

# Court of King's Bench of Alberta

Citation: Pollard v Lougheed Block Inc 2024 ABKB 493

Date: 20240813  
Docket: 1103 05229  
Registry: Edmonton

Between:

Lee David Pollard, Shannon Erin Pollard, Donald Joseph Kramer, James Kerwin Mahood and Jo Anne Marie Mahood

Plaintiffs

- and -

The Lougheed Block Inc., Neil John Richardson, Heritage Capital Corporation, JR Smith, JR Smith, also known as J R Smith, JR Smith also John Richard Smith, J R Smith and John Richard Smith

Defendants

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## Memorandum of Decision of the Honourable Applications Judge M.R. Park

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### Introduction:

[1] This is an application by the Plaintiffs for summary judgment against all defendants save for Neil John Richardson (“**Richardson**”).

[2] Following oral submissions, I dismissed the application as it pertained to the defendant. The Lougheed Block Inc. (“**Lougheed**”). I reserved my decision on the balance of the application.

[3] For the reasons that follow, the application is dismissed as it pertains to the defendants Heritage Capital Corporation (“**HCC**”) and JR Smith (“**Smith**”).

### A Preliminary Comment:

[4] Before delving into the material facts, I wish to draw to the attention of all that shortly after the application was heard, I received correspondence directly from Smith. I did not review that correspondence except to the extent necessary to determine the author and I did not consider it in arriving at any of my conclusions.

**Background:**

[5] At all material times, HCC was an Alberta corporation. Its primary role was help raise capital for real estate development projects being undertaken by Lougheed and another corporation, Seventh Avenue Property Corporation.

[6] At the time the Plaintiffs made their investments (as described in further detail below), Smith was HCC's sole director and held 60% of that corporation's issued voting shares. Richardson was the only other voting shareholder. As I understand it, Richardson was also a director of Lougheed.

[7] HCC and each of the Plaintiffs are parties to various mortgage syndication agreements (collectively the "**MSAs**"), all of which were entered into in 2008 and 2009. Although he signed the MSAs in his capacity as HCC's principal, Smith is not himself a party to those agreements.

[8] Essentially, the MSAs permitted the Plaintiffs to purchase an interest in a loan or loans to be made by HCC to Lougheed. In other words, HCC obtained cash investments from the Plaintiffs and others, which it then used to fund a loan or loans made by it to Lougheed (the "**Lougheed Loan**"). The idea was that the Plaintiffs' initial investments would eventually be returned to them, along with interest.

[9] To secure the Lougheed Loan and, by extension, the investments comprising that loan, HCC was to obtain a mortgage from Lougheed (the "**Mortgage**"), which was to be registered in second position as against title to certain real property in Calgary (the "**Lougheed Property**"). Further, Richardson and his father, Daryl Richardson ("**Darryl**"), were to personally guarantee the Lougheed Loan. All of this is reflected in Schedule "A" to the MSAs. The guarantees that were to be given by Richardson and Darryl will be collectively referred to herein as the "**Guarantees**", while the Mortgage and the Guarantees will be collectively referred to as the "**Security**".

[10] The MSAs provide that HCC is to administer the Lougheed Loan on behalf of the investors. The various powers and duties of HCC in its administrative role are described at section 4.4 of the MSAs.

[11] Section 4.2 of the MSAs sets out the standard of care to be met by HCC in the discharge of its duties and powers as administrator. That provision provides that HCC will carry out its obligations under the MSAs exercising the same degree of care, diligence and skill that a reasonable and prudent person would exercise in similar circumstances.

[12] The funds comprising the Lougheed Loan, which included the Plaintiffs' respective investments, were forwarded to Lougheed without HCC first receiving verification that the Security was in place.

[13] As it turns out, the Mortgage was initially registered against title in third position, behind mortgages registered in favor of The Equitable Trust Company ("**Equitable Trust**") and Krayzel Corp. ("**Krayzel**"). Later on, HCC agreed to postpone its position in relation to a further (possible) \$800,000.00 or so advance from Equitable Trust to Lougheed. The Plaintiffs claim this

postponement was made without investor authorization. HCC and Smith say otherwise. In the result, it does not matter who is correct on this point.

