

Court of Appeal File No. COA-24-CV-0702
Superior Court File No. CV-21-00664778-00CL

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

APPEAL PURSUANT TO S. 193 OF THE BANKRUPTCY AND INSOLVENCY ACT

**FACTUM OF THE RESPONDENT IN APPEAL
KSV RESTRUCTURING INC., IN ITS CAPACITY AS COURT-APPOINTED
RECEIVER AND MANAGER OF MAHAL VENTURE CAPITAL INC.
AND GOLDEN MILES FOOD CORPORATION**

December 17, 2024

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COURT OF APPEAL FOR ONTARIO

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PART I - OVERVIEW

1. MNP Ltd., in its capacity as Court-Appointed Receiver of 12175622 Canada Inc. and GPM Food Inc. (the “**Purchaser Receiver**” or the “**Appellant**”) appeals from an order of the Honourable Justice Steele (the “**Motion Judge**”) declaring that the KSV Receiver (as defined below) is not liable to pay 12175622 Canada Ltd. (the “**Purchaser**”), the Purchaser Receiver or the City of Brantford (the “**City**”) the amounts set out in the omit tax bills dated November 25, 2022 or any other omit tax bill issued by the City to the Purchaser.
2. The KSV Receiver submits that the Motion Judge correctly determined that the Purchaser Receiver is liable for the omit tax bills. The appeal should therefore be dismissed.

PART II - SUMMARY OF FACTS

Receivership and Bankruptcy Proceedings

3. On October 1, 2021, KSV Restructuring Inc. (“**KSV**”, and in such capacity, the “**KSV Receiver**” or the “**Respondent in Appeal**”) was appointed as the receiver of Mahal Venture Capital Inc. (“**Mahal VC**”) and Golden Miles Food Corporation (“**Golden Miles**”, together with Mahal VC, the “**Companies**”) pursuant to an order (the “**Receivership Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”).¹
4. Pursuant to paragraph 3(r) of the Receivership Order, on November 15, 2021, the KSV Receiver filed an assignment in bankruptcy under the *Bankruptcy and Insolvency*

¹ Endorsement of Justice Steele dated June 18, 2024 (the “**Reasons**”) at para 7, Respondents’ Compendium (“**RC**”), tab 1, p. 3.

Act, R.S.C. 1985, c. B-3, as amended, on the Companies' behalf.² KSV was appointed as licenced insolvency trustee of the Companies.³

Real Property Sale

5. On March 18, 2022, the KSV Receiver and the Purchaser entered into an asset purchase agreement (as amended, the "**APA**") which provided for the sale of substantially all of the assets and property of the Companies, including real property located at 155 Adams Boulevard, Brantford, Ontario (the "**Real Property**"), on which a non-operational flour mill (the "**Mill**" and, together with the Real Property, the "**Property**") was built.⁴

6. The Purchaser is owned and controlled by Santokh Mahal, who is also the principal and owner of Mahal VC (the vendor of the Real Property, acting by the KSV Receiver) and the party that attempted to develop the Property for several years.⁵

7. On April 11, 2022, the Court granted an approval and vesting order (the "**AVO**") approving, among other things, the sale transaction contemplated by the APA (the "**Transaction**").⁶ The Transaction closed on May 18, 2022 (the "**Closing Date**"),⁷ with aggregate net proceeds of \$18.47 million (the "**Sale Proceeds**").⁸

8. In connection with the closing of the Transaction, the City provided tax certificates to counsel to the KSV Receiver (the "**Tax Certificates**"), which set out that \$167,560 was

² Reasons at para 11, RC, tab 1, p. 3.

³ Reasons at para 11, RC, tab 1, p. 3.

⁴ Reasons at paras 9, 14, 16, RC, tab 1, p. 3.

⁵ Sixth Report of the Receiver dated March 26, 2024 (the "**Sixth Report**") at para 1.0(6), RC, tab 2, p. 13.

⁶ Reasons at paras 9, 14, 16, RC, tab 1, p. 3.

⁷ Reasons at para 17, RC, tab 1, p. 3.

