CITATION: Portuguese Canadian Credit Union v. CUMIS, 2010 ONSC 6107
COURT FILE NO.: 09-8386-00CL
DATE: 20101108

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Portuguese Canadian Credit Union Limited, by its Liquidator, Deposit Insurance Corporation of Ontario, Plaintiff

AND:

CUMIS General Insurance Company, Defendant

BEFORE: D. M. Brown J.

COUNSEL: F. Myers and J. Wadden, for the Plaintiff

J. Halfnight and J. Bolla, for the Defendant

HEARD: July 27 and 28, 2010.

REASONS FOR DECISION

I. Motion for the determination of questions of law: Rule 21.01(1)(a)

[1] The Portuguese Canadian Credit Union Limited (the "Credit Union") is in liquidation as a result of the unauthorized advance of funds by certain of its directors and employees. Its liquidator, the Deposit Insurance Corporation of Ontario ("DICO"), commenced this action in September, 2009, on behalf of the Credit Union, against CUMIS General Insurance Company ("CUMIS") seeking judgment for $10 million under fidelity insurance (the "Bond") contained in a contract of insurance (the "Policy") issued by CUMIS to the Credit Union.

[2] The Credit Union moves under Rule 21.01(1)(a) of the *Rules of Civil Procedure* for answers to two questions of law raised by its Statement of Claim. The Credit Union contends that the determination of those questions may dispose of all or part of the action, substantially shorten the trial and will result in a substantial savings of costs. CUMIS opposes the determination of those questions at this stage of the proceeding.

II. Where matters stand in this action

[3] As mentioned, the Credit Union commenced this action by notice of action in September, 2009, and filed its Statement of Claim in June, 2010. The Statement of Claim is a lengthy one,

256 paragraphs to be precise. It contains extensive pleadings of material facts relating to the Bond, the losses incurred by the Credit Union, and particulars of the two schemes which it asserts caused the losses and in respect of which it seeks recovery under the Bond.

[4] CUMIS has not yet filed its Statement of Defence. No joinder of issues has yet occurred, as a result of which I do not have before me the formal position of CUMIS on the facts alleged on any issue or the statement of any defences it intends to raise in response to the claim.

[5] Although no evidence was filed before me on this motion,[1] the Credit Union did include in its motion record several documents referred to in its Statement of Claim – the Policy, the application documents submitted by the Credit Union to obtain the Policy (the "Application"), and a letter from CUMIS dated December 16, 2009 advising the Credit Union that the Policy "was void for material misrepresentations in the applications."

[6] CUMIS did not file any responding materials.

III. Asserted Facts

[7] Drawing on facts pleaded in its Statement of Claim, the Credit Union contended that the facts concerning the validity of the Policy were straight-forward. An Application for insurance was signed by two employees of the Credit Union – Antonio Carvalho, who was the CEO from October, 2005 until October, 2007, and David Rendeiro, who was Chair of the Credit Union's Board of Directors at all material times and who also had been the plaintiff's CEO and legal counsel.

[8] Carvalho signed the "Privacy Statement" portion of the Application form on August 16, 2007 as an "authorized representative" of the Credit Union which included the following certification:

> The information stated within forms the basis of the contract and may become part of the Policy. I hereby certify that the information herein is true and complete and I have been authorized to request this coverage on behalf of the organization I represent.

[9] Rendeiro signed the "Declaration" portion of the form on January 9, 2008, again as an "authorized representative" of the Credit Union, which included the following statement:

> The undersigned declares that the information on this Application and in any attachments is true and complete and that I am authorized to complete this application on behalf of the Applicant.

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[1] Rule 21.01(2)(a).

[10] In the portion of the Application concerning the Bond, the question, “Are you aware of any claims or potential claims under the Bond?”, was answered “no”.

[11] In response to the Application CUMIS issued the Policy which covered the period January 1, 2008 to January 1, 2009. The Policy contained the Bond which covered losses of up to $10 million resulting from the dishonest or fraudulent acts of the Credit Union’s directors, employees, auditors or contractors performing employee duties. The Bond was a “claims made” policy of insurance covering any loss of property caused by the dishonest conduct of an employee discovered during the term of the Bond, even if the conduct or loss had occurred before the Bond came into effect.

