SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. 7503997 Canada Inc.*, 2017 NSSC 167

Date: 20170620
Docket: Hfx No. 424614
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

7503997 Canada Inc. and Xing Bin (Ronald) Luo

Defendants

Judge:	The Honourable Justice Margaret J. Stewart
Heard:	November 21, 22, 23 and 24, 2016, in Halifax, Nova Scotia
Final Written Submissions:	December 7, 14 and 16, 2016
Counsel:	Richard Norman and Sian Laing, Articled Clerk, for the plaintiff William M. Leahey, for the defendants

By the Court:

Introduction

[1] This proceeding arises from the construction, opening, and, four months later, the closure, of a cheesecake franchise restaurant in downtown Halifax. This decision concerns the enforcement of two guarantees that the guarantor seeks to discharge based on alleged breach of contract and misrepresentation.

[2] The defendant Xing Bin (Ronald) Luo ("Luo") and principal of corporate defendant and franchisee 7503997 Canada Inc. ("750") was the unfortunate victim of deceit by the now-bankrupt cheesecake franchisor William Vourakis ("Vourakis"). Luo agreed to invest $300,000, along with a franchise fee of $57,500. He paid Vourakis's company, 7094604 Canada Inc. ("709") the franchise fee, plus $145,000, to start construction of the restaurant. 750 later paid a further $40,000 in HST refund. 709 also received a full loan advance of $250,000 from 750 under the *Canada Small Business Financing Act*, SC 1998, c 36 ("*CSBF Act*"), a significant part of which Vourakis retained and never paid to the general contractor, Gaudet.

[3] Vourakis on 709's behalf unilaterally changed the price of construction to $350,000, misled Luo about the progress of the construction, invoiced for full payment rather than what the general contractor had completed, purchased used equipment, and failed to pay the contractor. He consistently cheated and lied to Luo.

[4] The corporate defendant, 750, through Luo as its principal, borrowed money from the plaintiff, Royal Bank of Canada ("the Bank") for construction and the purchase of equipment for a "turnkey" cheesecake franchise operation. The loan was made under the terms of the CSBF program. 750 defaulted on the CSBF loan. Luo guaranteed the loan (on two guarantees) to the extent of $25,000 and $63,750. Luo closed the restaurant some four months after opening. Luo's pledged shares under the franchise agreement left 750 under the control of Vourakis's company. 750 did not file a defence and default judgment was entered against it. No payments have been made.

[5] The Bank, as secured creditor, now sues Luo on his two guarantees, with a combined face value of $88,750, plus interest. Luo seeks discharge of his obligations, alleging breach of both the CSBF loan agreement and a verbal

agreement with the Bank, as well as misrepresentation. Luo blames the Bank for accepting invoices from the franchisor rather than insisting that Vourakis produce third party invoices from the contractor, which he says resulted in the closure of the business due to the contractor's leasehold lien against the landlord and 709.

[6] By decision dated February 1, 2016, Hood, J. denied the Bank summary judgment on the evidence. She held that if a misrepresentation affected Luo's "authorization to advance the funds on behalf of his company, funds partly guaranteed by Ronald Luo personally, it raises the issue of the validity of the guarantee at the time the advance was made. If the loan was advanced on the basis of a misrepresentation, the surety is not bound": *Royal Bank of Canada* v. *7503997 Canada Inc.*, 2016 NSSC 40, at para. 60.

Background

[7] Luo and his wife, Jenny Jin (Jin) were seeking a low-maintenance investment that would not require their direct involvement. Luo and Jin hold degrees from Chinese universities. They immigrated to Canada and obtained Master's degrees in engineering from Concordia University. When they entered into the franchising arrangement, they had experience in commercial purchasing, mortgage financing, and rental management, including owning and managing a 21-unit apartment building. They had no experience with franchising, construction financing, or restaurant operation. They contracted for a "turn-key" franchise, which would not require their direct involvement in its operations.

[8] Luo and Jin were investing their own money, as well as funds of relatives in China. After conversations with Vourakis, Luo signed a franchise agreement and incorporated 750 to operate the business. Luo and Vourakis agreed that the restaurant would cost $300,000, with a $50,000 franchise fee, plus HST. In addition, 750 would apply for the HST refund. Funding for construction and equipment would be by way of Luo's $145,000 investment and a CSBF loan of $204,000, guaranteed by Luo. Through Vourakis as a Bank franchise client, Luo was eventually referred to Halifax based senior account manager Andre LeBlanc.

[9] LeBlanc was commercial manager for retail clients at the Bank's main office in Halifax and was account manager for the franchisee, 750. The Bank had a vetted franchise agreement with Broadway Cheesecake. LeBlanc had experience in franchise operations and was familiar with the various degrees of franchisors' involvement. The CSBF transaction for leasehold improvements and equipment

involved the Bank's group in Montreal that dealt with CSBF loans, the client, and LeBlanc. Invoices were required to advance funds under the *CSBF* program. The client provided invoices directly to the Bank's loan advance group, or dropped them off to LeBlanc, who would generally look at them and forward them on to the loan advance group, as specified in the *Act* and regulations. The advance group, not LeBlanc, would vet the documents for the advance of funds.

[10] In August 2011, Luo paid Vourakis the franchise fee, totalling $57,500, acknowledging that the payment was "non-refundable save and except in the scenario that financing cannot be obtained for the franchisee only."

[11] On September 7, 2011, Vourakis's company, 709, signed a franchise agreement with 750. The agreement made no reference to construction costs. The opening was to be at the end of 2011. In support of 750's loan application, on September 30, Luo sent a form letter, headed "Information Disclosure Authorization/Disclaimer" regarding 750 to LeBlanc's attention. (In places, the two company names were reversed.)

[12] In the September 2011 "Information Disclosure Authorization/Disclaimer" letter signed by Luo on behalf of 750, and sent to LeBlanc's attention, the parameters of 750's relationships with the Bank and the franchisor, 709, were established. 750 acknowledged that the Bank had not made any representations or warranties regarding 709 and that 750 was receiving independent legal and financial advice. It was also acknowledged that the Bank might not be able to disclose to 750 future confidential information about 709, and 750 authorized the Bank to disclose and discuss with 709 any financial information relating to 750. The document was drafted by the Bank.

