the benefit of their ratepayers."
>
> November 27, 2009 Decision, EB-2008-0411, para. 87, MR, Tab A, p. 35

13. Based on the submissions of CME, among others, the Board determined that the proposed transaction would harm ratepayers:

> The Board concludes that the transaction does result in harm to ratepayers. The harm is the inability of ratepayers to recoup the cumulative past subsidy since 2003 through future revenues. The harm arises because Union intends to do outside the utility what it originally intended to do within the utility. The asset is not being sold to be used for an entirely different purpose; it is being sold to a utility and will continue to be used for utility service – the very service it was originally expected to provide.
>
> November 27, 2009 EB-2008-0411, para. 92, MR, Tab A, p. 37

14. However, the Board was nonetheless willing to approve the transaction, provided that ratepayers were compensated for the harm they would incur if the sale proceeded:

> The Board further concludes that in order to mitigate the harm of the transaction, ratepayers should be allocated an amount equivalent to the cumulative under-recovery of the asset since 2003 from the proceeds of a sale based on fair market value as determined by replacement cost. (Emphasis added.)
>
> November 27, 2009 EB-2008-0411, para. 122, MR, Tab A, p. 45

15. Accordingly, the Board directed the establishment of a deferral account to hold the cumulative under-recovery of the St. Clair Line since 2003:

> The Board will approve the transaction conditional on the ratepayers being allocated a portion of the deemed net gain equivalent to the cumulative under-recovery as of the date of the transaction. The Board directs Union to file the necessary evidence to substantiate the cumulative under-recovery of the assets since 2003... The Board will then fix the amount to be allocated to ratepayers to compensate for the harm arising from the transaction. This amount will only vary depending upon the timing of the actual transaction. The determination of the relevant amount will be made as part of this proceeding so as to provide certainty to the parties. A deferral account will be established to capture the amount of the allocation as of the date of the transaction. Rates can be adjusted at a subsequent rates proceeding.
>
> November 27, 2009, EB-2008-0411, para. 123, MR, Tab A, p. 45

16. **Cumulative Under-Recovery Calculation.** In accordance with the Board's November 27, 2009 Decision, Union filed its proposed calculation of the cumulative under-recovery of the St. Clair Line from 2003 to the estimated closing date of the transaction.

17. Submissions were also made by Board Staff, CME and the Federation of Rental-housing Providers of Ontario. The parties disagreed as to the precise amount that Union should be required to place into the deferral account. A significant component of this disagreement was based on the deemed transaction date for the purposes of the under-recovery calculation.

> March 2, 2010, EB-2008-0411, CME Responding Motion Record ("RMR"), Tab 8

18. Based on the information available to it at the time, Union "estimated" that the closing date of the St. Clair Transaction would be March 1, 2010, if the project proceeded, and the Board agreed.

> Submission of Union Gas, December 23, 2009, EB-2008-0411, p. 1, Hughes Affidavit, RMR, Tab 5; March 2, 2010, EB-2008-0411; para. 46, RMR, Tab 8

19. The Board determined that two deferral accounts should be established, one to record the amount of $6.402 million, which represents the ratepayers' share of the deemed net gain on disposition of the utility asset as compensation for harm as a result of the transaction, and a second capture the effect of removing the St. Clair Line from rates beginning March 1, 2010.

> March 2, 2010, EB-2008-0411, para. 56, RMR, Tab 8

20. **Deferral Account Approval.** By Decision dated May 11, 2010, the Board approved the accounting for the two deferral accounts. Deferral account No. 179-121 ("the 121 Account") was created to capture the $6.402 million to be allocated to the ratepayers at the time of the sale, and deferral account No. 179-122 ("the 122 Account") was created to capture the effects of removing the St. Clair Transmission Line from rates effective March 1, 2010.

> Kitchen Affidavit, para. 9, MR, Tab 2, p. 7

Proposed Construction of the Dawn Gateway Pipeline

21. On December 23, 2009, Dawn Gateway brought an application for leave to construct new facilities from Bickford to Dawn (EB-2009-0422). The application was approved on March 6, 2010.

22. Prior to this application, Dawn Gateway had entered into precedent agreements with five (5) shippers (the "Shippers") who agreed to purchase transportation capacity on the Dawn Gateway Pipeline.

Kitchen affidavit, para. 13, MR, Tab 2, p. 8

23. Shortly after the release of the Board's EB-2009-0422 Decision, several of the Shippers requested that construction, originally planned for 2010, be delayed due to recent changes in North American supply dynamics.

Kitchen affidavit, para. 14, MR, Tab 2, p. 8

24. Since the Board's decisions in EB-2008-0411 and EB-2009-0422, market dynamics have shifted significantly, reducing the cost-effectiveness of the proposed Dawn Gateway Pipeline for Shippers.

Kitchen Affidavit, para. 14, MR, Tab 2, p. 8

25. These shifts include the recent large increase in shale gas supplies in the Northeast United States, increased supplies of Rockies gas as a result of the completion of the Rockies Express Pipeline, the decline in Western Canadian supplies and reduced North American demand due to economic conditions, all of which have led to a rapid and significant decline in the spread between gas prices in Michigan compared to Dawn.

Kitchen Affidavit, para. 14, MR, Tab 2, p. 8

26. As a result of these market changes, Dawn Gateway and its Shippers entered into an Agreement and Amendment to Precedent Agreement, whereby they agreed to delay the construction of the Dawn Gateway Pipeline. Notice of this agreement was provided to the Board and Intervenors shortly after the Agreement was reached and before the Board issued its rate order in the EB-2009-0422 proceeding.

Kitchen Affidavit, para. 15, MR, Tab. 2, p. 9

The 2009 Deferral Account Proceeding

27. By application dated April 22, 2010, Union commenced this proceeding (EB-2010-0039) relating to 2009 earnings sharing and the disposition of deferral account and other balances. In the proceeding, Union raised the issue of the balances in the 121 and 122 Accounts.

Kitchen affidavit, para. 17, MR, Tab 2, p. 9

28. Given that Dawn Gateway had not committed to proceeding with the purchase of the St. Clair Transmission Line, Union proposed not to dispose of the balances in the 121 and 122 Accounts. Instead, Union proposed to record in the 121 Account the $6.402 million amount to be allocated to the ratepayers at the time of the sale, and to record in the 122 Account for disposition in the future the amount attributable to the St. Clair Line that is included in Union's rates. Union proposed to continue to track the ratepayer credit in the 122 Account based on a sale date later than March 1, 2010 and to use the Board's methodology as outlined in its EB-2008-0411 Decision to calculate the ratepayer credit.

Kitchen affidavit, para. 18, MR, Tab 2, p. 9

29. Pursuant to Procedural Order No. 1, on July 26 and 27, Union and intervenors participated in a Settlement Conference. This conference resulted in a comprehensive settlement of all issues including those relating to the disposal of the balances the 121 and 122 Accounts. On that issue, the parties agreed to defer the determination of disposal of those balances until after November 1, 2010 -- the deadline by which Dawn Gateway Limited Partnership and its shippers intended to determine whether the Dawn Gateway Pipeline would proceed for in-service in November 2011.

Kitchen affidavit, para. 19, MR, Tab 2, pp. 10-11

30. At the time of the settlement, Union believed that postponing the determination of whether the 121 and 122 Accounts should be disposed was a reasonable compromise. It was Union's belief that, after November 1, 2010, it would have information as to whether Dawn Gateway and its Shippers intended to proceed with construction of the Dawn Gateway Pipeline, and therefore, whether the purchase of the St. Clair Line would proceed for in-service in 2011.

Kitchen affidavit, para. 20, MR, Tab 2, p. 11

31. On September 3, 2010, the Board ordered that a two day oral hearing be scheduled for December 6 and 7, 2010, to address the balances in the 121 and 122 Accounts.

Kitchen affidavit, para. 21, MR, Tab 2, p. 11

Current Status of the Dawn Gateway Project

32. The Shippers did not provide Dawn Gateway with notice that they intended to proceed with construction of the Dawn Gateway pipeline on November 1, 2010.

Kitchen affidavit, para. 22, MR, Tab 2, p. 11

33. Dawn Gateway remains committed to the project and is currently in discussions with the Shippers with the intent of securing their commitment for a 2011 in-service date on alternative terms.

Kitchen affidavit, para. 22, MR, Tab 2, p. 11

34. In addition, on November 15, 2010, DTE, on behalf of Dawn Gateway, released a binding open season for firm transportation service between MichCon's Belle River facility and Union Gas' Dawn Hub. Interested parties have been asked to submit binding bids for the open season by December 7, 2010. Dawn Gateway will evaluate the bids and respond to interested parties by December 20, 2010.