[12] The Credit Union alleges that it suffered direct losses of property totaling $32,613,419 as the result of unlawful and unauthorized advances of funds made by certain of its directors and employees to Forbes/Hutton Armoured Car Service Inc. (the “Forbes/Hutton Claim”) and to Humberto Varela and related entities (the “Varela Claim”). In its Statement of Claim the plaintiff alleges that the losses involved in the Forbes/Hutton Claim resulted from unauthorized advances approved by two employees, one of whom was Rendeiro, and that Carvalho participated in dishonestly or fraudulently concealing the nature of the advances from the Credit Union. As to the Varela Claim, the Credit Union alleges that Carvalho caused the plaintiff to make unauthorized advances to the Varela Group and that Rendeiro later made misrepresentations regarding the receivership of the Varela Group.

[13] The Credit Union pleaded that it filed a proof of loss under the Bond with CUMIS on July 31, 2009, and that CUMIS wrote it on December 16, 2009, advising that the Policy was void *ab initio* for material misrepresentation in the Application. Although in that letter CUMIS wrote that it had not been able to confirm the correctness of significant portions of the factual narrative contained in the proof of loss, it listed several losses identified in the proof of loss “which were factually known to the senior management of PCCU, including Antonio Carvalho and David Rendeiro at the time of such certifications.” CUMIS then wrote:

> The conclusion is therefore clear that, based upon DICO’s sworn statements in the Proof of Loss, by the plain meaning of these statements and particularly the recitation of losses that form part of these statements, both Antonio Carvalho and David Rendeiro must have lied in their certifications of the insurance claim particulars in August, 2007 and January, 2008 concerning there being no claims or claim circumstances under the bond coverage as of those dates. Even if the failure of Antonio Carvalho or David Rendeiro to act on their knowledge of dishonest activity by others is deemed not to be dishonest, the policy is still void because their knowledge of actual or potential loss caused by others was not disclosed on the applications. The answers constituted misrepresentations by PCCU that were material to the risk because CUMIS would not have issued the policy to PCCU had it received truthful answers to the subject questions.

IV. The questions of law posed

[14] The Credit Union moves for answers to the following two questions which it contends are raised by its Statement of Claim:

> **Question 1**: Is Carvalho's or Rendeiro's knowledge of their dishonest conduct against the Credit Union, which they did not disclose to the Credit Union and which was not disclosed on the Application, imputed to the Credit Union or otherwise relevant as a matter of law in determining whether there was a material misrepresentation on the Application?
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> **Question 2**: Is CUMIS entitled to void the Bond if there is a material misrepresentation on the Application?

CUMIS did not agree to the language of these questions; it submitted that they questions were drafted too narrowly.

[15] In its Factum the Credit Union explained why it sought the determination of these two questions at this stage of the litigation:

> By obtaining an answer to the Questions, the Credit Union should be able to determine whether the Bond is valid, so that it can determine whether there is any purpose in proceeding with this Action. If the Court determines that the legal premise underlying CUMIS' position is correct, there will very likely be no purpose in proceeding with the Action, since the Credit Union will be establishing CUMIS' defence in the process of proving the existence of the Dishonest Conduct in order to establish its own case. If the Credit Union cannot succeed even if it proves all the facts it has alleged, then it is very unlikely that a trial of this Action will not be necessary. Accordingly, determination of the Questions at this stage may dispose of all or part of the Action and result in a substantial saving of costs, and will, in any event, shorten the trial, as this is the preliminary threshold issue in this case.[2]

V. Availability of Rule 21 in the circumstances of this case

A. The Rule

[16] The Credit Union moves under Rule 21.01(1)(a) of the *Rules of Civil Procedure* which provides as follows:

> 21.01(1) A party may move before a judge,

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[2] Factum of the Credit Union, para. 4.

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

B. Positions of the parties

[17] The Credit Union submitted that Rule 21 properly was available in the circumstances of this action because the material facts required to decide the questions posed were plain and obvious. At the same time it stressed that it was not seeking a declaration of the validity of the Policy – that would be a matter for trial.

