CITATION: Chand Morningside Plaza Inc. v. Healthy Lifestyle Medical Group Inc., 2024 ONSC 7285
COURT FILE NO.: CV-11-439398
DATE: 20241230

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: CHAND MORNINGSIDE PLAZA INC., and JOSHI GROUP OF COMPANIES LTD. Plaintiffs – and – HEALTHY LIFESTYLE MEDICAL GROUP INC., ROCHAK BADHWAR, GORE DOCTORS MEDICAL INC., ASHOK BADHWAR, USHA BADHWAR, AASH KARIA, BINDAAS CAPITAL INC. and MARVIN TALSKY Defendants	*Jonathan Rosenstein*, for the plaintiffs *Rhea Sharma* (non-lawyer), for Ashok Badhwar and Usha Badhwar **HEARD: April 9, 11, June 10-12, 2024.**

KOEHNEN J.

REASONS FOR JUDGMENT

I. OVERVIEW

[1] The plaintiffs claim $1,373,000[1] as of May 8, 2024 against the defendants Ashok and Usha Badhwar. Ashok and Usha are the father and mother of the defendant

[1] This reflects the claim of $1,267,798.50 as shown on trial exhibit number 5 up to May 8, 2023. I have extended that claim to May 8, 2024 using a compound interest calculator at 8% compounded monthly as the plaintiff's claim.

Rochak Badhwar. Rochak has since made an assignment in bankruptcy so is no longer an active defendant. The action has settled against the remaining defendants.

[2] The action arises out of a guarantee, promissory note and mortgage that Ashok[2] and Usha signed in favour of the plaintiffs to guarantee Rochak's debt of $607,607.71 to the plaintiffs. The difference between the amount of the original debt and the amount claimed reflects expenses and interest at 8% compounded monthly since 2011. In addition to the money judgment, the plaintiffs seek a writ of possession against the home of the Ashok and Usha to enforce the mortgage they signed in favour of the plaintiffs.

[3] Ashok and Usha assert *non est factum* in the signing of the guarantee, promissory note and mortgage and a failure to demand payment on the guarantee as defences. Usha also pleads undue influence as a defence. The plaintiffs argue they ensured that the parents received independent legal advice as a result of which the defences of *non est factum* and undue influence cannot prevail. The plaintiffs submit that they were not required to make a demand on the guarantee because Ashok and Usha assumed liability as principal debtors.

[4] For the reasons set out below, I dismiss the action, order that the mortgage be removed from title to Ashok's and Usha's home and set aside the guarantee,

[2] Given the common surnames, I will refer to each of Ashok, Usha and Rochak by their first names, I mean no disrespect in doing so.

promissory note and mortgage. On my view of the facts, the plaintiffs knew or ought to have known that there was a substantial risk of the parents not understanding what they were signing and, at least in Usha's case, was signing documents under undue influence. The certificate of independent legal advice is of no avail to the plaintiffs because it is, on its face, marred by fatal flaws that ought to have been evident to the plaintiffs. In those circumstances, the plaintiffs did not take the steps that the law requires to prevent them from being subject to the equitable defences that Ashok and Usha have raised. I also dismiss the action for the plaintiffs' failure to make a demand on the guarantee before commencing this action. The guarantee is at best ambiguous about whether it is a demand guarantee or it establishes liability as principal debtors. In those circumstances, the guarantee should be construed against the plaintiffs who drafted it.

II. Background Facts

[5] Ashok and Usha are immigrants from India. After immigrating to Canada they worked in modest jobs as a labourer and factory worker. Ashok's English is very limited. For all practical purposes, Usha does not speak, read or write English. Both testified at trial through a translator.

[6] On the first day of trial Ashok and Usha appeared on their own. I was unable to communicate with them in English. I subsequently allowed them to be represented by their daughter-in-law Rhea Sharma. Ms. Sharma was raised and educated in Canada. Although she is not a lawyer, I allowed Ms. Sharma to act for her parents-in-law because there was simply no other way of proceeding in an orderly way.

[7] The action arises out of Rochak's purchase of five commercial condominium units from the plaintiff Chand Morningside Plaza Inc. Rochak did not have enough financing to complete the purchase. He required additional financing in the amount of $607,607.71. That ultimately took the form of a vendor takeback mortgage from the plaintiff Joshi Group.

[8] Rochak says he needed the additional financing because Chand had demanded a higher purchase price than what was initially agreed to. The closing documents do not make that out. Although there were some minor adjustments to the purchase price on individual units based on the final square footage, the increase in the purchase price of all five units combined was approximately $3,000. Rochak also asserts that the adjustments to the purchase price were greater than he anticipated and that this resulted in a need for additional financing. Rochak did not satisfy me on a balance of probabilities that this was the case. His evidence in this regard was more of a bald assertion than the sort of detailed analysis of the statements of adjustment that his assertion would require.

[9] Finally, Rochak asserts that he could have obtained additional financing from Royal Bank of Canada which was providing a first mortgage but that he was unable to do so because Chand insisted on closing in short order. Rochak never explained why he did not obtain additional financing from Royal Bank of Canada after closing to eliminate the vendor takeback mortgage if, as he claims, such financing was available.