Kitchen affidavit, para. 23, MR, Tab 2, p. 11

35. It is Dawn Gateway's belief that the sale of existing capacity coupled with the ongoing discussions with Shippers affords the best opportunity for the project to proceed next year. Dawn Gateway requires the period until the end of January 2011 to conduct the open season and to negotiate new contracts with the open season bidders.

Kitchen affidavit, para. 27, MR, Tab 2, p. 12

36. In the meantime, the conditions precedent set out above in the Purchase and Sale agreement between Union and Dawn Gateway have not been satisfied or waived. In this respect, Union has advised the Board and Intervenors in this proceeding as follows:

> [I]t is Union's understanding that at least the following conditions have not been waived, satisfied or complied with: Article 3.1(2) requiring a vote of DGLP's partners in favour of proceeding with the Pipeline System (as defined); Article (g) relating to the contemporaneous closing of a lease or purchase between Dawn Gateway Pipeline, LLC and Michigan Consolidated Gas Company; and Article (l) requiring regulatory approvals including from the Michigan authority to the operation of the Pipeline System.
>
> Kitchen affidavit, paras. 28-29, MR, Tab 2, p. 2
>
> Letter from Chris Ripley dated July 23, 2010, Hughes Affidavit, Tab 17

37. Only Dawn Gateway is capable of satisfying or waiving those conditions and, until it does, the sale of the St. Clair Line cannot be completed.

> Kitchen affidavit, paras. 28-29, MR, Tab 2, p. 12

PART III - LAW AND ARGUMENT

A. Union's Motion for an Adjournment

An Adjournment is Justified and Reasonable in the Circumstances

38. Union is seeking an adjournment of the hearing respecting the disposition of the 179-121 and 179-122 Accounts until late February 2011. The requested adjournment will afford Dawn Gateway time to work with the existing Shippers, to complete the open season and to negotiate any resulting contracts.

39. Rule 26.01 of the Board's Rules of Practice and Procedure confirms the Board's jurisdiction to adjourn hearings:

> The Board may adjourn a hearing on its own initiative, or upon motion by a party, and on conditions the Board considers appropriate.
>
> Rule 26.01, *Rules of Civil Procedure*

40. In Union's submission, the Board should exercise its jurisdiction to adjourn the hearing respecting the disposition of the 121 and 122 Accounts because the adjournment will not prejudice any party and will save time and resources.

41. Proceeding with the hearing at this time would result in a waste of time and resources. At the present time, the facts necessary to determine the proper disposition of the deferral accounts do not yet exist. Those facts will not be apparent until a decision is made regarding whether the sale of the St. Clair Line is to proceed.

B. CME's Motion for Summary Judgment

CME's Summary Judgment Motion is Without Merit

42. CME has moved for the immediate disposition of the credit balance in the 121 Account, and disposition of the credit balance in the 122 Account by December 31, 2010. It is bringing this motion in spite of the Board's September 3, 2010, Order that the issue of the balances in the deferral account be addressed by way of a two day oral hearing. In short, CME is arguing for summary judgment on the deferral account issue.

43. There is no express provision in the Board's Rules of Practice for summary judgment.

44. In the civil litigation context, summary judgment motions have traditionally been reserved for cases where no assessment of credibility, weighing of evidence, or finding the facts was necessary, and where, accordingly, it was possible to "safely predict the result without a trial".

> *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) (Appendix "A")

45. Although, in Ontario, the summary judgment rule has recently been expanded, summary judgment still remains appropriate only where the party seeking it proves that there is no genuine issue requiring a trial [hearing].

> *Hino Motors Canada Ltd. v. Kell,* 2010 ONSC 1329 at p. 5 (S.C.J.) (Appendix "B")

46. For the reasons set out below, CME has failed to discharge this onus.

The Deferral Accounts Were Created For a Purpose That Has Not Yet Arisen

47. The hearing scheduled in this matter is intended to address the disposition of the two deferral accounts related to the St. Clair Transaction. Any hearing pertaining to the deferral accounts would be premature before the St. Clair Transaction has closed, or before it is

determined that the Transaction will not occur; before those events, it is not possible to know whether the purpose for which the deferral accounts were created has or ever will crystallize.

48. As set out above, the deferral accounts were created for the specific purpose of compensating ratepayers for harm they would incur if the sale of the St. Clair Line took place. In determining whether the transaction should be approved, the Board applied the "no-harm test". It determined that there would be harm to ratepayers **if the transaction were to occur**, but also determined that it was possible to mitigate this harm by compensating ratepayers. The deferral accounts were specifically created in order to facilitate this mitigation.

November 27, 2009 Decision, EB-2008-0411, paras. 92, 93

49. The harm that the Board contemplated was "the inability of ratepayers to recoup the cumulative past subsidy since 2003 through future revenues" if the transaction occurred. This harm exists only if the sale of the St. Clair Line takes place.

November 27, 2009 Decision, EB-2008-0411, para. 92

50. Two scenarios are possible: (1) if the sale takes place, Union does not dispute that the balances in the deferral accounts should be disposed to ratepayers at that time; (2) if the sale does not take place, ratepayers will be able to recoup the cumulative past subsidy of the St. Clair Line through future revenues; consequently, there will be no harm to ratepayers and no entitlement for them to be compensated through disposition of the amounts in the deferral accounts. It is not yet known which of these two scenarios will obtain.

51. In these circumstances, a summary judgment motion is plainly inappropriate. A full hearing on the deferral account issue is premature until the St. Clair Transaction has closed, or it has been determined that the Transaction will not close. Because a full hearing is premature by virtue of facts that have not yet crystallized, there can be no basis for determining that a full hearing is unnecessary. Accordingly, CME cannot meet its onus of demonstrating that summary judgment is justified.

52. By its motion, CME is anticipating a harm that ratepayers might incur in the future and requesting that the Board order Union to compensate ratepayers for that harm, regardless of whether it actually occurs.

Ratepayers Are Not Unconditionally Entitled to the Balances in the Deferral Accounts

53. In its Points of Argument, CME asserts that ratepayers are entitled to the balances in the deferral accounts regardless of whether the St. Clair Transaction takes place. This assertion blatantly disregards the Board's repeated statements that the purpose of the deferral accounts is to compensate ratepayers for harm that would arise from the St. Clair Transaction.

> Decision dated November 27, 2009, EB-2008-0411, paras. 118, 122, 123, MR, Tab A
>
> Decision dated March 2, 2010, EB-2008-0411, para. 56, RMR, Tab 8

54. In support for its position, CME argues that the Board's November 27, 2010 Decision and Order "included an express condition" for the ratepayers receiving a ratemaking credit. In Union's submission, CME has misinterpreted the Board's Decision and Order.

55. The Board's November 27, 2009 approved the St. Clair Transaction on the following three conditions:

(a) the sale price for ratemaking purposes shall be the fair market value which is defined as the replacement cost of the line;

(b) the ratepayers will receive a credit for ratemaking purposes equal to the amount of the cumulative under-recovery from 2003 until the time of the transaction which amount shall be placed in a deferral account for disposition in a rates proceeding; and

(c) Union shall file with the Board, with a copy to all intervenors, its calculation of the cumulative under-recovery from 2003 to the current time and its estimate as of the closing date of the transaction. Union at its discretion may file its estimate of the replacement cost of the line.

> November 27, 2009, EB-2008-0411, MR, Tab A, p. 51

56. CME relies on the Board's statement that "ratepayers will receive a credit". In Union's submission, this statement is simply a forward-looking statement based on the assumption that the transaction would take place, not an unequivocal and unconditional requirement that Union is required to reduce rates regardless of whether the St. Clair Transaction takes place. For the

purposes of the Order, the Board makes the assumption that there will be a need to credit ratepayers in the same way as it assumes that the transaction will take place. Notably, the Board chose not to state that "ratepayers shall receive" the credit, despite the fact that it used this mandatory language in the other two conditions.

57. Contrary to CME's assertion, ratepayers are not unconditionally entitled to the balances in the deferral accounts. Their entitlement to those balances is triggered by the closing of the St. Clair Transaction.

It is Questionable Whether the Sale of the St. Clair Line Will Proceed

58. In support of its argument for summary judgment, CME argues that there is no genuine issue requiring a hearing, because the sale of the St. Clair Line is a certainty. This assertion has no basis in the evidence. First, there is no dispute that the St. Clair Transaction has not occurred. Second, the issue of whether it will ever occur remains uncertain, and so long as it remains uncertain, there remain outstanding questions material to the determination of the deferral account issue.