[18] CUMIS disputed the appropriateness of resorting to Rule 21 for four reasons: (i) the motion was premature because CUMIS had not yet filed a defence, resulting in the unilateral framing of a narrow question by the plaintiff without regard to the real issues between the parties; (ii) the plaintiff sought to test the correctness of a ruling made in a previous case on almost identical facts, *jjBarnicke Ltd. v. Commercial Union Assurance Co. of Canada*,[3] (iii) to determine the two questions the court would have to rely on hypothetical facts, and (iv) the questions only dealt partially with the dispute between the parties, so their determination would not dispose of a significant part of the litigation.

C. Analysis

C.1 The jurisprudence

[19] I think it worth starting the consideration of the principles underpinning Rule 21.01(1)(a) by going back in time to the "old rules" – i.e. the pre-1985 rules. Rule 124 of the *Rules of Practice* provided:

> Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.

In *Fisher v. Albert*,[4] the Court of Appeal considered the purpose of Rule 124. That case involved a motion brought following the delivery of a statement of defence. Orde J. stated:

> In one sense every defence raises a question of law. A defendant, setting up certain facts in answer to the plaintiff 's statement, and then pleading that upon that state of facts the plaintiff is not entitled as a matter of law to the relief claimed, might then ask the Court to determine that question of law in a summary way under Rule 122. The Rule was, of course, not intended for any such purpose. Its object was to provide either

[3] (1998), 40 O.R. (3d) 726 (Gen. Div.), affirmed [2000] O.J. No. 1059 (C.A.).
[4] (1921), 50 O.L.R. 68 (C.A.).

> for the disposal of the whole action or some important phase of it, *by dealing with some question of law upon a state of facts admitted for the purposes of the motion*.[5]

[20] In one of the first cases considering the "new" Rule 21.01(1)(a), *Barnes v. Kaladar, Anglesea & Effingham (Townships)*,[6] Callaghan A.C.J.H.C. adopted the statement put forward by the Court of Appeal in *Fisher v. Albert*:

> I think that statement is appropriate to the new rule. *In my view the plaintiff herein cannot invoke rule 21.01(a) for a determination as to whether or not it has a cause of action where the facts fundamental to that cause are in dispute.* To rule otherwise would lead the court into the realm of the hypothetical.[7]

[21] In the *Barnes* case pleadings had closed. The plaintiff alleged that the defendant municipality had failed to use proper equipment in fighting a fire and had failed to keep its equipment in good working order. In its statement of defence the municipality admitted that the fire had occurred, but denied any negligence. The plaintiff moved for the determination of two questions:

> *Assuming the facts alleged in the statement of claim can be proved*, is the defendant, as a municipal corporation, liable in negligence for its failure to use proper equipment in the fighting of the fire in question and its failure to keep its equipment in good working order?

[22] In dismissing that motion Callaghan A.C.J.H.C. held that the plaintiff was seeking to lead the court into the realm of the hypothetical:

> I also think it significant that the question posed raises the issue of whether or not the court in exercising its jurisdiction under this rule should be placed in the position of advising a plaintiff as to the validity of its cause of action when the facts which form the substratum of the alleged cause of action are in dispute. That matter was dealt with properly in *Gladstone Petroleums Ltd. v. Husky Oil (Alberta) Ltd*. (1968), 1 D.L.R. (3d) 219 at p. 229, per Hall J.A.:
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> > The point of law which the learned Chamber Judge has here ordered to be tried rests entirely on allegations of fact raised by the plaintiff itself. In my opinion, it is not the purpose of the rule to permit a plaintiff to test his view of the law before presenting his case. If it were, the Courts would continually be trying what would in reality be hypothetical questions of law.[8]

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[5] *Ibid*., p. 72 (emphasis added).
[6] (1985), 52 O.R. (2d) 283 (H.C.J.).
[7] *Ibid*., para. 8 (emphasis added).
[8] *Ibid*., para. 7.