[14] In addition to the issues with the Mortgage's priority position, the Guarantees never materialized.

[15] Eventually, Equitable Trust commenced foreclosure proceedings, which ultimately resulted in the sale of the Lougheed Property. There were insufficient proceeds available to pay any part of the Lougheed Loan. None of the Plaintiffs have been repaid any part of their respective investments, let alone any interest on those investments.

[16] Between late December, 2011 and late November, 2013, HCC, Lougheed, Richardson and Darryl entered into a series of standstill agreements. Smith's evidence is that HCC entered into these agreements in consultation with all investors, including the Plaintiffs. The suspension period provided for by the most recent standstill agreement remains extant, which means HCC has not taken any meaningful action to attempt to realize on the debt owed to it by Lougheed.

**Issues:**

[17] The Court must determine, based on the record before it on this application, if there are any genuine issues requiring a trial to resolve.

**Analysis:**

**a. The summary judgment test:**

[18] Rule 7.3 (1) of the *Alberta Rules of Court* codifies the rules for summary judgment and provides that a plaintiff may apply for summary judgment if there is no defence to their claim, or any part of it, or the only real issue is the amount to be awarded.

[19] Summary judgment may be awarded upon the applicant establishing that there is no "genuine issue for trial". There will be no issue requiring a trial when the judge is able to make the necessary findings of fact on the record before them, apply the law to those facts and be satisfied that the process reflects a proportionate, timely and cost-effective means to achieve a just result: *Hyrniak v Mauldin*, 2014 SCC 7 ("*Hyrniak*").

[20] The analysis to be undertaken by the Court on a summary judgment was set out by the Alberta Court of Appeal in its decision in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 ("*Weir-Jones*"). The key considerations to be addressed are as follows:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

- b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[21] In *Hannam v Medicine Hat School District No. 76, 2020 ABCA 343*, our Court of Appeal provided confirmation and clarity on the summary judgment test set out in *Weir-Jones*. The Court noted that the *Weir-Jones* standard sanctions summary judgment if the presiding judge is left with sufficient confidence in the record such that he or she is prepared to exercise the judicial discretion in to summarily resolve the dispute. More specifically, if the moving party has proved the material facts on the balance of probabilities and advances the law that vindicates their position, summary judgment is appropriate. The outcome does not have to be obvious. Summary judgment cannot be granted if the application presents a genuine issue requiring trial.

**b. Application of the summary judgment test to the claims made against HCC:**

[22] Although not explicitly spelled out in the MSAs, I would think it obvious that HCC owed a duty to investors to take all reasonable measures to secure and protect the investments it received. It is equally obvious that HCC failed to discharge that duty.

[23] The MSAs include a limitation of liability clause, which provides as follows:

**4.7 Liability of the Administrator**

The Administrator, in the exercise of any of its duties or powers with respect to the Mortgage, will not be liable for any acts or omissions made in good faith unless such acts or omissions constitute wilful misconduct, and the Administrator may act on the advice or information obtained from the Lending Committee, or any barrister, solicitor, appraiser, surveyor engineer, architect, receiver or other expert retained by it (collectively, the "Experts", or individually an "Expert"), and in addition may rely upon any statutory declarations, opinions, reports or certificates furnished under the Mortgage and will not be responsible for any loss resulting from anything which the Administrator in good faith and reliance on such advice, information, statutory declarations, opinions, reports or certificates does or refrains from doing, and will be entitled to legal or other advice and employ such assistance as may be necessary for the proper discharge of its duties and pay reasonable compensation for all such legal and other advice or assistance which compensation, to the extent such expenses are not the responsibility of the Borrower under the Mortgage, shall be recoverable by the Administrator from the Co-Lender in proportion to the Co-Lender's Share. The Administrator will not be bound to supervise the actions of, nor will the Administrator be

responsible for any misconduct on the part of the Lending Committee, or any Expert retained by it as aforesaid. [emphasis added].

