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Docket: CI 19-01-21068
(Winnipeg Centre)
Indexed as: Kozak et al. v. Core Life Inc. et al.
Cited as: 2024 MBKB 122

2024 MBKB 122 (CanLII)

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

JAMES DENNIS KOZAK, HEIDI KOZAK, CRAIG BABCOCK, CARLA BABCOCK, and 4019947 MANITOBA LTD.,	)	Wayne M. Onchulenko Leiba R. Feldman for the plaintiffs
plaintiffs,	)	
- and -	)	
CORE LIFE INC. and ITALO FERRARI,	)	R. Ivan Holloway Evan F.P. Podaima for the defendants
defendants.	)	

A N D B E T W E E N:

ITALO FERRARI,	)	R. Ivan Holloway Evan F.P. Podaima
plaintiff by counterclaim,	)	for the plaintiff by counterclaim
- and -	)	
JAMES DENNIS KOZAK, ROBIN BERGMAN, AS EXECUTRIX OF THE ESTATE OF JOSEPH BERGMAN and ALLAN TAUBE,	)	Wayne M. Onchulenko Leiba R. Feldman for James Dennis Kozak
defendants by counterclaim.	)	Lynda K. Troup for the remaining defendants by counterclaim
	)	Judgment Delivered: August 09, 2024

GRAMMOND J.

INTRODUCTION

[1] These reasons for decision relate to three summary judgment motions:

a) the plaintiffs' motion to grant the claim and dismiss the counterclaim;

b) the defendants' motion to dismiss the claim and grant the counterclaim; and

c) the motion of the defendants by counterclaim Robin Bergman, as executrix of the estate of Joseph Bergman ("Mr. Bergman") and Allan Taube ("Mr. Taube"), to dismiss the counterclaim, or alternatively, to order that the defendants post security for costs in the amount of $75,000.00.

[2] I granted permission to the parties to file the motions on each of the following dates: January 25, 2023 (the plaintiffs), June 16, 2023 (Messrs. Bergman and Taube), and June 27, 2023 (the defendants).

BACKGROUND

[3] The parties began discussions in August 2016 regarding the plaintiffs' purchase of an equity interest in a long term care and assisted living project to be undertaken by the defendants in the Province of Ontario.

[4] On or about October 14, 2016, the defendant Core Life Inc. ("Core Life") issued an offering memorandum to prospective investors, wherein it sought to raise between $1 million and $4 million for the construction of a retirement residence.

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[5] On or about October 25, 2016, the plaintiffs[1] entered into a series of subscription agreements to purchase a total of 450,000 special shares in Core Life for the collective sum of $450,000.00 ($1.00 per share). The offering memorandum provided that the shares were retractable and redeemable on March 30, 2017, at the price of $1.10 per share, after which each investor would be paid interest on their original subscription amount, of 2% per month for six months starting on April 30, 2017.

[6] At all material times, the defendant Italo Ferrari ("Mr. Ferrari") was the sole officer and director of Core Life. On October 25, 2016, he executed a document entitled "Personal Indemnity" in favour of the plaintiffs (the "Indemnity").

[7] The plaintiffs allege that, in breach of the subscription agreements, Core Life failed to redeem the shares as agreed, or at all. The plaintiffs claim, therefore, the amount of $495,000.00, plus interest for six months in the amount of $54,000.00, plus pre-judgment interest of $43,920.00 to April 14, 2023. At the hearing of the motions, the defendants agreed with these calculations, and the plaintiffs' counsel agreed to update the interest calculation as needed.

[8] After the plaintiffs filed the claim in this matter, the defendants filed a motion for a finding that this court lacked jurisdiction to hear the dispute. That motion was adjudicated by Harris J. of this court on October 23, 2020[2] (the "Decision"). The plaintiffs argued that in making the Decision, Harris J. determined that the Indemnity is

[1] The plaintiff Carla Babcock did not enter into a subscription agreement. As such, she does not appear to have a cause of action against the defendants. All subsequent references to "the plaintiffs" in these reasons exclude the plaintiff Carla Babcock.

[2] The reasons for decision of Harris J. are found at 2020 MBQB 149.

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valid, such that the doctrine of issue estoppel applies to these motions, and their summary judgment motion should be granted on that basis alone.