[23] Two points flow from the *Barnes* case. First, Rule 21.01(1)(a) is not designed to answer questions of law where materials facts are in dispute or, put another way, where no agreement exists on the material facts which underpin the question of law posed. Where an agreement exists on material facts, the special case procedure under Rule 22 usually affords the parties with a consensual means by which to secure the answer to a question of law.[9]

[24] Second, a plaintiff may not use Rule 21 to secure the advice of the court about the soundness of its cause of action by asking the court to assume that the material facts it has pleaded will be proved at trial. This point was canvassed later by a divided Court of Appeal in *Law Society of Upper Canada v. Ernst & Young*,[10] a case in which the defendants moved for summary judgment and under Rule 21.01(1)(a) after they had filed their defences. In that case Borins J.A. disapproved of parties resorting to Rule 21.01(1)(a) on the basis of facts assumed only for the purpose of the motion when a dispute otherwise existed over material facts and liability. He concluded that it was "not the purpose of rule 21.01(1)(a) to enable a party to obtain the advisory opinion of the court as to the validity of its cause of action or defence where the facts that constitute the substratum thereof are in dispute."[11] McMurtry C.J.O. and Carthy J.A. disagreed with the breadth of that statement, holding that "the hypothetical to be avoided is one where an underpinning of the legal determination sought under Rule 21 may be altered at trial, and the legal determination thus rendered redundant."[12]

[25] However, in that case McMurtry C.J.O. and Borins J.A. agreed that it was not appropriate to determine the questions posed under Rule 21.01(1)(a), noting that the "plain and obvious" test applicable to motions to strike claims as disclosing no reasonable causes of action applied equally to motions to determine questions of law under Rule 21.01(1)(a):

> From the perspective of the plain and obvious test, it is my opinion that this action should proceed to trial. From my reading of the authorities considered by the motion judge, as well as those referred to by counsel, it is not plain and obvious, as a matter of law, that the passing on defence does not constitute a reasonable defence. As this court said in *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778, at p. 782: "Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this [interlocutory] stage of the proceedings."[13]

[26] Two further points about the appropriateness of a Rule 21.01(1)(a) motion were made by Borins J., as he then was, in *Montreal Trust Co. of Canada v. Toronto Dominion Bank*.[14] He expressed the view that where a defendant wished to move for the determination of a question of

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[9] *4287975 Canada Inc. v. Imvescor Restaurants Inc.* (2009), 98 O.R. (3d) 187 (C.A.), para. 16.
[10] (2003), 65 O.R. (3d) 577 (C.A.).
[11] *Ibid*., para. 47.
[12] *Ibid*., paras. 60 and 71.
[13] *Ibid*., para. 50.
[14] [1992] O.J. No. 1274 (Gen. Div.).

law "raised by a pleading", it could only do so after pleadings were complete.[15] Whether a defendant could seek the determination of a question of law before filing its statement of defence was considered by the Court of Appeal in *Beardsley v. Ontario Provincial Police*.[16] The Court held that a defendant could not bring a motion under Rule 21.01(1)(a) for the determination of a question of law based on the expiry of a limitation period until it had filed its statement of defence unless circumstances existed "where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired".[17] In *Greatrek Trust S.A./Inc. v. Aurelian Resources Inc.*,[18] after reviewing the case law, I observed that the jurisprudence since *Beardsley* had confined the plain and obvious exception to claims involving the determination of a question of law involving the applicability of a limitation period.

[27] The other point made by Borins J. in the *Montreal Trust* case was that where the question of law depends on the construction of a contract, the terms of which are unclear and capable of more than one meaning, Rule 21 was not an appropriate device to use to answer the question.[19]

[28] By way of summary, from the cases placed before me by counsel I extract the following general principles about the availability of a motion under Rule 21.01(1)(a):

(i) The rule is not designed to answer questions of law where materials facts are in dispute or, put another way, where no agreement exists on the material facts which underpin the question of law posed;

(ii) A party should not use Rule 21 to secure the advice of the court about the soundness of its cause of action or defence by asking the court to assume that the material facts it has pleaded will be proved at trial, thereby asking the court to answer a hypothetical question. However, the hypothetical to be avoided is one where an underpinning of the legal determination sought under Rule 21 might be altered at trial, and the legal determination thus rendered redundant;

(iii) A defendant should not move for the determination of a question of law involving the applicability of a limitation period until after it has filed its statement of defence, except where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired;

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[15] *Ibid*., para. 13.
[16] (2001), 57 O.R. (3d) 1 (C.A.).
[17] *Ibid*., para. 21.
[18] [2009] O.J. No. 611 (S.C.J.).
[19] *Montreal Trust*, *supra*., note 14, para. 14.