⁸ Sixth Report at para 1.0(7), RC, tab 2, p. 13.

due and owing in respect of property taxes, water arrears, interest and penalties on the Real Property as of the anticipated Closing Date (the “**Outstanding Closing Taxes**”).⁹

9. Copies of the Tax Certificates were provided to Purchaser’s counsel on April 28, 2022 and May 17, 2022.¹⁰

10. The Tax Certificates explicitly state that, among other things, the taxes in the Tax Certificates do not include subsequent supplementary taxes that may be levied and added under the *Assessment Act*, R.S.O. 1990, c. A. 31 (Ontario), and that supplementary tax bills for new buildings and additions/improvements to existing buildings may be issued.¹¹

11. Additionally, the KSV Receiver had been advised by the City on or about October 28, 2021 that the Property was not properly assessed during the time that Mr. Mahal developed the Real Property, that the City had submitted a request to the Municipal Property Assessment Corporation (“**MPAC**”) in the spring of 2021 (well prior to the receivership proceedings commencing) to reassess the Property, and that the reassessment would result in additional taxes on the Property and omitted tax notices being issued.¹² MPAC did not perform its reassessment until October 28, 2022.¹³

⁹ Reasons at para 19, RC, tab 1, p. 4.

¹⁰ Second Supplement to the Sixth Report dated May 10, 2024 (the “**Second Supplement**”) at paras 2.0(4)(a) and (c), RC, tab 6, p. 100; Appendix A to the Second Supplement – April 28 Email (the “**April 28 Email**”), RC, tab 7, p. 102; and Appendix C to the Second Supplement – May 17 Email (the “**May 17 Email**”), RC, tab 9, p. 110.

¹¹ Appendix B to the Second Supplement – Tax Certificate (the “**Tax Certificates**”), RC, tab 8, p. 107 and 109.

¹² Reasons at para 10, RC, tab 1, p. 3.

¹³ Reasons at para 21, RC, tab 1, p. 4.

12. On or about May 25, 2022, the KSV Receiver paid the Outstanding Closing Taxes (adjusted to \$167,402 as of the Closing Date) to the City.¹⁴

13. Also in connection with the closing of the Transaction, the parties both provided an undertaking to re-adjust for a period of up to 45 days (expiring on July 4, 2022).¹⁵ The duration of the readjustment period was negotiated and a key aspect of the sale agreement. Both the KSV Receiver's and the Purchaser's undertaking to readjust included the re-adjustment of municipal property taxes (the "**Receiver's Undertaking to Readjust**").¹⁶

Omit Tax Claims

14. MPAC reassessed the Real Property on or about October 28, 2022, over five months after the Transaction closed.¹⁷ Following MPAC's reassessment, on November 24, 2022, the City issued omit tax bills to the Purchaser totaling \$1,091,423 for the 2020, 2021 and 2022 taxation years (the "**Omit Tax Claims**").¹⁸ The Omit Tax Claims were all dated November 25, 2022, approximately 6 months after the Closing Date.¹⁹ The Omit Tax Claims were only brought to the attention of the KSV Receiver on February 24, 2023.²⁰

¹⁴ Reasons at para 20, RC, tab 1, p. 4.

¹⁵ Reasons at para 18, RC, tab 1, p. 4.

¹⁶ Reasons at para 18, RC, tab 1, p. 4.

¹⁷ Reasons at para 21, RC, tab 1, p. 4.

¹⁸ Reasons at para 22, RC, tab 1, p. 4.

¹⁹ Reasons at para 31, RC, tab 1, p. 5.

²⁰ Reasons at para 23, RC, tab 1, p. 4.

15. The Purchaser appealed the tax reassessment on March 5, 2023 but subsequently withdrew such appeal.²¹ The appeal was brought without notice to the KSV Receiver, who learned about it from an affidavit filed in the lower court proceedings.

16. In August 2023, the KSV Receiver was authorized by the Court to reserve \$1,500,000 from the Sale Proceeds, pending a final determination by the Court of the Omit Tax Claims.²²

17. The KSV Receiver brought a motion for an order that the KSV Receiver and Mahal VC were not liable for the payment of the Omit Tax Claims.²³ After this motion was brought, but before it was heard, the KSV Receiver was advised that the Purchaser Receiver was appointed as the receiver of the Purchaser, effective March 5, 2024. The Purchaser Receiver accordingly responded to the KSV Receiver's motion, on behalf of the Purchaser's estate.

18. The motion was heard on June 4, 2024, and the Motion Judge's endorsement (the "**Reasons**") was released on June 18, 2024.²⁴

PART III - POSITION ON ISSUES

Standard of Review

19. The KSV Receiver agrees with the characterization of the standard of review applicable to the issues raised by the Appellant.