[10] The plaintiffs' witness at trial was their shareholder and director, Parminder Joshi. Joshi explained that the closing on the Plaza units was set for July 2010 but that Rochak asked for extensions and eventually asked for a vendor takeback mortgage. Joshi asked for additional security. When Rochak had none, Joshi asked for a guarantee from Rochak's parents and a mortgage on their house. On the first day of trial, Joshi testified that he met Ashok at Rochak's Brampton office and asked for a guarantee and mortgage to which Ashok agreed because he wanted to help his son. Rochak was present at the meeting. Joshi gave this evidence after Ashok and Usha had left the court room.[3] Neither Rochak nor Ashok were ever asked about that meeting. Joshi admits he never had any meeting with Usha. That meeting is said to have occurred on approximately September 28 or 29, 2010. Joshi has not produced any notes or confirming emails of that meeting. The purchase closed on October 7, 2010. The vendor takeback mortgages came to a total of $607,607.71.

[11] Joshi had known Ashok and Usha for approximately 50 years. Both came from the same village in India. After both came to Canada they attended the same temple. They knew each other's families and met each other regularly at family activities. It is clear that Joshi on the one hand, and Ashok and Usha on the other hand, have very different skill sets. Joshi is a sophisticated, well spoken, business

[3] Ashok and Usha left the court room after the plaintiff's opening argument. They clearly did not follow what was going on. Ashok said he was having chest pains. I nevertheless continued the trial because there had been many adjournments of the trial and the trial had been ordered to be peremptory as set out in my endorsements of April 5 and April 11, 2024. When I received information that Ashok was under medical care I adjourned the trial to June 10, 2024. On June 10, 2024 Mr. Sharma appeared on behalf of Ashok and Usha.

person. Although it was unclear whether English was a language a language Joshi learned as a child, his facility in English is equal to that of a well educated native speaker. As noted, Ashok and Usha were factory workers with limited or nonexistent English.

[12] Rochak was clearly raised and educated in Canada. He is articulate and appears to have an outgoing, entrepreneurial, salesman type personality.

[13] I highlight the long-standing relationships between individuals at issue, their skill sets and their level of English because it demonstrates what Joshi knew or ought to have known about the ability of Ashok and Usha to understand the implications of what they were being asked to do and their ability to resist the requests made of them.

[14] This is particularly significant because Rochak testified that he told Ashok he needed him to sign a guarantee. Rochak did not tell Ashok about the mortgage or the promissory note.

[15] Ashok understood he was signing a guarantee. He understood the guarantee would allow Joshi to pursue him if Rochak defaulted but understood that any such claim would be without recourse to their real property.[4] Ashok never knew he was signing a mortgage and a promissory note.

[4] See paragraph 7 of the first Fresh as amended statement of defence. Ashok repeated that understanding at trial.

[16] While Ashok is clearly wrong in his understanding, I accept his evidence that he did not believe his house was exposed. Ashok struck me as honest in his evidence. He admitted for example, that he knew he was giving a guarantee and that he told Usha that she would be doing that as well. That was not in his or Usha's interest to say. He could just as easily have denied knowledge of the guarantee as he denied knowledge of the promissory note and the mortgage.

[17] The overall position of Usha within the family is also relevant in this regard. She testified at trial that she simply does what her son and husband tell her to do because when she asks questions they simply yell at her and tell her to be quiet and do as they say.[5] Usha described Ashok as someone with a volatile temper who would yell and throw dishes on the floor if she did not do what he said.

[18] Shortly before the purchase of the units closed, Rochak took his parents to the office of Mr. Nanda, Rochak's lawyer.[6] Ashok testified that before going to Mr. Nanda's office, he told Usha that they would be signing guarantees for Rochak's benefit. Once at Mr. Nanda's office, they met Amritpal Singh Mann, a lawyer. They first met with Mr. Nanda, Rochak and Mr. Mann,. Rochak and Mr. Nanda

[5] That evidence comes from an earlier out-of-court cross examination of Usha on October 22, 2018 qq. 23-27, 73-74. Counsel for Joshi stated he had no objection to that evidence being read in.

[6] There is some ambiguity in the record about whether the parents met with Mr. Nanda once or twice. In earlier affidavits and cross examinations they appear to have said that they met with Mr. Nanda twice. What is clear is that if there was only one meeting with the lawyer who provided independent legal advice, Mr. Mann. I do not see how anything turns on whether there was one meeting or two with Mr. Nanda. If anything, a second meeting with Mr. Nanda only underscores the need for truly independent legal advice because the initial meeting at which at least the parents' initial views may have been formed was one without the benefit of independent legal advice.

then left the room and Ashok and Usha remained alone with Mr. Mann for what Rochak described as 5 to 10 minutes.

[19] Both Ashok and Usha described the meeting with Mr. Mann as one that lasted approximately 10 minutes during which Mr. Mann told them where to sign certain documents. Both Ashok and Usha say that Mr. Mann did not explain the nature of the documents. Neither Ashok nor Usha understood that they were signing a mortgage on their house or a promissory note.

[20] Approximately one year later, Rochak's business failed. In order to maintain control of the property, Joshi took an assignment of the first mortgage on the property in favour of Royal Bank of Canada as a result of which he held both the first and second mortgages on the condominium units. The plaintiffs sold the units and now claim for the deficiency plus interest and expenses.

[21] The plaintiffs never made a demand on the parents before serving the statement of claim.

III. ANALYSIS

[22] Usha and Ashok raise the three fundamental defences: *non est factum*, undue influence (at least for Usha) and the failure to issue a demand under the guarantee.

A. *Non est factum*

[23] *Non est factum* is a Latin phrase which means “it is not my deed.” In effect, it can apply where signatories of a document do not understand the nature of the document they are signing.

[24] Here, Ashok and Usha say they did not know the effect of the documents they were asked to sign. As noted above, Ashok knew he was signing a guarantee but thought it would not affect his home. He did not know he was signing a mortgage or a promissory note.

