

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

SKYMARK FINANCE CORPORATION

Applicant

and

MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD
CORPORATION

Respondents

**FACTUM OF THE APPELLANT MNP LTD., IN ITS CAPACITY AS
COURT-APPOINTED RECEIVER OF 12175622
CANADA INC. AND GPM FOOD INC.**

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PART I: THE APPEAL

1. The Appellant, MNP Ltd. (the “**MNP Receiver**”), appeals from the Order of the Honourable Justice Steele dated June 18, 2024 (the “**June 18 Order**”) directing that KSV Restructuring Inc., in its capacity as licensed insolvency trustee of the Respondents (the “**KSV Receiver**”), is not liable or otherwise obligated to pay 12175622 Canada Ltd. (the “**Purchaser**”), the MNP Receiver as receiver of the Purchaser, or the City of Brantford (the “**City**”) the amounts set out in certain pre-purchase tax bills dated November 25, 2022, issued by the City to the Purchaser (the “**Omit Tax Claims**”), and that the MNP Receiver is responsible for the Omit Tax Claims.¹

¹ Order of Justice Steele dated June 18, 2024 (the “**June 18 Order**”), Appeal Book and Compendium (“**ABC**”), Tab 2, p. 11.

PART II: OVERVIEW

2. The Learned Judge made reviewable errors in holding that the MNP Receiver is liable for the Omit Tax Claims. Under both the Asset Purchase Agreement entered into between the KSV Receiver and the Purchaser (the “**APA**”) and the related Approval and Vesting Order (the “**AVO**”), the KSV Receiver is liable for the Omit Tax Claims. The errors fall into three categories—the crystallization and vesting errors, the *Municipal Act, 2001* interpretation errors, and errors relating to the parties’ knowledge of the tax reassessment that was being conducted by MPAC.
3. As in the Ontario Court of Appeal’s decision in *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.* (“**Heritage Property**”), the Omit Tax Claims arose prior to the issuance of the Receiver’s Certificate at the closing of the Transaction (as defined below), even though the quantum of the Omit Tax Claims was not determined until later.
4. The Learned Judge erred in concluding that *Heritage Property* did not apply because the Omit Tax Claims in this case crystallized after the date of the AVO. Contrary to the reasoning in *Heritage Property*, the Learned Judge reached this conclusion by confusing the question of whether the Omit Tax Claims were liquidated amounts at the date of the AVO with the question of whether or not they had arisen and were due. This resulted in Her Honour’s finding that the Omit Tax Claims were Assumed Liabilities under the APA and were not vested out under the AVO.

5. A purposive interpretation of the AVO reveals that the AVO properly vested out the Omit Tax Claims as a liability of the Purchaser. As a result, the Omit Tax Claims are to be asserted against the proceeds of the Transaction held by the KSV Receiver, not against the estate of the Purchaser.

6. The Learned Judge also made palpable and overriding errors by failing to properly take into account the evidence of the parties' knowledge (or lack thereof) of the Omit Tax Claims. The Omit Tax Claims were a liability known to the KSV Receiver at the time the parties entered into the APA and when the Court granted the AVO in these receivership proceedings. Despite the KSV Receiver having knowledge prior to the close of the Transaction of the need for a reassessment of the Lands (as defined below) for years pre-dating the closing year (specifically, 2019, 2020 and 2021), the Receiver elected not to notify prospective purchasers of the tax liability or identify it as a Permitted Encumbrance under the AVO. Had the KSV Receiver done so, there would have been an effect on purchase price in all likelihood.

PART III: SUMMARY OF FACTS

The Transaction

7. The Purchaser entered into the APA dated March 18, 2022 to purchase substantially all of the assets, undertakings and property ("**Property**") of the Respondents in these proceedings (the "**Mahal VC Receivership**"), including the

real property located at 155 Adams Boulevard, Brantford, Ontario (the “**Transaction**”).²

8. FCC provided the financing for the Transaction.³
9. On April 11, 2022, the KSV Receiver brought a motion to approve the Transaction and obtained an approval and vesting order with respect to the Transaction (the “**AVO**”), which conveyed the Property, including the real property located at 155 Adams Boulevard (the “**Lands**”), to the Purchaser free and clear of all claims and encumbrances.⁴
10. The Lands included a non-operational flour mill (the “**Flour Mill**”). Construction on the Flour Mill started in 2016 and was completed some time in 2019 or 2020.⁵
11. The City was given notice of the AVO motion and did not oppose the motion.⁶
12. “Assumed Liabilities” was defined in the APA as follows:⁷

“Assumed Liabilities” means the following Liabilities of each of the Debtors:

(a) all Liabilities under the Assigned Contracts and Permits and Licences (in each case to the extent such Assigned Contract or Permit and Licence is effectively assigned to the Purchaser);

(b) all Liabilities relating to the Purchased Assets or Related to the Business arising on or after the Closing Date;

² Affidavit of Dale Snider affirmed April 25, 2024 (the “**Snider Affidavit**”) at paras 4-5, ABC Tab 5, p. 44.