59. The evidence on the record is that there has been and continues to be considerable uncertainty as to whether the sale of the St. Clair Line will proceed. This uncertainty is due in large part to shifting market dynamics which have reduced the cost-effectiveness of the proposed Dawn Gateway Pipeline for Shippers, consequently making it less likely that the Dawn Gateway Pipeline project would proceed.

60. These market changes were reflected in an internal Dawn Gateway email sent on March 12, 2010, in which the Shippers' concerns were described as including the fact that "the MI-Dawn spreads have fallen to such a level that they could not over variable fuel costs in the summer" and the existence of a "Ton of uncertainty in all markets".

Email from Steven Baker, Hughes Affidavit, RMR, Tab 15

61. A subsequent internal Dawn Gateway email sent on March 31, 2010 indicated that certain of the Shippers were contemplating whether to proceed, and that their decision would depend on whether the "market turns around and if rate adjustment works to pick up any costs increases."

Email from Steve Baker, Hughes Affidavit, RMR, Tab 15

62. There is no evidence on the record suggesting that the effects of these unfavourable market conditions have been alleviated. On the contrary, the fact that the Shippers have not provided notice of their intention to participate, and the fact that the Dawn Gateway project has not commenced suggest that at least some of these remain live concerns.

63. Further, the evidence is that at least three of the conditions precedent to the transaction closing remain unfulfilled.

64. CME asserts that the conditions precedent in the Purchase and Sale Agreement have been satisfied. Its interpretation of the evidence in support of this assertion is misleading.

65. In its materials, CME suggests that Union's 2009 Annual Report "confirms that the conditions precedent to a sale of the St. Clair Line… had been satisfied."

> Notice of Motion, para. (l), RMR, p. 5
> Points of Argument, para. 5(l)

66. As CME is well aware, the 2009 Annual Report was the subject of discussion at the Technical Conference in this, the EB-2010-0039 proceeding. Following the technical conference, Union wrote to the Board, copying the Intervenors to clarify that Union had never received confirmation from Dawn Gateway that all of the conditions under the Purchase and Sale Agreement had been waived satisfied or complied with, and that it was Union's understanding that at least three conditions precedent had not been waived, satisfied or complied with. Union has adduced sworn evidence to this effect on the motion.

67. Similarly, CME argues that, during Union's submissions to the Board's Natural Gas Market Review, it "acknowledged… that [Dawn Gateway] will be proceeding because it is essential to enhancing liquidity at Dawn." Union's submission contains no such acknowledgment. What Union's submission does contain is a description of the Dawn Gateway Project as an example of the market responding to changing needs (under the heading "Allow the Market to Work and Respond to Changing Dynamics"). In this context, Union assessed the positive outcomes that the Pipeline could provide when in service, but acknowledged that the project was "currently on hold".

Natural Gas Market Review Submission, p. 9, Hughes Affidavit, Tab 18

68. The evidence reflects the fact that the St. Clair Transaction remains up in the air. Union's has provided sworn evidence of its understanding of the basis for the delay of the Dawn Gateway project, and of the fact that it has not received notice that the conditions precedent under the St. Clair Transaction Purchase and Sale Agreement have not all been fulfilled.

69. CME, on the other hand, has merely speculated that the Transaction must be a sure thing, contrary to what Union has stated. In doing so, CME has directly called into question the credibility of Union's prefiled and sworn evidence on this motion, stating that Union's evidence that the Dawn Gateway Project might not proceed has been "discredited".

Points of Argument, para. 5(u)

70. CME's position in this regard undermines rather than supports its argument for a summary judgment motion. To the extent that the question of whether the St. Clair Transaction is a certainty is a question of the relative weight of the evidence, and the credibility of the witnesses, it is a question that should be determined in the context of a full hearing, with the opportunity for the Board to witness the evidence first hand and assess it.

The Sale Has Always Been Contemplated Only as a Future Possibility

71. In further support of its summary judgment motion, CME argues that Union represented to the Board and to Intervenors that the St. Clair Transaction would close on or about March 1, 2010, and that all parties were free to treat that date as the transaction date for all purposes. This is clearly contrary to the evidence. The evidence establishes that Union has consistently maintained that the closing of the St. Clair is only a future possibility and is not within Union's control.

72. In its Points of Argument, CME relies on statements made by Union in the context of the calculation of the historical cumulative under-recovery of the St. Clair Pipeline, and on statements made by Dawn Gateway in the EB-2009-0422 proceeding with respect to the parties' respective beliefs that the St. Clair Transaction would close on or about March 1, 2010. CME

goes on to assert that the Board made an "unequivocal determination of March 1, 2010 as St. Clair Line sale transaction date for regulatory purposes."

73. The Board recognized the March 1, 2010 date as a "deemed" transaction date in the context of the cumulative under-recovery calculation. Nothing in the record suggests that either the Board or Union treated it as having any broader application.

March 2, 2010 decision, EB-2008-0411, para. 52

74. For the purposes of the cumulative under-recovery calculation, Union was required by the Board to provide an estimate of when the St. Clair Transaction would close. Union's estimate, based on the evidence available to it at the time was that the transaction would close on March 1, 2010. Based on this estimate, it provided a calculation of the amount to be placed in the deferral account representing the cumulative under-recovery from January 1, 2003 to March 1, 2010.

75. The Board accepted Union's proposed transaction date of March 1, 2010 for the purposes of the cumulative under-recovery calculation. It did so in part based on its concurrent decision that the St. Clair Line would be removed from rates as of March 1, 2010. Accordingly, as of March 1, 2010, ratepayers would neither continue to subsidize the St. Clair Line, nor accrue additional "compensation" of their historical subsidization.

76. The evidence is that Union has no ability to compel the completion of the sale and, from the earliest days, Union and Dawn Gateway have consistently maintained that the St. Clair Transaction was only a future possibility; not an established reality. For example, from the earliest days, in its submissions on the projected closing date, Union stated:

- "In accordance with the Board's Order, Union is filing .... its estimate as of March 1, 2010 which is the projected closing date of the transaction should the project proceed" (RMR, Tab 3, p. 1); and
- "If the sale does not proceed, Union will not require a deferral account as there would be no refund of the cumulative under-recovery to customers" (RMR, Tab 3, p. 2).

77. In any event, any purported assurance by Union that the transaction was sure to close or would close is irrelevant to the question of whether the Board should dispose of these accounts. The undisputed evidence before the Board is that the transaction has not taken place. The issue before the Board is not a question of estoppel in which it would be open to CME to argue that it has relied to its detriment on Union's statements about its expectations for the future. There has been no such reliance, no detriment and no harm caused by a transaction which has not occurred.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Crawford Smith

Lawyers for Union Gas Limited

Irving Ungerman Ltd. and Karl Ungerman Ltd. v. Galanis and Haut

a

Galanis v. Irving Ungerman Ltd., Karl Ungerman Ltd. and Haut

[Indexed as: Irving Ungerman Ltd. v. Galanis]

Court of Appeal for Ontario, Morden A.C.J.O., Brooke and Catzman JJ.A.
September 6, 1991

b

Civil procedure — Availability of summary judgment where disputed issue of fact and credibility — Meaning of genuine issue for trial — Rules of Civil Procedure, O. Reg. 560/84, Rule 20.

In an action and counterclaim, the appellants and the respondent G competed for specific performance of their respective agreements to purchase a property owned
c by the respondent H. The appellants' claim was based upon an agreement of purchase and sale with H. The respondent G's claim was based upon a right of first refusal contained in a lease with H. It was common ground that G's claim would prevail if and only if G had properly exercised his right of first refusal on October 21, 1988. Both parties moved for summary judgment and placed extensive affidavit and transcript evidence before the court. The appellants contended that G had not
d properly exercised his right to buy the property because he had not before midnight on October 21, 1988 presented H with an offer matching the appellants' offer accompanied by a $10,000 deposit cheque. The trial judge concluded that notwithstanding H's denials, G had properly exercised his right of first refusal. The trial judge concluded that there was no genuine issue for trial and granted G specific performance. The appellants appealed.

e **Held,** the appeal should be allowed.

Under rule 20.04(2) of the Rules of Civil Procedure, where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly. The summary judgment rule enables a party to pierce the allegations of fact in the other party's pleadings. This means that, in addition to having a right to move for early resolution of a question of law,
f it is possible to avoid a trial or shorten the proceeding on satisfying a court that there is no need for a trial because there is no genuine issue of fact requiring one. "Genuine issue" cannot be expressed in a precise formula given the varied and unpredictable ways in which issues under Rule 20 may arise. However, it was safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing meaning for the term. If the evidence on a motion for
g summary judgment satisfies the court that there is no issue of fact that requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. Here the heart of the proceeding was an issue of credibility arising from H's insistence that she did not receive the deposit cheque on October 21, 1988. It is a sensible proposition that, if there is a genuine issue of credibility, a trial is required and summary judgment should not be granted. Here
h it could not be said that there was no genuine issue for trial. The timing and sequence of the drawing of the deposit cheque and the related issues of credibility constituted relevant issues that required a trial. The resolution of the credibility issue would be enhanced by the trial judge's opportunity to observe the demeanour of the witnesses.