[13] In October 2011, a dispute arose between Luo and Vourakis over whether the construction costs (before HST) were $300,000 (according to Luo) or $350,000 (according to Vourakis). Luo reconsidered investing. Vourakis ultimately confirmed the price of $300,000.

[14] On November 1, 2011, Luo signed two personal guarantees to the Bank with face values of $25,000 and $51,000. Between November 9 and 18, he personally invested $145,000. Neither the franchise fee or the investment were receipted by Vourakis' company, and Luo's requests for receipts were ignored. On November 22, Luo, on behalf of 750, signed a Bank loan agreement under the auspices of the CSBF program, dated November 16, 2011, for $204,000. This CSBF loan was intended to cover the balance of the construction and equipment costs. At the end

of that month, 750 received a letter from the Bank, dated November 16, setting out "some important facts to remember" regarding the CSBF loan. There were three headings, one being "Invoices", which listed ten bulleted facts, including the following:

- Loan advances are subject to invoice review to ensure they are in compliance with government guidelines.

- The Invoice Control Sheet must be duly completed with every submission accompanied by a valid proof of payment.

- If you are paying contractor by way of progress draws, an invoice from your contractor is required. This should detail the amount of work completed to-date supported by a copy of the contract. The deposit (prior to work being done) is eligible only at the end of the project.

- When financing equipment, the presence of subject equipment must be confirmed, on site, prior to advancing funds.

[15] In December 2011, the month originally intended for opening the restaurant, Vourakis informed Luo that construction costs were in fact $350,000 plus HST. Vourakis had complete control of construction. There was no activity at the site. He had not provided receipts for funds invested or invoices for work done to date, and was again demanding further funds after apologizing profusely that he was in error in doing so only a month earlier and pre Luo's personal investment. Luo now distrusted Vourakis. In December 2011, Luo and Jin expressed concerns about Vourakis to LeBlanc.

[16] In March 2012, Vourakis's company threatened legal action over the additional $50,000 in construction costs. Vourakis had still not provided third party invoices. In an email to Vourakis dated March 30, 2012, Luo summarized budget and action items required from a meeting on March 27:

> The main objective of this meeting was to keep original overall budget/cost within $300,000, but unfortunately we are realized it is not achievable. We agreed to maximize our small business loan to $250,000 from $200,000. Billy had discussed with RBC and got approved from RBC for extra $50,000 in January. Billy will confirm this with RBC by the first of April 2012.

[17] Jin testified that there was no agreement until action items were completed or provided by Vourakis, and suggested that the email reflected her husband's difficulty with the English language. I note that Luo's command of spoken English presented as broken and strained, but his comprehension was solid, especially in

written exchanges. Jin's command of the English language far exceeded his, and she was a constant sounding board for him in decision-making, including reviewing documentation and attending some Bank meetings. I also note Luo's comments on his resume that he had the "ability to thrive under deadline pressure" and adapt "easily to new protocols and changing environments." He claimed that he associated these traits with functioning in a Chinese context, but these statements were contained in his English-language resume. In short, I do not accept that Luo was an unsophisticated party, despite having some issues with the English language.

[18] Luo and Jin met with LeBlanc in December 2011 and on April 4, 2012. They discussed invoices inclusive of review and verification and loan release process. In the April 4 meeting Luo told LeBlanc that Vourakis had misled them as to the cost of the investment, had threatened legal action, and had failed to provide receipts and invoices confirming work completed to date. According to Luo and Jin, they told LeBlanc that they did not want to borrow more money. Luo said LeBlanc described Vourakis as an honest businessman with four or five stores in the Montreal area, financed through the Bank. Luo and Jin said that LeBlanc presented as helpful, professional, and confident, and assured them that all was done in accordance with Bank policy and the guidelines.

[19] While LeBlanc did not specifically recall, his early undated notes say, "need to set an extra step to verify with Ronald and Jenny to review invoices prior to requesting advances." According to Luo, these discussions led to an agreement that alleviated his mistrust of Vourakis and his concerns about work completion prior to advances. He said the Bank specifically represented that it would secure third party invoices from Vourakis, and would ensure that invoices that were not already marked "paid" would be paid out of any loan advance, in accordance with CSBF guidelines outlined in the Bank's letter of November 16, 2011.

[20] In an e-mail dated April 9, 2012, Vourakis, just as Luo in his March summary email said he would do, told LeBlanc that the loan was to be increased to $250,000. According to Luo, this was untrue, to LeBlanc's knowledge from their April 4 meeting, Luo said that at that meeting it was agreed that the loan increase and advance was subject to obtaining contractor invoices. By email to both Vourakis and Luo on April 18, LeBlanc indicated that he expected the new loan documentation within a day.

[21] Late in the afternoon of April 23, 2012, after requests by LeBlanc, Vourakis provided 709's invoice #151 of same date in the amount of $259,716. Gaudet's item prices were "transposed" on it. Some $10,000 of the total was supported by two separate invoices related to professional drawings; both had been provided to Luo in March, and he had rejected them, as they were not marked paid. Vourakis had previously received Gaudet's January 31, 2012, invoice for $105,983.23, which was ultimately paid out of the advance. The transposed summary on 709's invoice, however, claimed the full general contractor budget price of some $200,000. 709 wanted the advance of funds once the extension loan and guarantees were executed.

[22] Early on April 24, 2012, LeBlanc provided Luo with the invoice and told him that the Bank would advance loan funds on the strength of the invoice provided by Vourakis. Luo testified that he was upset and very disappointed that LeBlanc failed to provide contractor invoices. On hearing from LeBlanc that this was normal procedure, and seeing (by his own evidence) no alternative "but to follow him", and not wanting to "quarrel" with LeBlanc, Luo executed (on behalf of 750) the extension CSBF loan for $250,000, plus an administrative fee. To reflect the increase, he signed a new guarantee in the face value of $63,750, replacing the earlier guarantee for $51,000. At noon, Leblanc reiterating the morning discussion, sent the following email to Luo with the subject line "Invoices":

> Hello Ronald, just wanted to let you known that I have spoken to Billy regarding the additional supporting invoices for invoice # 151 for the leasehold improvements totaling $259,718. Given that there is one general contractor that is handling the project he just transposes that invoice info to this invoice for progress advances as the general presents them in order to then pay the sub trades. From what I understand and as part of the agreement, Billy will provide you a binder once all the project costs are received and at that point the general contractor will provide all the detail. This is consistent with how the other projects of this nature have been handled and I trust it to be the normal procedure for this particular operation.
>
> So if you could discuss that with Jenny in respect to all being OK with advancing funds on the Canada Small Business Financing Loans Act Loan as most likely the sub trades want to be paid some funds by the general contractor and we need to advance funds on the loan to get that completed.
>
> I also understand that Billy anticipates the project to be hopefully completed within 2 weeks so it sounds like the timing for busy pedestrian traffic should be right on

> the mark. Like you and Billy, I look forward to seeing the open sign on and customers flowing in and out of your location.
>
> Let me know as soon as you can in order for us to request the release of funds.