³ Snider Affidavit at para 6, ABC Tab 5, p. 44.

⁴ Snider Affidavit at para 7, ABC Tab 5, p. 44.

⁵ KSV Receiver Motion Factum dated May 22, 2024 (the “**KSV Factum**”) at para 55, ABC Tab 8, p. 81; Affidavit of Pat Telfer affirmed May 2, 2024 (the “**Telfer Affidavit**”) at para 5, ABC Tab 6, p. 49.

⁶ Snider Affidavit at para 8, ABC Tab 5, p. 44.

⁷ Sixth Report of KSV dated March 26, 2024 (the “**Sixth Report of KSV**”), Appendix G, APA, article 1.1, ABC Tab 9, p. 95.

(c) all Liabilities on account of the trade accounts, payables and other current accounts payable, in each case incurred or accrued by any of the Debtors on or after the Closing Date in the ordinary course of business and Related to the Business; and

(d) all Environmental Claims and all Environmental Liabilities. [All emphasis added.]

13. Paragraph 4 of the AVO provided:⁸

4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "Receiver's Certificate"), **all of the Receiver's and the Companies' right, title and interest in and to the Purchased Assets described in the APA shall vest absolutely in the Purchaser, free and clear** of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims") **including, without limiting the generality of the foregoing:** (i) any encumbrances or charges created by the Order of the Honourable Justice McEwen dated October 1, 2021; (ii) all charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Ontario) or any other personal property registry system; and (iii) **those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "C")** and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets and are non-enforceable and non-binding as against the Purchaser.

...

Schedule C – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)

(a) **Encumbrances related to Taxes** and utilities arising by operation of law (statutory or otherwise) **which relate to** or secure **Liabilities that in**

⁸ Sixth Report of KSV, Appendix H, AVO at para 4, ABC Tab 10, p. 145; Sixth Report of KSV, Appendix H, AVO at Schedule "C", ABC Tab 10, p. 153.

each case are not yet due or are not in arrears or, if due or in arrears, the validity of which is being contested; [All emphasis added.]

14. In advance of the close of the Transaction, the City issued a tax certificate in respect of the Lands dated March 21, 2022 (the “**March 2022 Tax Certificate**”).⁹
The March 2022 Tax Certificate did not include the amounts constituting the Omit Tax Claims.
15. The Transaction closed on May 18, 2022.¹⁰
16. The KSV Receiver paid the full amount of the March 2022 Tax Certificate on May 25, 2022.¹¹

The Omit Tax Claims

17. Unbeknownst to the Purchaser, on October 1, 2021, the City gave notice to the KSV Receiver that the Lands would need to be reassessed and that omitted tax notices would be issued after MPAC properly assessed the Lands. The City advised the KSV Receiver that the reassessment would result in additional taxes being added to the Lands.¹²
18. The KSV Receiver had ongoing communications with the City throughout 2021 until the close of the Transaction, including receiving updates from the City that the Lands had not yet been properly assessed.¹³

⁹ Snider Affidavit at para 9, ABC Tab 5, p. 44.

¹⁰ Snider Affidavit at para 10, ABC Tab 5, p. 45.

¹¹ Snider Affidavit at para 11, ABC Tab 5, p. 45.

¹² Telfer Affidavit at para 5, ABC Tab 6, p. 49; Telfer Affidavit, Exhibit A, ABC Tab 7, p. 57.

¹³ Telfer Affidavit at para 5, ABC Tab 6, p. 49.

