

# COURT OF APPEAL FOR ONTARIO

CITATION: Foodies Curry & Shawarma Inc. v. Royal Paan Leasing Ltd., 2026  
ONCA 26  
DATE: 20260120  
DOCKET: COA-25-CV-0247

van Rensburg, Miller and Sossin JJ.A.

BETWEEN

Foodies Curry & Shawarma Inc.

Applicant (Respondent)

and

Royal Paan Leasing Ltd.\*, Zolo Realty, Brokerage,  
Everest Realty Ltd., and First Capital (Dundas &  
Prince Michael) Corporation

Respondents (Appellant\*)

Harpreet Singh Makkar, for the appellant

Ajay Duggal, for the respondent

Heard: November 25, 2025

On appeal from the order of Justice Charles C. Chang of the Superior Court of Justice, dated January 8, 2025, with reasons reported at 2025 ONSC 187.

## REASONS FOR DECISION

### Overview

[1] At issue on this appeal is whether the appellant Royal Paan Leasing Ltd. (“Royal Paan”) was denied procedural fairness in the hearing of an application

brought by the respondent Foodies Curry & Shawarma (“Foodies”), which sought specific performance of an agreement of sale of its restaurant assets to Royal Paan. The application judge denied Foodies specific performance but awarded it restitution for unjust enrichment. However, restitution for unjust enrichment was not sought in the Notice of Application and was first raised at the oral hearing of the application. Accordingly, the record before the court was insufficient to adjudicate that claim. In the colloquy with counsel, the application judge indicated that he would not entertain the claim for restitution due to it not having been properly pleaded. Consequently, the appellant made no submissions on that issue.

[2] As explained below, we conclude that the application judge erred by subsequently making an order for restitution in circumstances where the relief was not pleaded, the record was insufficient, and the appellant was effectively denied the opportunity to respond to the claim. The appeal must be allowed, and the judgment vacated.

### **Factual overview and proceedings below**

[3] Foodies operated a restaurant in Oakville. On March 22, 2023, it entered into a written agreement to sell its business assets to Royal Paan for \$260,000. The agreement contained a warranty that all chattels, equipment, and accessories that were the subject of the sale were free of encumbrances.

[4] By the closing date, which had been extended to May 31, 2023, two of the chattels remained encumbered by personal property security registrations, one in favour of VendorLender Funding Corp. (“VendorLender”), and the other in favour of the Bank of Montreal (“BMO”). Royal Paan had informed Foodies it would proceed with the transaction if payout statements were provided. Royal Paan was concerned that the debt secured against the chattels might exceed the purchase price, and that Foodies might be financially unable to repay the loans and discharge the liens. Foodies discharged the first registration in favour of VendorLender, but did not provide a payout statement or an undertaking in respect of the BMO registration. Foodies proposed to pay out BMO from the sale proceeds, but did not provide a formal undertaking. Royal Paan informed Foodies that it would not proceed with the purchase.

[5] Although Royal Paan did not proceed with the asset purchase, it nevertheless ended up in possession of the assets. Roughly coincidental with concluding the asset purchase agreement with Foodies, Royal Paan entered into a lease of the premises where Foodies had operated its restaurant and where the assets remained. When Royal Paan took possession of the premises on June 1, 2023, it also took possession of the assets that it had refused to purchase. Foodies alleged that Royal Paan thereafter used the assets for its benefit without compensating Foodies. Other than an initial \$15,000 deposit that had been placed in trust with a realty company, Royal Paan had not paid any of the purchase price

to Foodies. But it enjoyed the use and benefit of the assets, while Foodies may or may not have continued to service the underlying debt to BMO.

[6] Foodies brought an application by which it sought specific performance of the asset purchase agreement. Effectively, it sought an order that it be paid the purchase price. Ultimately, that ground of relief was denied, as the application judge found that Foodies had breached the agreement by not providing clear title.