[23] As noted earlier, Leblanc's role in respect of CSBF loans was to facilitate the flow of documentation between the field, the Bank's Montreal Business Service Centre, and the loans advance group. His normal practice was to be in constant conversation with loans advancing group once documentation had been submitted to them. The loan advance group would give input with respect to communication with the client. LeBlanc could not recall any discussions concerning the April 24 email that he sent to Luo.

[24] On April 30, 2012, LeBlanc e-mailed Luo the authorization form for signature. Luo replied, in part, "But, if you think it's Ok, like we talked last week, we follow you for sure." Luo also questioned the erroneous loan amount on the form, and wrote: "To be honest, we are not sure we have received all merchandise or services in the subject mentioned invoices/contact of sale. Even if we got some of the invoices from you. If Billy said its done, we have to agree. We hate this situation."

[25] On May 1, 2012, on 750's behalf, Luo signed a confirmation and authorization to advance funds and debit form. LeBlanc had sent the form to Luo by email on April 30, 2012, referencing an advance of $114,716. As noted, in a reply email Luo questioned the loan amount of $204,000, and questioned his ability to confirm receipt of items and services. He did, however, sign it. The document confirmed that: "we have received all merchandise or services described in subject mentioned invoices/contracts of sale and we hereby authorize the bank to debit our account … for full payment of same." The form credited Luo's earlier investment of $145,000 as a deposit against the franchisor's invoice for $259,716.00, and indicated that $114,716 would be debited from 750's account, leaving $135,284 unadvanced.

[26] Luo subsequently received from LeBlanc a second franchisor invoice, with the same date and number as the first, in the amount of $70,407.60. This invoice was attributed to equipment. Two documents supported the invoice: a quote for tables and counters, dated April 3, that requested a signature to reflect "mutual agreement to the above contract", and an invoice for equipment, requiring payment in full prior to shipment. LeBlanc advised Luo late in the afternoon of May 2 that the Bank was ready to advance the funds on basis of the May 1 documentation, and

that he had just learned from Vourakis that the invoiced equipment was being delivered C.O.D. the next morning.

[27] LeBlanc recommended adding the second invoice to the advance, to move things along more quickly. He attached a new confirmation and authorization form, which referred to both of the franchisor invoices, in the amounts of $259,716.00 and $70,407.60, totaling $330,123.60. It showed no credit for Luo's $145,000, and thus no unadvanced loan amount of $64,876.40. It also corrected the loan amount, previously shown as $204,000 (as Luo had pointed out). Luo responded the night of May 2 that he would go forward "if you think it's good", to which LeBlanc replied, "I believe it is all OK." The next morning Luo went to LeBlanc's office and signed; Luo's evidence was that he did so under protest, without reading the document. He said he expected $185,123.60 to be advanced.

[28] The advance of $250,000 was processed overnight. 750's account was debited the full amount and $80,123.60 and then was recredited $80,123.60 from Vourakis's 709 account, with interest charges on 750's overdraft reversed. Luo said the full loan amount was not supposed to be advanced; rather, $70,407.60 should have been added to the balance on the May 1 form, leaving $64,876.40 unadvanced, rather than still in Vourakis's control. Luo said he did not know that it had all been advanced until he reviewed 709's bank statement a month later. He called the Bank, but LeBlanc had left the Bank's employ in mid-May.

[29] Vourakis was in complete control of the construction. Luo, following his directions, did not visit the site. Other than looking through the windows on walk-bys, and one limited walk-in, Luo made his first visit to the site with Vourakis and LeBlanc on May 4, 2012, the morning after the loan advance. Luo could not recall whether the invoices he requested for review were there. He did not know whether LeBlanc told him funds had been released the previous evening.

[30] On July 12, 2012, Luo met with a new account manager, Tarek Al-Owaishi ("Al-Owaishi"), and signed an amended loan agreement for interest-only payments on the CSBF loan, as the opening of the restaurant had been delayed. Also in July, at Vourakis's insistence, Luo, paid 750's HST refund of $40,000 to 709 to complete the restaurant, rather than for the opening, as had been planned. In total, Luo paid Vourakis's company $90,000 more.

[31] The restaurant opened on August 3, 2012, rather than two weeks after the May 3 advance as Vourakis had earlier promised. Luo subsequently learned from Gaudet that money was owing to the contractor. Gaudet's final invoice, dated

September 1, 2012, contained an unpaid account balance of $159,413.96. Gaudet filed a lien claim against 709 and the landlord, dated October 24 and registered on October 30, for $162,014.47. Luo learned of the lien in 750's capacity as sub-lessor. Vourakis, on behalf of 709, as leaseholder, did not follow through with his promise to the landlord to pay out the lien on November 29. A Certificate of *Lis Pendens* was issued on December 19, 2012.

[32] In October and November 2012, Al-Owaishi called Luo concerning overdrafts in 750's account.

[33] By letter dated November 24, 2012, Luo and Jin responded to Vourakis email threats of franchise default action and advised him of their intention to manage the restaurant themselves, due in part to dissatisfaction with the staff he hired and training he provided. A demand letter from 709's counsel followed. Various other issues arose, including a failure of 709 to pay the rent, causing Luo to negotiate a deal with the landlord. Vourakis tried to make Luo personally responsible for the sub-lease and subsequently brought a Small Claims Court action. After obtaining legal advice, Luo advised staff of the closure of the business and cancelled the December 1 rent cheque. The doors were locked on December 1. Wages of staff members were paid personally by Luo and Jin.