Cases referred to

Engl v. Aetna Life Insurance Co., 139 F.2d 469 (1943); *Millichamp v. Jones*, [1983] 1 All E.R. 267, [1982] 1 W.L.R. 1422 (Ch. D.); *209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce* (1988), 39 B.L.R. 44, 24 C.P.C. (2d) 248, 8 P.P.S.A.C. 135 (Ont. H.C.J.)

Rules and regulations referred to

Federal Rules of Civil Procedure (U.S., 1938), Rule 56(c)
Rules of Civil Procedure, O. Reg. 560/84, Rules 20, 21, 22, rules 1.04(1), 20.01(1), (3), 20.04(2), 20.05(1), 20.06(1)
Rules of Practice, R.R.O. 1980, Reg. 540, Rules 33, 42, 58
Rules of the Supreme Court (U.K.), R.S.C., O. 86

Authorities referred to

6 *Moore's Federal Practice*, 2nd ed. (1987 release), pp. 56-391, 56-519, 56-521 to 56-522, 56-778 *et seq.* (James W. Moore, *Moore's Federal Practice*, 34 vols. (New York: Bender, Matthew & Co., 1948, looseleaf))
Wright, Miller and Kane, *Federal Practice and Procedure*, 2nd ed. (St. Paul, Minn.: West Publishing Co, 1983), vol. 10A, pp. 93-95, 97-107, 176-77, 297-302, 574-75

APPEAL from the summary judgment granted by the High Court of Justice (1990), 13 R.P.R. (2d) 102, under Rule 20 of the Rules of Civil Procedure.

James A. Hodgson, for Irving Ungerman Ltd. and Karl Ungerman Ltd., appellants.

A.M. Rock, Q.C., and *Paul J. Martin*, for Sam Galanis, respondent.

Donna MacFarlane, for Linda Haut, respondent.

The judgment of the court was delivered by

MORDEN A.C.J.O.:—The appellants, Irving Ungerman Limited and Karl Ungerman Limited, appeal from a summary judgment against them granted by Sutherland J. under Rule 20 of the Rules of Civil Procedure, O. Reg. 560/84. His reasons are reported at (1990), 13 R.P.R. (2d) 102 (H.C.J.).

The only issue raised is whether the learned motions court judge erred in concluding that there was no "genuine issue for trial" (rule 20.04(2)).

The major items of relief granted in the judgment are:

(1) a declaration that the respondent, Sam Galanis, validly exercised an option agreement based on a right of first refusal provided for in a lease respecting the purchase of a property owned by Linda Haut, who is formally a respondent in this appeal; and

(2) an order for specific performance of an agreement between Mr. Galanis and Mrs. Haut respecting the purchase of the property by Mr. Galanis.

The appellants had, some three days before the day on which Mr. Galanis allegedly exercised his option, entered into an agreement with Mrs. Haut to purchase the property from her. It is common ground that the agreement with Mr. Galanis takes priority over the one with the appellants if Mr. Galanis properly exercised his option rights on October 21, 1988 — and that, if he did not, then the appellants are entitled to prevail over Mr. Galanis.

Accordingly, although the proceeding involves Mrs. Haut's property, the real issue is between the appellants and Mr. Galanis. Mrs. Haut is no longer taking an active role in the proceeding. Her counsel made no submissions and appeared only to answer questions that might be asked by the court.

Mr. Galanis, who is a defendant and plaintiff by counterclaim in this proceeding, brought his motion for summary judgment on the counterclaim following the exchange of pleadings. The appellants brought a counter-motion for summary judgment on their claim in the action. The parties placed extensive evidence before the court on these motions, including affidavits of the parties or their representatives, affidavits of witnesses, transcripts of cross-examinations on these affidavits and of the examination for discovery of Mr. Galanis which was combined with his cross-examination. (I might mention that the appellants' counter-motion was dismissed in light of the judge's conclusion on Mr. Galanis' motion. There is no appeal from this particular decision.)

Sutherland J. reviewed the evidence in considerable detail and I shall not repeat what he has done. The appellants' contention was that Mr. Galanis had not validly exercised his option to buy the property because he had not presented to Mrs. Haut, within the requisite time (before midnight on October 21, 1988), an offer matching the appellants' offer accompanied by a deposit cheque for $10,000 payable to "Howard Ungerman in Trust". Howard Ungerman was Mrs. Haut's lawyer in the transaction with the appellants.

The appellants submitted to Sutherland J. that there were several genuine issues of fact which required a trial. He ruled against each submission. In the argument before us the appellants confined their submissions to two issues: (1) that Mr. Galanis had not presented Mrs. Haut with an offer matching that of the appel-

lants; and (2) that he did not present her with the requisite deposit cheque for $10,000. Clearly, on the evidence, the second submission raises more difficulties than the first as far as Mr. Galanis is concerned.

Before considering the relevant law relating to the granting of summary judgment and its application to the evidence in this case, I shall refer to those passages in Sutherland J.'s reasons which indicate how he approached the issues before him.

He quoted the following passage from the judgment of Anderson J. in *209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce* (1988), 24 C.P.C. (2d) 248, 8 P.P.S.A.C. 135 (Ont. H.C.J.), at p. 261 C.P.C., p. 147 P.P.S.A.C.:

> No doubt the extent to which it is appropriate for the Court on a motion such as this to investigate questions of fact, and the nature of the issues of fact which will comprise a "genuine issue for trial" will vary from case to case . . .

Sutherland J. then said at pp. 134-35 R.P.R.:

> I am respectfully and wholly in agreement with that statement. Anderson J. continues, at p. 261, as follows:
>
> > As a matter of present impression, I see nothing in the language of the rule or in the review of the law contained in *Vaughan* (*Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (H.C.J.)), to suggest any clear or arbitrary limit, although it seems safe to say that, where there are contested issues of fact involving the credibility of witnesses, the only appropriate forum remains a trial Court. A lawyer . . . schooled in the tradition that almost any substantial issue was to be determined at trial requires a material change in attitude to give appropriate effect to the rule.
>
> I am more comfortable with the last quoted sentence than with the sentence that precedes it. I note that the second last sentence is *obiter* for the reason that Anderson J. as he stated, did not on the facts before him have to choose between contradictory factual allegations. My reservation about the penultimate quoted sentence is that it tends to give too much effect to what may be mere vehement and self-serving assertion. In my view the question of a *genuine* issue for trial means that, admittedly within narrow limits not often attainable, the Court can look at the whole of the evidence and consider the inherent probability or improbability of an assertion of fact, having regard to the number of other assertions by the same witness or witnesses that have subsequently been admitted to be or clearly shown to be incorrect. Regard should also be had to how self-serving or conclusory the factual assertion may be. The rule does not, in my opinion, require an admission that a previously asserted fact is not or may not be the truth. In the absence of admission the Court will properly proceed with great caution, requiring a very high level of probability, but in my view, the Court must not be stopped in its tracks by a vehement and dogged assertion where the person's other evidence has been

repeatedly, and often admittedly, shown to be incorrect and where the doggedly asserted fact is both inherently improbable and contrary to the evidence of witnesses, the body of whose evidence has not been shown to be significantly or inherently improbable.

. . . . .

In this case I have reviewed the evidence with care — and at what I am confident many will agree to be tedious length — in order to satisfy myself that, and to demonstrate the reasons why, this is one of the rare and exceptional cases where in the face of controverted evidence as to a material matter there is no genuine issue for trial and the defendant Galanis is entitled to the order for specific performance that he seeks and to related declarations and relief to be referred to below.

Specifically, with respect to the issue of whether or not Mr. Galanis delivered a deposit cheque of $10,000 to Mrs. Haut on October 21, 1988, he concluded at p. 139 R.P.R.:

On all the evidence and despite Haut's persistent denials, I am satisfied that there is no genuine issue for trial on the question of whether on Friday, October 21 Galanis left with Haut along with the second Galanis offer an uncertified deposit cheque dated October 21, 1988 and payable to Howard Ungerman in trust in the amount of $10,000. That means that Galanis properly exercised his option on October 21, 1988 and I so find.