19. Only the KSV Receiver and City staff were copied on this email correspondence. No representative of the Purchaser, including Mr. Mahal, was copied.¹⁴
20. The Purchaser was not notified of these discussions prior to or after the close of the Transaction.¹⁵
21. On May 19, 2022, following the close of the Transaction, the KSV Receiver wrote to the City to advise that all future tax bills should be directed to the Purchaser.¹⁶ The letter makes no reference to the previously identified reassessment. The Purchaser was not copied on this correspondence.
22. On November 1, 2022, the City delivered a tax assessment to the Purchaser (the “**November 2022 Tax Certificate**”), which included three “omit” tax bills for 2020, 2021, and 2022 totalling \$1,091,423, which constitute the Omit Tax Claims.¹⁷
23. On February 23, 2023, the Purchaser notified the KSV Receiver of the November 2022 Tax Certificate.¹⁸
24. On June 1, 2023, FCC obtained a copy of the November 2022 Tax Certificate.¹⁹
25. Prior to receiving the November 2022 Tax Certificate, the Purchaser and FCC did not have any notice of potential tax claims other than those addressed in the March 2022 Tax Certificate.²⁰

¹⁴ Telfer Affidavit, Exhibit A, ABC Tab 7, p. 57.

¹⁵ KSV Factum at paras 53-56, ABC Tab 8, p. 80-81.

¹⁶ Telfer Affidavit at para 14, ABC Tab 6, p. 52.

¹⁷ Telfer Affidavit at para 17, ABC Tab 6, p. 53.

¹⁸ Fifth Report of KSV dated August 15, 2023 at para 9.0(1), ABC Tab 11, p. 190.

¹⁹ Snider Affidavit at para 12, ABC Tab 5, p. 45.

²⁰ Snider Affidavit at para 13, ABC Tab 5, p. 45.

26. FCC advanced funds for the Transaction on its specific reliance that the Lands were being conveyed free and clear of any claims or encumbrances, and based on the March 2022 Tax Certificate. FCC would not have agreed to advance funds for the Transaction if it was aware the Omit Tax Claims were a continued liability as against the Purchaser and the Lands.²¹

The GPM Receivership

27. FCC brought an application on January 18, 2024 to appoint MNP Ltd. as receiver and manager, without security, over all assets, undertakings and properties of the Purchaser and a related entity, GPM Food Inc., (collectively, “**GPM**”) acquired for, or used in relation to a business carried on by GPM, which includes the Lands (the “**GPM Receivership**”). The Court granted the relief sought by Order of Justice Krawchenko dated January 18, 2024²² and the Receivership is ongoing.

PART IV: STATEMENT OF ISSUES, LAW & AUTHORITIES

28. The issues on appeal are whether the Learned Judge made reviewable errors, which can be categorized in the three broad areas set out below.

Issue 1 – Crystallization and Vesting Interpretation Errors

29. Did the Learned Judge err in her interpretation and application of the AVO to the Omit Tax Claims? In particular, did the Learned Judge err in law as follows:

²¹ Snider Affidavit at para 15, ABC Tab 5, p. 45.

²² Snider Affidavit at para 16, ABC Tab 5, p. 46.

- (a) by holding that the Omit Tax Claims had not “crystallized” prior to the issuance of the receiver’s certificate (the “**Receiver’s Certificate**”) delivered pursuant to the AVO and issued in connection with the sale of the Respondents’ assets to the Purchaser, and therefore were not vested out of the Purchased Assets and extinguished as against the Purchaser and Property;
- (b) by holding that the Omit Tax Claims could not be vested out of the Purchased Assets and extinguished as against the Purchaser by the AVO because they had not been quantified prior to the issuance of the Receiver’s Certificate and the close of the Transaction;
- (c) by holding that the Omit Tax Claims were not due prior to the issuance of the Receiver’s Certificate and the close of the Transaction and therefore were not vested out of the Purchased Assets and extinguished as against the Purchaser by the AVO;
- (d) in distinguishing the decision of This Honourable Court in *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.*, 2008 ONCA 167, which decision held that: (i) tax liabilities due to a municipality became due and arose prior to the granting of an AVO, notwithstanding the fact that the relevant tax liabilities had not been quantified at the closing date when an approval and vesting order took effect; and, (ii) approval and vesting orders provide protection to purchasers by causing the conveyance of property free and clear of all encumbrances or claims

and are a key mechanism for providing certainty at the conclusion of insolvency proceedings; and,

- (e) by failing to give effect to fundamental principles of insolvency law concerning when claims arise, including principles providing that a claim may arise before an insolvency event even though the claim may not be quantifiable at that time.

