

COURT OF APPEAL FOR ONTARIO

CITATION: White v. 6975429 Ontario Inc., 2020 ONCA 627

DATE: 20201006

DOCKET: C67537 & C67538

Pepall, Benotto and Coroza JJ.A.

C67537

BETWEEN

Kenneth White, Jacqueline Chepurnyj and Brenda Innes

Plaintiffs (Respondents)

and

6975429 Ontario Inc. carrying on business as Engreen Inc. and Anthony Guido

Defendants (Appellants)

C67538

AND BETWEEN

Albino Armanasco and Anthony Fusco

Plaintiffs  
(Non-Parties to Appeal)

and

Brenda Innes, Kenneth White and Jacqueline Chepurnyj

Defendants  
(Respondents/Appellants by way of Cross-Appeal)

and

2402169 Ontario Inc., Engreen Inc. and Anthony Guido

Third Parties (Appellants)  
(Appellants/Respondents by way of Cross-Appeal)

James Zibarras, for the appellants/respondents by way of cross-appeal

Christophe Shammas and Tamara Watson, for the respondents/appellants by way of cross-appeal

Heard: September 21, 2020 by video conference

On appeal from the orders of Justice William S. Chalmers of the Superior Court of Justice, dated September 13, 2019 with reasons reported at 2019 ONSC 7455.

## REASONS FOR DECISION

[1] This appeal and cross-appeal arise from the sale of the shares of 2402169 Ontario Inc. (“240”) by Kenneth White, Brenda Innes and Jaqueline Chepurnyj (the “Innes Parties”) to 6975429 Ontario Inc., carrying on business as Engreen Inc. (“Engreen”). Anthony Guido (“Guido”) is the principal of Engreen.

[2] The only assets of 240 were a quarry, the licence to operate it and related equipment. The terms of the share purchase involved a sale price of \$1,610,000, a promissory note signed by Engreen, a personal guarantee signed by Guido, and an agreement by Engreen to assume the obligations of 240 with respect to three

mortgages on the property. Engreen and Guido also agreed to indemnify the Innes Parties for all liabilities in connection with the mortgages.

[3] Prior to the closing of the transaction, the appellants were provided with a bill of sale that described the equipment 240 owned and that it had been acquired on an “as is” condition from a third party.

[4] Engreen did not make the payments required by the share purchase agreement including the payments on the first mortgage held by Albino Armanasco and Anthony Fusco.

[5] The Innes parties brought an action in Newmarket for damages arising from breach of the agreement. Engreen and Guido defended the action on the basis that they were induced to enter the agreement by misrepresentations made by the Innes Parties. They also counterclaimed asserting that the respondents had breached the agreement because they failed to deliver equipment that was in working order.

[6] Meanwhile Armanasco and Fusco brought an action in Toronto against the Innes Parties for payment of the first mortgage. They obtained judgment against the Innes Parties for \$577,893.07 plus interest and costs. It was also a term of the judgment that - in accordance with the security provided in the mortgage – Innes and Chepurnyj deliver possession of their homes to Armanasco and Fusco. The

Innes Parties brought a third-party action against Engreen, Guido and 240 for contribution and indemnity.

[7] The Newmarket action and the third-party action in the Toronto action became the subject matter of two summary judgment motions heard together.

### **Decision Below**

[8] In the Newmarket action, the motion judge granted judgment against Engreen and Guido for \$1,477,200 plus interest and dismissed their counterclaim. He held that the various agreements were valid, and that Engreen and Guido were not induced to enter into these agreements by any misrepresentation.

[9] In the Toronto action, the motion judge held that Engreen and Guido breached their agreement to assume all obligations and indemnify the Innes Parties in relation to the Armanasco/Fusco mortgage. He declared that the Innes Parties were entitled to contribution and indemnity from Engreen and Guido for all costs, claims, payments, and demands in relation to the judgment against them. Although the motion judge gave no reasons with respect to the Innes Parties' claim for contribution and indemnity against 240, the claim was dismissed.

### **The Appeal**

[10] Before the motion judge, Engreen and Guido raised several bases for misrepresentation. On appeal, they relied only on the allegation that the condition of the equipment was misrepresented as being in good working order.

[11] They submit that the motion judge erred in his interpretation of the agreement by failing to consider the circumstances surrounding the agreement when he concluded that there was “no representation in the Agreement that the equipment [was] in good working order.” They point to various factors that should have been considered, including: the definition of equipment in the agreement, Engreen’s intention to use the equipment to operate the quarry, the requirement to deliver keys to Engreen and Engreen’s intention to have a “turn key” operation. They submit that these factors support their allegation that the Innes Parties misrepresented the condition of the equipment and that they relied on the misrepresentation. They also complain of the motion judge’s reference to the terms of the agreement being just as consistent with a transfer of the equipment on an as is basis.

[12] We do not accept these submissions.

[13] The motion judge considered the surrounding circumstances. He addressed the factual matrix and specifically found that there was no misrepresentation as to the condition of the equipment. A plain reading of the agreement, including the “entire agreement” clause and the express list of warranties and representations, which made no reference to the condition of the equipment, support his conclusion. The “as is” reference in his reasons must be read in that context. It certainly does not mean the motion judge found ambiguity in the contract. We see no legal error and the motion judge’s interpretation of the agreement is entitled to deference.

### **The Cross-Appeal**

[14] The motion judge provided no reasons for the dismissal of the Innes Parties' claims in relation to 240. This aspect of the appeal is not capable of review. There was no consideration of the request for a declaration for an indemnity from 240, be it at law or in equity. The claim against 240 is therefore remitted to the motion judge for determination.

### **Disposition**

[15] The appeal is dismissed. The cross-appeal is allowed and remitted back to the motion judge. Costs are payable to the Innes Parties in the amount of \$20,000 inclusive of disbursements and HST.

"S.E. Pepall J.A."  
"M.L. Benotto J.A."  
"S. Coroza J.A."