[34] The Bank seeks enforcement of Luo's two guarantees with a combined face value of $88,750, plus interest.

Positions of the parties

Luo and 750

[35] Luo says the loss of the restaurant resulted from the Bank's failure to honour the terms of the CSBF loan agreement with 750, as set out in the Bank's letter of November 16, 2011, and repeated in meetings between Luo, Jin and LeBlanc, in November and December 2011 and April 2012. Luo says the Bank breached both written and verbal agreements and mislead him with assurances and misrepresentations.

[36] Luo says LeBlanc agreed orally that the Bank would obtain from Vourakis third party invoices detailing work actually performed and goods delivered as of the invoice date, and that the Bank would ensure that invoices not already marked "paid" would be paid from the advance under 750's loan. He argues that this was required by the CSBF loan conditions. He says Vourakis's fraud (in not paying the

general contractor) could have been avoided if LeBlanc had proceeded this way. By allowing Vourakis to supply 709's invoices, Luo says, the Bank breached both agreements. As such, he claims the right to be discharged as guarantor of 750.

[37] Luo says the Bank misled him with false assurances of Vourakis's reliability and trustworthiness, that the CSBF guidelines were met by the franchisor's invoices, and that it was normal for funds to be advanced without vetted contractor invoices. He alleges that these statements were intended to induce him to go through with the loan advance under the pretenses that there had been no breach and that the Bank was following normal procedure. He also says LeBlanc indicated that it was appropriate to sign a confirmation and debit authorization when Luo (to LeBlanc's knowledge) did not know if the confirmation was true. Further, Luo says, LeBlanc did not inform him about communications with Vourakis concerning such matters as the reason for the overdraft on 750's account, and the fact that the full advance would be released the night before the restaurant walk-through and equipment confirmation.

[38] Luo says the Bank used its superior knowledge and his trust in his banker to push through a deal on terms contrary to both the *CSBF Act* and the loan agreement. He says requiring invoices from third parties would have ensured payment and would have prevented the lien that led to the closure of the business.

The Bank

[39] The Bank says, firstly, that no right of action is created or given to a borrower or a guarantor by the *CSBF Act*, regulations or guidelines. The *CSBF Act*, regulations, and guidelines were not terms of the loan agreement or of the guarantees, and are only binding between the Bank and Industry Canada.

[40] The Bank submits that it was not a condition of the loan that the Bank would obtain third party invoices from the borrower, or that the borrower would be obliged to provide such invoices before funds would be advanced. The Bank's letter of November 16, 2011, imposed obligations on the borrower, 750, but not on the Bank. It was not incorporated into the loan agreement, but was only an information sheet for borrowers. Due to the flexibility of franchise arrangements, the Bank says, it was not unusual for the Bank to accept invoices from a franchisor who was dealing with the contractors.

[41] As such, the bank submits, any issue respecting the CSBF guidelines, such as practice and compliance was a matter between the Bank and Industry Canada.

Indeed, Industry Canada paid the Bank's claim for default based on Vourakis's invoices.

[42] Alternatively, the Bank argues, if the guidelines were part of the loan agreement, the invoice requirements were a contingent condition for the benefit of the Bank, which could be (and were) unilaterally waived by the Bank.

[43] In the further alternative, if the requirement to obtain invoices was a part of the loan agreement, then the Bank says such invoices were in fact obtained and there was no breach.

[44] The Bank further argues that, given its sole discretion under the loan agreement, the Bank was free at any time to decide how the credit facilities were to be made available.

[45] With respect to the guarantees, the Bank submits that they were effective upon execution, pursuant to the loan agreement. Luo, as guarantor contracted out of any potential defence relating to the manner in which the Bank dealt with 750's credit facilities. The language of the guarantees, specifically exclusion clause 1, gave the Bank wide latitude to deal with loans as it saw fit without limiting the guarantor's liability. The Bank could accept invoices from 750 in any form, or not collect invoices at all, without affecting the guarantees.

[46] The bank also says that even if a breach of the loan agreement occurred, this does not relieve Luo of liability under the guarantees. A discharge of a guarantee occurs with a breach of condition of the agreement which materially varies the guarantor's risk without his consent: Kevin McGuiness, *The Law of Guarantee*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2013) at 899. The Bank says obtaining invoices was not a condition of the loan agreement, but at most a warranty which does not give rise to a right of rescission, since the failure to provide the invoices did not deprive 750 of "substantially the whole benefit of the contract": McGuiness, *Law of Guarantee*, at 938. 750 received the money, built the restaurant, and did business. The fact that some of the money advanced to Vourakis did not go to the contractor did not deprive 750 of substantially the whole benefit of the loan agreement. Gaudet's collection and lien issues over nonpayment were with Vourakis, not with Luo or 750.

[47] The Bank goes on to argue that if supplying invoices was a condition of the loan agreement, and there was a breach, then Luo, as guarantor, knew of, and agreed to, any increased risk to 750 as result of that breach. Even if Luo did not

know or consent beforehand, the Bank says, he found out shortly afterwards and then consented, thereby ratifying all material changes.

[48] The Bank further submits that any statements or oral agreements by LeBlanc in December 2011 or April 2012 did not form part of the loan or the guarantees, each of which contained "entire agreement" clauses. Moreover, any such statements or oral agreements would have been revoked on April 24 or May 3, 2012, with the advance of funds based on 709's invoices.

[49] The Bank denies that any misrepresentations were made. A defence of innocent misrepresentation is not an alternative defence, as the misleading statement must be regarded as a term of the contract and shown to be material to result in a rescission-type remedy. Such a defence depends on finding that the collection of invoices was a term of the loan agreement, which the Bank denies. The Bank says the alleged misrepresentations were not negligent or fraudulent, and at most were innocent.

Finally, the bank says that even if there was a breach or misrepresentation, it did not cause any damage to Luo personally. There were intervening events between the advance of funds on May 3, 2012, and Luo walking away from the business on November 30, 2012, which broke the chain of causation. Further, Luo's behaviour clearly showed that he accepted it.