30. The forgoing errors concern questions of law, for which the standard of review is correctness and it is respectfully submitted that on these questions no deference is owed to the Learned Judge.²³

Issue 2 – Municipal Act Interpretation Errors

31. Did the Learned Judge err in her interpretation and application of the *Municipal Act, 2001*? In particular, did the Learned Judge err in law as follows:

- (a) by finding that section 307(3) of the *Municipal Act, 2001* does not make taxes assessed under the *Assessment Act* due on January 1 of the year to which they relate and by further finding that, under section 307(3) of the *Municipal Act, 2001*, the Omit Tax Claims did not arise until November 25, 2022 when the omit tax bills were issued; and,
- (b) by finding that section 349 of the *Municipal Act, 2001* applies in the present case and in failing to hold that the AVO displaces section 349 of

²³ *Housen v Nikolaisen*, 2002 SCC 33 at [para 8](#).

the *Municipal Act, 2001* and establishes unqualified rights in favour of the Purchaser.

32. The forgoing errors concern questions of law, for which the standard of review is correctness and it is respectfully submitted that on these questions no deference is owed to the Learned Judge.²⁴

Issue 3 – Knowledge of MPAC Reassessment Errors

33. Did the Learned Judge make palpable and overriding errors by:
- (a) holding that the principal of the Purchaser knew that the Omit Tax Claims existed in the absence of any probative evidence to support this conclusion; and
 - (b) failing to take account of evidence of the KSV Receiver’s knowledge that a reassessment would occur.
34. The errors set out in paragraph 33 above were errors of fact and subject to a reasonableness standard of review.

The Crystallization and Vesting Errors

The Omit Tax Claims Arose and Crystallized Prior to the Close of Transaction

35. The Learned Judge erred in holding that the Omit Tax Claims did not arise (or “crystallize”) until the omit tax bills were issued on November 25, 2022, six

²⁴ *Housen v Nikolaisen*, 2002 SCC 33 at [para 8](#).

months after the Transaction closed, and therefore were not excluded liabilities on the Closing Date,²⁵ rather they were Assumed Liabilities under the APA.²⁶

36. The Omit Tax Claims arose prior to the issuance of the Receiver's Certificate at the close of the Transaction. The concept of when the Omit Tax Claims crystallized is not contemplated under the APA or the AVO and has been introduced without context by the Learned Judge. Respectfully, in so doing, the Learned Judge confuses the question of whether a claim has arisen in law with the question of whether it is liquidated. In deciding that the Omit Tax Claims "crystallized" only when quantified in November, 2022 the Learned Judge answered the wrong question.
37. The Omit Tax Claims arose and were due on January 1, 2020, 2021 and 2022, respectively. As set out in paragraphs 52 to 57 below, pursuant to section 307(3) of the *Municipal Act, 2001*, the Omit Tax Claims were deemed to have been imposed and due on January 1, 2020, 2021 and 2022.²⁷
38. At the latest, the Omit Tax Claims existed at the time the City wrote to the KSV Receiver on October 21, 2021, prior to the close of the Transaction, to advise that a reassessment of the Lands for previous years would occur and that the reassessment would result in additional taxes being added.²⁸ The Omit Tax

²⁵ Endorsement of Justice Steele dated June 18, 2024 ("Reasons") at para 31, ABC Tab 3, p. 23.

²⁶ Reasons at para 41, ABC Tab 3, p. 24.

²⁷ *Municipal Act, 2001*, SO 2001, c 25, [s 307\(3\)](#), "Deemed imposition".

²⁸ Telfer Affidavit at para 5, ABC Tab 6, p. 49; Telfer Affidavit, Exhibit A, ABC Tab 7, p. 57.

Claims existed at this time, even if the amount of the reassessed claims had not been quantified.

39. It is a fundamental principle of insolvency law that there must be fixed dates on which claims are determined. Claims are often said to have arisen prior to such a reference date, in the sense that all of the facts necessary to make the claims are in place, even though the quantum of the claim cannot be determined until a later date (for example, an unliquidated damages claim that is being litigated on the date of a bankruptcy).
40. The claims process in a bankruptcy is a useful analogy. By way of example, where a company has been sued but the company declares bankruptcy before the court has given judgment, the date of the bankruptcy will be treated as the date for the purposes of determining and proving claims in the bankruptcy. This will be the case even though the quantum of the potential liability is unknown at the date of bankruptcy. The *Bankruptcy and Insolvency Act* sets out a process for a trustee in bankruptcy to determine and value such a claim, but the claim is clearly provable in the bankruptcy. It is in this sense, a pre-filing claim.²⁹
41. Applying the analogy to the current situation, the determination date for claims arising in relation to sale approval and vesting orders is the date the Receiver's Certificate is delivered and the contemplated transaction closes.³⁰

²⁹ [Bankruptcy and Insolvency Act, RSC, 1985, c B-3](#), ss 121-135.