Rule 20, which came into force on January 1, 1985 as part of the *Rules of Civil Procedure*, substantially expanded the potential scope of a litigant's right to move for summary judgment beyond that provided for in the former Rules of Practice, R.R.O. 1980, Reg. 540, as amended. Under the former rules only a plaintiff could move for summary judgment and only in actions where the writ of summons was specially endorsed (see former Rules 33 and 58). Now, either party may so move (rules 20.01(1) and 20.01(3)).

Under the former rules only the defendant had to support his or her position by affidavit (see former Rules 42 and 58). The new rule contemplates both parties "delivering affidavit material or other evidence" (rules 20.01(1) and 20.01(3)). There are other distinctions between the former and the new rules which need not be mentioned.

The key provision in the new practice, as far as the present appeal is concerned, is rule 20.04(2), which reads:

(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

The expression "genuine issue" was borrowed from the third sentence in Rule 56(*c*) in the Federal Rules of Civil Procedure in the United States which were adopted in 1938. It reads:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Our rule does not contain, after "genuine issue", the additional words "as to any material fact". Such a requirement is implicit. If a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a "genuine issue for trial". (See Wright, Miller and Kane, *Federal Practice and Procedure*, 2nd ed. (1983), vol. 10A, pp. 93-95.) Similar reasoning applies to the absence from our rule of the words "and the moving party is entitled to a judgment as a matter of law". This is implicit.

Because the term "genuine issue" is taken from Rule 56(*c*) it is reasonable to think that some of the judicial experience with that provision would be of assistance in applying the term. In a relatively early United States decision concerned with Rule 56(*c*), *Engl v. Aetna Life Insurance Co.*, 139 F.2d 469 (1943), Judge Charles E. Clark, one of the drafters of the Federal Rules of Civil Procedure, said at p. 472:

> But the matter is sufficiently important so that we should go beyond the bare words of the summary-judgment rule to the reasons behind it. The federal summary judgment proceeding is the most extensive of any jurisdiction in that it is equally available to plaintiffs and defendants and in all forms and kinds of civil actions. But the history of the development of this procedure shows that it is intended to permit "a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried". 3 Moore's Federal Practice 3175.

I refer, in particular, to the intention of enabling "a party to pierce the allegations of fact in the (other party's) pleadings". This means that, in addition to having a right to move for early resolution of a question of law, as a means of avoiding a trial or shortening a proceeding as provided for in Rules 21 and 22, it is now possible to avoid a trial or shorten the proceeding on satisfying a court that there is no need for a trial because there is no genuine issue of fact requiring one.

The summary judgment rule, properly applied, is one of several rules which enables the policy expressed in rule 1.04(1) to be given effect. It reads:

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice

and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve
a any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. Rule 20 exists as a
b mechanism for avoiding these failures of procedural justice.

It would be convenient if the term "genuine issue" could be expressed in a precise formula for the ease of its application. Having regard, however, to the varied and unpredictable ways in which issues under Rule 20 may arise, it cannot — and the
c experience with Rule 56(*c*) in the United States has shown that it can be harmful to gloss the wording of the rule with expressions that fail to capture its meaning. (See Wright, Miller and Kane, *supra*, at vol. 10A, pp. 97-107 and 176-77.)

It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the
d meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the
e requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. (See 6 *Moore's Federal Practice*, 2nd ed. (1987 release), p. 56-391; Wright, Miller and Kane, *supra*, at vol. 10A, pp. 574-75.)

f At the heart of the proceeding before us is the issue of credibility. Mrs. Haut has steadfastly maintained in her evidence that she did not receive a deposit cheque for $10,000 on October 21, 1988. The evidence on behalf of the respondent is that a cheque for $10,000 was delivered to her in the evening of October 21, 1988.

g It is a sensible general proposition that, if there is an issue of credibility, a trial is required and summary judgment should not be granted. This is reflected in the settled practice under Rule 56(*c*) in the United States. In 6 *Moore's Federal Practice*, *supra*, at p. 56-519 the following appears:

h
> The general and well settled rule is that the court should not resolve a genuine issue of credibility at the hearing on the motion for summary judgment, whether the case be a jury or court case; and if such an issue is present the motion should be denied and the issue resolved at trial by the appropriate trier of the facts, where, to the extent that witnesses are available, he will have the opportunity to observe their demeanor.

At pp. 56-521 to 56-522 the following appears in 6 *Moore's Federal Practice, supra,* with respect to whether an issue of credibility exists:

> Judge Hutcheson's statement as to the test to be applied in determining whether the materials favorable to the opposing party present an issue of credibility will bear repetition:
>
> > To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. (*Whitaker v. Coleman* (1940), 115 F.2d 305, 306)
>
> The test has been applied and often quoted. Evidence, then, that is too incredible to be accepted by reasonable minds does not raise an issue of credibility. Conversely, if the evidence is such that a jury would not be at liberty to disbelieve it no issue of credibility is present. Or, stated differently, a summary judgment may be granted on evidence that would compel the direction of a verdict; and should be denied when a directed verdict would be improper.

As the first passage indicates, the proposition that an issue of credibility precludes the granting of summary judgment applies only when what is said to be an issue of credibility is a genuine issue of credibility. In the present case Sutherland J. was satisfied that "this is one of the rare and exceptional cases where in the face of controverted evidence as to a material matter there is no genuine issue for trial" (p. 135 R.P.R.).

With respect, I do not think that the evidence before the court reasonably justifies this conclusion.

Sutherland J. formed the view, and it was open to him to do so on the evidence, that Mrs. Haut was an unsatisfactory witness. He also was impressed by the evidence of the witnesses who testified that the cheque had been presented to Mrs. Haut on October 21. This evidence was referred to by the respondent before us as undisputed objective evidence. With respect, I think that this puts the matter too highly. It would be open to a trier of fact to reject the evidence of Mr. Galanis and his son with respect to presenting the cheque. The acceptance of this evidence, ultimately, turns on the credibility of these witnesses and that of Mrs. Haut.

It is true that a cheque for $10,000 dated October 21, 1988 drawn by Mr. Galanis was put in evidence. It was No. 072 drawn on the Canadian Imperial Bank of Commerce. The appellants submit that it is an issue as to *when* this cheque came into existence. It could have been after October 21. The next cheque, apparently from the same cheque book, No. 073 for $10,000

payable to Linda Haut, was drawn on October 24, 1988, but is dated October 21, 1988. Mr. Galanis was unable to explain why it was not dated as of the date it was drawn. Mr. Rock urged us not to draw an inference that this back-dating was intended to mislead anyone. In my view, whether or not it was intended to mislead, it is evidence showing that, at least on one occasion close in time to the transaction in question and related to it, Mr. Galanis drew a cheque and put a date on it other than the date it was drawn.

The cheque on the account preceding the No. 072 cheque, No. 071, was produced in the court below. It is payable to Toronto Dominion Bank and is in the amount of $42.75. It is dated November 20, 1988. The production of this cheque does not, of course, support Mrs. Haut's evidence that the only cheque presented on October 21, 1988 was for $5,000 — but, by reason of its date, supports the contention that Mr. Galanis was making random use of his cheque book as far as the order in which cheques drawn was concerned. This is evidence that cheque No. 072 was not necessarily drawn before cheque No. 073.

With respect to cheque No. 071, we were informed by counsel, on consent (since the matter had not been covered in the evidence), that it was Mr. Galanis' position that this was a post-dated cheque related to a car loan — and, accordingly, that its date does not support the conclusion that No. 072 was not drawn on October 21, 1988. If it is accepted that No. 071 is a post-dated cheque in payment of a loan, Mr. Hodgson raised certain questions with respect to it. If it was in payment of a loan one would expect it to be part of a series of post-dated cheques. If this were so and it was not the last one in the series, the one or ones following it would also be made out to the bank and not as they were made out. If it was the last one in the series, the question arises of *when* it was drawn in relation to October 21, 1988.

There may well be a clear and sensible explanation of these matters but, with respect, it does not emerge from the materials before the court.

Further, on the matter of when cheque No. 072 came into existence, the motions court judge referred to evidence that it was returned to Mr. Galanis by Mrs. Haut on October 24, having been in her possession up to that time, and was soon after seen by Mr. Galanis' lawyer, Mr. Waldin, on that date, on a table in his office. This tended to show continuity relating to the existence and possession of this cheque. With respect, however, Mr. Waldin's evidence on this matter is not clear. His evidence is clear that he saw the two previous offers on the table but it is not clear that he

saw a cheque. Mr. Rock fairly said his evidence on this matter was not as clear as one would hope.