[7] In its oral submissions, Foodies made a submission in the alternative for restitution for unjust enrichment for Royal Paan's use of the assets. The application judge questioned whether this cause of action had been properly pleaded. During an extended exchange with counsel for Foodies (not Mr. Duggal), the application judge repeated several variations of the following objection: "(n)owhere in your amended notice of application do you use the words or similar words that the respondent has been enriched, the applicant has been correspondingly deprived, and there is no juristic reason for that enrichment and corresponding deprivation." The closest the respondent came to raising the issue in the Notice of Application was a statement that Royal Paan was "unjustly getting enriched". Ultimately, the application judge directed counsel away from the unjust enrichment issue:

The Court: [F]orget about that ... let me do this because I – the horse is dead and it's gone to heaven. The only remedy you're seeking is specific performance. You want Royal Paan to pay you the money that is due under the agreement of purchase and sale.

Counsel: Yeah.

[8] Understanding that the application judge had foreclosed unjust enrichment and was not willing to entertain submissions on the issue in any event, counsel for the appellant did not make any submissions on the issue in oral argument. This was not so much a tactical decision by counsel as it was a product of the application judge's overly prescriptive conduct of the hearing. Counsel were given very little leeway to make submissions. From a review of the transcript, it is evident that the application judge essentially conducted the hearing as though it were a cross-examination of counsel. This was itself improper and jeopardized the fairness of the hearing.

### **Analysis**

[9] The respondent's notice of application was badly drafted and counsel's unfocused oral argument (again, not Mr. Duggal) was obviously frustrating to the application judge. The application judge nevertheless concluded that the justice of the case was with the respondent, who had effectively surrendered assets to the control of the appellant without receiving any compensation. But the manner in which the application judge proceeded was not only procedurally unfair, but ended up prejudicing Royal Paan in ways that could not have been intended.

[10] The application judge rightly noted at the oral hearing that restitution for unjust enrichment had not been requested in the Notice of Application. The factual

record that would have been needed to adjudicate a claim of unjust enrichment was not before the court. There was no evidence, for example, of what use Royal Paan had made of the assets, if any, and if it had, what the nature of the benefit was. There was no evidence of the value of the assets. There was no evidence as to whether Foodies had sought to recover the assets from Royal Paan. Significantly, there was no evidence as to whether Foodies had continued to pay the financing charges and what amount remained owing to BMO. Royal Paan could not be faulted for not addressing these issues in its affidavits as it had no notice that a restitution claim would be advanced at the hearing. And although it conceivably could have flagged for the application judge the problem with proceeding without this evidence, on a review of the transcript we accept the submissions of the appellant's counsel that the application judge was, to an unusual degree, disinclined to hear submissions outside of the narrow confines of his questions to counsel. In any event, he had given the parties the clear message that restitution for unjust enrichment was not a claim he was willing to consider.

[11] By finding for the applicant on the basis of a claim that was not properly pleaded, and for which insufficient evidence was led, the application judge denied Royal Paan “the right to know the case they had to meet and the right to a fair opportunity to meet that case”: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), 257 O.A.C. 203, at para. 61.

[12] A further practical problem with the order made is that although the application judge ordered a payout of BMO, he did not provide for the vesting of the assets in Royal Paan. Fresh evidence tendered by Royal Paan on appeal, which we accept, establishes that BMO was, at the time of the hearing of the appeal, about to enforce its security interest in the assets.

[13] It is therefore necessary to allow the appeal and set aside the judgment. We are advised by the parties that there is an extant action between the parties. We do not have those pleadings before us, but nothing in these reasons should be taken as deciding the restitution claim, or foreclosing the addition of a restitution claim to those proceedings.

## **DISPOSITION**

[14] The fresh evidence is admitted, the appeal is allowed, and judgment set aside. The appellant is awarded costs of the appeal in the amount of \$22,500, all inclusive, as agreed between the parties.

“K. van Rensburg J.A.”

“B.W. Miller J.A.”

“L. Sossin J.A.”