³⁰ Model Order, Approval and Vesting Order, para 4 and Footnote 8, ABC Tab 12, p. 202.

42. The Learned Judge failed to give effect to these fundamental principles. As set out above, the Omit Tax Claims had arisen by the date the Receiver's Certificate was delivered at the close of the Transaction, even though the quantum of the Omit Tax Claims was unknown at that time.

The Learned Judge Erred in Distinguishing Heritage Property

43. The Learned Judge erred by distinguishing the Court of Appeal's decision in *Heritage Property* from the facts of this case.³¹ In both cases, it was the receivership itself that triggered the relevant municipality to take steps to rectify the failure of MPAC to complete a reassessment. In both cases, the purchaser was not aware of the potential tax liability at the time it negotiated the transaction and the form of the approval and vesting order to be sought.³²
44. The Learned Judge's decision turned on her finding that the Omit Tax Claims only arose on November 25, 2022 when the tax omit bills were issued.³³ This finding disregards the Court of Appeal's holding in *Heritage Property* that the reassessed municipal tax liability had arisen or crystallized prior to the date of closing, even though the quantum of the reassessment was unknown at that time.³⁴

³¹ [Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.](#), 2008 ONCA 167 [*"Heritage Property"*].

³² *Heritage Property* at [paras 1-3](#); Telfer Affidavit at para 5, ABC Tab 6, p. 49.

³³ Reasons at paras 31 and 41, ABC Tab 3, p. 23 and 24.

³⁴ *Heritage Property* at [paras 1-2](#), and [27](#).

45. Since the Omit Tax Claims arose prior to the close of the Transaction, the Learned Judge also erred in her interpretation that the Omit Tax Claims were an Assumed Liability subject to the 45-day adjustment period.³⁵
46. Additionally, the Learned Judge failed to take a purposive approach to the AVO in the present case, instead disposing of the issue on the basis that the AVO did not include the exact same language as in *Heritage Property*.³⁶ In doing so, the Learned Judge disregarded this Court's caution in *Heritage Property* not to undermine the importance of approval and vesting orders and the nature and extent of the protection they afford to purchasers³⁷ by requiring language specifically contemplating the treatment of the Omit Tax Claims in the AVO.³⁸
47. It would create a troubling precedent if courts were to limit the effects of approval and vesting orders based on narrow forms of language or to take overly technical approaches that ignore the expectations of purchasers. In *Heritage Property*, the Court of Appeal took a purposive interpretation of the approval and vesting order, holding that the reassessed taxes were properly vested out as part of the released claims, even though the purchaser had no knowledge of the reassessment at the time that its transaction was negotiated.³⁹

³⁵ Reasons at para 41, ABC Tab 3, p. 24.

³⁶ Reasons at paras 50-51, ABC Tab 3, p. 26.

³⁷ *Heritage Property* at [para 26](#).

³⁸ As the motions judge would have required in *Heritage Property*, see [para 15](#).

³⁹ *Heritage Property* at [para 26](#).

The AVO Conveyed the Property Free and Clear of Encumbrances

48. The vesting paragraph in the AVO should be read broadly and with the parties' intentions in mind.⁴⁰
49. It is clear that the purpose of paragraph 4 of the AVO was to convey the Property free and clear of any and all encumbrances, except the contemplated Permitted Encumbrances set out in Schedule "C". As set out above, the Omit Tax Claims are taxes that are already due so are not encapsulated by the Permitted Encumbrances in Schedule "C".
50. The Purchaser's intention was to purchase the lands free and clear of any encumbrances. If 12175622 Canada Inc., or any prospective purchaser, had known about the Omit Tax Claims and that it would be assuming that liability, they would no doubt have offered a lower price.⁴¹ Moreover, FCC advanced funds for the Transaction on the specific reliance that the Lands were being conveyed free and clear of any claims or encumbrances. FCC would not have agreed to advance funds for the Transaction if it was aware that the Omit Tax Claims were a continued liability as against the Purchaser and the Lands.⁴²
51. In the event of ambiguity in the AVO language, the ambiguity should be resolved in favour of the Purchaser. The KSV Receiver alone had knowledge of the

⁴⁰ *Heritage Property* at [para 29](#).