(iv) Where the question of law depends on the construction of a contract the terms of which are unclear and capable of more than one meaning, Rule 21 is not an appropriate device to use to answer the question; and,

(v) Matters of law which have not been settled fully in the jurisprudence usually should not be disposed of at an interlocutory stage of the proceedings.

C.2 Applying the jurisprudence to this case

[29] In light of the principles contained in the jurisprudence about the availability of motions under Rule 21.01(1)(a), I have concluded that in the circumstances of this case it would not be appropriate to determine the questions posed by the plaintiffs. I reach this conclusion for several reasons.

The state of the factual record

[30] First, in the present case the plaintiff has brought its Rule 21 motion before CUMIS filed its statement of defence. As a result, I do not know what facts about the Application, Policy, Bond or any other issue are in dispute or which facts are uncontested. Nor do I know what defences CUMIS intends to raise formally in its pleading. In sum, I cannot ascertain at this stage of the proceeding the scope of the dispute between the parties or the nature or extent of their factual dispute.

[31] Second, CUMIS has not conceded any facts or issues for the purposes of this motion. On the contrary, in paragraph 7 of its factum CUMIS stated:

> By agreement, CUMIS has not yet delivered its statement of defence in this action. Therefore, there is no adverse pleading to define the *lis* between the parties. Consequently, any "question of law raised by the pleading" is entirely a creation of DICO in its own pleading and the factual context is provided only by DICO's asserted case in its statement of claim.

[32] The cases I reviewed above indicate that it is not appropriate to determine a question of law under Rule 21.01(1)(a) unless the material facts upon which such a determination depends are not in dispute. That is not the case on this motion. Given the absence of a statement of defence or any factual concessions by the defendant on this motion, I am faced with a proceeding in which disputed facts may well exist. At this point I simply cannot tell. Until CUMIS files its statement of defence, the determination of any question of law would be premature. If the statement of defence ultimately reveals the existence of disputed material facts in relation to the question of law, Rule 21.01 might continue to be an inappropriate device by which to resolve the dispute.

[33] Third, I do not accept the submission of the Credit Union that its Rule 21 motion falls within the category of cases alluded to in *Beardsley* "where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted". In *Beardsley* the possibility of bringing a Rule 21.01(1)(a) motion before the close of pleadings was discussed in the context of

a determination as to whether an action was statute-barred – for example, such as in cases where the injuries suffered in a car accident occurred on a date certain and nothing more could be said about that fact.[20] That type of case is a far cry from the complex claim asserted in this proceeding.

[34] Moreover, in its Statement of Claim the Credit Union does not expressly concede that Carvalho and Rendeiro made misrepresentations on the Application they signed on behalf of the Credit Union. In paragraphs 25 and 26 of its claim the plaintiff pleaded:

> 25. The Credit Union states that the knowledge of David Rendeiro and Antonio Carvalho regarding their fraudulent or dishonest conduct against the Credit Union is not imputed to the Credit Union, and is not otherwise relevant to, the determination of whether or not the Credit Union made a material misrepresentation in the Application. The Credit Union states, and the fact is, that the representation relied on by CUMIS accurately stated the Credit Union's knowledge regarding the existence of any claims or potential claims under the Bond.
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> 26. In the alternative, if there is a material misrepresentation in the Application, the Credit Union states that CUMIS is not entitled to declare the Bond or the Policy void *ab initio*, and the Bond was, at all material times, a valid and subsisting contracting of insurance.

