CITATION: CIBC Investor Services Inc. v. Chan, 2024 ONSC 1628
COURT FILE NO.: CV-22-2046-0000
DATE: 2024 03 20

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: CIBC INVESTOR SERVICES INC. carrying on business as CIBC INVESTOR'S EDGE Plaintiff	R. Aisenberg, for the Plaintiff
– and – MING FAI CHAN, LAI YANG CHANG and HENRY HO CHAN Defendants	G. Sidlofsky, for the Defendants
	HEARD: March 4, 2024

REASONS FOR DECISION

CONLAN J.

I. The Action

The Claim

[1] The Plaintiff, CIBC Investor Services Inc., carrying on business as CIBC Investor's Edge ("CIBC"), has, by Statement of Claim issued on October 17, 2022, sued the

Defendants, Ming Fai Chan ("Ming"), Lai Yang Chang ("Lai"), and Henry Ho Chan ("Henry").

[2] As against Ming and Lai, CIBC seeks $856,602.80 in damages, plus interest, plus other relief.

[3] Further, as against all three Defendants, CIBC seeks an order setting aside a transfer of real property in Toronto ("2304") from Ming and Lai to Henry on September 2, 2022, as being a fraudulent conveyance, and an order setting aside a transfer of another real property in Toronto ("2311") from Ming and Lai to Henry on September 12, 2022, as being a fraudulent conveyance, plus costs, plus punitive damages of $300,000.00, plus other relief.

[4] Further, as against Ming and Henry, CIBC seeks an order setting aside a transfer of a third real property, this time in Scarborough ("4465"), from Ming to Henry on September 16, 2022, as being a fraudulent conveyance, plus other relief.

The Facts

[5] Many of the facts are undisputed. At least one key issue of fact is hotly disputed, however, and that is whether Ming placed "stop loss orders" on the share purchases that he made through CIBC's online stock trading platform.

[6] CIBC is an online investment and brokerage firm. Ming and Lai are husband and wife, respectively, and they live in Toronto, Ontario. Henry is their son. He also lives in Toronto.

[7] In January 2020, Ming and Lai applied for a joint investment trading account with CIBC, with margin trading privileges ("Account"). The application was approved, and the Account was opened.

[8] On August 5, 2022, a Friday, Magic Empire Global Limited, trading as "MEGL", had its initial public offering of shares on the NASDAQ stock exchange. On Monday, August 8th, Ming and Lai bought 10,500 shares of MEGL through the Account, for a total cost of $1,887,527.28 USD.

[9] In their Statement of Defence dated December 12, 2022, Ming and Lai assert that the 10,500 shares were bought in two chunks, on the same day. According to Ming and Lai, the first purchase was for 5000 shares, with a stop loss order of $169.00 USD per share. The second purchase was for 5500 shares, with a stop loss order of $150.00 USD per share.

[10] That there were two purchases of MEGL shares, and that any stop loss orders were registered by Ming and/or Lai, are alleged facts that are disputed by CIBC.

[11] Ming and Lai take the position that a significant number of the shares purchased ought not to have been fulfilled in light of the stop loss orders that were placed by them. CIBC disputes that.

[12] On August 9, 2022, MEGL opened at $85.30 per share, down considerably from the prior day's closing price ($97.00 per share) and down significantly from the average cost per share paid by Ming and Lai ($179.76). CIBC made a margin call. It was not met by Ming and Lai.

[13] On August 10th, things got even worse for Ming and Lai as MEGL opened at just $13.16 per share. CIBC made another margin call. Again, it was not met by Ming and Lai.

[14] On August 10th, CIBC sold all of the MEGL shares in the Account - $12.252 per share for a total of $128,634.72 USD. Other assets in the Account were also sold by CIBC.

[15] On August 12th, Ming and Lai still owed $924,000.00 CAD. On the 15th of August, further assets were sold to reduce the alleged debt to $856,602.80 CAD. CIBC demanded payment by letter dated September 12th. Payment has not been made.

[16] 2304 was bought by Ming and Lai in July 2018. On September 2, 2022, according to the documentation, they transferred it to Henry for $2.00 and as a gift for love and affection.