[9] Alternatively, if issue estoppel does not apply, the plaintiffs argued that the Indemnity is valid, and that there is no genuine issue requiring a trial with respect to that question.

[10] The defendants denied that the Indemnity is valid on the bases that:

a) the Indemnity cannot be reconciled with the offering memorandum and subscription agreements pursuant to securities law principles, and it is therefore void and unenforceable; and

b) the defendants by counterclaim conspired against Mr. Ferrari with respect to the execution of the Indemnity through the torts of deceit, fraudulent misrepresentation, and negligent misrepresentation, such that he relies upon the doctrine of *non est factum* with respect to the Indemnity[3].

[11] More specifically, Mr. Ferrari argued that the defendants by counterclaim shared a common intention to harm him, given their collective commercial experience relative to his lack of experience in transactions of this nature.

THE LAW

[12] Rule 20 of the Court of King's Bench Rules, M.R. 553/88, provides as follows:

> **Summary judgment motion**
>
> 20.01(1) A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.
>
> …

[3] Although the defendants pleaded that there was a lack of consideration for the Indemnity, they withdrew that argument at the hearing of the motions.

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Responding evidence

20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

Granting summary judgment

20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

Powers of judge

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

(a) weighing the evidence;

(b) evaluating the credibility of a deponent;

(c) drawing any reasonable inference from the evidence;

unless it is in the interests of justice for these powers to be exercised only at trial.

[13] The leading case on summary judgment is ***Hryniak v. Mauldin***, 2014 SCC 7, where the court stated:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[14] In ***Dakota Ojibway Child and Family Services et al v. MBH***, 2019 MBCA 91, the court stated:

> [108] At the hearing of [a summary judgment] motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or

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> cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.
>
> [109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition" (*Weir-Jones* at para 32; and *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.
>
> [110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).
>
> [111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

ANALYSIS

[15] The evidence is clear that pursuant to the offering memorandum, the plaintiffs entered into a series of subscription agreements with Core Life and that those agreements were breached when their shares were not redeemed or retracted on March 31, 2017. As such, the plaintiffs have met their evidential burden of establishing that there is no genuine issue requiring a trial relative to their claim for breach of contract against Core Life. I must consider, then, whether the defendants have met their evidential burden of establishing that the record, the facts, or the law preclude a fair disposition on summary judgment.

[16] Although Core Life did not consent to the granting of summary judgment against it, the defendants did not dispute the liability of Core Life in any material way. As such,

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the defendants have not met their evidential burden and have not established that there is an issue requiring a trial relative to the claim against Core Life. The real dispute on these motions relates to whether summary judgment should be granted for or against Mr. Ferrari, and the defendants by counterclaim.

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ISSUE ESTOPPEL

[17] I will consider first whether issue estoppel applies in this case.

[18] In ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44, the court stated:

> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, 1924 CanLII 401 (ON CA), [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle, supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell, supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority of *Angle, supra*, at p. 255, subscribed to the more stringent definition for purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

> [25] The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[19] In this case, the third step of the test was conceded by the defendants.

[20] I will consider first, then, whether Harris J. decided the same question in the Decision.

[21] In ***Danyluk***, the court stated:

> [54] …Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

[22] In ***Smith v Dawgs Canada Distribution Ltd***, 2013 SKCA 69 (Westlaw), the court stated:

> [12] The first precondition for the application of issue estoppel is the requirement that the issue in the respondent's first application be the same as in the second. In his seminal treatise, *The Doctrine of Res Judicata in Canada*, 3rd ed. (Toronto, Ont: Lexis Nexis, 2010), Dr. Donald J. Lange succinctly states (at p. 304): "Issue estoppel applies to foil an attempt to relitigate the same question in another motion in the same proceeding." In negative terms, if the issue or question currently before the court is different or distinguishable from that which was previously before the court, the doctrine of issue estoppel does not apply. With respect to interlocutory or interim matters, Dr. Lange maintains (at p. 308):
>
> > Issue estoppel applies to interlocutory decisions which finally determine an issue in the absence of an appeal, material change in circumstances, or new evidence which has been previously suppressed or unavailable *but*

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> *the issue in the second motion must be the precise issue adjudicated upon in the first motion*".
>
> [Emphasis added.]