[24] HCC says that it did not act in bad faith or engage in any willful misconduct and that it is therefore shielded by this exclusionary clause. I disagree.

[25] The exclusionary clause pertains to MCC's exercise of its duties or powers with respect to the Mortgage. That is not what the Plaintiffs' complaint is about. They are aggrieved by the fact that HCC released funds to Loughheed without first taking reasonable (or really any) measures to ensure the Security was in place. HCC more or less took the Plaintiffs' money and handed it over to Loughheed, apparently taking nothing more than Richardson's word that the Security would be procured.

[26] As I noted, the general standard of care to be met by HCC in the discharge of its duties is set out at Article 4.2 of the MSAs and requires HCC to exercise the same degree of care, diligence and skill that a reasonable and prudent person would exercise in similar circumstances.

[27] No reasonably prudent secured lender, be they an "administrator" or otherwise, would fund a loan without first verifying that the security to be given by the borrower was in place. HCC's omission in that regard is a significant departure from the contractual standard of care. HCC has breached its contractual duties owed to the Plaintiffs.

[28] The difficulty the Plaintiffs face is that they have not established that HCC's acts/omissions have caused them to suffer a loss.

[29] There is no evidence that HCC (and consequently the Plaintiffs) would have obtained any recovery had the Mortgage been registered in the proper priority position.

[30] Insofar as the Mortgage postponement is concerned, there is no evidence that the \$800,000.00 was actually advanced. Even if it was, there is no evidence that this advance was prejudicial to the Plaintiffs position, other than notionally.

[31] Additionally, the Plaintiffs have not established that there would have been any prospect for realization on the Guarantees had they in fact been given.

[32] Finally, Loughheed's liability to HCC isn't limited by the Mortgage. HCC maintains an *in personam* claim against Loughheed, which it has not pursued owing to the standstill agreements. There is again no evidence related to Loughheed's ability to make good on the debt.

[33] The result of all of this is that the Plaintiffs' have not established that they have suffered a loss as a result of any act or omission on the part of HCC. At best, their application is premature.

**c. Application of the summary judgment test to the claims made against Smith:**

[34] In the Third Amended Statement of Claim, the Plaintiffs level various accusations at Smith, including breach of contract, breach of fiduciary duty and fraudulent or negligent misrepresentation. None of these claims were directly addressed or argued at the application.

Rather, the Plaintiffs argued that I ought to pierce the corporate veil and hold Smith personally liable for HCC's purported wrongdoings.

[35] Canadian courts will typically pierce or lift the corporate veil only when a corporation has been completely dominated and controlled and used as a shield for fraudulent or improper conduct. There are two primary factors to be considered: (i) the degree of control the shareholder or director has over the corporation and (ii) the nature of the wrongful act: *Elbow River Marketing Limited Partnership v. Canada Clean Fuels Inc.*, 2012 ABCA 328 at para. 16.

[36] In *Tirecraft Group Inc. (Receiver of) v. High Park Holdings ULC*, 2010 ABQB 653 ("*Tirecraft*"), Justice Yamauchi cited the factors to be considered in assessing the degree of control a person exercises over a corporation and whether a corporation is a "sham, cloak or alter ego." Those factors include whether the shareholder treats itself and the corporation interchangeably and intermingles the corporation's affairs with its own; whether the corporation is independent from its shareholders, whether the corporation has its own assets, skills or employees, and whether the corporation has its own bank account, books or records.

[37] I cannot conclude from the evidence before me on this application that HCC was "completely dominated" by Smith or that HCC was Smith's mere puppet or agent. While it is true that Smith was HCC's sole director and controlling voting shareholder, that is simply not enough. There is no evidence that any of the factors identified in *Tirecraft* are present.

[38] Even if Smith exercised the requisite dominance over HCC, I am not satisfied that the acts complained of were fraudulent or sufficiently improper to warrant lifting the corporate veil.