[25] At best, Usha thought she was also signing a guarantee based on Ashok’s evidence that he told her this. Usha’s evidence about what she was signing was more ambivalent. Although the statement of defence does not distinguish between Ashok’s and Usha’s understanding of the guarantee and could therefore be seen as an admission on the part of Usha, she testified at trial that she was simply signing documents because her husband and son told her to do so without knowing the nature of the documents.

[26] When it was put to Ashok during cross-examination that he could have asked Mr. Mann to explain the documents Ashok was being asked to sign, he responded “we did not know what to ask.” Given the level of sophistication of the parents I accept that answer.

[27] When Usha was asked why she did not ask questions she answered that she trusted Ashok and does what he tells her to do.

[28] The defence of *non est factum* is available "to someone who, as a result of a misrepresentation, has signed a document mistaken as to its nature and character and who has not been careless in doing so."[7]

[29] That defence is available here. Rochak misrepresented the nature of the documents to his parents. He told Ashok he would be signing a guarantee, not that he would be signing a mortgage or a promissory note. He told his mother nothing in the context of a family in which his mother simply did what she was told to do by Ashok and Rochak. Misrepresentation can arise by incomplete information as much as it can by a positive statement.

[30] There is no doubt in my mind that the level of sophistication and English language skills possessed by the parents would not allow them to understand the nature and effect of the documents they were signing without a plain language explanation. This is not a case where the parents' failure to read the documents or ask questions amounts to carelessness. Their level of English is such that "reading" the document would be pointless. Their level of sophistication is such that, as Ashok put it, they did not know what to ask.

[31] The defence of *non est factum* tends to be strictly confined against the interests of the person who signed the documents because it can easily be abused. If anyone could just claim they did not know what they were signing, it would undermine commercial certainty. In addition, in cases involving guarantees it could be

[7] *Bulut v. Carter*, 2014 ONCA 424 at para. 18.

prejudicial to the creditor seeking the guarantee because the creditor is usually not involved in the signing or explaining of the documents.

[32] How then does one resolve those tensions? As the House of Lords put it in the seminal case of *Barclays plc v. O'Brien,* "it is the proper application of the doctrine of notice which provides the key to finding a principled basis for the law."[8] Although the House of Lords made that statement in the context of the equitable defence of undue influence, the principle is equally applicable on the facts of this case, to *non est factum.*

[33] Here, Joshi had full notice of the parents' lack of sophistication and lack of English language skills. He had known them for 50 years. This is not a case of an "innocent" creditor having commercial certainty upended on him. Nor is it a case of an "innocent" creditor being taken by surprise by a claim that people who signed a document did not know what they were signing. This was a case of a creditor who knew or ought to have known that the parents could not possibly understand the nature of the English language documents being put in front of them.

[34] The law has recognized that in cases of "*non est factum*, unconscionability, fraud, misrepresentation or undue influence"[9] independent legal advice can ensure that a creditor is protected against such defences. I infer that Joshi recognized that

[8] *Barclays Bank plc v. O'Brien*, [1994] 1 AC 180 at 196.
[9] *Bank of Montréal v. 1480863 Ontario Inc.*, 2007 CanLII 13359 at para. 25.

here by asking that the parents receive independent legal advice and having his own lawyers prepare a certificate of independent legal advice.

[35] I will return to the issue of independent legal advice after discussing the defence of undue influence.

B. Undue Influence

[36] In addition to *non est factum*, Usha pleads the defence of undue influence.

[37] Undue influence was not raised until September 2019 when it was asserted on behalf of Usha in the Amended Fresh as Amended Statement of Defence. Joshi points out that the amendment was never formally taken out although the Amended Fresh as Amended Statement of Defence was served. Joshi's counsel conceded in oral argument that there was no prejudice to him in formalizing that amendment now to allow Usha to plead undue influence. I therefore order that Usha's statement of defence be amended in the form as found in the Amended Fresh as Amended Statement of Defence found at page B-1-44 of Case Centre.

[38] In *Geffen v. Goodman Estate*,[10] Wilson J. dissenting but writing for the majority on this point began the analysis as follows:

> What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in

[10] *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 SCR 353.

> the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

[39] Although the drafting in the paragraph quoted above suggests that Wilson J. may have been referring to the parent influencing the child, it has equally been recognized that there are many parent-child relationships in which it is the child influencing the parent; frequently in cases where the parent is unsophisticated and speaks English poorly and the child is seeking a guarantee of its own business affairs from the parent. By way of example, in *Bertolo v. Bank of Montreal*[11] the Court of Appeal for Ontario recognized that the relationship between a child "in the prime of life and parents in the evening of life is a relationship in which it should be appreciated that the possibility of influence exists."[12]

[40] The next step is to inquire into the nature of the transaction. Where the transaction arises out of a relationship of the sort described above and is "manifestly disadvantageous" for one of the parties, undue influence may be presumed to exist.[13]

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[11] *Bertolo v. Bank of Montreal*, 1986 CanLII 150.
[12] *Bertolo v. Bank of Montreal*, 1986 CanLII 150.
[13] *Bank of Montreal v. Duguid*, 2000 CanLII 5710 (ONCA) at para. 55.

[41] In cases of presumed influence, the burden shifts to the creditor to prove that the guarantor entered into the guarantee freely. One way of doing so is by showing that the guarantor received independent legal advice.[14]

[42] Undue influence can also arise by way of evidence of actual undue influence. In those cases it is necessary for the guarantor to prove that the debtor exerted actual undue influence on the guarantor to enter the guarantee. In such cases the creditor must have been put on notice of the undue influence to move to the next step in the analysis. A creditor is put on notice where (a) the wrongdoer (the debtor) acted as the creditor's agent in procuring the transaction, or (b) the creditor had actual or constructive notice of the wrongdoing.[15]

[43] In my view Usha was under undue presumed undue influence from Rochak and under actual undue influence from Ashok.