²¹ Reasons at para 24, RC, tab 1, p. 4.

²² Reasons at para 25, RC, tab 1, p. 4.

²³ Reasons at para 3, RC, tab 1, p. 2.

²⁴ Reasons, RC, tab 1, p. 1 and 9.

20. Where the issues relate to the interpretation and application of the AVO to the Omit Tax Claims, the application of case law to the facts and the interpretation and application of the *Municipal Act*, 2001, S.O. 2001, c. 25 (the “**Municipal Act**”), the appropriate standard of review is correctness, as the alleged errors involve pure questions of law or readily extricable questions of law.²⁵

21. When applying correctness review, the “appellate court is free to replace the opinion of the trial judge with its own.”²⁶ The appellate court must consider whether the lower court’s decision was correct and then undertake its own analysis to substitute its view and provide the correct answer.²⁷

22. Where the alleged errors relate to the parties’ knowledge of the Omit Tax Claims, the proper standard of review is that of “palpable and overriding error”, and the court should only interfere with the Motion Judge’s decision when there is an “obvious error in the trial decision that is determinative of the outcome of the case.”²⁸

²⁵ *Housen v Nikolaisen*, [2002 SCC 33](#) at paras 8, 36-37 [*Housen*].

²⁶ *Housen*, *supra* note 25 at para 8.

²⁷ *Dunsmuir v New Brunswick*, [2008 SCC 9](#) at para 50.

²⁸ *Salomon v Matte-Thompson*, [2019 SCC 14](#) at para 33 [*Salomon*].

Issue 1: Did the Motion Judge err in holding that the Omit Tax Claims could not be vested out of the Purchased Assets by the provisions of the APA and the AVO?

The Motion Judge Properly Concluded that the Omit Tax Claims Were Not Vested Out of the Purchased Assets by the APA and AVO

23. The Motion Judge interpreted the APA and AVO in a manner that correctly focused on the intentions of the parties and therefore found that both documents demonstrated that the Omit Tax Claims were liabilities of the Purchaser.

The Terms of the APA and AVO

24. The KSV Receiver and the Purchaser entered into the APA to provide a complete code for, among other things, the liabilities that would be apportioned among the KSV Receiver and the Purchaser.²⁹

25. Liability for the Omit Tax Claims is explicitly provided for in the APA. The APA provides at Section 2.2 that:

2.2 At the Closing Time, on and subject to the terms and conditions of this Agreement, the Purchaser shall assume and agree to pay when due and perform and discharge in accordance with their terms, the Assumed Liabilities. Notwithstanding any other provision of this Agreement, the Purchaser shall not assume any Liabilities hereunder other than the Assumed Liabilities, except as required under Applicable Law.³⁰

²⁹ A complete copy of the APA can be found as Appendix G to the Sixth Report – Asset Purchase Agreement (the “**APA**”), RC, tab 4, p. 37.

³⁰ APA, s 2.2, RC, tab 4, p. 53.

26. The APA defines “Assumed Liabilities” to include: “all Liabilities relating to the Purchased Assets or Related to the Business arising on or after the Closing Date.”³¹ The Purchased Assets are set out in Schedule “D” to the APA.³²

27. The Omit Tax Claims are clearly “relating to the Purchased Assets”, which are defined in the APA, given that they are tax liabilities assessed against the Real Property (a Purchased Asset) as a result of the construction of the Mill (a Purchased Asset). As discussed in further detail below, the Motion Judge correctly decided that the Omit Tax Claims arose after the Closing Date.

28. Similarly, it is clear by the terms of the APA that the Omit Tax Claims were not vested out of the Real Property. The APA provides at Section 2.1 that [emphasis added]:

2.1 At the Closing Time, on and subject to the terms and conditions of this Agreement, the Sale Procedure and the Approval and Vesting Order, the Vendor shall sell to the Purchaser, and the Purchaser shall purchase from the Vendor, all of the Debtors’ and the Vendor’s right, title and interest, if any, in and to the Purchased Assets, which shall be free and clear of all Encumbrances other than Permitted Encumbrances, to the extent and as provided for in the Approval and Vesting Order.³³

29. There is no dispute that the Property are Purchased Assets. The APA defines “Permitted Encumbrances” to include [emphasis added]:

Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case are not yet due or are not in arrears or, if due or in arrears, the validity of which is being contested.³⁴

30. The AVO’s terms are consistent with those in the APA and are clear that any lien (statutory or otherwise) that secures a Permitted Encumbrance, which the KSV Receiver

³¹ APA, s 1.1, RC, tab 4, p. 43.