I shall refer to one further matter covered in the evidence. Both Mrs. Haut and Irving Ungerman gave evidence that on the evening of October 21, 1988, around 10:00 to 10:30 p.m., Mrs. Haut telephoned Mr. Ungerman and told him that no deal had been made with Mr. Galanis. No matching offer had been presented and Mr. Galanis had not brought a cheque. Mr. Ungerman was not clear on whether Mrs. Haut said "certified cheque" or simply "cheque". To match the terms of the Ungerman offer the cheque did not have to be certified. In any event, although this evidence might not ultimately prove anything in favour of the appellants it is evidence that tends to support them in that it reflects Mrs. Haut's position, on the very evening in question, that she had no agreement with Mr. Galanis. She would not appear to have had any reason to mislead Mr. Ungerman at that time.

As indicated, I think Sutherland J. erred in concluding that there was no genuine issue for trial. No doubt there are contradictions in Mrs. Haut's evidence. There are also circumstantial features which support, perhaps strongly so, the probability that the $10,000 deposit cheque was presented to Mrs. Haut on October 21, 1988. The motions court judge obviously thought that the level of probability was such that Mrs. Haut's evidence could be rejected as incredible. With respect, on the basis of the evidence to which I have referred, including that of Mrs. Haut, I do not think that the materials before the court were such that the court could properly be "satisfied" that there was no genuine issue requiring a trial. The timing and sequence of the drawing of the cheques constitute a relevant issue that requires a trial to be satisfactorily resolved and, in connection with it, no doubt the resolution of the credibility issue between Mrs. Haut and Sam Galanis and his son would be significantly enhanced by the trial judge's opportunity to observe the demeanour of these witnesses.

Before concluding I shall deal briefly with other issues that were raised.

The respondent raised before this court, as he did before Sutherland J., the alternative submission that even if a $10,000 cheque was not delivered to Mrs. Haut on October 21 this was not essential to the valid exercise of the option. In support of this contention he relied upon the decision of Warner J. in *Millichamp v. Jones*, [1983] 1 All E.R. 267, [1982] 1 W.L.R. 1422 (Ch. D.). During the course of the argument before us the court indicated

that we did not think that we could properly consider this alternative since the whole case had been pleaded and presented by the respondent as one based on the delivery of the $10,000 cheque, with the effect that the factual issues which would be relevant under *Millichamp*, assuming that it could be applicable to this case, were not developed or examined.

Second, the appellants initially submitted, but did not ultimately pursue, the contention that summary judgment should not be granted on a claim for specific performance. I think that they were right in not pursuing this point, at least on the evidence in this case. There is nothing in Rule 20 that restricts its application to particular kinds of actions. It is true that whether a court will decree specific performance is a matter of equitable discretion. In some cases there could be genuine issues of fact which bear on the question of the exercise of the court's discretion. In these circumstances summary judgment would not be proper. No reason is advanced in this case why, if the option were validly exercised, specific performance would not be appropriate.

I note that specific performance can be granted by summary judgment under Rule 56(*c*) in the United States. See Wright, Miller and Kane, *supra*, vol. 10A, pp. 297-302:

> But if there are no triable fact issues and the court believes that equitable relief is warranted, it is fully empowered to grant it on a Rule 56 motion.

See also 6 *Moore's Federal Practice*, *supra*, pp. 56-778 *et seq.* It may also be granted by summary judgment in England, although there the matter is expressly provided for: R.S.C., Order 86.

Third, the matter of the court specifying under rule 20.05(1) what material facts are not in dispute was briefly touched upon in the argument. Neither party urged that this be done and, in the circumstances, I do not think that to do so would be of practical assistance.

Fourth, although it has transpired that the respondent's motion for summary judgment has been unsuccessful, I do not think that this is a proper case for awarding solicitor-and-client costs against them (which would flow from the main provision in rule 20.06(1)). The appellants have not asked for costs on this basis.

In the result, I would allow the appeal with costs, set aside the order of Sutherland J., and in its place make an order dismissing the respondent's motion with costs. The costs orders are in favour

of the appellants against the respondent Galanis. I would make no costs order for or against Mrs. Haut.

Appeal allowed.

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Hino Motors Canada Ltd. v. Kell

Hino Motors Canada Ltd. (Plaintiff) and William Joseph Kell (Defendant)

Ontario Superior Court of Justice [Commercial List]

Karakatsanis J.

Heard: February 12, 2010
Judgment: March 2, 2010
Docket: CV-09-386063, 10-8580-00CL

Counsel: Michael A. Handler, Giovanna Paolucci for Moving Party

Paul Bates, Bernadette Chung for Responding Party / Defendant

Subject: Estates and Trusts; Civil Practice and Procedure; Torts; Contracts; Corporate and Commercial; Property

Estates and trusts --- Trusts — Constructive trust — Miscellaneous issues

Fleet of trucks were delivered by plaintiff to plaintiff's dealer, which undertook pre-delivery service work — Dealer delivered truck and received payment from customer — Dealer did not remit monies to plaintiff and used monies for its operating expenses — Dealer sued plaintiff for wrongful termination of franchise agreement — Plaintiff disputed franchise relationship and counterclaimed for monies owed from sale of trucks — Plaintiff commenced action against principal of dealer for breach of trust, conversion, inducing breach of contract and interference with contractual relations — Plaintiff brought motion for summary judgment — Motion dismissed — Essence of claim against dealer's principal was that monies customer paid to dealer for trucks were subject to constructive trust in favour of plaintiff, and principal knew or was wilfully blind or reckless about whether they were trust funds, and he caused dealer not to pay funds to plaintiff — Issue of whether or not there was constructive trust was genuine issue requiring trial — Principal did not make admission of trust relationship in other action — Differences between principal's current affidavit and previous testimony did not support adverse finding of credibility — Plaintiff did not establish that both plaintiff and dealer intended fleet sales payment arrangement to be trust arrangement — Evidence regarding plaintiff's retention of title until it was paid and principal's admission that customer monies belonged to plaintiff was not sufficiently clear evidence of intention to create trust relationship — There were no discussions between parties concerning placing funds in separate trust account — There was no reference to trust in agreement or any paperwork — Plaintiff did not allege breach of trust in initial demands for funds, counterclaim or summary judgment motion against dealer.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Fleet of trucks were delivered by plaintiff to plaintiff's dealer, which undertook pre-delivery service work — Dealer delivered truck and received payment from customer — Dealer did not remit monies to plaintiff and used monies for its operating expenses — Dealer sued plaintiff for wrongful termination of franchise agreement — Plaintiff disputed franchise relationship and counterclaimed for monies owed from sale of trucks — Plaintiff commenced action against principal of dealer for breach of trust, conversion, inducing breach of contract and interference with contractual relations — Plaintiff brought motion for summary judgment — Motion dismissed — There were genuine issues that required trial for their resolution — Essence of claim against dealer's principal was that monies customer paid to dealer for trucks were subject to constructive trust in favour of plaintiff, and principal knew or was wilfully blind or reckless about whether they were trust funds, and he caused dealer not to pay funds to plaintiff — Issue of whether or not there was constructive trust was genuine issue requiring trial — Principal did not make admission of trust relationship in other action — Differences between principal's current affidavit and previous testimony did not support adverse finding of credibility — Plaintiff did not establish that both plaintiff and dealer intended fleet sales payment arrangement to be trust arrangement — Evidence regarding plaintiff's retention of title until it was paid and principal's admission that customer monies belonged to plaintiff was not sufficiently clear evidence of intention to create trust relationship — There were no discussions between parties concerning placing funds in separate trust account — There was no reference to trust in agreement or any paperwork — Plaintiff did not allege breach of trust in initial demands for funds, counterclaim or summary judgment motion against dealer — Claim for inducing breach of contract could not proceed against corporate officer or director where claim for breach of contract lied against corporation.

Torts --- Inducing breach of contract — Elements of tort

Fleet of trucks were delivered by plaintiff to plaintiff's dealer, which undertook pre-delivery service work — Dealer delivered truck and received payment from customer — Dealer did not remit monies to plaintiff and used monies for its operating expenses — Dealer sued plaintiff for wrongful termination of franchise agreement — Plaintiff disputed franchise relationship and counterclaimed for monies owed from sale of trucks — Plaintiff commenced action against principal of dealer for inducing breach of contract — Plaintiff brought motion for summary judgment — Motion dismissed — Evidence raised genuine issue requiring trial — Claim for inducing breach of contract could not proceed against corporate officer or director where claim for breach of contract lied against corporation — Evidence was not clear that conduct or actions of dealer's principal were themselves tortious or exhibited separate identity of interest from that of company so as to make act or conduct complained of his own — Principal deposed that he did not intentionally withhold money from plaintiff as company controller took care of day-to-day financial matters — Principal deposed that because of termination of franchise relationship, lack of credit facility and cash flow problems, he had to pay operating expenses and did not have money to pay plaintiff.