[44] With respect to undue influence from Rochak, this was a situation of an unsophisticated older woman with no English language skills to speak of being asked to sign a guarantee, mortgage and promissory note for the benefit of her charismatic, outwardly successful Canadian educated son. The transaction was "manifestly disadvantageous" to Usha.

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[14] *Bank of Montreal v. Duguid*, 2000 CanLII 5710 (ONCA) at para. 45.
[15] *Bank of Montreal v. Duguid*, 2000 CanLII 5710 (ONCA) at para. 12.

[45] In addition, Usha faced actual undue influence from Ashok by virtue of trusting Ashok with all financial matters and by virtue of the psychological bullying to which she was subject if she questioned what Ashok wanted.

[46] I am satisfied that there is no unfairness to the plaintiffs in proceeding on this basis. Joshi had known the family for 50 years. Joshi had to know that the dynamic between Usha and Rochak was one rife for undue influence. In addition, while Joshi may not have been aware of Ashok's volatile temper, he would in all likelihood have been aware of that the marriage between Usha and Ashok was one that is sometimes referred to as a "conservative" or "traditional" marriage in which Usha was very much the subordinate who did what her husband asked, especially in financial affairs.

[47] The next step in the analysis is to consider what the effect of undue influence is on the commercial transaction.

[48] In essence it is that the creditor has a duty to inquire and satisfy himself that the transactions being entered into are the product of knowledge and free will.[16] As Ontario Court of Appeal put it in *JGB Collateral v. Rochon*,[17]

> First, a lender is put on notice and inquiry. In order to protect itself from a claim that the guarantee provided to it was obtained by undue influence by the benefitting spouse or party, the lender must take reasonable steps to try to ensure that the proposed guarantor understands the transaction and is entering into it voluntarily by encouraging the guarantor to

[16] *Bank of Montreal v. Duguid*, 2000 CanLII 5710 at para. 17.
[17] *JGB Collateral v. Rochon*, 2020 ONCA 464.

> seek and obtain independent legal advice and a full explanation of the transaction.[18]

[49] That is in fact what Joshi did here. He asked that the parents receive independent legal advice and he obtained a certificate of independent legal advice indicating that this had been done.

C. The Nature of the Independent Legal Advice

[50] As noted earlier, the plaintiffs say Ashok and Usha received independent legal advice from Mr. Mann who also signed a certificate of independent legal advice which was acknowledged and signed by Ashok and Usha.

[51] The plaintiffs describe the certificate of independent legal advice as a "safe harbour" for creditors. That is to say, the plaintiffs were not obliged to look behind the certificate to ensure that the advice was complete or correct. If there was an issue about the quality of the legal advice, that might give Ashok and Usha a claim in negligence against Mr. Mann but does not give them a defence against the plaintiffs. In advancing this submission the plaintiffs rely on the following passage from *Royal Bank of Canada v Biddell et al.*:[19]

> It is not an obligation of the Bank to examine if Ruth obtained such "proper" legal advice. The Bank is not obligated in law, as I so find, to investigate that the letter of independent legal advice it received from Ruth was proper and thorough legal advice. The Bank can rely on a letter of independent legal advice from a lawyer who is licenced to practice law in the

[18] *JGB Collateral v. Rochon*, 2020 ONCA 464 at paras. 8-11, citations omitted.
[19] *Royal Bank of Canada v. Biddell et al*, 2015 ONSC 6535.

> Province of Ontario, as long as the Bank did not have any knowledge, direct or otherwise, that there is an issue of authenticity or propriety of the independence of the legal advice.[20]

[52] I agree with that statement of the law. The critical issue though is whether the plaintiffs here had " knowledge, direct or otherwise", that there was an issue about the authenticity or propriety of the independence of the legal advice. In *Bidell* the guarantor was an elementary school teacher. There was no evidence that the lawyer giving the independent legal advice failed to provide a reporting letter setting out that advice and there was no evidence that the creditor ought to have known that the quality of the independent legal advice was suspect in any way.[21]

[53] *Bidell* also cites the Ontario Court of Appeal's decision in *Bertolo v. Bank of Montreal*,[22] as a case in which the creditor was deemed to have notice of problems with the independent legal advice. In that case, Mrs. Bertolo was 71 years old, of modest means and was not fluent in English. Her son sought a loan from the bank to purchase a restaurant. To assist in obtaining the loan the mother signed a promissory note and mortgaged her home in favour of the bank. All she knew was that her son was buying restaurant and she was willing to help him. In those circumstances the Court found that equity required that the mother receive independent legal advice. The actual advice she received was flawed because it came from a partner in the same law firm that was acting for the bank in the matter,

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[20] *Royal Bank of Canada v. Biddell et al*, 2015 ONSC 6535 at para. 75.
[21] *Ibid*. at para. 74.
[22] *Bertolo v. Bank of Montreal*, 1986 CanLII 150.

although from someone who was not otherwise working on the file. The partner giving the advice made no notes and had no memory of the conversation. There was no evidence that the mother was told that she could lose her home. In those circumstances, the Court of Appeal found that the bank knew or ought to have known that the legal advice the mother received was not independent and that the bank had otherwise failed to ensure that the mother understood that her house was at risk. The Court of Appeal found that it would be unconscionable to permit the bank to take advantage of the security it obtained in the absence of proper independent legal advice.

[54] In my view, on the facts of the case before me, the plaintiffs knew or ought to have known that there were serious issues about the scope, nature and quality of the independent legal advice Ashok and Usha received.