[39] The test for civil fraud was set out by the Supreme Court of Canada in *Bruno Appliance and Furniture Inc. v. Hyrniak*, 2014 SCC 8, where Justice Karakatsanis commented as follows:

From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[40] The Plaintiffs say that Smith represented to them that the Mortgage would be registered in second position and that the Guarantees would be obtained. Those representations are expressly made in the MSAs and are false.

[41] However, the evidence given by the Plaintiffs on this point is somewhat vague, in that it is not possible to ascertain if the allegations are limited to the MSAs or if the Plaintiffs contend that Smith otherwise made representations to them. It may be that the Plaintiffs are conflating HCC and Smith in this regard.

[42] To the extent that the representations complained of are those made in the MSAs, they are HCC's representations; not Smith's. For his part, Smith says he made no representations of any sort to any of the Plaintiffs.

[43] The bottom line is that the evidence given by the Plaintiffs concerning the misrepresentations is unclear and may be in direct conflict with Smith's evidence. It is simply not possible to resolve this issue on a summary basis.

[44] In terms of improper conduct, the Plaintiffs allege that Smith:

- a) illegally marketed syndicated mortgages without being registered as a dealer under the *Securities Act*, R.S.A 2000, c. S-4 (the "***Securities Act***");
- b) illegally marketed syndicated mortgages without being authorized as a mortgage broker under the *Real Estate Act*, R.S.A. 2000, c. R-5 (the "***Real Estate Act***"); and
- c) released the monies invested by the Plaintiffs without first ensuring that the Mortgage was a first charge and that the Guarantees had been provided.

[45] The record before me on this application is insufficient to draw the conclusion that HCC and/or Smith were required to be registered as dealers under the *Securities Act* or as mortgage brokers under the *Real Estate Act*.

[46] The Plaintiffs' brief excerpts portions of both the *Securities Act* and the *Real Estate Act*, which they say establish HCC and Smith's breaches of that legislation. While that may well be true today (and I give no comment on that one way or the other), I was provided with no evidence or information as to the legislative requirements of the day, namely 2008 and 2009.

[47] Further, as deposed to by Mr. Smith in his affidavit sworn in response to this application, a law firm was engaged to be responsible for and handle any issues concerning regulatory requirements associated with securities. There is no evidence that law firm raised any concerns regarding the need for either Smith or HCC to be registered as a dealer and/or mortgage broker and Smith's evidence is that to the best of his knowledge, neither he nor HCC were required to be registered as alleged by the Plaintiffs.

[48] Additionally, Smith and HCC point out that there is no evidence that either of them were investigated, charged or convicted of any breaches of either the *Securities Act* or the *Real Estate Act*.

[49] Given the foregoing, I cannot make a fair and just determination concerning the purported statutory breaches.

[50] There is no dispute that investment funds were released by HCC without ensuring the required security was in place. I have found HCC's omission in that regard to have been a contravention of duties owed by it to the Plaintiffs. However, I don't accept that Smith owed duties to the Plaintiffs for no reason other than that HCC owed those duties, and the record before me on this application does not establish that Smith owed duties to any of the Plaintiffs independent of any duties owed to them by HCC.

[51] Finally, the causation of loss issues that apply to the Plaintiffs' claim as against HCC apply equally to their claim against Smith.

**Conclusion:**

[52] The Plaintiffs' application as it pertains to HCC and Smith is dismissed.

[53] If the relevant parties cannot agree on costs, they may appear before me in morning Chambers to make submissions on that point.

Heard on the 26<sup>th</sup> day of January, 2024.

**Dated** at the City of Edmonton, Alberta this 13<sup>th</sup> day of August, 2024.

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**M.R. Park**  
**A.J.C.K.B.A.**

**Appearances:**

Brian S. Sussman, KC, Biamonte LLP  
for the Plaintiffs

Brad J. Findlater, Bradley James Findlater Professional Corporation  
for the Defendants Heritage Capital Corporation and Smith

Teddy E. Nobles, Walsh LLP  
for the Defendant Neil John Richardson