Cases considered by *Karakatsanis J.*:

ADGA Systems International Ltd. v. Valcom Ltd. (1999), 41 B.L.R. (2d) 157, 117 O.A.C. 39, 168 D.L.R. (4th) 351, 1999 CarswellOnt 29, 44 C.C.L.T. (2d) 174, 43 O.R. (3d) 101, 39 C.C.E.L. (2d) 163 (Ont. C.A.) — referred to

Air Canada v. M & L Travel Ltd. (1993), 1993 CarswellOnt 994, 1993 CarswellOnt 568, 15 O.R. (3d) 804 (note), 50 E.T.R. 225, 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 67 O.A.C. 1, 159 N.R. 1 (S.C.C.) — re-

ferred to

Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 26 C.P.C. (4th) 1, 111 O.A.C. 201, 164 D.L.R. (4th) 257, 1998 CarswellOnt 3202, 20 R.P.R. (3d) 207 (Ont. C.A.) — referred to

Excel Lighting & Manufacturing Ltd. v. Gladstone (1995), 1995 CarswellOnt 2436 (Ont. Gen. Div.) — distinguished

Excel Lighting & Manufacturing Ltd. v. Gladstone (1997), 1997 CarswellOnt 4814 (Ont. C.A.) — referred to

Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, (sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176, 1 C.P.C. (3d) 248, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1991 CarswellOnt 370 (Ont. C.A.) — followed

J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd. (2006), 16 B.L.R. (4th) 227, 2006 CarswellOnt 1212 (Ont. S.C.J.) — referred to

Lana International Ltd. v. Menasco Aerospace Ltd. (2000), 2000 CarswellOnt 3092, 50 C.P.C. (4th) 244, 190 D.L.R. (4th) 340, 50 O.R. (3d) 97, 136 O.A.C. 71 (Ont. C.A.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), (sub nom. *Lameman v. Canada (Attorney General))* 372 N.R. 239, [2008] 5 W.W.R. 195, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 2008 SCC 14, [2008] 2 C.N.L.R. 295, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, (sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372, (sub nom. *Lameman v. Canada (Attorney General))* 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General))* 421 W.A.C. 26, 86 Alta. L.R. (4th) 1 (S.C.C.) — considered

Rozin v. Ilitchev (2003), 66 O.R. (3d) 410, 175 O.A.C. 4, 2003 CarswellOnt 3052 (Ont. C.A.) — referred to

Statutes considered:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3

Generally — referred to

Rules considered:

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

Generally — referred to

R. 20.02(2) — referred to

R. 20.04 — considered

R. 20.04(2)(a) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

MOTION by plaintiff for summary judgment.

***Karakatsanis J.*:**

1 The plaintiff Hino Canada moves for summary judgment in the amount of $405,000 for monies owed from the sale of Hino fleet trucks, against Kell, as dealer principal, president and majority shareholder of Toronto Hino.

2 In a related action, Toronto Hino has sued Hino Canada for wrongful termination under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000 c. 3. Hino Canada disputes a franchise relationship, pleads a supplier dealer relationship and counterclaims for monies owed from the sale of nine Hino fleet trucks to Ryder. Hino Canada was granted partial summary judgment on the counterclaim for $285,760.66 by Morawetz J., who held that the issue of set-off for the balance of the debt was a genuine issue for trial. He exercised his discretion to stay execution on the judgment pending trial on the main action.

3 This claim relates to the same monies that were the subject of the summary judgment against Toronto Hino. In this action against Kell, as the principal of Toronto Hino, the plaintiff claims the monies are trust monies and that Kell is personally liable for breach of trust, conversion, inducing breach of contract and interference with contractual relations. Hino Canada takes the position that having regard to the previous findings of Morawetz J. in the Toronto Hino action and the admissions made by Kell, there is no genuine issue requiring a trial and they are entitled to judgment. Furthermore, Hino Canada submits that there is no reason to reduce the amount by a potential set-off or to stay execution as there is no counterclaim by Kell personally.

4 Breach of trust was not claimed against Toronto Hino. That claim was based upon breach of contract. Morawetz J. found the debt to be a liquidated debt. In this action, the plaintiff submits that there is a trust relationship between Hino Canada and Toronto Hino in respect of the Ryder Truck monies.

The Summary Judgment Rule

5 Rule 20.04 provides:

> (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;...
>
> (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.

> (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.

6 The change in the Rules from "no genuine issue for trial" to "no genuine issue requiring a trial," together with the explicit powers of the motions judge to make evidentiary determinations, permits a more meaningful analytical review of the paper record and expressly overrules jurisprudence that restricted motions judges from making evidentiary determinations.

7 The test for summary judgment - whether there is a genuine issue of material fact that requires a trial for its resolution as first articulated in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) - has not changed. However, the cases that restricted a motions judge in assessing credibility, weighing evidence or drawing factual inferences have been superseded by the powers set out in the new Rule. Both the analytical review and the availability of oral evidence have considerably broadened the motions judge's tools in a summary judgment motion. Nonetheless, although a motions judge may weigh the evidence, evaluate the credibility and draw reasonable inferences from the evidence, the judge does so for the purpose of determining whether a trial is required to resolve a genuine issue. Although a summary judgment motion may, if the motions judge so directs, resemble a summary trial, the task of the judge hearing a summary judgment motion is different: See *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) The motions judge must take "a hard look" at the evidence to determine whether it raises a genuine issue requiring a trial: See *Rozin v. Ilitchev* (2003), 66 O.R. (3d) 410 (Ont. C.A.) at para. 8. Simply put, the test remains largely the same as it was under *Irving Ungerman*, where the issue was whether the evidence "requires a trial." The new Rule 20.04 provides the judge with more tools to determine if this test is met.

8 As the Supreme Court of Canada stated in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372 (S.C.C.) at para. 10:

> Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

9 The new Rule does not change the burden in a summary judgment motion. The moving party bears the evidentiary burden of showing that there is no genuine issue requiring a trial. The moving party must prove this and cannot rely on mere allegations or the pleadings. Pursuant to Rule 20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleadings but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial." In other words, consistent with existing jurisprudence, each side must "put its best foot forward" with respect to the existence or nonexistence of material issues to be tried. The court is entitled to assume that the record contains all the evidence which the parties would present if there were a trial.

Conversion and Breach of Trust

10 The essence of the claim against Kell is that the monies Ryder paid to Toronto Hino for the trucks were subject to a constructive trust in favour of Hino Canada, and Kell knew or was wilfully blind or reckless about whether they were trust funds, and he caused Toronto Hino not to pay the funds to Hino Canada. Both the torts of conversion and of breach of trust require a finding of a trust relationship between Hino Canada and Toronto

Hino. Counsel for the plaintiff agreed that they stand or fall together.

11 A trust relationship is characterized by three certainties: certainty of intention to create a trust; certainty of the subject matter of the trust; and certainty of the object or beneficiary of the trust. The nature of the relationship between parties is a matter of intention. While the presence or absence of a prohibition on the commingling of trust funds is a factor to be considered when deciding if the relationship is a trust relationship, it is not necessarily determinative: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.), para. 22-26, 31.

12 Article 3.6 of the agreement between Hino Canada and Toronto Hino provided for "direct sales" and stipulated that Hino Canada "may sell any product directly to any purchaser" and fleet truck sales would "be governed under a separate fleet policy and procedures guidelines." Article 5.8 provided that title to the trucks shall remain with Hino Canada until it has received payment in full for them.

13 In cross-examination in the other proceedings, Kell acknowledged the unwritten protocol for fleet sales: they were negotiated directly between Hino Canada and its fleet customer, but the delivery of the trucks was handled through a Delivering Dealer. The Delivering Dealer was asked to provide to Hino Canada a Vehicle Purchase Order for the trucks to complete the order. After receipt of the completed Vehicle Purchase Order, Hino Canada delivered the trucks to the Delivering Dealer and issued invoices to the Delivering Dealer for the trucks. The Delivering Dealer was then required to issue its own invoice to the fleet purchaser for no more than the purchase price negotiated by Hino Canada plus a handling fee of no more than $1,250 per truck. Once delivery of the trucks was complete and the Delivering Dealer's invoice was paid by the fleet purchaser, the Delivering Dealer deposited the cheques to its own bank account; as soon as the cheques cleared the bank, the Delivery Dealer was required to remit payment of the proceeds of sale, less the handling fee.