Discussion

[50] The Bank submits that Luo did not rely on it in deciding to invest in the franchise. He had no personal relationship with the Bank through the lending relationship between 750 and the Bank. As guarantor and a shareholder of 750, he executed the guarantees in his personal capacity. His guarantee of the loan was subject to the rights of 750 and the Bank as parties to the CSBF loan. Unlike the plaintiff in *Big X Holdings Inc.* v. *Royal Bank of Canada*, 2015 NSSC 184, Luo personally borrowed no money from the Bank to invest in 750, and was not a Bank customer. Vourakis's company, 709, as franchisor, was a customer of the Bank.

[51] As between 750 and the Bank, the Bank's sole duty was to offer credit facilities to its client. The Bank owed no duty to its customers, or to anyone else, to advise them not to undertake a loan, or to advise them to assess the prudence of potential investments: *National Bank of Canada* v. *Meneses*, [2008] O.J. No. 2108; *Big X Holdings, supra*. The Bank did not owe a duty of care to Luo as a shareholder of the Bank's corporate customer to exercise reasonable care in

lending to that company, 750. That is not a duty that has been recognized as already existing in law: *Big X Holdings*, *supra*. As a shareholder of 750, Luo was a third party to 750's relationship with the Banks. He was not personally bound by that contract. Any borrowing guidelines in that agreement were for the benefit of the Bank, not Luo, and the Bank never represented otherwise. As in *Big X Holdings*, *supra*, Luo signed guarantees that stated in clause 1 that the Bank could deal with 750 as it saw fit without affecting the security of the guarantee. Luo knew that his interests, as guarantor, were not part of the Bank's consideration.

[52] Luo's defence centres on the Bank's alleged non-compliance with the summarized version of the CSBF guidelines on invoice requirements found in the Bank's November 16, 2011, letter, and the guidelines themselves. The question is whether obtaining actual contractor invoices was a term of 750's loan agreement, and, if so, whether it was breached.

[53] A review of the purpose of the *CSBF Act* and regulations appears in *Royal Bank of Canada v. Ultimate Holographic Reproductions Inc.*, 2013 ONSC 1838, where Whitten J. stated:

> 24. All in all, the regime under the statute and the regulations is for the benefit of the lender institution who makes loans to qualifying small businesses. It does not create a Charter of rights for the borrowers. If the lender does not fulfill its obligations under the statute; for example, to obtain a first ranking security in the assets of the business, it just means that the lender would disentitle itself from making a claim for compensation from the Minister.
>
> …
>
> 27 The statute does not override the contractual relations between lender and borrower, it simply provides relief to the lender if certain preconditions or steps, pursuant to the regulations, are followed. The lender and borrower/guarantors can still go ahead and negotiate the terms of the loan and guarantee. It is just that if those contractual relations depart from the terms of the statute, the lender cannot submit a claim to the Minister for any loss.
>
> 28 Once it is recognized that statute and regulations only determine the extent of the risk to the lender and not the contractual relationship between the parties, we are left with those documents that describe the loan and extent of the guarantee.

[54] The *CSBF Act*, regulations and guidelines do not impose contractual terms *vis-à-vis* a bank and a borrower additional to the loan agreement. A bank must take certain steps to ensure that money lent is insured in case of default. CSBF obligations are between the federal government and the bank. The Guidelines are the program Directorate's interpretation of the Act and regulations, addressed to lenders. The Act provides no right of action for borrowers or guarantors: *ACFMD 2005 Inc.* v. *Pizza One Group Inc.*, 2013 ONSC 1838, at para 24.

[55] I turn first to the construction and interpretation of the loan agreement. In *Sattva Capital Corp.* v. *Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada reaffirmed certain principles of contractual interpretation, while discussing the use of evidence of surrounding circumstances, or the factual matrix, noting that the parol evidence rule does not preclude evidence of surrounding circumstances. The court noted that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" (para. 47). The court went on to say that "[t]he interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (para. 57). The court elaborated on the nature of the evidence that can be considered:

> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[56] When Luo executed the extended loan agreement and the guarantee on April 24, 2012, he knew, because LeBlanc told him prior to signing, that the Bank was accepting the franchisor's invoice as a basis for advancing the loan funds in compliance with the CSBF guidelines. I find that this was within the common knowledge of both parties on execution of the agreements. The opening clause of the loan agreement provides the context for what follows. It states:

> Royal Bank of Canada (the "Bank") hereby confirms to the undersigned (the "Borrower") the following credit facilities…issued pursuant to the requirements of the *Canada Small Business Financing Loans Act*, subject to the terms and conditions set forth below and in the standard terms provided herewith (collectively the "Agreement"). This Agreement is separate and in addition to any other Agreements which may exists between the Borrower and the Bank. The Credit Facilities are made available at the sole discretion of the Bank and the Bank may cancel or restrict availability of any unutilized portion of these facilities at any time and from time to time without notice.

[57] The Bank, therefore, had sole discretion as to how credit was made available. The loan agreement imposes no requirements on 750 to supply invoices before funds would be advanced. The November 16, 2011, letter is not referenced in the loan agreement, or in the guarantees. Both documents do include "entire agreement" provisions. The loan agreement, for instance, provided:

> This Agreement and any documents or instruments referred to in, or delivered pursuant to, or in connection with, this Agreement constitute the whole and entire agreement between the Borrower and the Bank with respect to the Credit Facilities.

[58] Relying on these provisions, the Bank says that neither the loan agreement nor the guarantees import the contents of the CSBF references in the Bank's letter. It is necessary to consider the meaning of the words "*delivered*….in connection with" in the "entire agreement" clause. The loan agreement defines the "whole agreement" in an unambiguous way. The loan agreement and any document delivered pursuant to, or *in connection with this Agreement* constitute the whole and entire agreement between the Bank and 750. [emphasis added].

[59] The Bank letter to 750 contained bulleted particulars, noted as "some important facts to remember regarding" the CSBF loan, and concluded with the comment that a Bank Associate would help 750 "meet guidelines/criteria as outlined by Industry Canada." The Bank's letter has the same date and the same loan number in its subject heading as the loan agreement signed by 750 on November 22, 2011. It erroneously names Vourakis rather than Luo as the addressee. It was not delivered with the loan agreement on signing. LeBlanc was not the source of, or familiar with, the specific letter, but he testified that it was a standard document in a CSBF loan process from the Bank's Montreal Business Service Centre. It is signed by the Bank and references the Bank as the contact for questions, indicating that a Bank associate "will contact you to assist and help you meet the guidelines/criteria". LeBlanc was not that associate. This was not a document picked up by Luo, but was delivered by the Bank to its customer. I

conclude that the letter is a document delivered "in connection with" the agreement. It and the loan agreement constitute the entire agreement between 750 and the Bank.