[23] The plaintiffs argued that to determine the necessary jurisdictional issues, Harris J. found that the Indemnity was valid, and that this issue was brought to his attention.

[24] The Decision reflects that:

a) "…there are two contracts at the heart of the dispute. In my opinion, each agreement is integral to the other. It is clear from the Affidavit of [the plaintiff James Kozak] sworn October 9, 2019 that the $450,000 would not have been released to Core Life if Ferrari did not execute the amended Indemnity. Manitoba clearly has jurisdiction with respect to the Indemnity….”; (at para. 21), and

b) this "is a reasonably straightforward case based on a breach of promises to pay.” (at para. 27). Harris J. made this statement in the context of considering whether this claim was related to other, ongoing litigation in Ontario, and he concluded that there was nothing specialized about the litigation that should give rise to concerns about conflicting judgments in different jurisdictions.

[25] Having said that, the Decision contains neither an examination of the circumstances in which the Indemnity was signed nor an analysis of its validity. This approach stands to reason because the nature of the motion was a jurisdictional dispute regarding whether the claim should proceed in Manitoba or Ontario.

[26] In the defendants' brief filed relative to the jurisdictional motion they stated that the substantive validity of the Indemnity would be an issue for trial. They also submitted that the Indemnity was unenforceable due a lack of consideration, but

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Harris J. made no reference to this argument in the Decision, and no other submissions regarding the validity of the Indemnity appear to have been made before him, including relative to ***The Securities Act***, C.C.S.M. c. S50, (the "***Act***") or the doctrine of *non est factum*.

[27] In other words, the validity of the Indemnity was not fundamental to the Decision, and was neither "distinctly put in issue" nor "directly determined" by Harris J. Moreover, Harris J.'s finding that the subscription agreements and Indemnity were integral to one another does not equate to a finding that the Indemnity is valid. In the context of the jurisdictional motion before him, this approach makes sense, because an analysis of the validity of the Indemnity was not relevant to the issues to be decided, and would be more properly considered in the future, in connection with the merits of the claim and counterclaim.

[28] Since the same question was not already decided by Harris J., there is no issue requiring a trial relative to the first step of the test for issue estoppel. For the purposes of the cross-motions before me, the defendants have met the burden of establishing that there is no issue requiring a trial with respect to issue estoppel, because it does not apply in this case. The plaintiffs have not met their evidential, responding burden of establishing that the record, the facts, or the law preclude a fair disposition of the application of issue estoppel in this case on that basis.

[29] I need not consider, therefore, the application of the second step of the test for issue estoppel, but I will do so briefly.

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[30] As referenced at paragraph 22 above, issue estoppel applies to interlocutory decisions which determine an issue on a final basis, in the absence of an appeal, a material change in circumstances, or new evidence. In this case, the Decision was determinative of the jurisdiction in which this matter would be heard on a final basis. I am satisfied, therefore, that the Decision was final for the purposes of issue estoppel and that the second requirement of the test has been met.

[31] Since, however, the first requirement of the test has not been met, I am satisfied that there is no issue requiring a trial on the question of whether issue estoppel applies in this case.

IS THE INDEMNITY VALID?

[32] The plaintiffs argued that Mr. Ferrari provided the Indemnity as an inducement for them to invest in Core Life and that Mr. Ferrari's arguments against the validity of the Indemnity are inconsistent with the documents in evidence. They also submitted that it would be unfair if the Indemnity was invalid, because Mr. Ferrari is the sole owner of Core Life, the issuer of the shares, and as such, Mr. Ferrari received the benefit of the plaintiffs' investment.

[33] The defendants raised two arguments with respect to the validity of the Indemnity.

The Securities Act

[34] The first argument raised by the defendants is that the Indemnity is void because it cannot be reconciled with the offering memorandum and subscription agreement under securities law principles. In other words, the offering memorandum is

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a regulated contract in a prescribed form to which significant public policy issues apply. The offering memorandum contains multiple warnings about the potential consequences of purchasing shares, it provides that no other information can be given to investors, and it provides that all of its terms and conditions are contained within it.

[35] The defendants argued, therefore, that the Indemnity cannot be a "further inducement" to buy shares as referenced in its recitals. To be valid, the Indemnity would have to be shared with all investors pursuant to securities law. In other words, there must be fairness among all investors, and there are public policy implications where only some investors are protected by certain terms. The Indemnity was, therefore, a collateral agreement, and a breach of the offering memorandum.