In other words, the position of the plaintiff is that no misrepresentation was made on the Application for the Policy and, if one was, it did not invalidate the Policy. CUMIS obviously disputed that position in its December 16, 2009 letter, so it cannot be said, in my view, that this is one of those cases "where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted".

The plaintiff seeks an advisory opinion on the merits of its case

[35] Fourth, as was clear from the extract from the Credit Union's factum that I set out in paragraph 15 above, the plaintiff seeks answers to the questions posed "so that it can determine whether there is any purpose in proceeding with this Action." As the jurisprudence reveals, courts do not view a Rule 21.01(1)(a) motion as appropriate for advising a plaintiff as to the validity of its cause of action when it places before the court hypothetical or disputed facts.

[20] The Credit Union relied on two cases where a Rule 21.01(1)(a) motion was decided prior to the filing of a statement of defence: *Teskey v. Gura*, [2009] O.J. No. 3730 (S.C.J.), and *779975 Ontario Ltd. v. Mmmuffins Canada Corp.*, [2009] O.J. No. 2357 (S.C.J.). Both involved questions about whether an action was statute-barred.

The determination of this motion will not end the litigation or a substantial part of it

[36] Fifth, the determination under Rule 21.01(1)(a) of a question of law raised by a pleading is only appropriate if the determination "may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs." In the absence of a statement of defence from CUMIS and a precise understanding of the *lis* between the parties, it is very difficult to ascertain how much of this action might be disposed of by answering the questions, to what extent the trial would be shortened, or how much would be saved in costs.

[37] In its factum the Credit Union submitted that if the legal premise underlying CUMIS' position was correct, "there will very likely be no purpose in proceeding with the Action", and if the Credit Union could not succeed even if it proved all the facts alleged, "then it is very unlikely that a trial of this Action will not be necessary".[21] What I took from that submission was that depending on the answers to the questions posed, the Credit Union likely will assess its strategic position in this action and perhaps the claim might not proceed – it would be up to the Credit Union to decide. That position lacks the degree of determinativeness that should accompany a Rule 21.01(1)(a) motion. It is one thing for the determination of such a motion to result in a decision that an action is statute-barred and therefore at an end, and quite another for the moving party to say to the court, "Please answer our questions so that we can consider our options".

[38] I pursued this issue with plaintiff's counsel at the hearing. I asked Mr. Myers to advise me of the Credit Union's position about the consequences of certain answers to the questions posed. The Credit Union submitted that both questions should be answered in the negative.[22] I asked whether a negative answer to Question 1 (i.e. the answer sought by the plaintiff) would dispose of all or part of the action; counsel replied that it would not do so. I asked whether a negative answer to Question 2 (the validity of the Bond) would dispose of all or part of the action; counsel answered it would not. When I asked whether an unfavourable answer to Question 2 would dispose of all or part of the action, plaintiff's counsel replied that, based on instructions from his client, an affirmative answer to Question 2 would resolve the action – it would be no more.

[39] In sum, as I understand the plaintiff's position, favourable (i.e. negative) answers to Questions 1 and 2 would not dispose of all or part of the action – issues as to whether the Policy was void on grounds other than the imputation of the agent's knowledge to the principal and issues of coverage would remain for trial. That position, coupled with the absence of a statement of defence from CUMIS and a precise understanding of the *lis* between the parties, leads me to conclude that it is not possible to ascertain, in any practical sense, how much of this action might be disposed of by answering the questions, or to what extent the trial would be shortened, or how much would be saved in costs. In my view the plaintiff has not made a persuasive case that it has met those elements of the Rule 21.01(1)(a) test.

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[21] Factum of the Credit Union, para. 4.
[22] *Ibid*, para. 6.