[55] The certificate of independent legal advice here suggests that the advice the parents received was a perfunctory exercise that paid little or no attention to the details of what the parents were being asked to do. In that regard, it is important to note that the certificate of independent legal advice was drafted by the plaintiffs' lawyers.

[56] There are two glaring defects in the certificate that ought to have been apparent to the creditor. First, although the parents were asked to sign a promissory note, there is no reference to the promissory note in the certificate of independent legal advice nor is there any suggestion on the face of the certificate that the parents were given any advice about the promissory note. This is a significant defect

because the promissory note purports to establish a freestanding debt from the parents to Joshi independent of the guarantee or any defences that might arise under the guarantee.

[57] Second, although the certificate refers to the guarantee, it does not indicate that any independent legal advice was given about it. The second paragraph of the certificate indicates that the solicitor has been consulted by the parents "with respect to the nature and effect of the Guarantee…" The fourth and most material paragraph of the guarantees states;

> I have plainly and fully described to ASHOK BADHWAR and USHA BADHWAR, the nature, effect and liability of her (*sic)* executing the Charge/Mortgage of land. ASHOK BADHWAR and USHA BADHWAR advised me that they fully understands (*sic)* the nature, effect and liability of the Charge/Mortgage of the Land and the Guarantee and I am satisfied that ASHOK BADHWAR and USHA BADHWAR are executing the Charge/Mortgage of Land, Guarantee and related documentation voluntarily and without any fear, threat, undue influence, duress or compulsion of, from or by any person including, without limitation, Joshi Group of Companies Ltd.

[58] Although this certificate purports to certify that Ashok and Usha fully understood the nature, effect and liability of the guarantee, the certificate does not indicate that the nature, effect and liability of the guarantee were ever explained to them.

[59] While not nearly as significant, the paragraph also contains grammatical errors such as the solicitor explaining the effect of "**her** executing the Charge/Mortgage" rather than "them" and referring to Ashok and Usha advising the lawyer that "they fully **understands**" the nature, effect and liability of the Charge/Mortgage of Land

and the Guarantee. While on their own, errors of that nature would not be fatal, when coupled with the failure to mention the promissory note and the failure to mention any advice about the guarantee, they suggest that the entire exercise of providing independent legal advice was not undertaken with the level of care and detail that it should be to ensure that Ashok and Usha truly understood what they were signing. Had the more serious defects arisen in relation to sophisticated parties one might have a different reaction. Here, however, the defects occurred with respect to clearly unsophisticated people with extremely limited or no English; both factors of which Joshi was fully aware.

[60] Even those defects could possibly be saved by other evidence of independent legal advice such as a contemporaneous reporting letter to Ashok and Usha. There is no such reporting letter. There are no docket sheets describing what was done or how long it took. There is no invoice describing what was done or how long it took.

[61] Mr. Mann did not testify at trial. He did file an affidavit for the purposes of an earlier motion. It is unclear whether the affidavit was filed by the plaintiffs or whether it was somehow filed independently filed by Mr. Mann. The affidavit consists of three sentences. Mr. Mann identifies himself as a solicitor practising in Mississauga. He says he met with Usha and Ashok on October 4, 2010 and issued a Certificate of Independent Legal advice which he attaches as an exhibit to his affidavit. Finally he says the clients executed the certificate.

[62] Mr. Mann was cross-examined out of court on his affidavit on the earlier motion. Plaintiffs' counsel asked that the transcript of the cross examination be entered into evidence. I did so although I had serious doubts about whether it meets the requirements of necessity and reliability. There was no evidence led or explanation given about the necessity of introducing the affidavit and transcript as opposed to calling Mr. Mann personally, apart from the submission of plaintiffs' counsel that it was more efficient to do so. While I accept that the transcript is reliable in that it accurately reflects what occurred at the cross examination, I have concerns about the reliability of the evidence it contains given that it appears to contradict the certificate itself.

[63] Mr. Mann testified that the certificate of independent legal advice likely came from the lender's solicitor and was given to him by Mr. Nanda. Mr. Mann also stated that Mr. Nanda contacted him to retain him to provide independent legal advice.

[64] When first asked during his cross-examination whether he remembered meeting with Ashok and Usha he replied: "Faintly. It's been five years."

[65] During cross-examination Mr. Mann stated that he reviewed the certificate of independent legal advice, the promissory note, the guarantee and the charge with Ashok and Usha. He stated he gave advice on each document in both English and Punjabi. According to Mr. Mann when he read something it was in English, when he explained something it was in Punjabi. When first asked how long he spent going over the promissory note with the parents he said he did not

remember. He then approximated it was 15 minutes solely for the promissory note and 20 minutes for the guarantee.

[66] There was no evidence about the level of Mr. Mann's Punjabi language skills. I do not know if he is someone who received a university education in Punjabi or if he is the son of immigrants who has rudimentary Punjabi language skills that he picked up from home as a child.

[67] Although Mr. Mann says he gave advice about the mortgage, and gave the parents a copy of the standard charge terms referred to in the mortgage, he did not have the parents acknowledge receipt of the standard charge terms because they were not in the package that was to be executed by the parents. The standard charge terms are not referred to in the certificate.

[68] In my view, it is more likely that Mr. Mann was reconstructing what occurred during the meeting with Ashok and Usha and was stating how long he perhaps should have spent with each document rather than recounting a specific recollection of the meeting. I come to that conclusion because at the outset of the cross-examination he had only a "faint" recollection of meeting Ashok and Usha because it had been five years. It is unlikely that someone who has only a faint recollection of having met the parents would have a specific recollection of how much time he spent reviewing each document with them. Moreover, as already noted, there is no reporting letter, time sheet or invoice to refresh his memory or support his evidence.