³² APA, s 1.1 and Schedule “D,” RC, tab 4, p. 49 and 78.

³³ APA, s 2.1, RC, tab 4, p. 52-53.

³⁴ APA, s 1.1, RC, tab 4, p. 48.

views as including the Omit Tax Claims, is not vested out of the Property by operation of the AVO.³⁵

31. Paragraph 4 of the AVO provides that the Purchased Assets are acquired by the Purchaser “free and clear of all...Encumbrances, which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule “C””.³⁶ Schedule “C” of the AVO explicitly includes the same language as the APA related to Permitted Encumbrances:

(a) Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case are not yet due or are not in arrears or, if due or in arrears, the validity of which is being contested.³⁷

32. Lastly, section 7.2 of the APA provides for a 45-day period post-closing where any readjustment of certain items, including items such as the Omit Tax Claims, would be undertaken by the KSV Receiver.³⁸ Following this 45-day period, any taxes or other liabilities subject to the statement of adjustments that arose would be the obligation of the Purchaser.

The Motion Judge Correctly Applied the Intention of the Parties in Determining that the Omit Tax Claims Were Not Vested Out by the APA and AVO

33. The Motion Judge properly stated that it is important for a purchaser to be able to rely on an approval and vesting order granted by a court.³⁹

³⁵ A complete copy of the AVO can be found as Appendix H to the Sixth Report – Approval and Vesting Order dated April 11, 2022 (the “AVO”), RC, tab 5, p. 82.

³⁶ AVO at para 4, RC, tab 5, p. 85.

³⁷ AVO at Schedule C para (a), RC, tab 5, p. 93.

³⁸ APA, s 7.2(2), RC, tab 4, p. 64.

³⁹ Reasons at para 32, RC, tab 1, p. 5.

34. The Appellant insists that the Motion Judge failed to give a purposive interpretation of the AVO,⁴⁰ but the Reasons demonstrate that was exactly the approach taken by the Motion Judge based on all the evidence available to her.

35. The KSV Receiver agrees with the Appellant that the purpose of paragraph 4 of the AVO was to convey the Property to the Purchaser free and clear of all encumbrances except the Permitted Encumbrances.

36. However, it is clear from the definition of Permitted Encumbrances that the Omit Tax Claims were exactly the types of claims that were intended by the language of the APA and the AVO to be borne by the Purchaser. Therefore, the Motion Judge correctly interpreted the language in the definition of Permitted Encumbrances in the APA and AVO to encompass the Omit Tax Claims.⁴¹

37. The Appellant raises the spectre that letting the Motion Judge's decision stand will create a "troubling precedent" with respect to the interpretation of approval and vesting orders that will undermine the expectations of purchasers.⁴² However, the Reasons do no such thing. The Reasons explicitly note that purchasers need to be able to rely on vesting orders (and the KSV Receiver would add that vendors also require this ability to rely on vesting orders),⁴³ and the Purchaser could and did rely on the AVO to acquire the Property free and clear of all encumbrances other than the Permitted Encumbrances. However, the Purchaser had knowledge of the changes made to the Real Property and

⁴⁰ Factum of the Appellant at para 46.

⁴¹ Reasons at para 53, RC, tab 1, p. 9.

⁴² Factum of the Appellant at para 47.

⁴³ Reasons at para 52, RC, tab 1, p. 9.

the potential for a tax reassessment giving rise to the Omit Tax Claims,⁴⁴ which are Permitted Encumbrances, and there is precedent for courts to refuse to vest out liabilities when there is knowledge of such liabilities on behalf of the purchaser and the purchaser agreed to accept such liabilities.⁴⁵ The KSV Receiver and the Purchaser mutually agreed upon the terms of the APA, and it is not the role of this Court to rewrite the definition therein of “Permitted Encumbrances”, which formed the basis for the AVO.⁴⁶

38. The Appellant further submits that the Motion Judge erred in distinguishing the *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc*⁴⁷ case and, in so doing, ignored this Court’s warning not to undermine the purpose of approval and vesting orders.⁴⁸

39. As noted above, the Reasons clearly address the intentions of the parties in drafting the APA and AVO and states that the parties “turned their minds to what the permitted encumbrances would be in the APA and then replicated that language in the AVO.”⁴⁹

40. The Motion Judge examined the *Heritage Property* case in detail and correctly found that it should be distinguished because the vesting language in the approval and vesting order in *Heritage Property* did not include taxes as permitted encumbrances, which meant that the taxes in question were vested out as against the purchaser in that

⁴⁴ Reasons at para 29, RC, tab 1, p. 4-5.

