

Enzo, his “bird dog.” Mick made money on certain of their ventures through real estate commissions to his brokerage or other remuneration and assisted Enzo with his businesses, including note taking at meetings.

[3] 1543333 Ontario Limited (“333 Ontario”) is a corporation incorporated under the laws of Ontario. 333 Ontario is the registered owner of a property municipally known as 1 Homewood Avenue, Toronto, Ontario. 1 Homewood Avenue was a 67-unit apartment building. 1544274 Ontario Limited (“274 Ontario”) is a corporation incorporated under the laws of Ontario. 274 Ontario is the registered owner of a property municipally known as 7/9 Homewood Avenue, Toronto, Ontario. 7/9 Homewood Avenue was a licensed rooming house. The shares of these two number companies, holding the Homewood properties, “Homewood”, are the subject matter of the dispute.

[4] Mick is a property appraiser. He was also formerly a real estate agent and broker. He has a B.A. in economics from the University of Toronto. His evidence was that doing appraisals was his primary career.

[5] Enzo is a businessperson, involved in real estate development, among other things. Enzo has worked in the Mizzi family businesses for over thirty years, helping to accumulate the portfolio of properties held by the Mizzi family.

[6] Despite there being a complete dearth of documents regarding their partnership, Mick says that since 2001 he and Enzo operated as partners. Mick points to various business dealings that Enzo had with others, including James Collishaw (“James”), Albert Jones (also known as Allan Jones) (“Albert”), and Tim Neeb (“Tim”), as examples of alleged bad faith on the part of Enzo. Mick claims that he is being similarly shortchanged by Enzo out of his entitlement to half of Enzo’s interest in the Homewood properties, among others.

[7] Albert was also involved with the Homewood investment. James and Tim had unrelated business dealings with Enzo.

[8] Much trial evidence was not particularly relevant to any issues, other than credibility, and was just both parties “mud-slinging.”

[9] Certain parties to the action—Mary Campisi (“Mary”), the Estate of Emanuele Mizzi (the “Mizzi Estate”) and Albert—settled after many years of litigation. It was determined that the shares of 333 Ontario and 274 Ontario would be split equally among Mary, the Mizzi Estate, and Albert.

[10] Enzo claims that the shares owned by his father, Emanuele, who passed away in April 2020, are now owned by the Mizzi Estate. However, Mick says half of the shares allocated to the Mizzi Estate, belong to him and the other half are held by the Mizzi Estate for Enzo.

[11] For the reasons set out below, I find that there was no Umbrella Agreement and, accordingly, dismiss the action.

The Evidence

[12] Mick stated that in or around 2001 he and Enzo entered into a verbal agreement that they would work together to build a portfolio, including real estate properties and construction projects. Mick had the experience in real estate and appraisals and Enzo had experience in construction and development. Mick's evidence was that he would source properties and potential deals, and Enzo would finance them, and they would share everything 50/50 (the "Umbrella Agreement").

[13] Mick's position is that the Homewood properties are covered under the Umbrella Agreement.

[14] When pressed on cross examination regarding the terms of the alleged verbal Umbrella Agreement, Mick could only enumerate three terms of the Umbrella Agreement: Mick's function was to source the deals, Enzo was to put up the money, and projects were to be held in single purpose companies.

[15] Enzo says there never was an Umbrella Agreement of any sort with Mick.

[16] The other witnesses at trial, Albert, James, Tim, and David Franklin (Mick's former lawyer) all indicated that they understood that Enzo and Mick had a partnership of some sort. Albert stated that Mick had told him he and Enzo were partners but did not specifically name Homewood.

[17] James' evidence was that in the course of their dealings, Enzo introduced Mick to him as his 50/50 partner. This is consistent with the memorandums of understanding that were drafted in the course of their dealings, related to certain listed properties (not including the Homewood properties) as discussed below.

[18] Mark Purai ("Mark"), another former business associate of Enzo's involved with the development of a property on Wilson ("Wilson Deal"), stated that when Mick was introduced to him Enzo stated that Mick was part of the team.

Documents re Umbrella Agreement

[19] As mentioned, Mick stated that the Umbrella Agreement was a verbal agreement. He relied on a few documents to support his position that there was an agreement between him and Enzo, and that Homewood was covered under it: the Discussion letter, dated August 1, 2005 (the "Discussion Letter"); memos drafted by Mick reporting on meetings with Mick, Enzo, Albert and Magaly Bianchi ("Magaly"); as well as various emails.