[36] The defendants also argued, in their motion brief, that pursuant to the ***Act*** the Indemnity was unlawful, because none of Mr. Taube, Mr. Bergman or the plaintiff James Dennis Kozak ("Mr. Kozak") were registered to sell securities, and they acted illegally by raising share capital without a license. At the hearing of these motions, the defendants' counsel advised that this argument was not being pursued.

[37] The plaintiffs submitted that these securities law issues were not pleaded by the defendants, and that no further amendments to the re-amended statement of defence and counterclaim have been requested. In addition, they noted that the defendants did not raise these issues in their pre-trial conference brief, their summary judgment motion, or Mr. Ferrari's affidavits, such that there is no evidence before the court to support their position. The plaintiffs submitted that in these circumstances the court should not entertain the arguments, and to do otherwise would prejudice their position.

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[38] The plaintiffs also argued that the purpose of the ***Act*** is to protect investors, not a seller such as Mr. Ferrari who received the funds invested and now seeks to shirk his obligations. They also submitted that the Indemnity does not contravene the legislation, and that the cases upon which the defendants rely are distinguishable.

[39] I will consider first the plaintiffs' argument that these issues have not been pleaded and that I should not consider them. The law is clear that pleadings in an action must reflect the material facts upon which a party relies (Rule 25.06(1)). This rule exists for a variety of reasons, including the need to direct the attention of counsel and the court to the real issues in dispute between the parties.

[40] The defendants submitted that the subscription agreements and offering memorandum contain the necessary evidence on these points. In addition, the re-amended statement of defence and counterclaim reflects, in the alternative, that:

> 8.d. …if the Indemnity created greater obligations on the part of Ferrari than [sic] the obligations of Core Life under the Subscription Agreements, which is denied, then the Indemnity is void for public policy reasons;

[41] I note, however, that neither the re-amended statement of defence nor the counterclaim contain any reference to either the ***Act***, or to any specific section upon which the defendants rely, which is required pursuant to Rule 25.06(4).

[42] In my view, a plain reading of the re-amended statement of defence and counterclaim would <u>not</u> disclose to the reader that the defendants sought to rely on the above-referenced arguments raised relative to the ***Act***. As such, those issues are not properly before the court on these motions and should not be considered, particularly in the absence of a request to amend the defendants' pleading.

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[43] Having said that, I will add that although the offering memorandum contains multiple references to securities legislation, and to the risks of the investment, there is no provision within it that prohibited the granting of additional security by Mr. Ferrari to any investor. Although the defendants pointed to several provisions of the offering memorandum in support of their position, the only provision that bears mentioning is article 7(9) of the terms and conditions which provides as follows:

> 9. Irrevocable Offer. Subject to Section 2 hereof, the Investor's offer to subscribe for the Special Shares as herein set out is unconditional, irrevocable and non-transferable and has not been induced by any warranties or representations with regard to the present or future value of Special Shares, that any person will resell or repurchase the Special Shares, or that any person will refund the purchase price for the Special Shares. Notwithstanding the foregoing, however, the Special Shares are subject to the redemption and retraction provisions as set forth in Item 5.3 of the Offering Memorandum.

[44] I am not satisfied that there is an issue requiring a trial relative to whether the language of this provision precluded the Indemnity. It contains no reference to additional security, including guarantees or indemnities, and as such on a plain reading this provision did not prohibit Mr. Ferrari from giving the Indemnity. Moreover, I have not been provided with any authorities that additional security such as the Indemnity was prohibited pursuant to either the offering memorandum, the ***Act***, or securities law generally.

[45] For these reasons, I reject the defendants' argument that whether the Indemnity is invalid pursuant to securities law principles is an issue requiring a trial. Accordingly, summary judgment invalidating the Indemnity on that basis is denied.

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Non Est Factum

[46] The defendants' second argument is that the Indemnity is invalid pursuant to the doctrine of *non est factum*. In ***Langdon v. Langdon***, 2015 MBQB 153, the court stated that there are three elements to this doctrine:

a) the burden of proving *non est factum* rests upon the party seeking to disown their signature, and where the person is of full capacity, it is a heavy onus;

b) the party who seeks to invoke this remedy must show that the document they signed is radically or fundamentally different from what they believed they were signing; and

c) the person must not have been careless in taking reasonable measures to inform themselves regarding the contents and effect of the document when they signed it.