⁴⁵ *Winick v 1305067 Ontario Ltd*, [2008 CanLII 6937 \(ON SC\)](#) at para 15.

⁴⁶ *Pacific National Investments Ltd v Victoria (City)*, [2004 SCC 75](#) at para 31 [*Pacific*].

⁴⁷ [2008 ONCA 167](#) [*Heritage Property*].

⁴⁸ Factum of the Appellant at para 46.

⁴⁹ Reasons at para 53, RC, tab 1, p. 9.

case.⁵⁰ In the instant case, the Permitted Encumbrances in the APA and AVO clearly encompass taxes, which include the Omit Tax Claims, and taxes are therefore not vested out as against the Purchaser. The Motion Judge recognized this fundamental difference in the Reasons and came to the correct conclusion that the decision in *Heritage Property* was not applicable.⁵¹

41. Lastly, the Appellant takes the position that the APA and AVO must have transferred the Property free and clear of the Omit Tax Claims, otherwise the Purchaser would have paid a lower price because they would have accounted for that fact when negotiating the Transaction.⁵² The Motion Judge's findings demonstrate that this argument is misguided. As further detailed below, the Motion Judge found that the Purchaser had knowledge of the circumstances that ultimately gave rise to the Omit Tax Claims,⁵³ and, therefore, the Purchaser should have negotiated the terms of the APA with that knowledge in mind.

42. In such a situation it is not for a court to relieve a party from the consequences of a poor bargain or to construct a contract to be more just from the court's perspective.⁵⁴ The Purchaser may, in retrospect, believe that it has paid more than it feels it should have for the Property (although there is no evidence to this effect), but that is not for this Court to correct.

⁵⁰ *Heritage Property*, *supra* note 47 at para 29.

⁵¹ Reasons at paras 49-51, RC, tab 1, p. 8.

⁵² Factum of the Appellant at para 50.

⁵³ Reasons at para 29, RC, tab 1, p. 4-5.

⁵⁴ See *Pacific*, *supra* note 46 at para 31 and *Jedfro Investments (USA) Ltd v Jacyk*, [2007 SCC 55](#) at para 34.

Issue 2: Did the Motion Judge err in holding that the Omit Tax Claims did not arise prior to the issuance of the KSV Receiver's certificate and the closing of the Transaction?

The Motion Judge Properly Concluded that the Omit Tax Claims Did Not Arise Prior to the Issuance of the KSV Receiver's Certificate and the Closing of the Transaction

43. The Motion Judge determined that the Omit Tax Claims did not arise until over six months after the Closing Date, and her decision was based on a practical and purposive interpretation of the APA and AVO. This decision was correct, and the Court should not interfere with it.

44. The mechanism in the APA apportioning the liability for tax reassessments is clear that the Purchaser bore the risk for the Omit Tax Claims if they arose more than 45 days after the Closing Date.⁵⁵

45. Section 7.2(2) of the APA requires the KSV Receiver to provide the Receiver's Undertaking to Readjust, which was an undertaking by the KSV Receiver to "readjust all items on the Statement of Adjustments within 45 days from the Closing Date, upon written request by the Purchaser".⁵⁶ Section 7.3(4) of the APA requires the Purchaser to deliver a corresponding undertaking to readjust in favour of the KSV Receiver, on the same terms as the Receiver's Undertaking to Readjust, which the Purchaser in fact provided.⁵⁷

46. This mechanism was a business term in the APA that was negotiated by sophisticated commercial parties. It served to give the Purchaser comfort in case there

⁵⁵ APA, definition of "Permitted Encumbrances" and s. 7.2 RC, tab 4, p. 48 and 64.

⁵⁶ APA, s 7.2(2), RC, tab 4, p. 64.