[20] There are emails and memos that support Mick's understanding that he and Enzo had an arrangement of some sort. However, Mick was the author of many of them. Further, the documents are also consistent with Enzo's assertion that Mick worked for him and they entered into certain limited ventures together. The following are excerpts from certain emails or memos pointed to by Mick to support his position:

- Email from Mick to Enzo, re “Wesbrooke – JV terms – my thoughts,” dated 8/3/2016:

Regarding Magaly, when you and I met at the restaurant to discuss “moving forward”... it was just you and I on a 50/50 basis. Magaly wasn’t included. I say this because you and I are individually only going to be getting 8.3% of any FUTURE projects in BC if Magaly is included (and its worse for the first 3 projects... we’re only getting 6.25% each!!!) and we’re only getting one-third of one percent each as Asset Managers if Magaly is included (under the current terms & structure – which is why you are trying to change it, I know). ...

- Memos dated July 21 and 25, 2002 from Mick to Magaly, Albert, and Enzo providing details on a meeting they held and the status of various properties. In respect of Homewood, Mick wrote:

The group still needs to “firm up” on allocation and timetable of cash requirements for the deal. [Enzo, Magaly & Mick - \$600,000 in total required on closing?]. Partnership split and responsibilities may still need financing. Will \$600,000 be enough to close this deal?

- Emails from Mick to Enzo, dated November 7, 2002, and November 19, 2002, with the subject “Updates...”. In the emails, Mick provides updates on various properties. With regard to Homewood, he wrote on November 7, 2002 and November 19, 2002, respectively: “Need any help? How is that progressing?” and “Anything needed there?”
- There was an email from “Fiona”, an assistant property manager at one of the Mizzi family companies to Mick, copying Enzo, reporting on where there are vacancies, including re Homewood.

[21] Mick relies heavily on the Discussion Letter. The Discussion Letter was created by Mick and sent to Enzo. There is also a follow up email from Mick to Enzo, dated September 9, 2005, regarding the Discussion Letter (the “Follow up Email”, and together with the Discussion Letter, the “2005 Documents”). There is no reply by Enzo to either the Discussion Letter or the Follow up Email.

[22] The Discussion Letter, sent by Mick to Enzo, includes Mick’s understanding of the terms of their business dealings. It was never acknowledged or agreed to by Enzo. It provides, *inter alia*:

- As requested and in an attempt to provide assistance with your estate planning and with reconciliation of all of our business dealings to date, I would ask you to please review the following letter and provide me with your comments as warranted.

- To date, our business dealings have primarily been on a “verbal basis” and to a large part, have been successful. As an extension of this then, in virtually every instance and simply for “administrative convenience”, it is either you or I that legally hold[s] 100% of the interest(s) that are, by our verbal agreements, intended to be for our mutual benefit (i.e. “ours”). Effectively, for almost everything we’ve done to date, one of us legally holds the business and/or project interest “in Trust” for the other.
- In very general terms, the intent of our association has been to get involved in businesses and projects on a 50/50 basis where capital and construction expertise is provided through you and where I am principally responsible for the generation of leads and the introduction to certain key business personnel, the completion of administrative and quasi-legal contract work and/or the performance of real estate and/or mortgage brokerage duties and for the completion of economic analysis and the valuation of the businesses or projects that we’re involved with or that we’re contemplating getting involved with.
- Notwithstanding the foregoing, it should be noted however, that we are not partners in every mutual business or project on a 50/50 basis. Certain situations have developed (or where known “going-in” to the investment) where “concessions” may have had to have been made by one or both of us to make the intent of our involvement in the project more “fair” or appropriate to one or both of the partners. An example of this is our project at 1, 7 & 9 Homewood Avenue.
- **PROJECTS OWNED BY ENZO & MICK**

1, 7 & 9 Homewood

- A total of 2/3 (or 4/6th) of the project held by Enzo & Mick
- 3/6th- of project held by Enzo Mizzi (with Magaly Bianchini (50/50?))
- 1/6th of project held by Mick
- (i.e., 75% of our interest by Enzo and 25% by Mick – Unequal interests)
- Interest on Cash Invested due to Enzo
- Profits from Management (if any) accrue to Parties according to their ownership interest. (May not include Alan Jones?)
- 2/6th of project held by Alan Jones

[23] Mick followed up on the Discussion Letter with an email to Enzo about a month later. In that email Mick stated that: “[He] believe[d] that they were in business together with the intention of splitting all profits and losses equally.” Again, Enzo did not reply to the email in writing. When asked about the Discussion Letter and Follow up Email, Enzo’s evidence was that he would have told Mick at the time that there was no deal between them.