[17] 2311 was bought by Ming and Lai in July 2018. On September 12, 2022, according to the documentation, they transferred it to Henry for $630,000.00 in "monies paid or to be paid in cash".

[18] 4465 was bought by Ming in November 2012. On September 16, 2022, according to the documentation, he transferred it to Henry for $200,000.00 in "monies paid or to be paid in cash".

The Defence and the Counterclaim

[19] Ming and Lai deny that they owe any money to CIBC.

[20] They have raised several issues in their Defence, including (i) the stop loss orders allegedly placed by them and not adhered to by CIBC, (ii) the failure of CIBC to follow their instructions when the problem was first identified by CIBC and made known to Ming, (iii) the failure of CIBC to promptly offer services to Ming in Cantonese, (iv) the sale of their other assets by CIBC without their consent, and (v) the alleged legitimate transfers of the three real properties in question to their son.

[21] They have also counterclaimed against CIBC for $1,645,717.45, plus interest and costs. The focus of the Counterclaim, defended by CIBC, is the allegation by Ming and Lai that CIBC failed to follow the stop loss orders registered by them.

What is a Stop Loss Order?

[22] There is no disagreement between the parties as to what a stop loss order is; rather, the controversy surrounds whether Ming and/or Lai placed any stop loss orders with regard to the MEGL shares.

[23] Very briefly stated, a stop loss order is designed to minimize risk to the investor. It automatically sells the stock once the share price drops to a certain level ("X"), thereby limiting financial loss in the event that the share price continues to drop even further below X.

II. The Motion

[24] CIBC moves for partial summary judgment. It seeks judgment in its favour on the debt claim. It also seeks judgment in its favour in dismissing the Counterclaim. It does not seek summary judgment on its claim regarding the alleged fraudulent conveyances.

[25] CIBC seeks a judgment against Ming and Lai (not against Henry) for $856,602.60, plus interest, plus a dismissal of the Counterclaim, plus costs.

[26] The motion for partial summary judgment is opposed by the Defendants.

[27] The motion was heard by this Court in Milton, Ontario on March 4, 2024, based on the records, the facta, and the other written materials filed. Oral submissions by counsel took about 2.5 hours, total, including reply.

III. The Law and the Positions of the Parties

[28] There is no dispute between the parties regarding any of the following:

(i) partial summary judgment is expressly authorized by Rule 20.01(1) of the *Rules of Civil Procedure*;
(ii) the burden of proof is on the moving party, CIBC, to demonstrate on the balance of probabilities that there is no genuine issue requiring a

trial on its debt claim and on the Counterclaim – Rule 20.04(2)(a); and

(iii) in making that determination, this Court may, unless it finds that it is in the interests of justice for such powers to be exercised only at a trial, weigh the evidence, evaluate credibility, and draw reasonable inferences – Rule 20.04(2.1).

[29] In *Oliver et al v. Herold et al*, 2021 ONSC 376, Harper J. stated the following at paragraphs 12 and 13, referring to the decision in *Zaky v. 2285771 Ontario Inc.*, 2020 ONSC 4380.

> [12] In *Zaky v. 2285771 Ontario Inc.*, 2020 ONSC 4380 (CanLII), Conlan, J. reviewed the principles to guide the court when considering summary judgments. I agree with his review that commences at para.13:
>
> > [13] The following principles may be gleaned from a careful review of the leading decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7.
> >
> > [14] First, it is the principle of proportionality that ought to drive the Court's decision on a request for summary judgment. There will be no genuine issue requiring a trial when the judge hearing the motion is able to reach a fair and just determination on the merits.
> >
> > [15] Second, what does that mean – a fair and just determination on the merits? It means (i) that the judge hearing the motion is able to make the necessary findings of fact, (ii) is able to apply the law to the facts, and (iii) the process employed to do those things is a proportionate, more expeditious and less expensive means to achieve a just result (as compared to a trial).
> >
> > [16] The judge must be able to have confidence in the conclusions reached on the motion, otherwise, the case ought to proceed to trial.
> >
> > [17] Third, the judge hearing the motion should follow a two-stage procedure. Initially, consider only the evidence filed without regard to the expanded powers. Then, afterwards, if there appears to be a genuine issue requiring a trial, the judge may (but does not have to) weigh the evidence, evaluate credibility and draw reasonable inferences.
> >
> > [18] Fourth, there is certainly a culture shift that was signalled by the decision of the Supreme Court of Canada referred to above. The Courts have been encouraged to, wherever possible, deal with matters expeditiously. Cases should proceed to trial only if they really have to. The summary judgment process can, where employed properly,

> increase access to affordable and timely justice. A trial should no longer be viewed as the default procedure.
>
> [13] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.