[47] For the following reasons, I have found that Mr. Ferrari's evidence relative to the execution of the Indemnity is not credible, and that the defendants have not satisfied me that there is a genuine issue requiring a trial with respect to any of these requirements in this case.

[48] I will comment first upon Mr. Ferrari's evidence. Mr. Ferrari deposed that he had no experience with syndicated mortgages involving multiple lenders, or the issuance of shares to the public. He stated that his business experience was derived from developing commercial real estate projects by obtaining financing from standard lending sources, and that he was completely unfamiliar with raising capital and issuing shares.

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Conversely, he stated that Messrs. Kozak, Bergman, and Taube, who all knew each other before this transaction, were familiar with that process.

[49] Mr. Ferrari submitted that Messrs. Bergman and Taube convinced him to enter into the transaction with the plaintiffs, and that Mr. Bergman, a non-practising lawyer and Core Life's manager of business development, acted as his legal advisor. Mr. Ferrari stated that he relied upon Messrs. Bergman and Taube to advise him, and he did not read or understand the vast majority of the hundreds of documents that they presented to him for signature.

[50] Mr. Ferrari deposed that although Mr. Taube advised him in early October 2016 that Mr. Kozak had requested a personal indemnity, he did not understand the legal effect of the indemnity. He assumed it related to leveraging some of his corporate assets that were already part of the equity raising strategy being implemented by Messrs. Bergman and Taube.

[51] The following particulars reflect that, at best, Mr. Ferrari acted carelessly with respect to the execution of the Indemnity, as well as the various other versions of a similar document that preceded it. The first version of a guarantee or indemnity that he signed was entitled "Personal Guarantee" and was prepared by Core Life's counsel. Mr. Ferrari signed it on October 12, 2016, and his signature was witnessed by Mr. Bergman. Mr. Ferrari then sent that document to Messrs. Bergman and Taube, among others, with a covering note stating "here is the signed personal guarantee as requested". Mr. Ferrari deposed that Mr. Bergman did not provide any explanation to

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him regarding the legal effect of the document, beyond telling him that he had to sign it to complete the transaction with the plaintiffs.

[52] On October 15, 2016, a lawyer that Mr. Ferrari admitted to using "from time to time" sent to Messrs. Bergman and Ferrari a form of personal indemnity, and asked them in the covering email "Is tis [sic] what you had in mind?" On cross-examination, Mr. Ferrari stated that he did not remember whether he had asked the lawyer to prepare this document. This form of indemnity was similar, but not identical to, the Indemnity.

[53] On October 17, 2016, Mr. Ferrari signed an indemnity, which was very similar in content to that which the lawyer had sent to him on October 15, 2016. Mr. Ferrari deposed, however, that Mr. Bergman prepared this document and presented it to him for signature. Mr. Taube then emailed the signed indemnity to Messrs. Kozak and Ferrari, among others. In a separate email message sent on the same date, Mr. Taube sent Mr. Ferrari's signed net worth statement to the plaintiffs' solicitor, Mr. Kozak, and Mr. Ferrari.

[54] The plaintiffs then requested some changes to the form of indemnity, and on October 20, 2016, Mr. Taube sent to Messrs. Kozak and Ferrari, and others, a third version of the indemnity signed by Mr. Ferrari, together with his signed personal net worth statement.

[55] On October 24, 2016, the plaintiffs' solicitor sought additional changes to the form of indemnity, and on October 25, 2016, Mr. Ferrari signed the fourth and final version of the indemnity (the Indemnity). He then emailed the signed Indemnity to

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Messrs. Bergman and Taube, and others, with the subject line "Italo's personal Inemnity/Kozak" [sic], and sent the original Indemnity to the plaintiffs' counsel by courier.

[56] Mr. Ferrari deposed that he did not read the Indemnity, and relied upon advice from Messrs. Bergman and Taube that there had been no substantive changes from the earlier versions of the document. Mr. Ferrari deposed that Mr. Bergman did not advise him to obtain independent legal advice with respect to the Indemnity.