[24] Mick’s position is that the 2005 Documents were created contemporaneously and support his position, whereas there are no contemporaneous documents that support Enzo’s position. Mick argues that if Enzo’s version of events is correct (that he told Mick there was no such deal immediately after receiving the Discussion Letter), then Mick would not have written his Follow up Email five weeks later. Further, Mick points to language in the Discussion Letter where Mick states that he is drafting the letter at Enzo’s request.

[25] Enzo’s evidence was that he and Mick spoke all the time. Enzo stated that he knew that Mick wanted to be more involved in the various Mizzi family projects, but his position was that Mick had to put up money in order to be a shareholder or participating partner in the various ventures.

[26] Enzo’s evidence was that he and his family had been very generous with Mick and had involved him in certain projects, helped fund Mick’s company, and assisted him financially when his home was under power of sale. Enzo acknowledged that he and Mick were both involved in the following: JMS Appraisals, Appraisal Source Canada, the Mpire Group of companies and a joint venture regarding the substantial renovation of a property known as the Moran Property. I note that the draft MOUs, which were not executed, and which were done in respect of a proposed development known as Butternut involving Enzo, James, Mick, and the Mpire Realty Group, listed 12 properties as potential Mpire Development Corporation projects, but did not include Homewood (consistent with Enzo’s evidence). The recitals to the draft MOUs also refer to the 12 listed properties as being held 50/50 by Enzo and Mick.

[27] Enzo stated that as a businessperson he would never agree to a general Umbrella Agreement pursuant to which Mick, or anyone, would get half of virtually all future Mizzi family projects.

Homewood

[28] The Memorandum of Understanding, dated October 5, 2002, with regard to Homewood is between Albert, Magaly, and Enzo in trust (on behalf of a company to be incorporated) (the “Homewood MOU”). The Homewood MOU sets out the terms of the agreement with regard to the Homewood properties, including:

- It sets out the “framework upon which more formal documentation can be drafted and upon which the shareholders agreement can be progressed.”
- Albert purchased the lands under an agreement of purchase and sale, dated May 28, 2002. Albert agreed to assign the APS to a company to be incorporated.

- It sets out the primary contributions to the joint venture of each of Albert, Enzo and Magaly. Enzo's and Magaly's principal contribution will be to provide \$600,000.00 for the completion of the purchase of the property. The loan will be made to the group at the rate of 10% to be paid interest only, monthly, and the principal shall be repaid within 6 months of closing.
- A new corporation is to be formed for the joint venture. "The share structure of the corporation shall be issued as 33 1/3% to Allan [Albert] and 66 2/3% to Enzo and Magaly, in trust."
- All cheques and contracts requiring capital expenditures require any 2 signatures of Enzo, Magaly or Albert.

[29] Mick is not mentioned anywhere in the Homewood MOU. Mick's evidence is that he and Enzo were partners under a verbal Umbrella Agreement, and Enzo holds half of his shares of the corporations formed for the joint ventures in respect of Homewood in trust for Mick.

[30] Mick attended many meetings on Homewood. He took detailed notes at these meetings. His evidence was that he was doing so as a partner in the venture. Enzo's evidence was that Mick attended many of his project meetings to assist him and take notes on the Homewood venture as well as other projects.

Credibility Assessment

[31] Mick tried to position himself as a naïve guy who just followed Enzo's directions. However, Mick is an educated person, who has been involved for many years in the real estate business through his work as a property appraiser, real estate agent and broker. At the very least, Mick is familiar with documentation related to real estate and other transactions. Albert's evidence was that Mick was an intelligent, organized individual, who was well versed in his profession as an appraiser.

[32] Mick acknowledged that he previously lied under oath on at least one prior occasion. At the judgment debtor examination, Mick stated under oath that he only had an interest in two residential properties (the Moran Property and the Samson Property), neither of which was the Homewood properties. Mick claimed he lied under oath at the judgment debtor examination because Enzo told him to lie, and Enzo was sitting beside him at the examination. Enzo's position at trial was that Mick was telling the truth at the judgment debtor exam.

[33] Mick also testified to other questionable dealings engaged in by him and Enzo, including a "mortgage" that Mick says was documented but not advanced to the Patels.

[34] When Mick was asked under cross examination what actions he was responsible for, he remained silent and did not answer the question.