⁴¹ [Grant Thornton Limited et al v 1902408 Ontario Ltd.](#), 2022 ONSC 2011 at [para 51](#), citing [Bloom Lake, g.p.l. \(Arrangement relatif à\)](#), 2016 QCCS 5620, aff'd 2017 QCCA 15.

⁴² Snider Affidavit at para 15, ABC Tab 5, p. 45.

reassessment and its consequences, and, as the party responsible for the estate, is best positioned to bear the risk of the ambiguity.

The *Municipal Act, 2001* Interpretation Errors

52. The Learned Judge made two errors in her interpretation of the *Municipal Act, 2001* in the context of a receivership.
53. The relevant issue relating to the *Municipal Act, 2001* was when the Omit Tax Claims were due, not who assumed the liabilities. The Learned Judge was correct that the KSV Receiver and Purchaser were entitled to negotiate to divide liabilities as between the parties.⁴³ However, the Learned Judge erred in holding that section 307(3) of the *Municipal Act, 2001* does not apply because the parties addressed the division of liabilities in the APA and by seeking the AVO.⁴⁴ With respect, that conclusion presumes the answer to the interpretive question that the Learned Judge was actually addressing.
54. The Learned Judge further erred in finding that, under section 307(3), the Omit Tax Claims did not arise until November 25, 2022 when the omit tax bills were issued.⁴⁵
55. Section 307(3) is about timing, not the assumption of liability. The deeming provision in section 307(3) establishes when the liability is deemed to have

⁴³ Reasons at para 40, ABC Tab 3, p. 24.

⁴⁴ Reasons at para 40, ABC Tab 3, p. 24.

⁴⁵ Reasons at para 31, ABC Tab 3, p. 23.

arisen. The parties cannot contract out of the deeming provision through their APA.

56. The language of section 307(3) is clear: “Taxes imposed for a year shall be deemed to have been imposed and to be due on January 1 of the year unless the by-law imposing the tax provides otherwise.”⁴⁶ There was no evidence that there was a City by-law providing otherwise. The reassessed amounts were for 2020, 2021 and 2022 and, as a result, the Omit Tax Claims were deemed to be imposed and due on January 1, 2019, January 1, 2020, and January 1, 2021.
57. In contrast, section 349, upon which the Learned Judge places reliance, addresses assumption of liability and not crystallization or timing. Under section 349, either the previous owner or the subsequent owner of assessed lands can be responsible for payment of assessed taxes.⁴⁷ Through an approval and vesting order, the Court can displace section 349 and attribute liability for assessed taxes to a particular party to the transaction. Here, the AVO displaces section 349 by establishing unqualified rights in favour of the Purchaser.

Knowledge of the MPAC Reassessment Errors

58. The Learned Judge made two errors related to the impact of the parties’ knowledge about the MPAC reassessment. First, the Learned Judge erred in fact in holding that the principal of the Purchaser, Mr. Mahal, knew that the Omit Tax

⁴⁶ *Municipal Act, 2001*, SO 2001, c 25, [s 307\(3\)](#), “Deemed imposition”.

⁴⁷ *Municipal Act, 2001*, SO 2001, c 25, [s 349](#), “Recovery of taxes”.

Claims existed because he was also the principal of the debtor companies.⁴⁸

There was no evidence that Mr. Mahal had any knowledge of the MPAC reassessment. To the contrary, the evidence demonstrated that MPAC only corresponded with the KSV Receiver regarding the reassessment.⁴⁹ There is no evidence that MPAC corresponded with Mr. Mahal about a reassessment. Mr. Mahal is not copied on any of MPAC's correspondence with the KSV Receiver and the KSV Receiver admitted that they did not notify Mr. Mahal of the need for a reassessment.⁵⁰ Although the Omit Tax Claims are for 2019, 2020 and 2021, MPAC did not advise the debtors of the need for a reassessment until almost three years later in October, 2021, after the KSV Receiver was appointed.⁵¹

59. This was an unreasonable exercise of the Learned Judge's fact-finding power in the face of evidence that Mr. Mahal did not have knowledge of the MPAC reassessment. The Learned Judge also took judicial notice that Mr. Mahal would have been aware of the change of use of the Lands. It is unfair to assume from this fact that Mr. Mahal would have the expertise or knowledge to understand that a change in property use would have tax consequences or that the change of use from vacant land to a non-operational Flour Mill would result in an increase in municipal taxes. The Learned Judge's assumptions were therefore an unreasonable exercise of judicial notice.

⁴⁸ Reasons at para 29, ABC Tab 3, p. 22.