⁵⁷ APA, s 7.3(4), RC, tab 4, p. 65.

was an immediate reassessment post-closing and provided certainty, and finality to the KSV Receiver, so that it did not bear the risk of any reassessments beyond a set period, which would enable it to make distributions to the Companies' creditors to complete the administration of the receivership on a timely basis. Without the certainty provided in the APA, the KSV Receiver would be significantly hindered in its ability to administer the estates.

47. Both parties were aware of the potential for the Omit Tax Claims to arise, and the Motion Judge was alive to the fact that the KSV Receiver and the Purchaser had designed the APA (which the AVO was later based on) to reflect those concerns.⁵⁸ In restructuring transactions, courts in Canada recognize that commercial certainty and finality are key components for contracting parties and that contractual terms (third party releases being an example) are often negotiated to provide such certainty and finality.⁵⁹ Additionally, certainty and finality are key components that drive the time limitations on the reviewability of fraudulent preference and conveyance legislation to provide commercial parties with defined parameters for when transactions can be re-opened by courts.⁶⁰

48. The Appellant's arguments, if adopted, undermine the intentions of the KSV Receiver and Purchaser to create such certainty and finality in favour of a technical approach that does not reflect the intentions of the parties pursuant to the APA.

⁵⁸ Reasons at paras 32 and 53, RC, tab 1, p. 5 and 9.

⁵⁹ *Harte Gold Corp (Re)*, [2022 ONSC 653](#) at para 84.

⁶⁰ Stephanie Ben-Ishai, "[Bank Bankruptcy in Canada: A Comparative Perspective](#)" (2008), 24:3 BFLR 59 at 69 and 73.

49. The Appellant states that section 307(3) of the *Municipal Act* applies so that the Omit Tax Claims are deemed to have arisen before the Closing Date.⁶¹ However, the Motion Judge explicitly considered this provision and found that the Omit Tax Claims could not have arisen until November 25, 2022, over six months after closing.⁶² Moreover, the Reasons are clear that it was the parties' intention and expectation that taxes that were not identified within 45 days of the closing of the Transaction would be the liabilities of the Purchaser.⁶³

50. The Appellant puts significant emphasis on the fact that the Omit Tax Claims must have arisen before the Closing Date because it is a fundamental principle of insolvency law that claims have a fixed date attached to them and that such fixed date can be before the quantum of a claim is determined.⁶⁴ The Appellant's argument in this regard is an answer in search of a question. No one, including the Motion Judge, denies that it is possible for a claim to be considered to have arisen before quantified.

51. The proper question is not a theoretical one but a practical one of when the Omit Tax Claims actually arose. The Motion Judge correctly found that the Omit Tax Claims arose when they were issued on November 25, 2022.⁶⁵ The Motion Judge's correct conclusion is also consistent with a plain reading of the omit tax bills, which are explicit on their face that (a) the Omit Tax Claims are not due and owing until January 6, 2023

⁶¹ Factum of the Appellant at paras 52-56.

⁶² Reasons at paras 31 and 41, RC, tab 1, p. 5 and 6.

⁶³ Reasons at paras 32 and 41, RC, tab 1, p. 5 and 6.

⁶⁴ Factum of the Appellant at paras 39-42.

⁶⁵ Reasons at para 31, RC, tab 1, p. 5.

and February 17, 2023, and (b) there were no arrears as of November 24, 2022, the day prior to the date that the omit tax bills were issued.⁶⁶

52. Such an interpretation supports the apportionment of liability between the KSV Receiver and the Purchaser as set out in the APA and AVO.

Issue 3: Did the Motion Judge make palpable and overriding errors regarding factual findings related to the knowledge of the KSV Receiver and the Purchaser surrounding the Omit Tax Claims and the MPAC reassessment?

The Motion Judge Made Reasonable Factual Findings in the Circumstances

53. The Appellant argues that the Motion Judge made palpable and overriding factual errors related to the knowledge of the KSV Receiver and Purchaser with respect to the potential for the Omit Tax Claims to arise and the impact of such knowledge (or lack thereof) on the negotiations leading up to the Transaction.⁶⁷

54. The Motion Judge's factual findings are due significant deference under the relevant standard of review. Only if there is an "obvious error" should this Court overturn those findings, and there is no such error in this case.⁶⁸

55. The Purchaser was on notice prior to the Closing Date that a reassessment of precisely the type that resulted in the Omit Tax Claims was possible:

(a) the City provided the Tax Certificates to the KSV Receiver;⁶⁹

⁶⁶ Appendix E to the Sixth Report – Purchaser's Letter dated February 24, 2023 and associated Omit Tax Bills, RC, tab 3, p. 34-36.