[35] Enzo was also not a credible witness. Other witnesses at trial, including Albert and James, gave differing accounts of how Enzo had misled or tricked them:

- James, a professional planner in Ontario, stated that in the Butternut development, Enzo took steps to wrongly appropriate James' equity in a successful retirement home he had developed in Uxbridge, Ontario. James alleges that his signature was forged on a key transfer document, which purported to transfer James' interest to one of Enzo's companies. James stated that he never signed the transfer document. Even though the allegedly forged transfer document was in existence (unbeknownst to James), Enzo was negotiating MOUs with James pursuant to which he would transfer the same interest to another joint venture. My impression of James was that he was a straightforward witness. He clearly felt very wronged by Enzo, who he had trusted.
- Albert's evidence was that when the Homewood properties were purchased, one third of the shares were to be issued to Albert and two thirds were to be issued in Enzo's name in trust. He stated that there was not a discussion that Enzo's father would be a shareholder and Albert never agreed to Enzo's father being a shareholder. However, as noted above, the Mizzi Estate holds one third of the shares in each of 333 Ontario and 274 Ontario. Further, Albert's evidence was that immediately after one third of the shares in each of 333 Ontario and 274 Ontario were issued to him, Enzo created documents, signing as president and secretary of the companies, and documented Albert's shares of the two companies in his father's name.
- Albert's evidence was also that he had an action against Enzo, among others, related to 333 Ontario and 274 Ontario. He indicated that in that lawsuit he took the position that Enzo took cash receipts. He also gave evidence of various promissory notes from companies related to Enzo or his family at high interest rates to 333 Ontario and 274 Ontario. Albert stated that he did not agree to these promissory notes, which totaled approximately \$25 million, with interest and principal. He stated that the interest alone on the notes equals the value of the three Homewood properties, which would have made his shares in the companies basically worthless. He further stated that the liabilities that would be accruing under these promissory notes were not in the tax returns or books and records of the companies. His evidence was that under the settlement, where it was agreed that Albert held one third of the shares of 333 Ontario and 274 Ontario, the companies do not have to pay the multiple promissory notes.
- Mark's evidence was that he was involved in the Wilson Deal with Enzo and others. Mark stated that after the deal closed Enzo put a mortgage on the property for about \$12 million. The mortgagee was one of Enzo's companies. Mark stated that he did not know about the mortgage and only found out about it when the company went into receivership. He said that there was a document that had a forgery of his signature. Mark lost everything he invested in the deal.

[36] Mick points to other business partners that Enzo has allegedly double crossed suggesting that he is just another victim of Enzo's manipulative practices.

[37] Both Enzo and Mick had a strong interest and personal stake in the outcome of these proceedings. They were asked to recall details of discussions from over twenty years ago. When providing evidence about their discussions, Enzo was consistent in his insistence that he would never have agreed to a partnership deal of the sort alleged by Mick with Mick, or anyone. There is logic to Enzo's position, which is one of the reasons I prefer Enzo's evidence to Mick's evidence. Mick's evidence that multi-million dollar dealings were done with Enzo after hockey in the locker room or shower, and with no documentation, is not consistent with how sophisticated parties would do business. In addition, the documentation related to Homewood was more consistent with Enzo's position. Specifically, the Homewood MOU, which was among Enzo in trust (on behalf of a company to be incorporated), Magaly and Albert.

[38] Neither Mick nor Enzo was a credible witness.

Analysis

[39] Mick's counsel defines this matter as a dispute over the ownership of shares in the companies that hold Homewood. However, as submitted by Enzo's counsel, the implications are much broader. Mick claims entitlement to one sixth of Homewood as a result of an "umbrella agreement" he states was reached between him and Enzo. Mick stated that the Homewood properties were the first properties that he and Enzo acquired together under their alleged arrangement.

Did Mick and Enzo enter into an Umbrella Agreement?

[40] For a contract to exist there must be a meeting of the minds, or consensus *ad idem*. The test for whether there is an agreement is objective. The Court must consider whether an objective, reasonable bystander would determine, in all of the circumstances, that the parties intended to contract. More than an intention is needed for an enforceable agreement to exist. The essential terms of the agreement must be sufficiently certain: *UBS Securities Canada, Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328, 95 O.R. (3d) 93, at para. 47.

[41] I find that there was no Umbrella Agreement.

[42] With regard to Homewood, I accept that there may have been discussions regarding a venture between Mick and Enzo. This is supported by the Discussion Letter, the Follow up Email, and the fact that Mick attended the meetings on this venture and Albert thought he was a partner. James' evidence was also that Enzo introduced Mick as his partner. I also accept that Mick may have thought that he and Enzo had reached some sort of agreement.