[69] Mr. Mann did not provide particulars of any of the advice that he gave about any of the documents and never even suggested that he explained to Ashok and Usha that they could lose their house if Rochak did not repay the plaintiffs. There was also no explanation for the inconsistency between the evidence on cross-examination and the certificate of independent legal advice.

[70] I hasten to add that none of this is intended to be critical of Mr. Mann. Mr. Mann may well have given advice of a nature that fully meets the requirements of independent legal advice. I, however, can only balance the evidence that is before me. Mr. Mann was not asked any of the questions that I raise here nor were the contradictions between his evidence and the certificate put to him. On the record before me, I am not satisfied that the parents received independent legal advice of the sort the court expects and find that the plaintiffs knew or ought to have known of those deficiencies because they are evident on the face of the certificate.

[71] When assessing the equities of the situation and deciding who should bear the risk of the defects on the face of the certificate I conclude that it is the plaintiffs who should bear those risks. On the evidence before me, the plaintiffs or their counsel prepared the certificate. The plaintiffs therefore had notice of the defects in the certificate before it was signed. They also had notice after it was signed by virtue of receiving a copy of the signed certificate and being able to read it. The plaintiffs could have taken steps to ensure that there was an evidentiary record of proper independent legal advice but did not do so. Doing so would have been as simple

as writing to Ashok and Usha in their native language and making clear to them that they could lose their house if Rochak did not repay the loan.

[72] Given the contradictions between the contemporaneous certificate and Mr. Mann's cross examination five years afterwards, where the evidence of Mr. Mann differs from that of the parents or the content of the certificate, I prefer the evidence of the parents and the contents of the certificate.

[73] The plaintiffs submit that there is no contradiction between the certificate of independent legal advice and Mr. Mann's evidence on cross-examination. They submit that the promissory note was merely a secondary route to liability and that the focus of Mr. Mann's effort was the mortgage together with the guarantee. They note that the certificate indicates that the parents understood their obligations under the guarantee and that while it would have been preferable for Mr. Mann to explain how he came to that conclusion in the body of the certificate, the failure to do so does not mean that the parents did not understand the guarantee. The plaintiffs then say in respect of both the promissory note and the guarantee that the fact that Mr. Mann chose to draft the certificate in a certain way or chose not to edit his standard form guarantee does not mean that his evidence at cross-examination should be disbelieved.[23]

[23] These submissions were made in an email of December 29, 2024 in response to my questions about the wording of the certificate. The issues about the wording of the certificate did not arise during the trial but were raised by me during my deliberations.

[74] This, however, misconceives the evidence. Mr. Mann testified that the certificate he signed came from the plaintiffs' lawyers. It was not drafted by him. Moreover, the approach of saying that the parents understood the guarantee without receiving any legal advice about it belies the purpose of the certificate. Its purpose is to demonstrate that a lawyer actually provided advice to the guarantors. The certificate does not evidence that. Finally, as noted earlier, I think it more likely that Mr. Mann's evidence is a reconstruction of what he thinks ought to have happened rather than a specific recollection of what actually happened.

[75] Although Joshi could not be expected to know about them, there are two further considerations that cast doubt on the fulsomeness of the legal advice provided. First, the Certificate contains a further defect in that it has the lawyer state that:

> I certify that I am not acting in any way on behalf of Joshi Group of Companies Inc. or any other party or interest in connection with the indebtedness and/or the Charge and that I have been consulted by and have advised ASHOK BADHWAR and USHA BADHWAR, independently of such other parties and in her (*sic*) interest only.

[76] That statement is not correct. Mr. Mann was not consulted by Ashok or Usha let alone consulted independently of other parties to the transaction. Mr. Mann was found by Rochak's lawyer and was an individual who had finished articling for Mr. Nanda only a few months before providing the advice. To the extent that the final phrase of the passage quoted in the previous paragraph is meant to indicate that the lawyer gave Usha advice in her interest only, as opposed to being a grammatical error, then that is also not the case because the advice was given in

a meeting together with Ashok. If the advice was intended for Usha alone, it should have been given in a meeting with her alone.

[77] Ashok and Usha also never received an invoice for the independent legal advice. It appears that the invoice was paid for by Rochak or Mr. Nanda. The failure to have the beneficiaries of the advice receive and pay the invoice for it also raises concerns about its independence.

[78] Finally, the absence of a reporting letter about the advice raises issues about its nature and completeness. Advice can be given in a variety of forms. One could tell the parents that: “In the event Rochak does not fulfil his obligations vis-à-vis the Joshi Group of Companies then the latter would have security against the assets of the parents which it could enforce at will.” That is a form of expression readily understandable to a lawyer but not as readily understandable to an unsophisticated layperson who would not necessarily even understand what “security” was. It is another thing entirely to tell the parents: “If Rochak does not pay his loan to Joshi, then Joshi can take your house from you and put you on the street. The document he is asking you to sign will allow him to take your furniture and the two of you and place you on the curb if you do not leave the house voluntarily.” Although the technical legal content of the two modes of advice may be the same, the clarity of the message and the ease with which it is understood is entirely different. A contemporaneous reporting letter would have ensured that there was no doubt about the nature of the advice given.