⁴⁹ Telfer Affidavit at paras 5-10, ABC Tab 6, p. 49-51.

⁵⁰ Telfer Affidavit at paras 5-10, ABC Tab 5, p. 49-51; KSV Factum at para 53, ABC Tab 8, p. 80.

⁵¹ KSV Factum at para 55, ABC Tab 8, p. 81; Telfer Affidavit at para 5, ABC Tab 6, p. 49.

60. The Learned Judge further erred by failing to take into account that the KSV Receiver had knowledge of the fact of the MPAC assessment, even if the KSV Receiver did not know the timing or likely quantum of the reassessment.⁵² The Learned Judge held that the KSV Receiver's knowledge was not significant to her decision because the motion could be resolved by the relevant documentation. In doing this, the Learned Judge failed to account for the impact of the KSV Receiver's knowledge (and the prospective Purchaser's lack of knowledge) on the parties ability to negotiate the Transaction, the language of the APA, and any impact on the vesting language in the AVO. In this manner, the Learned Judge failed to give the APA and the AVO an interpretation that protected the party least able (even unable) to avoid the risk represented by the Omit Tax Claims.

PART V: ORDER REQUESTED

61. The Appellant, MNP Ltd., requests:

- (a) an Order setting aside the June 18 Order directing that the KSV Receiver is not liable or otherwise obligated to pay the Purchaser, the MNP Receiver as receiver of the Purchaser, or the City the amounts set out in the Omit Tax Claims;
- (b) an Order that the KSV Receiver, in its capacity as receiver of the Respondents, is liable for the Omit Tax Claims;

⁵² Reasons at para 29, ABC Tab 3, p. 22.

- (c) costs of the motion below and this appeal; and
- (d) such further and other relief as this Honourable Court may deem just.

Estimated time for oral argument of the appeal (not including reply): 45 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of August, 2024.



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COURT OF APPEAL FOR ONTARIO

B E T W E E N:

SKYMARK FINANCE CORPORATION

Applicants

and

MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD
CORPORATION

Respondents

CERTIFICATE

I, Heather Fisher, lawyer for the Appellant, MNP Ltd., certify that:

1. I estimate that 45 minutes will be needed for my oral argument of the appeal, not including reply.
2. An order under subrule 61.09(2) (original record and exhibits) is not required.
3. Parts I to V do not exceed 9,200 words and 40 pages.
4. There are 5067 words in Parts I to V.
5. I am satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT City of Toronto this 13th day of August, 2024.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. [Housen v Nikolaisen](#), 2002 SCC 33
2. [Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.](#), 2008 ONCA 167
3. [Grant Thornton Limited et al v 1902408 Ontario Ltd.](#), 2022 ONSC 2011
4. [Bloom Lake, g.p.l. \(Arrangement relatif à\)](#), 2016 QCCS 5620, aff'd 2017 QCCA 15

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Claims Provable

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

Family support claims

(4) A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

Claims provable in bankruptcy following proposal

122 (1) The claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, provable in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal.

Interest

(2) If interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum to the date of the bankruptcy from the time the debt or sum was payable, if evidenced by a written document, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed.

Proof in respect of distinct contracts

123 Where a bankrupt was, at the date of the bankruptcy, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof, in respect of the contracts, against the properties respectively liable on the contracts.

Proof of Claims

Creditors shall prove claims

124 (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

Proof by delivery

(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

Who may make proof of claims

(3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

Shall refer to account

(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

Penalty for filing false claim

125 Where a creditor or other person in any proceedings under this Act files with the trustee a proof of claim containing any wilfully false statement or wilful misrepresentation, the court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part as the court in its discretion may see fit.

Who may examine proofs

126 (1) Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

Worker's wage claims

(2) Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt, by someone on the bankrupt's behalf, by a representative of a federal or provincial ministry responsible for labour matters, by a representative of a union representing workers and others employed by the bankrupt or by a court-appointed representative, and that proof is to be made by attaching to it a schedule setting out the names and addresses of the workers and others and the

amounts severally due to them, but that proof does not disentitle any worker or other wage earner to file a separate proof on his or her own behalf.

Proof by Secured Creditors

127 (1) Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized.

May prove whole claim on surrender

(2) Where a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove his whole claim.

Proof may be requested

128 (1) Where the trustee has knowledge of property that may be subject to a security, the trustee may, by serving notice in the prescribed form and manner, require any person to file, in the prescribed form and manner, a proof of the security that gives full particulars of the security, including the date on which the security was given and the value at which that person assesses it.