14 Ryder's payments for the nine trucks were deposited into Toronto Hino's bank account on April 7, April 29, May 13 and May 20, 2008. Toronto Hino delivered the ownership papers to Ryder. Hino Canada's share was not remitted back to them. Kell does not dispute that Toronto Hino owes the monies and Morawetz J. found it to be a liquidated debt of Toronto Hino. Toronto Hino and Kell take the position that upon the "abrupt termination" on April 18, 2008, "chaos" ensued, it was no longer business as usual, the protocol no longer governed, they lost their credit, and they had to use the money available to pay staff and creditors in order to keep the business operating. [Kell maintains that he was not specifically aware that the April 7 payment for a truck was made, as his controller managed the day to day financial affairs.]

15 The plaintiff relies upon the following factors to establish a certainty of intention to create a trust with respect to the Ryder monies:

1. The parties handled fleet sales in accordance with the Fleet Sale Procedure which Kell has admitted was known to him and Toronto Hino;

2. The substantive business deal was between Hino Canada and Ryder. Toronto Hino was, in many respects, simply a conduit to facilitate the fleet truck sale to Ryder and the parties followed the Fleet Sale Procedure;

3. Kell admitted that ownership of the Ryder Trucks remained with Hino Canada until Toronto Hino remitted the Ryder monies to Hino Canada (or until the trucks were transferred to Ryder);

4. Kell admitted that Toronto Hino was obliged to remit the Ryder Monies (less its handling fee) to Hino Canada after the monies cleared the bank (within 3-4 days); and

5. Kell admitted that the Ryder monies belonged to Hino Canada and not to Toronto Hino and knew that its entitlement to the monies was limited to an agreed upon maximum fee.

16 The plaintiff asked me to exercise my new powers under Rule 20.04 (2.1) to make an adverse finding of credibility against Kell, to find that the evidence in Kell's affidavits filed in this motion was disingenuous, and that he tried to resile from his evidence given in the other proceedings before the action against him was commenced. In particular, the plaintiff asked me to disregard the self-serving statement in paragraph 49 of Kell's recent affidavit that he first became aware that Hino Canada regarded the payments as funds subject to a 'trust' after this litigation commenced. Counsel argued this was not consistent with his earlier testimony acknowledging that title for the trucks stayed in Hino Canada's name until they received the monies (or until title was transferred to Ryder), that he was aware that they were Hino Canada's monies, that the protocol required that the monies be paid to them as soon as Ryder's payment had cleared the bank (within 3 or 4 days), that he had done it hundreds of times, and that he was the financial authority for Toronto Hino and signed all the cheques. Further, counsel relied upon the fact that "Kell declined to answer whether Toronto Hino was offside the trust and dealer arrangement with respect to the Ryder trucks because his answer could incriminate him."

17 After testifying that he did not pay Hino Canada for the trucks because of the abrupt termination, and acknowledging that the money was owing to Hino Canada, the following exchange occurred between counsel and Kell:

> Q. So basically you are offside the trust arrangement and the dealer arrangement with respect to those Ryder trucks?
>
> A. I decline to answer that.
>
> Q. On the grounds that it might incriminate you?
>
> A. Could be.
>
> [and after an exchange between counsel]
>
> Q He's concluded that he doesn't want to answer the question on the grounds that it could incriminate him. Isn't that what you said, sir?
>
> A. No, you said that.
>
> Q. No, what did you say? You declined to answer it. On what basis then, did you decline to answer the question?
>
> A. It's what I mentioned is that we were abruptly terminated our Hino franchise and at that particular time, there was chaos. All the monies from the Ryder trucks did not come in till after that date. And we ended up in a chaos, we ended up with a cash flow problem.

18 This does not, in my view, constitute an admission of a trust relationship. Furthermore, I was not persuaded that the differences between the current affidavit and the previous testimony would support an adverse finding of credibility on this written record. In any event, it is not necessary to determine credibility, as I find that there is a genuine issue for trial even on the basis of the findings of fact found by Morawetz J and the evid-

ence relied upon by the plaintiff.

19 I am not persuaded that the findings and the evidence relied upon by the plaintiff are sufficient to resolve these issues and clearly establish that both Hino Canada and Toronto Hino intended the fleet sales payment arrangement to be a trust arrangement. While a formal trust agreement and a requirement not to co-mingle the funds is not necessarily determinative of whether there was a constructive trust, the evidence must support an inference that both parties intended to create a trust relationship and impose a constructive trust on the monies. The evidence regarding Hino Canada's retention of title until it was paid (or the title was transferred to Ryder) and Kell's admission that, under the Protocol, the Ryder monies belonged to Hino Canada and that Toronto Hino's entitlement to the monies was limited to its handling fee is not sufficiently clear evidence of an intention to create a trust relationship in the circumstances of this case. Unlike *Excel Lighting & Manufacturing Ltd. v. Gladstone*, 1995 CarswellOnt 2436 (Ont. Gen. Div.) ; affirmed (Ont. C.A.), there were no discussions between the parties concerning placing the funds in a separate trust account. I am not satisfied on the evidence that there were any admissions. There was no reference to a trust in the agreement or any of the paperwork. Hino Canada invoiced Toronto Hino for the trucks. It is not disputed that Toronto Hino owes the money to Hino Canada and Morawetz J. found it to be a liquidated debt. Finally, Hino Canada did not allege breach of trust either in the initial demands for the funds, in the counterclaim or in the summary judgment motion against Toronto Hino.

20 I am satisfied on the evidence that the issue of whether or not there was a constructive trust relating to the funds is a genuine issue requiring a trial. The evidence on the motion leaves a genuine issue about whether the monies were imprinted with a trust and whether the parties intended to create a constructive trust. Counsel agreed that this was an essential element of both the tort of conversion and breach of trust. It is not necessary to deal with the other essential elements of the torts claimed.

21 Counsel for the defendant has raised the issue of whether *res judicata* precludes the plaintiff from arguing breach of trust, and whether the factual determinations would necessarily be the same if breach of trust had been before the motions judge. It is not necessary for me to deal with the issues of *res judicata* given my findings above.

Intentional Interference with contractual and economic relations and Inducing Breach of Contract

22 With respect to the torts of intentional interference with contractual relations and economic interest, the plaintiff relies upon Kell's unlawful conduct as conversion and breach of trust. Without such conduct the evidence is not clear that Kell intended to injure the plaintiff or interfered with the plaintiff's economic interest by illegal means.

23 A claim for inducing breach of contract cannot proceed against a corporate officer or director where a claim for breach of contract lies against the officer or director's corporation. I am not satisfied that the evidence is clear that Kell's conduct or actions are themselves tortuous or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of his own: *Lana International Ltd. v. Menasco Aerospace Ltd.* (2000), 50 O.R. (3d) 97 (Ont. C.A.) at paras. 43-47; *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.) para 26, 38-41; *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2006] O.J. No. 812 (Ont. S.C.J.) paras 98-100. Kell deposes he did not intentionally withhold the money from Hino Canada. Rather, although he signed all cheques, the company controller took care of the day to day financial matters. Kell's evidence is that he did not personally become aware the Ryder trucks had not been paid for until May 21 or 22. He deposed that because of the termination, the lack of credit facility and cash

flow problems, he had to pay operating expenses and did not have the money to pay Hino Canada. In my view this evidence raises a genuine issue requiring trial.

Conclusion

24 I find that there are genuine issues relating to breach of trust, conversion, intentional interference with economic interests and inducing breach of contract that require a trial for their resolution. This summary judgment motion is dismissed.

25 This action has been ordered tried together with the Toronto Hino action. Rule 20 motions are intended to simplify, expedite and reduce costs both for the parties and the justice system. There has already been a summary judgment motion with respect to these monies, in circumstances where the motions judge was not prepared to permit execution before all claims between the parties are dealt with. The action has been expedited. The facts relating to both summary judgment motions are an integral part of the facts that the trial judge will have to address in order to resolve the outstanding issues arising from the parties' relationship. The trial judge will have to deal with issues regarding *res judicata*. I am not persuaded that this summary judgment motion represents an efficient means of resolving these claims. I am not convinced that it is an efficient process to have three different judges dealing with overlapping facts. For these reasons, I do not consider it helpful to specify what material facts are not in dispute or to specifically define the issues to be tried.

26 I understand the other actions are ready for trial and a May trial date is feasible. These actions are to proceed expeditiously. The parties may attend at a 9:30 scheduling appointment to ensure a timely trial date.

27 If the parties cannot agree on costs, the defendant shall make brief written submissions within 10 days; the plaintiff shall respond with brief written submissions within 10 days following; and any reply is to be filed within 5 days thereafter.

Motion dismissed.

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