⁶⁷ Factum of the Appellant at paras 58-60.

⁶⁸ *Salomon*, *supra* note 28 at para 33.

⁶⁹ Reasons at para 19, RC, tab 1, p. 4.

(b) the Tax Certificates were explicit that subsequent supplementary taxes such as the Omit Tax Claims may be levied; and⁷⁰

(c) the KSV Receiver provided the Purchaser with the Tax Certificates several weeks prior to the Closing Date.⁷¹

As a result, there was sufficient evidence before the Motion Judge to come to the reasonable conclusion that the Purchaser had knowledge of the potential for the Omit Tax Claims to be levied.

56. The evidence before the Motion Judge was also clear that the knowledge that the KSV Receiver had about the potential for the Omit Tax Claims to arise was not different in any significant way from that of the Purchaser prior to the closing of the Transaction. The KSV Receiver was advised by the City that there may be a tax reassessment of the Real Property, but such information was also explicitly provided in the Tax Certificates, which had been provided to the Purchaser.⁷²

57. Moreover, the APA is explicit that only very limited representations and warranties were given by the KSV Receiver in connection with the Transaction as is commonly the case in an insolvency situation, and certainly no representations or warranties were given by the KSV Receiver with respect to the assessment of the Real Property for tax purposes.

⁷⁰ Tax Certificates, RC, tab 8, p. 107 and 109.

⁷¹ Second Supplement at para 2.0(4), RC, tab 6, p. 100; April 28 Email, RC, tab 7, p. 102; and May 17 Email, RC, tab 9, p. 110.

⁷² Second Supplement at para 2.0(4), RC, tab 6, p. 100; April 28 Email, RC, tab 7, p. 102; May 17 Email, RC, tab 9, p. 110; and Exhibit A to the Affidavit of Pat Telfer, RC, tab 11, p. 125.

58. Section 5.3 of the APA contains extensive “as is, where is” provisions regarding the Purchased Assets and Assumed Liabilities, including in particular subsection 5.3(2), which provides [emphasis added]:

5.3 As is, Where is. Notwithstanding any other provision of this Agreement, the Purchaser acknowledges, agrees and confirms that: ... (2) it has conducted to its satisfaction such independent searches, investigations and inspections of the Purchased Assets, the Business and the Assumed Liabilities as it deemed appropriate, and **based solely thereon**, has determined to proceed with the transactions contemplated by this Agreement.⁷³

59. All of this evidence was before the Motion Judge and, accordingly, she made no palpable and overriding error in not mentioning any difference in knowledge between the KSV Receiver and the Purchaser in the Reasons when considering the parties’ ability to negotiate the Transaction. Based on the evidence in front of the Motion Judge, there was no such difference, and it was correct for the Motion Judge to state that the clear terms of the APA and AVO were determinative of the matter.

PART IV - ADDITIONAL ISSUES

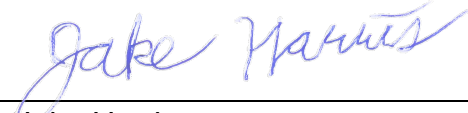
60. The Respondent in Appeal raises no additional issues on this appeal.

PART V - ORDER REQUESTED

61. The Respondent in Appeal request that this appeal be dismissed, with costs.

⁷³ APA, s 5.3(2), RC, tab 4, p. 59.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2024.



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Mahal Venture Capital Inc. and Golden
Miles Food Corporation.

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

CERTIFICATE

I estimate that an hour will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 17th day of December, 2024.



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Corporation.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Housen v Nikolaisen*, [2002 SCC 33](#).
2. *Dunsmuir v New Brunswick*, [2008 SCC 9](#).
3. *Salomon v. Matte-Thompson*, [2019 SCC 14](#).
4. *Winick v 1305067 Ontario Ltd*, [2008 CanLII 6937 \(ON SC\)](#).
5. *Pacific National Investments Ltd v Victoria (City)*, [2004 SCC 75](#).
6. *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc*, [2008 ONCA 167](#).
7. *Jedfro Investments (USA) Ltd v Jacyk*, [2007 SCC 55](#).
8. *Harte Gold Corp (Re)*, [2022 ONSC 653](#).
9. Stephanie Ben-Ishai, “[Bank Bankruptcy in Canada: A Comparative Perspective](#)” (2008), 24:3 BFLR 59.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Assessment Act*, [R.S.O. 1990, c.A.31](#).