[57] Unfortunately, Mr. Bergman passed away on July 12, 2022, and his evidence is not before the court. There is evidence, and I accept, that Mr. Bergman was involved in the Core Life project and advised Mr. Ferrari on the project generally, but there is no evidence that he gave any advice with respect to the Indemnity, or if he did so, what advice he gave.

[58] Mr. Taube deposed that he had no involvement in preparing the Indemnity, that Mr. Ferrari did not ask him any questions about it, and that he did not make any representations to Mr. Ferrari about the contents of the Indemnity. I accept his evidence on these points, because it is consistent with the documentary evidence before me, and because Mr. Taube withstood vigorous cross-examination regarding his role in this transaction. Moreover, I note that if Mr. Ferrari had sought or received advice from Mr. Taube it would not have constituted independent legal advice, because Mr. Taube is an accountant, not a lawyer.

[59] The evidence is clear that Mr. Ferrari is an experienced, sophisticated businessperson and has been involved in more than 50 business transactions over a

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period of many years. At all material times, he was the sole owner and director of multiple corporations, as described in the offering memorandum, including Wilsondale Assets Management Inc. ("Wilsondale"), a full service provider that helps investors with real estate investments.

[60] Although there is no evidence that Mr. Ferrari sought or was given any advice about the Indemnity from a lawyer, or from anyone else, it is clear that he had many opportunities to seek advice, with respect to each version of the indemnity, and that he chose not to do so.

[61] Mr. Ferrari deposed that he was not told about changes to the form of Indemnity, yet he also deposed that the changes were made "at the behest of the plaintiffs, through their counsel". It is unclear when or how he acquired this knowledge, because he also deposed that he does not believe he read any emails relating to Core Life from August to November 2016. Instead, he relied upon Messrs. Bergman and Taube to do so.

[62] The evidence is clear that Mr. Ferrari reads and writes in English, and he admitted that if he had read the Indemnity, he would not have signed it. I am satisfied, therefore, that he had the ability to understand its basic meaning. Moreover, each version of the Indemnity reflected the nature of the document by their titles alone. The first version was entitled "Personal Guarantee", and the subsequent versions including the Indemnity were entitled "Personal Indemnity". It is difficult to envision that any person literate in English would not see these words written plainly on the documents.

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[63] I acknowledge that Mr. Ferrari deposed that he did not know the difference between a guarantee and an indemnity, though he had previously executed personal guarantees in transactions involving the mortgages of real property. Nevertheless, if Mr. Ferrari chose not to read the various versions of the Indemnity and chose not to make any inquiries regarding the contents thereof, he took a risk from which he cannot benefit now, to the plaintiffs' detriment.

[64] I am not satisfied that there is a genuine issue for trial regarding Mr. Ferrari's reliance upon the doctrine of *non est factum*, because he has not shown that the Indemnity or any of the previous versions thereof were radically or fundamentally different from what he believed he was signing. In addition, there is no genuine issue regarding the third component of the test, because at best Mr. Ferrari very clearly was careless, and by his own admission did not take reasonable measures to inform himself regarding the contents and effect of the Indemnity, or the previous versions thereof, when he signed them.

[65] Having weighed the evidence and determined that Mr. Ferrari's version of the facts is not credible, I have concluded that the defendants have not met their burden of establishing that there is an issue requiring a trial regarding whether the Indemnity was executed validly. Conversely, the plaintiffs have established that there is no issue requiring a trial regarding whether the Indemnity is valid.

THE COUNTERCLAIM

[66] Mr. Ferrari alleges that the defendants by counterclaim conspired to cause him harm by signing the Indemnity, the terms of which were harmful to his interests, and

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that they misled him, deceived him, and misrepresented to him the contents of the Indemnity.

[67] The law is clear that the tort of conspiracy includes two categories:

a) The defendants agree to act, by lawful or unlawful means, with the predominant purpose of injuring the plaintiff, or

b) The defendants agree to commit unlawful acts directed at the plaintiff which they knew or should have known would injure the plaintiff.

(***Driskell v. Dangerfield et al***, 2007 MBQB 142, at para. 33, referencing Fridman)

[68] Certainly, direct evidence of the existence of a conspiracy can be difficult to obtain. In ***The Attorney General of Canada v. Cochrane et al***, 2008 MBQB 207, at para. 15, citing ***Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.***, 2002 MBQB 230, the court noted that an agreement to conspire may be proved by direct evidence or may be inferred from facts that cannot fairly admit of any other inference being drawn, on a "preponderance of probability".