[60] The letter, as a term of 750's CSBF loan, provides "important facts to remember" that are unrelated to the "standard terms" already included in the agreement. It deals with three subject areas: invoices, ineligibility, and proof of payment. The ten bulleted facts under "invoices" set out the borrower's obligations. The borrower has no discretion as to what invoices the Bank ought to require or over what it ought to supply. It does not limit invoice requirements to those listed in the document, and it imposes no obligation on the Bank. It does not alter the purpose of the *CSBF Act*, regulations, and criteria as described by Justice Whitten; in particular, nothing suggests that those obligations exist other than for the benefit of the Bank.

[61] I conclude that the letter, including the guidelines, was not a true condition precedent to performance of the loan agreement. It does not indicate consequences for failing to supply a contractor's construction invoices. It clearly sets out obligations for the borrower. The Bank did not fail to fulfill a condition precedent by not supplying the contractor's invoices. Consequently, the agreement was not voided, nor were the guarantees.

[62] In my view, the invoice provisions in the loan agreement were contingent conditions that the Bank could waive unilaterally, it being the party for whose benefit they were included. The Bank exercised its right to advance funds based on the franchisor's invoices. There was no breach of the agreement, and therefore the guarantees remained effective. As guarantor, Luo is subject the Bank's right to waive such conditions unilaterally: *Roynat Inc.* v. *Brown*, [1992] N.S.J. No. 395 (S.C.), at paras 27-31. The CSBF guidelines did not "govern the Bank's behaviour" as argued by Luo. The Bank could set its own requirements, which might result in consequences under the CSBF program in the event of a default, based on its own practice and its experience with the franchisor.

[63] I am satisfied that the invoices obtained by the Bank were sufficient to fulfill its contractual responsibility to 750. The Bank typically required the borrower to provide invoices to support leasehold construction in accordance with CSBF guidelines. The Bank obtained invoices from Vourakis. As evidenced not only by LeBlanc, but also by Al-Owaishi, who had less experience, when a franchisor

managed construction, and with contractors, it was not unusual to accept the franchisor's invoices. This was not contradicted.

[64] I conclude that advancing funds on the basis of the franchisor's invoices was consistent with the norm for franchisors, met the guidelines and was accepted by Luo. It was not a breach of the loan agreement. The guarantees remain effective.

Guarantees

[65] If I am in error in concluding that the Bank did not breach the loan agreement with 750 by accepting Vourakis's invoices as sufficient, I nevertheless conclude that Luo is not discharged under the terms of the guarantees.

[66] Luo executed the first guarantees, for $25,000 and $51,000, on November 1, 2011, before any invoice issue arose. The guarantee was not subject to any undertakings given orally by LeBlanc. Nothing was said prior to execution that induced Luo to sign. Another guarantee, in the amount of $63,750, securing the increased loan, was executed on April 24, 2012. These guarantees were effective from the execution dates. I conclude that pursuant, to clause 11 of the guarantees, that they were effective as of execution. After seeing 709's invoices, Luo took no steps to withdraw either of these guarantees.

[67] Although I will address the general principles of guarantee discharge below, I reach the following conclusion. Even if the loan agreement had included a condition in favour of 750, or the Bank in some other way breached the agreement, discharge would be unavailable due to the exclusion clauses in the guarantees. Those provisions permitted the Bank to deal with 750 and the guarantor as it saw fit, without limiting Luo's liability as guarantor, subject only to unlawful conduct or dealings by the Bank (which I do not find to have occurred here).

[68] The general principle is that a surety is discharged if the principal contract that is the subject of the guarantee is materially varied to his detriment and without his consent, or if the guarantee is breached by the creditor: *Rose v. Aftenberger* (1970), 1 O.R. 547 (C.A.). The latter defence is not raised here. Accordingly, for Luo to be discharged as guarantor, a breach of the loan agreement must have materially altered his risk as guarantor without his consent. The onus of proving that the guarantor consented to the variation of the loan agreement is upon the party seeking to enforce the guarantee: McGuiness, *Law of Guarantee*, at 1005.

[69] Luo contends that the Bank's failure to comply with contractor invoice requirements resulted in 709 not paying the general contractor out of the advance, leading to the loss of 750's business due to the contractor's lien claim against 709 and the landlord. I conclude that if the Bank did materially alter the loan agreement by not requiring contractor's invoices, Luo, as guarantor, was aware of this, and agreed to any resulting increased risk to 750 because of that breach.

[70] When Luo executed the extended loan agreement and guarantee on April 24, 2012, he knew, because LeBlanc told him, that the Bank was satisfied with the franchisor's invoices and did not intend to require contractor's invoices. Luo had trust issues with his franchise partner. As of this date, he knew the Bank intended to advance the full loan. Nevertheless, he agreed to proceed with the transaction. Having invested his family's money in the enterprise, his focus was on securing a return on the investment. The variation of risk did not occur without his consent.

[71] Alternatively, if the variation of risk did occur without Luo's consent, I am satisfied that he ratified it after the fact by signing the second amendment to the loan agreement in July 2012, and again after the August restaurant opening by continuing to make loan payments when he knew that Gaudet had not been paid from the advance. He continued to accept changes to the loan agreement until the end of November 2012 when he closed the business.

Oral Discussions

[72] As has been described, Luo had serious concerns about Vourakis's honesty, including a pattern of not providing invoices in the manner described in the November Bank letter. These concerns gave rise to Luo's focus on invoices at the December and April meetings. LeBlanc did not recall Luo suggesting Vourakis cheated him. Luo's evidence supports this. Luo did not use excuses for Vourakis's conduct as found in the "polite language" he sent to Vourakis's counsel while meaning otherwise. He did "not have any comments" about Vourakis when discussing the situation with LeBlanc. LeBlanc confirmed Bank guidelines with respect to invoices as set out in the November Bank letter, without specific reference to it, including the CSBF loan invoice criteria that Luo was aware of.