Change re land omitted from tax roll

33 (1) The following rules apply if land liable to assessment has been in whole or in part omitted from the tax roll for the current year or for all or part of either or both of the last two preceding years, and no taxes have been levied for the assessment omitted:

1. The assessment corporation shall make any assessment necessary to correct the omission.
2. If the land is located in a municipality, the clerk of the municipality shall alter the tax roll upon receiving notice of the change, and the municipality shall levy and collect the taxes that would have been payable if the assessment had not been omitted.
3. If the land is located in non-municipal territory, the Minister shall alter the tax roll upon receiving notice of the change, and shall collect the taxes that would have been payable if the assessment had not been omitted. 2006, c. 33, Sched. A, s. 23 (1).

(1.1) Repealed: 2020, c. 36, Sched. 3, s. 6 (1).

Definition

(2) For the purposes of this section,

"omitted" includes the invalidation or setting aside of an assessment by any court or assessment tribunal on any ground except that the land is not liable to taxation. R.S.O. 1990, c. A.31, s. 33 (2).

Change re incorrect exemption from tax

(3) The following rules apply if land liable to taxation has been entered on the tax roll for the current year or for all or part of either or both of the last two preceding years as exempt from taxation, and no taxes have been levied on that land:

1. The assessment corporation shall make any assessment necessary to correct the omission. However, no change shall be made if a court or tribunal has decided that the land is not liable to taxation.
2. If the land is in a municipality, the clerk of the municipality shall alter the tax roll upon receiving notice of the change, and the municipality shall levy and collect the taxes that would have been payable if the land had been entered in the tax roll as being liable to taxation.
3. If the land is in non-municipal territory, the Minister shall alter the tax roll upon receiving notice of the change, and shall collect the taxes that would have been payable if the land

had been entered in the tax roll as being liable to taxation. 2006, c. 33, Sched. A, s. 23 (2).

Prescribed exceptions

(3.1) The Minister may make regulations providing that subsection (1) or (3) does not apply with respect to specified land during the period and in the circumstances set out in the regulations. 2020, c. 36, Sched. 3, s. 6 (2).

Managed forests, conservation land

(4) Subsection (5) applies with respect to,

- (a) land in the managed forests property class;
- (b) land that is conservation land for the purposes of paragraph 25 of subsection 3 (1).
- (c) Repealed: 2005, c. 28, Sched. A, s. 3.

1997, c. 29, s. 17; 2005, c. 28, Sched. A, s. 3.

Reassessment re managed forests, conservation land

(5) The following rules apply if land described in clause (4) (a) or (b) ceases to be described by any of those clauses:

1. The assessment corporation shall make any change to the assessment and classification required as a result. However, any change to the assessment and classification shall not affect a taxation year that ends more than four years before the assessment and classification is made.
2. If the land is in a municipality, the clerk of the municipality shall alter the tax roll upon receiving notice of the change, and the municipality shall levy and collect the taxes payable for the years affected by the change.
3. If the land is in non-municipal territory, the Minister shall alter the tax roll upon receiving notice of the change, and shall collect the taxes payable for the years affected by the change. 2006, c. 33, Sched. A, s. 23 (3).

Changes to next assessment roll

(6) If the assessment corporation makes an assessment or classification under this section, the appropriate changes shall be made on the assessment roll for the next year, even if the day as of which land is valued for the next year is the same as for the current year. 1998, c. 3, s. 7; 2006, c. 33, Sched. A, s. 23 (4).

2. *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)

Court of Appeal File No. COA-24-CV-0702
Superior Court File No. CV-21-00664778-00CL

SKYMARK FINANCE CORPORATION
Applicant

-and-

MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD CORPORATION
Respondents

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**FACTUM OF THE RESPONDENT IN APPEAL,
KSV RESTRUCTURING INC., IN ITS CAPACITY AS COURT-APPOINTED
RECEIVER AND MANAGER OF MAHAL VENTURE CAPITAL INC.
AND GOLDEN MILES FOOD CORPORATION.**

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