

KEEPING CURRENT

April 7, 2021

Owner of corporation personally liable for litigation misfeasance

By James R.G. Cook

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

One of the perceived benefits of using a corporation for real estate or other business transactions is to shield the individual owner from personal liability for costs and other liabilities of the corporation. This protection may be lost, however, when an individual engages in egregious conduct during the course of litigation that leads a court to impose personal liability.

An example of this occurred in *Gupta v. 2075750 Ontario Inc.*, [2021 ONSC 2272 \(CanLII\)](#), a case arising from a failed real estate transaction in Guelph, Ontario, that wound up before the Honourable Justice James W. Sloan in 2019 and again in March 2021.

In 2012, Manish Gupta had entered into an Agreement of Purchase and Sale (APS) to buy a property from 2075750 Ontario Inc. ("207 Ontario"), which was scheduled to close in mid-2012. When the APS did not close, Mr. Gupta obtained the assistance of Ashywn Singh and his corporation, EB Investments, and revived the purchase with a new closing date of January 17, 2013. Again, the transaction did not close.

Litigation ensued thereafter between the buyers Mr. Gupta and EB Investments, on one side, and the seller 207 Ontario, on the other. The plaintiff buyers sought specific performance to obtain the property from 207 Ontario, and in the alternative damages of \$2,000,000 for breach of the APS. The central issues involved whether or not the plaintiffs had been ready, willing and able to close the purchase. The litigation dragged on over the subsequent years, while the deposit of \$200,000 was held in trust by the brokerage.

In 2019, when the matter was heard by Justice Sloan, the plaintiffs were still seeking title to the property. Conversely, 207 Ontario sought to dismiss the action entirely as a result of the plaintiffs' failure to comply with their procedural obligations to disclose all relevant documents.

In November 2013, Mr. Singh swore an affidavit of documents on behalf of EB Investments which did not include any correspondence between himself and Mr. Gupta from the time of the aborted closing in January earlier that year. Mr. Gupta did not deliver an affidavit of

documents at all. In 2015, Mr. Gupta refused to answer any questions during his examination for discovery about whether or not there may have been any disagreements in January 2013 between himself and Mr. Singh. Mr. Gupta's lawyer stated that any issues between Mr. Gupta and Mr. Singh were different issues that had nothing to do with the closing of the transaction." This was later shown to be patently false and misleading, but the answer was never corrected.

In June 2018, after numerous motions, the plaintiffs' fifth lawyer finally answered the plaintiffs' undertakings and requests for information, and produced the January 2013 emails. It was then 5.5 years after the events and 5 years after the action was commenced. Justice Sloan agreed with 207 Ontario and [dismissed](#) the plaintiffs' action due to what he described as "litigation misfeasance." In that regard, Justice Sloan noted that the whole system of civil litigation requires litigants to adhere to the *Rules of Civil Procedure* and produce to the other side all the relevant documents they have in their possession or are under their control.

It was only through the "dogged persistence" of 207 Ontario's lawyer that the 2013 emails had been obtained in 2018. By that time, there was demonstrable prejudice to 207 Ontario, not only from the passage of time but from the loss, whether intentional or not, of other emails and texts between Mr. Gupta, Mr. Singh, their real estate agent, their financing agent and perhaps others. The search of Mr. Singh's computer was not carried out by a computer expert and does not appear to have been very robust. Mr. Singh claimed to no longer have the computer that he used in January 2013, and Mr. Gupta did not provide any evidence about his own computer. Further, no text messages whatsoever were saved

notwithstanding that Mr. Gupta and Mr. Singh communicated with their real estate agent by text.

Justice Sloan had no difficulty in concluding that the plaintiffs had deliberately and wholly ignored the Rules of the Court with respect to the production of documents. The plaintiffs failed to offer any explanation for why they hid and continually refused to produce the subject emails and why they lied on discovery about their content. A monetary sanction would be insufficient, as the court would be offering an open invitation to litigants, particularly those with resources, to try to win their cases by breaching the court rules and the ethics that go with them.