[30] The position of CIBC may be summarized as follows:

(i) our case is very similar to *All-Terrain Track Sales and Services Ltd. v. 798839 Ontario Ltd.*, 2019 ONSC 2998, affirmed at 2020 ONCA 129, where Justice O'Brien granted partial summary judgment on an option agreement claim, leaving the fraudulent conveyance claim to proceed to trial;

(ii) on a motion for partial summary judgment, the question is whether it will achieve the objectives of proportionate, timely, and affordable justice, or instead cause delay and greater expense to the parties, and the judge hearing the motion for partial summary judgment should ask counsel for the moving party to demonstrate (a) that dividing the case into parts will prove cheaper, (b) that it will prove faster in the end, and (c) that it will not result in inconsistent findings – *Malik v. Attia*, 2020 ONCA 787, at paragraphs 61-62;

(iii) that the jurisprudence post-*Malik, supra* generally supports the position of CIBC; and

(iv) that granting partial summary judgment here will be cheaper, quicker, and will not risk inconsistent findings.

[31] The position of Ming and Lai may be summarized as follows:

(i) partial summary judgment is a rare procedure – *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, at paragraph 14, citing *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, at paragraphs 29-33;

(ii) CIBC's reliance on the decision of the Court of Appeal for Ontario in *Stanley v. Lucchese*, 2024 ONCA 68, which decision upheld that of the motion judge to grant partial summary judgment on a claim involving a loan and a personal guarantee, is misplaced because the facts in that case are readily distinguishable from those in ours;

(iii) "there is a serious risk of inconsistent findings if the claims are severed in the case at bar" (paragraph 53 of the factum filed on behalf of the Defendants) because the issue of the alleged stop loss orders is relevant to both the debt claim and the claim regarding the alleged fraudulent conveyances;

(iv) the granting of partial summary judgment in our case will prejudice the ability of the Defendants to defend the alleged fraudulent conveyances claim, and further, it will be neither cheaper nor quicker for the parties;
(v) on liability, there is a genuine issue requiring a trial in our case, even on the debt claim, and that issue surrounds the alleged stop loss orders registered by Ming and/or Lai; and
(vi) there is also a genuine issue requiring a trial on the assessment of the damages of the debt claim, and that issue focusses on the alleged failure of CIBC to take actions to limit the losses in the Account.

IV. Analysis

The Motion for Partial Summary Judgment is Dismissed

[32] Despite the very able submissions of Mr. Aisenberg, counsel for CIBC, and notwithstanding this Court's own reservations about the main defence advanced by Ming and Lai (the alleged stop loss orders), I have decided that partial summary judgment is not appropriate in this case. The motion by CIBC is, therefore, dismissed.

[33] In short, CIBC has not persuaded this Court, on the balance of probabilities, that there is no genuine issue requiring a trial on the debt claim and the Counterclaim.

Why Partial Summary Judgment is Not Appropriate in this Case

[34] The Court's decision to dismiss CIBC's motion is driven by two major considerations: (i) the jurisprudential cautions against partial summary judgment, except in rare circumstances, and (ii) the availability of the same defence on the two key issues in this case – (a) whether Ming and Lai owe the alleged debt to CIBC, and (b) whether Ming and Lai and Henry were parties to fraudulent conveyances.

[35] There is, in my opinion, (i) a genuine issue requiring a trial on the debt claim and on the Counterclaim – that is, whether Ming and/or Lai placed the stop loss orders, and, further, there is (ii) a potential for inconsistent findings of fact if partial summary judgment is granted in this case.