[69] Mr. Ferrari argued that Mr. Kozak had lost money on a previous investment involving Mr. Taube, as a result of which the plaintiffs in the main action insisted on the Indemnity, such that if the investment failed, he would bear their loss personally. Mr. Ferrari argued that the defendants by counterclaim sought to put the Indemnity before him, have him "quickly" sign it, and move on to other things. In other words, he alleges that he was tricked into giving up the protection of Core Life's corporate veil. Mr. Ferrari also argued that Messrs. Bergman and Taube knew the implications of the

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Indemnity, and that although he relied upon them, they neglected to explain the implications or frailties of the document to him. They misled him, and advised him to proceed without discussing the risks of the Indemnity with him.

[70] In addition, (and despite the fact that he did not argue a lack of consideration), Mr. Ferrari argued that as a businessperson he would not have given the Indemnity without receiving something of value in return. As such, the preponderance of probability is that Messrs. Bergman and Taube were responsible for the transaction, for which they received a benefit through the payment of a commission.

[71] I appreciate that there was a contract in place as between Wilsondale, Mr. Taube, and his wife, that included the payment of a referral fee to Mr. Taube and his wife if they raised a certain amount for the first phase of the project. The same agreement also included the payment of a referral fee to Mr. Kozak for investments made by him or his clients. I accept that Mr. Bergman also received a commission, although the applicable agreement is not in evidence before me.

[72] Mr. Taube testified on cross-examination that his task was to put people together, and he did so in this case. He denied any conspiracy, and most of his denials were not challenged on cross-examination.

[73] Mr. Ferrari also argued that the credibility of Mr. Taube must be assessed at trial, which is unusual in the context of a summary judgment motion. Having said that, I do not agree with this submission. In my view, Mr. Taube's evidence on cross-examination was given in a straightforward, albeit blunt manner.

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[74] As set out above, I concluded in the context of my analysis on the issue of *non est factum*, that Mr. Ferrari assumed a risk by signing the Indemnity and the previous versions thereof without reading them, apparently.

[75] In the context of the counterclaim, I have also concluded that there is no evidence of a conspiracy before me, or of any intent or attempt to harm Mr. Ferrari. Mr. Ferrari did not depose that anyone told him that the Indemnity had a meaning which was incorrect or untrue, or that any representations were made to him with respect to its meaning.

[76] The evidence reflects that the plaintiffs wanted protection for their investment, which is different than anyone having an intention to injure Mr. Ferrari. Moreover, according to Mr. Taube, the plaintiffs were the only investors who requested an indemnity.

[77] If Messrs. Bergman and Taube did not explain the Indemnity to Mr. Ferrari (and I have no evidence that they were obligated to do so), it does not follow that they made an untrue, deceitful, or fraudulent statement to him.

[78] On the basis of the foregoing, Mr. Ferrari has failed to establish that there is a genuine issue requiring a trial relative to the counterclaim in conspiracy, deceit, fraudulent misrepresentation, or negligent misrepresentation. Accordingly, the defendants' motion for summary judgment is denied. Conversely, the plaintiffs, Mr. Bergman, and Mr. Taube have met their respective burdens that the counterclaim should be dismissed, and their respective motions are granted.

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CONCLUSION

[79] I accept that there is no issue requiring a trial relative to whether the parties made a bargain by which they should be bound. Mr. Ferrari signed the Indemnity, and other versions before it, because the plaintiffs required that he do so before they would invest in Core Life. Mr. Ferrari received the benefit of the plaintiffs' investment, and he has not raised any issue requiring a trial relative to whether he should be bound by that agreement.

[80] The plaintiffs' summary judgment motion is granted. The plaintiffs' counsel are directed to include an updated interest calculation in the order that will flow from this decision.

[81] The defendants' summary judgment motion is denied.

[82] The summary judgment motion of Mr. Bergman and Mr. Taube is granted. There is no need for me to consider, therefore, their motion for security for costs.

[83] If costs cannot be agreed upon, counsel may request an appearance to make submissions.

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J.

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