[79] The plaintiffs argue that the issue of independent legal advice is irrelevant because neither Ashok nor Usha testified that they would have done something else had they been fully informed about the documents they were signing. I do not find that argument persuasive. Had they said they would not have signed the documents, the plaintiffs presumably would have argued that this was nothing but self-serving evidence that arose 13 years after the fact. The reality is that no one can say with any degree of reliability what they would have done in a different set of circumstances. What this argument really amounts to is the plaintiffs saying, we did not do what we ought to have done, but we should be excused from the consequences of that shortcoming because it would have made no difference. Accepting that argument would make it far too easy for people to avoid their legal obligations. The risk of what the parents would have or would not have done ought, in these circumstances, to fall on the plaintiffs. They were the ones with the best ability to control the risk of what the parents would have done by ensuring that they understood the issues and risks they faced in the first place.

[80] It was also suggested that Usha ought to have received separate independent legal advice from Ashok because of the undue influence he exercised over her separate from that which Rochak exercised over her. I was not directed to any authorities on the point. Given my findings about the nature of the independent legal advice generally, I do not find it necessary to address the issue of when co-guarantors might require independent legal advice separately from each other.

D. Failure to Demand on the Guarantee

[81] Ashok and Usha are what is known in law as accommodation sureties. That is to say they were intended to be guarantors who are not involved in the actual business transaction but who have provided a guarantee "with the expectation of little or no remuneration for the purpose of accommodating others."[24] In such cases, the Supreme Court of Canada has noted that "the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety."[25]

[82] One way in which the law has been astute to protect guarantors is, to require the creditor to demand payment from the guarantors before an action can be brought against them. The statement of claim itself cannot constitute a claim for payment. Courts have maintained that position while at the same time recognizing that the position is "very technical." [26]

[83] In *Bank of Nova Scotia v. Williamson* the Ontario Court of Appeal held that: 'Where the obligation of a third-party guarantor is to pay on demand, then demand is a condition precedent to that obligation."[27] This differs from the liability of

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[24] *Citadel Assurance v. Johns-Manville Canada Inc*., 1983 CanLII 52 (SCC), [1983] 1 S.C.R. 513 at 521.
[25] Ibid.
[26] *0867740 B.C. Ltd. v. Quails View Farm Inc.*, 2014 BCCA 25 at para. 60-61; *Bank of Nova Scotia v. Williamson*, 2009 ONCA 754 at paras. 11- 13. This defence was not raised in the statement of defence. It was raised in the defendants' opening argument, evidence and closing argument together with an article explaining the principle and citing the two cases referred to in this footnote. The plaintiffs did not object, or seek to call reply evidence or ask for an adjournment to prepare further submissions. I raised the issue in an email to the parties during my deliberations. Plaintiffs' counsel responded with submissions but raised no objection to the issue being considered.
[27] *Bank of Nova Scotia v. Williamson*, 2009 ONCA 754 at para. 13.

principal debtors who are liable without a formal demand and against whom an action can be commenced without demand.

[84] This principle is more than a technicality here. The parents say they had been demanding details of the various expenses for which the plaintiffs were claiming from the time the action was commenced but did not receive those in a timely manner. I was not provided with any evidence of any form of breakdown of the amounts the plaintiffs claim from the parents other than ones prepared for trial.

[85] In my view, the guarantee at issue here is one payable on demand. Section 2 of the guarantee provides, among other things:

> **The liability of the Guarantor under this guarantee does not exceed the Limited Amount plus legal expenses plus interest** on the Limited Amount at the rate provided under the Loan Security calculated and compounded monthly **from the date the Chargee demands payment under this guarantee**. (Emphasis added)

[86] The plaintiffs respond to this by pointing to section 3 of the guarantee which provides:

> As between the Chargee and the Guarantor, the Guarantor is liable as principal debtor for all the Chargor's covenants contained in the Loan Security[28] notwithstanding any act or omission of the Chargor or of the Chargee which might otherwise operate as a partial or absolute discharge of the Guarantor if the Guarantor were only a surety.

[28] Defined in section 1 of the guarantee to include among other things: all loan agreements, promissory notes, and, mortgages.

[87] The plaintiffs submit that section 3 makes Ashok and Usha liable as principal debtors on the mortgage and that the requirement to make a formal demand does not apply to principal debtors. They cite the Court of Appeal's decision in *Sicotte v. 2399153 Ontario Ltd.*,[29] in support of that proposition. On my reading, *Sicotte* is distinguishable. It dealt with a situation in which the guarantors were officers, directors and shareholders of the borrower.[30] Guarantors of that nature are not accommodation sureties and are therefore not subject to the requirement for a demand on their guarantees before an action can be commenced.

[88] Returning to section 3 of the guarantee, I am prepared to accept that a guarantor can contract out of common law protections. I would think, however, that contracting out of a long standing common law right would require clear, unambiguous language; especially given the principle that the law will be "astute to protect" guarantors by limiting their obligations "to the precise terms" of the guarantee. Here, sections 2 and 3 of the guarantee create an ambiguity. Section 2 suggests the guarantee is payable on demand while section 3 suggests liability as a principal debtor. Given that ambiguity, the guarantee should be interpreted according to principles of *contra proferentem;* that is to say, it should be interpreted against the interests of the drafter. Here, the plaintiffs drafted the guarantee in which case any ambiguity should be interpreted against them.

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[29] *Sicotte v. 2399153 Ontario Ltd.*, 2021 ONCA 912 at paras. 16, 23-25.
[30] *Sicotte v. 2399153 Ontario Ltd.*, 2021 ONCA 912 at para. 4.

[89] In addition, the fact that the guarantee may purport to contract out of longstanding common law rights makes independent legal advice about the guarantee all the more important. As noted earlier, the certificate of independent legal advice does not indicate that the parents were given any advice about the guarantee.