[36] The Court of Appeal for Ontario has made it very clear that judges hearing motions for partial summary judgment must grapple with that potential for inconsistent findings of fact. *Service Mold, supra*, at paragraphs 21-22.

Partial Summary Judgment is Not a Common Procedure

Malik, supra

[37] There is no question that the availability of partial summary judgment has been restricted by the Court of Appeal for Ontario.

[38] In *Malik, supra*, at paragraph 62, the Court lays out the three inquiries, including a risk of inconsistent findings of fact. We now know that "while partial summary judgment has its place, it 'should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner'". *Service Mold, supra*, at paragraph 14, citing *Butera, supra*.

[39] Other cases at the Superior Court of Justice level have interpreted the Court of Appeal for Ontario's guidance as an even stronger caution against the granting of partial summary judgment.

[40] In one case, for example, this was described as "a bright line rule that partial summary judgment is not available when there is any risk at all of duplication of findings or inconsistent verdicts at a proposed motion and the trial". *Lakefield Properties Ltd v. The Otonabee Region Conservation Authority*, 2021 ONSC 1060, at paragraph 16, referring to *Mason v. Perras Mongenais*, 2018 ONCA 978.

The Cases Relied on by CIBC, post-Malik, supra, are Distinguishable from our Case

[41] In light of the noted reluctance to grant partial summary judgment, this Court has examined the cases that CIBC presented in support of its motion, to evaluate their applicability to this case.

[42] CIBC relies on several decisions to support its position, including five appellate cases post-*Malik, supra*.

[43] Reading through those five cases, however, each is readily distinguishable from ours:

- *Stanley, supra*: distinguishable as the corporate defendants were controlled by the appellant; the motion judge noted that it was not obvious how, in such a circumstance, there could be a risk of inconsistent positions being taken (paragraph 6);
- *Froom v. LaFontaine*, 2023 ONSC 318, affirmed at 2023 ONCA 519: distinguishable as, in that case, the key determination (whether the mortgage document was a "fraudulent instrument") involved no findings of facts (paragraph 58 of the decision at first instance);
- *NDrive, Navigation Systems S.A. v. Zhou*, 2022 ONCA 602: distinguishable in that it was found that "the potential liability of the Zhou parties could be readily bifurcated from NDrive's action against the Hakemi parties," in large part because "the litigation against the two groups of defendants is 'factually interrelated but not legally similar'" (paragraph 40);
- *Jonas v. Elliott*, 2021 ONCA 124: the Court of Appeal for Ontario upheld the decision to grant partial summary judgment in an assault case, dismissing the action against Carrie Goudy, the host of a party, and the City of Stratford which rented the facility - distinguishable as the Court found that the claims against the respondents "could readily be bifurcated from the remaining claim against Mr. Elliott in an expeditious and cost-effective manner," but that finding was influenced by the Court's determination that, "[g]iven the nature of the remaining claim for damages for assault and battery against Mr. Elliott, any risk of inconsistent findings was **immaterial**" (paragraph 12, emphasis added); and
- *Heliotrope Investment Corporation v. 1324789 Ontario Inc.*, 2021 ONCA 589: distinguishable as the appeal from an order for partial summary judgment was dismissed because there were no credibility issues, and the claims could easily be determined, and the legal issues were distinct (paragraph 54).

[44] This Court's survey of the caselaw at the Superior Court of Justice level reveals similar patterns. Overall, the decisions that granted partial summary judgment were in

cases that were readily bifurcated, involved separate legal issues, or required no findings of fact (as in *Froom*, *supra*).

[45] For instance, *Morgan v. Co-Operators General Insurance et. al.*, 2022 ONSC 7254, at paragraph 35:

> [35] I am of the view that determination of the issue of whether the Policy provides coverage for the water damage to the Property can be readily bifurcated from the other issues in the main action: see *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, at para. 18. There is no competing evidence on the issue. The positions set out by the parties only conflict as it relates to their legal interpretation of the insurance provisions. This is not an issue that needs to wait for the evidence at trial. Further, a determination of this discrete issue will serve to make the trial more efficient and will not result in inconsistent findings: see *Hryniak v. Mauldin*, 2014 SCC 7, at paras. 49 and 60.