As a result, the plaintiffs' action was dismissed in its entirety, and the plaintiffs were ordered to pay costs of \$135,221.56. A subsequent appeal was administratively dismissed after the plaintiffs had failed to pursue it.

Justice Sloan's 2019 decision left open the question of entitlement to the deposit, as no determination had been made as to which side was responsible for the failure to close in 2013. In March 2021, the parties returned to court before Justice Sloan to address this issue. In addition, 207 Ontario sought an order that Mr. Singh be held personally responsible for the unpaid costs award owing from his corporation, EB Investments.

At the time of the 2021 hearing, it was revealed that the plaintiffs had previously failed to disclose that there was another related action in which they had taken opposite positions. In particular:

- EB Investments had sued Mr. Gupta in February 2013;



- Mr. Singh swore that the transaction failed in part because Mr. Gupta refused to cooperate with him;
- Mr. Singh further deposed that the 50% beneficial interest in the agreement of purchase and sale that EB Investments maintained had belonged to it, had in fact been assigned to Mr. Singh;
- Singh further deposed, that Mr. Gupta changed the plaintiffs' real estate lawyer without telling him; and
- Mr. Singh alleged that Mr. Gupta breached the trust agreement between them.

Neither the plaintiffs nor their then counsel disclosed the existence of the related action during the earlier 2019 motion, notwithstanding that the sworn evidence of Mr. Singh in the related action was directly contrary to the position he took in this action. Justice Sloan was less than pleased and stated: "This nondisclosure is beyond outrageous."

Because of the nonproduction of, and destruction of, emails and texts between the plaintiffs and third parties in January and February 2013, Justice Sloan reasoned that it could be impossible for 207 Ontario to conclusively prove that the plaintiffs were not ready willing and able to close the transaction. Because of the destruction of this evidence, Justice Sloan drew a negative inference against the plaintiffs and concluded that production of the lost emails and texts would not have been helpful to them and that it was more likely than not that the lost emails and texts would have shown the plaintiffs were not in a position to close in January 2013. 207

Ontario was therefore entitled to retain the deposit of \$200,000.

As to Mr. Singh's personal liability for the costs owed by his corporation, the courts have jurisdiction to award costs against a non-party for abusive litigation conduct. The Court of Appeal has confirmed that the court's inherent jurisdiction to award costs against a non-party is not confined to cases where a non-party puts forward a "person of straw" to avoid liability for costs: *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, [2017 ONCA 184 \(CanLII\)](#).

In the case at hand, Mr. Singh was the controlling mind of EB Investments. Justice Sloan ruled that Mr. Singh was responsible for the litigation misfeasance of his corporation described in the 2019 decision, and that he continued his abuse of Ontario's civil justice system through his concealment of the related action in which he was adverse to Mr. Gupta. Justice Sloan summarized his concerns as follows:

Not only does his [Mr. Singh's] abuse bring the administration of civil justice into disrepute, but it was responsible for inflating the costs of this litigation and increasing the costs to the taxpayers of Ontario, who publicly fund our civil justice system. [Mr.] Singh's abuse of the civil justice system must be denounced in the strongest terms.

As a result, Mr. Singh was held to be jointly and severally liable along with the other plaintiffs for the costs of the entire action including the unpaid costs of \$135,221.56 from the 2019 motion.

The decisions of Justice Sloan demonstrate how a fairly standard dispute over a moderately

complex real estate deal can spiral into years of litigation that is made far more complicated than necessary by the failure of parties to comply with basic procedural obligations. Mr. Singh would likely have escaped personal liability for the costs owed by his corporation had he properly disclosed all of his relevant emails and text messages in 2013, as he was required to do, and he could have adjudicated both of the actions in the ordinary course and perhaps even prevailed on the issue of the entitlement to the deposit. Instead, the court dismissed his claims due to his procedural violations and found him to be personally liable for the litigation misconduct of a corporation.

Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)