Unsettled matters of law should not be decided at the interlocutory stage of a proceeding

[40] Sixth, in order to secure the answers to the two questions it has posed, the Credit Union submitted that the Ontario authority relied upon by CUMIS in support of its position was wrongly decided. The Credit Union submitted that although an agent's knowledge is usually imputed to the principal, the law has long recognized that an agent's knowledge of his own fraudulent or dishonest conduct against his principal cannot be imputed to the principal and is not otherwise relevant in determining whether a statement made on behalf of a principal is a misrepresentation. CUMIS disputed that statement of the law, relying on the decision of Benotto J. in *jjBarnicke Limited v. Commercial Union Assurance Co. of Canada*.[23]

[41] The issue raised in the *jjBarnicke* case was nicely summarized by Benotto J. in the opening passage of her trial judgment:

> The plaintiff sues on a fidelity policy of insurance. The defendant insurance company claims that the policy is void because the employee who applied for the insurance on the plaintiff's behalf made material misrepresentations in the application. The fraud and misrepresentation are admitted, but the plaintiff says the employee's knowledge cannot be imputed to it because the employee was perpetrating a fraud on the plaintiff.

[42] In her reasons Benotto J. made three findings. First, a principal, such as jjBarnicke, could not enforce a contract induced by the representation of its agent, in that case one James Lake, who was the company's accountant. Second, although Benotto J. recognized that the presumption that knowledge will be passed on to the principal may be nullified by proof that the agent was defrauding the principal in the transaction in issue, she held that jjBarnicke did not fall within that exception because it stood to benefit from the fraud. Finally, she concluded that jjBarnicke had constructive knowledge of the actions of Lake.

[43] In upholding the trial judge's decision the Court of Appeal stated that it was only necessary to deal with the third basis given by Benotto J., and the appellate court concluded that "there was ample evidence that the appellant has constructive knowledge of the employee's fraud".[24]

[44] Pointing to the trial judgment of Benotto J., CUMIS submitted that "the fundamental point DICO raises in this motion has been correctly decided against it and the justification of the voiding on other grounds will stand regardless of the answer to the question posed in this motion."[25]

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[23] *Supra.*, note 3.
[24] *jjBarnicke, supra*., OCA, para. 4.
[25] Factum of CUMIS, para. 29.

[45] The Credit Union took a different view of the decision in *jjBarnicke* arguing, in paragraph 30(c) of its Factum:

> The authority CUMIS must rely upon is not the law of Ontario – The case that CUMIS must rely upon in support of its position, *jjBarnicke Limited v. Commercial Union Assurance Company of Canada*, was decided without any consideration of the long-standing and binding authority regarding the Fraud Exception from the House of Lords, Supreme Court of Canada and the Ontario Court of Appeal (i.e., it was decided *per incuriam*).

[46] Given the respective positions of the parties, a serious dispute exists between them about the existence, scope and applicability of any fraud exception to the imputed knowledge rule regarding agents and their principals. The Credit Union asks this court, before the close of pleadings and without any certainty as to which facts are in dispute and which are not, to depart from a previous decision of this court which was upheld on appeal, albeit on only one of three grounds articulated by the trial judge. I am not prepared to do so on this motion. Given the reasons for judgment of Benotto J. in the *jjBarnicke* case, the Credit Union has not demonstrated that the answers it seeks to the questions of law posed are plain and obvious. Further, the Court of Appeal has cautioned that matters of law which have not been settled fully in the jurisprudence should not be disposed of at the interlocutory stage of the proceedings.[26]

VI. Conclusion

[47] For these reasons I conclude that the motion brought by the Credit Union is premature, I decline to answer the questions posed, and I dismiss the motion, without prejudice, of course, to the Credit Union raising such questions again at a more appropriate stage of this proceeding.

VI. Costs

[48] I would encourage the parties to try to settle the costs of this motion. If they cannot, CUMIS may serve and file with my office written cost submissions, together with a Bill of Costs, by Wednesday, November 17, 2010. The Credit Union may serve and file with my office responding written cost submissions by Friday, November 26, 2010. Such responding cost submissions must include a Bill of Costs setting out the costs which the Credit Union would have claimed on a full, substantial, and partial indemnity basis. If they do not, I may take the failure to file such a Bill of Costs into account when considering the objections made by the Credit Union to the costs sought by CUMIS. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

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[26] *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778, at p. 782, quoted with approval by Borins J.A. in *LSUC v. Ernst & Young*, para. 50.

[49] I wish to thank counsel for their most interesting and helpful written and oral submissions on this motion.

D. M. Brown J.

Date: November 8, 2010