[46] In our case, unlike the decisions relied upon by CIBC, there are clearly credibility issues, in particular regarding Ming's assertions of having placed the stop loss orders. Further, there are clearly findings of fact at issue, including whether Ming placed the stop loss orders. Additionally, not only are the facts interrelated in terms of the debt claim and the claim regarding the alleged fraudulent conveyances, but the two claims are also legally similar. The legal issues are not the same, but they are overlapping. Whether Ming and Lai are liable to CIBC on the debt claim is a legal determination that is not only the issue before this Court on the motion but will also be a legal determination that will be before the trial judge on the claim regarding the fraudulent conveyances. That is because the claim for the fraudulent conveyances depends on Ming and Lai's liability for the debt. A risk of inconsistent findings of fact, in our case, including whether Ming placed the stop loss orders, will definitely not be immaterial to the results. Finally, the debt claim cannot be said to be capable of being easily adjudged by this Court. During oral argument, I queried whether Ming would have received something from CIBC if he had, in fact, placed the stop loss orders. If so, that would have made me wonder why that was not put before the Court in the evidence, to support Ming's assertions. It may have contributed to the Court's willingness to weigh the credibility of Ming and side with CIBC on the motion. It

would appear, however, that Ming would not have received anything except for some temporary pop-up on the screen of his computer or his electronic device. Thus, for this Court to point to the lack of corroborative evidence to support Ming's assertions would be fallacious.

[47] I am of the view that this case is one where the interests of justice require that the evaluation of Ming's credibility be done at trial. There is a language comprehension issue that has been raised by the Defendants, a not spurious one, and further, the alleged warts against Ming's credibility relied upon by CIBC, such as his failure to immediately tell the CIBC representative over the telephone that he placed the stop loss orders, are not so compelling as to cause me to change my view in that regard.

Other Court Decisions that are Particularly Relevant to our Case

[48] Beyond general guidance from the Court of Appeal for Ontario as to the rarity of granting partial summary judgment, there are decisions with particular applicability to the case at bar.

[49] Specifically, I refer to *Service Mold, supra*, as it does discuss the situation, like ours, involving the same defence to two claims:

> [21] Finally, and most critically, the motion judge appears to have failed to recognize that the BBA defence was pleaded in response to both claims, not just the cheque fraud. As the BBA defence was left open on the payroll claim, the risk of a different result went without consideration by the motion judge.
>
> [22] Together, these palpable errors are overriding given their impact.

[50] Looking beyond Ontario, in *A.C. Forestry Ltd. v. Big River First Nation*, 2023 SKCA 96, the appellate Court reviewed several of the recent Court of Appeal for Ontario decisions on partial summary judgment. A cautious approach was taken, and partial summary judgment was refused. Interestingly, that case in Saskatchewan, like ours, involved two issues to be decided on a review of much of the same evidence:

> [49] The issue of the validity of the Royalty Agreement is largely intertwined with the question of its enforceability, and the two questions cannot be bifurcated. There is only one document to be analyzed, i.e., the Royalty Agreement, for which validity *and* enforceability must be tested. The two issues overlap and will be decided based on a review of some of the same evidence. With that being the case, a final decision on validity at this stage risks the possibility of inconsistent findings on key issues of fact, with the potential of creating an appearance of injustice. [Emphasis added]

[51] Then there is also the pre-*Malik, supra* case, *Canadian Imperial Bank of Commerce v.* Deloitte *& Touche*, 2016 ONCA 922, noteworthy for it being another case, like ours, where two claims arose from the same factual matrix:

> [37] The motion judge correctly states that the Lenders' claim for reckless misrepresentation and Philip's breach of contract claim do not involve establishing a duty of care. However, the Lenders' claim for reckless misrepresentation and Philip's claims arise out of the same factual matrix as the Lenders' negligence claim. As I will explain below, the facts found by the motion judge in relation to the Lenders' negligence claim will likely be at issue in the trial of the Lenders' claim for reckless misrepresentation and Philip's claims.
> [38] Therefore, there is a real risk of duplicative or inconsistent findings at trial. This error taints the motion judge's conclusion that partial summary judgment was advisable in the context of the litigation as a whole. [Emphasis added]

CIBC's Reliance on *Issue Estoppel* and *Res Judicata*

[52] Finally, and with respect, this Court does not agree with counsel for CIBC in the submission that there is no risk of inconsistent findings here because the Court's factual determination that Ming did not make the stop loss orders, if that finding of fact is made, would be binding on the trial judge, and the principles of *issue estoppel* and *res judicata* (Mr. Aisenberg referred to both in his oral reply submissions at the hearing of the motion) would apply.