[90] As noted earlier, the plaintiffs also had the parents sign a promissory note and a mortgage. The plaintiffs presumably did so to have those two instruments act as separate obligations independent of the guarantee. In my view those separate instruments do not assist the plaintiffs. As noted earlier, the certificate of independent legal advice does not indicate that the parents were given any advice at all about the promissory note.

[91] To the extent that Joshi argues that the mortgage is a freestanding instrument independent of the guarantee, I do not accept that argument. The mortgage is clearly a collateral mortgage. Had Rochak paid off his mortgage to Joshi, there could be no argument that the parents owed Joshi anything under the mortgage. The mortgage was clearly payable only if Rochak failed to pay his mortgage to the plaintiffs. The mechanism that allows Joshi to enforce the mortgage against the parents is the guarantee.

E. Consideration Issue

[92] The defendants also argued that the guarantees were void for want of consideration. I do not accept that argument.

[93] The issue arises because the letters from the plaintiffs' lawyers to the plaintiffs reporting on the transaction say that the sales to Rochak closed on October 1, 2010. The guarantee, mortgage and promissory note were all signed on either October 4 or October 7, 2010. The argument then is that the plaintiffs were content to close the sale to Rochak without any security from the parents. Any security the parents gave arose after the sale and were therefore given without consideration.

[94] I am satisfied that this does not invalidate the guarantee, promissory note or mortgage. It appears that the reporting letters were mistaken. The transactions had been scheduled to close on October 1 but the closing was extended. The best evidence of this is the mortgage registrations. The mortgage from the parents to the plaintiffs was registered on October 7 at 12:46 PM. The vendor takeback mortgage from Rochak to the plaintiffs was registered on October 8. I am therefore satisfied that the mortgage from Ashok and Usha was satisfactory consideration for the vendor takeback mortgage registered the following day.

F. Damages

[95] In the event I am wrong about the enforceability of the guarantee, promissory note and mortgage, I address here the plaintiffs' claim for damages.

[96] The plaintiffs have set out a summary of their claim at Exhibit 5. There are a number of items on Exhibit 5 that I would adjust or disallow.

[97] The plaintiffs claim $15,283 for common expenses on unit 15 and 16 yet the evidence produced at tab 2A of their damages brief supports a payment of only $13,710.12.

[98] The plaintiff's claim $5,000 for heat and Hydro on the units. I disallow that expense. The plaintiffs have not produced any invoices or evidence of payment to support that claim such as cheques or bank transfers to service providers or pro rata allocations from the condominium corporation.

[99] The plaintiffs claim $5,000 for "front sign damage". I disallow that expense. The plaintiffs have not adequately explained how that expense relates to the defendants or to Rochak's default on the mortgages.

[100] The plaintiffs claim $75,000 for "management and consulting". I disallow this expense. This is said to be on account of Joshi's time over five years, including meeting potential buyers. The plaintiffs have not taken me to anything in the mortgage documents in respect of the condominium units that would justify such an expense nor have they explained why a five-year period is the relevant period given that the time between Rochak's default on the condominium mortgages and the sale of the units appears to have been approximately two years. In addition, there are no records of any sort to support that claim. It is merely an allocation of $15,000 per year for each of 5 years.

[101] The plaintiffs claim legal expenses of $22,569.18. I would decrease that amount by $3.161.96 to disallow the invoice at tab 8 A of the plaintiffs' damages brief. That invoice reflects the legal costs of Joshi assuming an assignment of the RBC first mortgage. While Joshi is of course free to assume the RBC mortgage if he believes it is in his interests to do so, the cost of obtaining that business advantage is not one to be borne by Rochak, let alone Ashok and Usha.

[102] On the plaintiffs' calculation, the balance owing as of March 31, 2013 was $567,390.40. That balance would be adjusted downward in accordance with the adjustments I set out above. The plaintiffs then calculate interest at 8%, compounded monthly for a total interest amount of $700,408.18. I would reduce that calculation to simple interest of 8%.

[103] The period at issue is long; 2010 to 2024. During that period interest rates were low. The Bank of Canada's website[31] discloses interest rates during that period for a conventional one year bank mortgage beginning at 3.3% in 2011, decreasing to a low of 2.7% in 2022 and rising briefly to a high of 8.09% in October 2023. The rates for a conventional five-year mortgage began at 6.25% in 2010, decreased to 4.64% in 2022 and reached a brief high of 7.04% in the fall of 2023. Given those interest rates, a rate of 8% compounded annually rather than monthly would appear to give a generous return.

[31] https://www.bankofcanada.ca/rates/banking-and-financial-statistics/posted-interest-rates-offered-by-chartered-banks

IV. Conclusion and Costs

[104] For the reasons set out above, I dismiss the plaintiffs' action, set aside the guarantee, mortgage and promissory note and order that the mortgage be removed from title to the parents' property.

[105] Any party seeking costs arising out of these reasons will have three weeks to deliver written submissions. The responding party will have two weeks to deliver its answer with a further one week for reply.

Koehnen J.

Released: December 30, 2024

CITATION: Chand Morningside Plaza Inc. v. Healthy Lifestyle Medical Group Inc., 2024 ONSC 7285
COURT FILE NO.: CV-11-439398
DATE: 20241230

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHAND MORNINGSIDE PLAZA INC., and JOSHI GROUP OF COMPANIES LTD.

Plaintiffs

– AND –

HEALTHY LIFESTYLE MEDICAL GROUP INC., ROCHAK BADHWAR, GORE DOCTORS MEDICAL INC., ASHOK BADHWAR, USHA BADHWAR, AASH KARIA, BINDAAS CAPITAL INC. and MARVIN TALSKY

Defendants

REASONS FOR JUDGMENT

Koehnen J.

Released: December 30, 2024