[43] However, I am unable to find that there was a contract. First, there was no meeting of the minds. Although Mick may have thought they had reached an agreement, Enzo did not. Second, the terms of the alleged contract are unascertainable.

[44] In *Bawitko Investment Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (C.A.), the Court of Appeal addressed "informal agreements". It stated at paras. 20-21:

As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may “contract to make a contract”, that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

However, where the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the “contract to make a contract” is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself.

[45] The Umbrella Agreement that Mick states was created between Mick and Enzo would, if valid, entitle Mick to half of virtually all projects Enzo engaged in over an extended period. The scope of this purported agreement, according to Mick, would include almost any property purchased by Enzo or the Mizzi family since around 2001 regardless of whether Mick sourced the property. Remarkably, this would include an ownership interest in the property Enzo and his spouse purchased and on which they built their home (7165 Bayview Ave.). This incredible assertion does not hold up to the test expressed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at para. 10:

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[46] While other persons, including James and Albert, gave evidence regarding Enzo’s improper dealings with them, these others also invested money in the venture in question. This is

not the case with Mick. He did not invest money in Homewood. At most, he spent some time assisting Enzo with the venture.

[47] Both parties took shots at the others' credibility. Fortunately, this case does not turn on credibility. Here we have two different versions of the business relationship between Enzo and Mick. However, only one version is objectively sustainable. Mick wants the Court to accept that he and Enzo reached a verbal multi-million-dollar agreement, covering virtually all of Enzo's properties acquired after 2001 entitling Mick to half. Enzo has acknowledged that there were certain ventures that he and Mick entered together. However, Enzo states that otherwise Mick provided various services to Enzo and the Mizzi family business.

[48] While there are some contemporaneous emails, they also support Enzo's version of their business relationship. The 2005 Documents were created by Mick and not agreed to by Enzo. There were no communications reporting on the so-called partnership financials. The only written communications regarding financials that Mick could point to in evidence was the one rent roll document. If Mick was a partner in respect of the 30+ properties under the alleged Umbrella Agreement, one would expect that he would have been provided with updates and information regarding the profitability of the properties. The evidence is far more consistent with Mick believing he had an entitlement to compensation for his working relationship with Enzo than it is with Enzo and Mick entering into the alleged Umbrella Agreement. Mick testified that the ongoing business dealings for this alleged 50/50 partnership were frequently conducted in the locker room or the shower after hockey. Enzo denies any such discussions – in any such forums. Objectively, given the undisputed extent of Enzo's business investments, I find that Mick's evidence on this point borders on the absurd.

[49] While there may have been discussions around the formation of a partnership of sorts, there was never a meeting of the minds regarding what that partnership would look like. Not only is there no documentation, Mick's assertion that Enzo would agree to divide half of virtually all of the properties acquired by Enzo on behalf of the Mizzi family after 2001 is nothing short of incredible. It is not logical that a sophisticated businessperson would agree to such a deal. In addition, Mick, an educated person, with real estate experience, would know that an important agreement such as the alleged Umbrella Agreement ought to be in writing. In fact, certain other business dealings involving Mick and companies controlled by Enzo or his family, including the mortgage transactions with respect to the Samson Property and the Moran Property, were appropriately documented.

Disposition and Costs

[50] I am therefore satisfied that there was no such Umbrella Agreement or contract that would entitle Mick to succeed in this action, which is accordingly dismissed.

[51] The parties are encouraged to settle the issue of costs. If they are unable to do so by September 29, 2023, they shall notify my judicial assistant in writing. In such case, Enzo may file written costs submissions by October 13, 2023 (limited to 4 pages double spaced). Mick may file responding costs submissions by October 27, 2023 (limited to 4 pages double spaced). The parties shall file their submissions on CaseLines and send a copy by email to my judicial assistant.

J. Steele J.

Released: 2023-09-06

CITATION: Cavanagh v. Mizzi et. al, 2023 ONSC 5033
COURT FILE NO.: CV-21-668582-CL
DATE: 20230906

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL CAVANAGH

Plaintiff

– and –

ENZO MIZZI, MARY CAMPISI, LINA MIZZI (also known as Carmela Mizzi) as executor for the Estate of EMANUELE MIZZI, 1543333 ONTARIO LTD., 1544274 ONTARIO LIMITED, MAGALY BINACHINI, ALBERT JONES AND KATHARINA GROSS

Defendants

REASONS FOR JUDGMENT

STEELE, J.

Released: 2023-09-06