[53] In my opinion, within the landscape of the jurisprudence on partial summary judgment, the high level of concern regarding the potential for inconsistent findings implies that findings of fact on a motion such as this one are not *prima facie* binding on the trial judge.

[54] See, for example, *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450:

> [37] In the complex situation in this case, it is therefore entirely possible that the trial judge who hears the trial of the issue on the validity of the promissory notes will develop a fuller appreciation of the relationships and the transactional context than the motion judge. That could force a trial decision on the promissory notes that would be implicitly inconsistent with the motion judge's finding that the third release is fully valid and effective, even though the parties would be bound by that finding. The process, in this context, risks inconsistent findings and substantive injustice.

[55] Reference should also be had to *Skunk v. Ketash*, 2016 ONCA 841:

> [35] Purported findings of fact by a motion judge who dismisses a summary judgment motion do not have binding effect in the subsequent proceeding unless the motion judge invokes her power under r. 20.05(1) to make an order specifying what material facts are not in dispute – a power that exists where summary judgment is refused or is granted only in part. As this court stated in *Ashak*, where a motion judge proposes to do so, she should specifically say so, and the order should refer to r. 20.05(1): para. 8, citing *Leone v. University of Toronto Outing Club*, 2007 ONCA 323, at para. 3.

[56] Thus, quite apart from this Court's conclusion that there is a genuine issue requiring a trial – whether Ming and/or Lai placed the stop loss orders, the risk of inconsistent findings remains live even if this Court, on the evidence filed on the motion, made a finding of fact that Ming did not place the stop loss orders, and that strengthens the reasoning to avoid partial summary judgment in this case.

V. Conclusion

[57] This Court is not persuaded by the other arguments advanced by Ming and Lai, including that partial summary judgment in this case will not prove to be cheaper or faster; I agree with CIBC that it has established both of those criteria outlined in *Malik*, *supra*.

[58] I agree with Mr. Sidlofsky, however, on the submission that to grant partial summary judgment in this case would be dangerous in that there is a legitimate risk of inconsistent findings.

[59] Counsel for the Defendants used the expression "serious risk" of inconsistent findings. Some decisions refer to "any risk". Others simply refer to "risk".

[60] This is not a lesson in semantics, but I do suggest that it would be better to think of it as a legitimate or a real risk. That is, not a fanciful one. Not a whimsical possibility that some trier of fact down the road might find something different. That could be said in every case.

[61] Our case presents a real risk of inconsistent findings of fact, specifically on the issue of whether Ming and/or Lai placed the stop loss orders, and, consequently, inconsistent results. For that reason, the motion by CIBC for partial summary judgment must be dismissed.

[62] If costs cannot be resolved between the parties, the Court will accept written submissions. The Defendants shall file theirs within thirty (30) calendar days after March 20, 2024, limited to three pages in length excluding necessary attachments. The Plaintiff shall file its within fifteen (15) calendar days after its counsel's receipt of the Defendants' submissions, with the same page limit. There shall be no reply submissions on costs.

_____

Conlan J.

Released: March 20, 2024

CITATION: CIBC Investor Services Inc. v. Chan, 2024 ONSC 1628
COURT FILE NO.: CV-22-2046-0000
DATE: 2024 03 20

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:
CIBC INVESTOR SERVICES INC. carrying on business as CIBC INVESTOR'S EDGE

Plaintiff

– and –

MING FAI CHAN, LAI YANG CHANG and HENRY HO CHAN

Defendants

REASONS FOR DECISION

Conlan J.

Released: March 20, 2024