[73] LeBlanc appreciated that there were invoice concerns, and noted the "need to set extra step to verify with Ronald and Jenny to review invoices prior to requesting advance." He was aware of Luo's concerns about Vourakis, at least to the extent of complaints that he did not provide what was requested. On the

evidence, I cannot conclude that it was as strong as a knowledge of allegations of lying or cheating. LeBlanc was presented with a franchisee who, despite some complainants about the conduct of the franchisor, was prepared to keep interacting with the franchisor and continue the loan process.

[74] That being said, any representations made by LeBlanc to Luo (whether on behalf of 750 or as guarantor) in December 2011 or on April 4, 2012, concerning the Bank seeking and obtaining contractor invoices was not part of the loan agreement or the guarantees. Both agreements contain "entire agreement" clauses that excluded additional representations, promises, or understandings from the four corners of the respective agreements. No verbal agreement exists. Nor was there any evidence that LeBlanc extinguished the Bank's right to unilaterally waive terms, or its sole discretion over credit facilities. Any reliance on such representations by Luo lacked the essential elements of a contract.

[75] In any event, any such oral representations would have been revoked by the Bank on April 24, 2012, before Luo executed the extended agreement and guarantee, or upon advancing the funds on May 3, 2012.

Misrepresentation

[76] Luo says misrepresentations from the Bank, including professional assurances, misled him and were given to secure his consent to the loan and guarantee agreements and to the advance of funds on the loan.

[77] Pursuant to the *Hedley Byrne* principle, negligent misrepresentation "is based on *advice* or *information* given by one who knows actually or inferentially that the receiver thereof will rely upon it, which advice or information is inaccurate *at the time it was made*": *Electrical Distributors Ltd.* v. *WCI Canada Inc*. (1992), 112 N.S.R. (2d) 300, 1992 CarswellNS 524 (C.A.), at para. 36 (emphasis in original). Luo contends that negligent misrepresentations can be found in LeBlanc's statements in April 2012, to the effect that Vourakis was a respected customer and an honest businessman; that proceeding based on invoices provided by Vourakis's franchisor company was consistent with how similar projects were handled; and that in doing so all was "ok with advancing funds" on the CSBF loan.

[78] It is not open to Luo to argue that 750 was the victim of a negligent misrepresentation. 750 did not defend the action, and default judgment was entered. Luo pledged his shares in 750 to 709 on termination of the franchise

agreement. He no longer owns or controls 750. He has no standing to advance this defence on behalf of 750.

[79] A successful negligent misrepresentation claim requires a duty of care based on a special relationship between the representor and the representee. As discussed earlier, Luo was never personally a customer of the Bank. The Bank did not owe Luo, in his personal capacity, any duty to oversee his relationship with Vourakis or to protect him from his franchise partner.

[80] Negligent misrepresentation requires that the representations must have been untrue, inaccurate or misleading. I cannot find that this element is established in respect of the April 2012 oral and written representations by the Bank. Nothing was misrepresented to Luo in his capacity as guarantor. Nothing was said prior to the execution of the guarantees that induced Luo to sign.

[81] Nor has it been established that Luo relied on the statements. Luo says he relied on Leblanc's verbal statement that Vourakis was an honest businessman with a well-known client history. LeBlanc knew Vourakis did business in Montreal, that he operated multiple restaurants, and that he had participated in the CSBF loan program as a Bank client. Besides Luo's invoice concerns, which caused Leblanc to note the "need to set extra step to verify with Ronald and Jenny to review invoices prior to requesting advance", Leblanc had no reason to believe Vourakis was dishonest. Vourakis offered explanations for LeBlanc's queries about documentation and supporting invoices. In emails, he presented as busy, trying to accommodate and apologetic. There is no evidence that the Bank knew of, or suspected, fraud. Further, Luo's doubts were not put to rest by LeBlanc's statement. Luo testified that he was upset and disappointed on April 24 when LeBlanc told him that 709's invoice was sufficient to proceed. That statement was not a misrepresentation. It was a description of the Bank's own position as to rights and obligations under the loan agreement.

[82] In any event, it would have been unreasonable for Luo to rely on this statement in the circumstances. He knew that the Bank had not obtained the contractor invoices and that it was prepared to proceed with the franchisor invoice. He also knew that (in his view) Vourakis had not provided sufficient invoices for his $145,000 deposit, and that the Bank intended to advance the full amount of the loan and any "control" he felt he had would be gone. Luo had reason to refuse the Bank's normal procedure. He was, however, not prepared to end the endeavor,

given his investment to that point. I find that Luo made his own choice to sign the extended loan and guarantee on April 24, 2012.

[83] LeBlanc and Al-Owaishi, both testified about their experience with franchise arrangements. When a franchisor was involved in construction and dealing with contractors, it was not unusual for the Bank to obtain invoices from the franchisor. Further confirmation that this was normal practice is found in Industry Canada's payment of the Bank's default claim based on those very invoices. The statement was not a misrepresentation. The Bank exercised its contractual right in obtaining and advancing on a franchisor's invoice. The April 24 e-mail clearly indicates that LeBlanc was seeking instructions from Luo as to whether he wished to proceed based on 709's invoice. It was open to him to refuse. LeBlanc did not claim that all of the contractors had been paid, nor did he conceal anything else. His statement about "all being ok with advancing funds" on the CBSF loan was accurate. The Bank had the right to unilaterally alter invoice conditions in its favour under the *CSBF Act*.

[84] Vourakis manipulated both LeBlanc and Luo. He established himself to LeBlanc as a regular Bank customer and CSBF loan program participant by requesting that he enlist the assistance of Vourakis's regular contact in the advancing group. When Leblanc (at Luo's request) sought invoice support from Vourakis, such as the receipt for Luo's investment, Vourakis warned about franchisees making inappropriate early HST claims, and indicated that the companies' arrangement with the contractor was that invoices would be provided collectively at the end. On November 24, 2012, Vourakis wrote to Luo, "I am under no obligation to provide you with invoices from my suppliers." On cross-examination, Luo stated that either Vourakis lied to LeBlanc as well as himself or, alternatively, that LeBlanc "created" the idea of such an agreement. Considering the totality of the evidence, I find it to be the former.