Where reply not received

Where the trustee serves a notice pursuant to subsection (1), and the person on whom the notice is served does not file a proof of security within thirty days after the day of service of the notice, the trustee may thereupon, with leave of the court, sell or dispose of any property that was subject to the security, free of that security.

Dividend on balance

(2) A creditor is entitled to receive a dividend in respect only of the balance due to him after deducting the assessed value of his security.

Trustee may redeem security

(3) The trustee may redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in the proof of security, by the secured creditor.

May order security to be sold

129 (1) Where the trustee is dissatisfied with the value at which a security is assessed, the trustee may require that the property the security comprises be offered for sale at such time and on such terms and conditions as may be agreed on between the creditor and the trustee or, in default of such an agreement, as the court may direct.

Sale by public auction

(2) Where a sale under subsection (1) is by public auction the creditor or the trustee on behalf of the estate may bid or purchase.

Costs of sale

(4) The costs and expenses of a sale made under this section are in the discretion of the court.

Creditor may require trustee to elect to exercise power

130 Notwithstanding subsection 128(3) and section 129, the creditor may, by notice in writing, require the trustee to elect whether he will exercise the power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he is not entitled to exercise it, and the equity of redemption or any other interest in the property comprised in the security that is vested in the trustee shall vest in the creditor, and the amount of his claim shall be reduced by the amount at which the security has been valued.

Amended valuation by creditor

131 Where a creditor after having valued his security subsequently realizes it, or it is realized under section 129, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor.

Secured creditor may amend

132 (1) Where the trustee has not elected to acquire the security as provided in this Act, a creditor may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the court that the valuation and proof were made in good faith on a mistaken estimate or that the security has diminished or increased in value since its previous valuation.

Amendment at cost of creditor

(2) An amendment pursuant to subsection (1) shall be made at the cost of the creditor and on such terms as the court orders, unless the trustee allows the amendment without application to the court.

Rights and liabilities of creditor where valuation amended

(3) Where a valuation has been amended pursuant to this section, the creditor

(a) shall forthwith repay any surplus dividend that he may have received in excess of that to which he would have been entitled on the amended valuation; or

(b) is entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend that he may have failed to receive by reason of the amount of the original valuation before that money is made applicable to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before the amendment is filed with the trustee.

Exclusion for non-compliance

133 Where a secured creditor does not comply with sections 127 to 132, he shall be excluded from any dividend.

No creditor to receive more than 100 cents in dollar

134 Subject to section 130, a creditor shall in no case receive more than one hundred cents on the dollar and interest as provided by this Act.

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

Municipal Act, 2001, SO 2001, c 25

Deemed imposition

307(3) Taxes imposed for a year shall be deemed to have been imposed and to be due on January 1 of the year unless the by-law imposing the tax provides otherwise. 2001, c. 25, s. 307 (3).

Recovery of taxes

349 (1) Taxes may be recovered with costs as a debt due to the municipality from the taxpayer originally assessed for them and from any subsequent owner of the assessed land or any part of it. 2001, c. 25, s. 349 (1).

Interpretation

(2) Subsection (1) does not affect the taxpayer's or owner's recourse against any other person. 2001, c. 25, s. 349 (2).

Taxes on escheated, etc. land

(2.1) For greater certainty, taxes that are levied or charges that are imposed under section 208 on the following land may not be recovered as a debt due to the municipality from the Crown:

1. Land that is vested in the Crown in right of Ontario because of an escheat or forfeiture as a result of the dissolution of a corporation.
2. Land that belongs to the Crown in right of Ontario as a result of the death of an individual who did not have any lawful heirs. 2017, c. 10, Sched. 1, s. 45.

Special lien

(3) Taxes are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or its agents or through taking no action to register a tax arrears certificate. 2001, c. 25, s. 349 (3).

Proof of debt

(4) In any action to recover taxes, the production of the relevant part of the tax roll purporting to be certified by the treasurer as a true copy is, in the absence of evidence to the contrary, proof of the debt. 2001, c. 25, s. 349 (4).

Separate action

(5) The municipality may treat each year's taxes as a separate amount owing to the municipality and may bring separate actions for the purposes of recovering each amount. 2001, c. 25, s. 349 (5)

SKYMARK FINANCE CORPORATION

- and - MAHAL VENTURE CAPITAL INC. et al.

Court File No. COA-24-CV-0702

Applicant

Respondents

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
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