[85] In addition to having the same information about Vourakis that LeBlanc had, Luo had formed his own negative view of Vourakis's reliability. I find that at the time of the April 24 discussion, LeBlanc did not understand that Luo's view was that there was no agreement between 709 and 750 about an end of project invoice/document binder. When LeBlanc's understanding of the situation was repeated in an e-mail, Luo did not correct him. Luo never insisted on the need for the contractor invoices. He knew the bank intended to advance the full amount of the loan. He chose to proceed, as he had previously done when faced with Vourakis's demand for a $50,000 loan increase after receipt of his investment, and

even after receiving a legal demand on behalf of Vourakis's company. Neither event caused him to seek legal advice about continuing to do business with Vourakis. He considered it necessary to continue because Vourakis had his franchise money and his, and his relatives', investment money.

[86] LeBlanc's statement that the restaurant would "hopefully" be completed in two weeks clearly was what Vourakis told him that he anticipated. It was not a misrepresentation to induce Luo. Luo knew better than anyone how accurate Vourakis had been with finish dates.

[87] As for any oral representations or promises in December 2011 and early April 2012 to the effect that the Bank would obtain paid contractor or service invoices, on April 24, 2012, LeBlanc told Luo that the franchisor invoices were sufficient. This constituted a correction of any misrepresentation that had occurred.

[88] Whatever impression Luo believed he relayed to LeBlanc about his relationship with Vourakis, the reality was that as late as April 30 he was indicating to LeBlanc that, although he hated the situation, he was at least partly still willing to go along with Vourakis. This was LeBlanc's understanding in facilitating the transaction. Luo knew that the Bank was prepared to advance funds on the basis of the franchisor's invoice and that he needed to sign the confirmation and debit authorization form.

[89] On May 2, 2012, in response to LeBlanc's e-mail suggesting that 709's second invoice (for $70,407.60) be added to the advance department processing and a signed authorization be provided for disbursement, Luo stated "If you think it's good, I will go to see you tomorrow…" LeBlanc, in turn, replied, "I believe it is all Ok." This was a subjective opinion, not a misrepresentation. It indicated that the Bank would continue with the process of advancing money to a new company for leasehold improvements and equipment. LeBlanc had no reason to think otherwise. He had the ability to do it and no evidence of fraud by Vourakis. He was not privy to any information that Luo lacked.

[90] Accordingly, on May 3, 2012, Luo confirmed receipt of merchandise described in the invoices. The Bank could waive on-site confirmation before advancing funds. Authorization to debit 750's account to advance funds was required. Based on the signed confirmation and authorization form, funds were advanced the evening of May 3. Any reference by Luo to invoices being considered on-site the next morning could be subject to the agreement of the parties to the franchise agreement. Luo himself could not recall whether the

invoices were present. The next day, LeBlanc saw large unwrapped equipment pieces on-site.

[91] I am satisfied that when Luo chose to proceed he knew that the full amount of the loan was to be advanced. He and Jin had anticipated this on April 24. The May 3 authorization form, unlike the May 1 form, did not account for the deposit of Luo's investment so as to reflect a total balance that left $64,876.40 in unadvanced funds. Luo received the new authorization, and, while he testified that he did not read it, I find that he reviewed it and was aware of the difference. He had drawn the Bank's attention to the $50,000 error in the loan amount on the May 1 form. He was not one to delay for more than a month to look at an account and wait for a bank statement to verify matters. Luo did not delay looking at 750's account. The May 3, 2012, form appeared more in keeping with the CSBF guidelines on deposits. Luo made no effort to withdraw his guarantees.

[92] LeBlanc left the Bank in early May 2012. Luo went to the Bank in July to arrange for an interest-only payment on the loan. The restaurant was not finished. In speaking to Al-Owaishi, he did not express surprise or disagreement with respect to the full advance being made, nor did he revisit it in August and point out what had happened when he learned that Gaudet had not been paid. I conclude that there was no misrepresentation made to Luo about the May 3 authorization form.

[93] A negative response from Luo would have ended the advance process. It was always open to Luo to refuse to proceed unless satisfactory invoices were provided. Although Luo and Jin testified that they relied on LeBlanc's professional assurances, Luo said he signed the May 3 confirmation and authorization form "under protest" and due to "deception." He could not rely on LeBlanc at the same time doing something he did not want to do. Jin stated in cross-examination that after LeBlanc's April 24 e-mail, and prior to the advance, she felt that LeBlanc had sided with Vourakis and was not helping "us anymore." I conclude that it was not reliance on LeBlanc that caused Luo to sign the agreements and to authorize the advance. Further, even if there was reliance on LeBlanc, I conclude it was not reasonable in the circumstances, given Luo's knowledge, his motivation, and the nature of LeBlanc's comments.

[94] In view of my initial findings and those "in the event of" and conclusion on ratification that follows, it is unnecessary to comment on causation.

[95] Based on all of above and totality of the evidence, I conclude that the loan agreement was not signed, and funds were not advanced, based on any

misrepresentation and Luo as surety is bound. I add that I do not find any fraud or other wrongdoing in the Bank's failure to copy Luo on every e-mail respecting funds transfers in order to comply with CSBF guidelines on the release of the full advance, or in regard to any other conduct.

Ratification

[96] In the alternative, even if any breach or misrepresentation occurred, I conclude that Luo affirmed it, waiving any right to later complain and seek rescission. He took several unequivocal acts consistent only with an election to ratify the guarantees of 750's borrowing, including (1) paying the HST refund to Vourakis in the summer of 2012 while knowing the restaurant was not ready; (2) although he raised it by correspondence in November 2012, Luo gave up seeking invoices related to his $145,000 investment; (3) in July 2012, Luo agreed to a loan amendment for interest-only payments; (4) Luo knew in August 2012 that the contractor was unpaid by 709, but took no action; (5) Luo's company, 750, made payments on the loan and interest payments in the fall of 2012; and (6) Luo opened and ran the restaurant.

Conclusion

[97] The Bank has a valid charge as a secured creditor against the combined sum of $88,750, together with interest at the rate set under the guarantees. Pre-judgment interest from date of demand upon Luo will be at the rate agreed upon by the parties or, if the parties are unable to agree, they may provide written submissions. I will also hear counsel by way of written submissions if they are unable to agree on costs.

Stewart, J.