Case Name:

Royal Bank of Canada v. Société Générale (Canada)

Between
Royal Bank of Canada, Plaintiff (Appellant), and
Société Générale (Canada), Bert Coish, CitiCapital Limited, Bank of Montreal, American Home Assurance Company, Chubb Insurance Company of Canada, Liberty Mutual Insurance Company of Canada as represented by Liberty International Canada, Gulf Insurance Company UK Ltd., and Lloyd's Syndicates 204 (R.A. Edwards), 1007 (SVB Villers), 435 (DP Mann) and 1212 (SVB Burnhope) respecting Policy No. MMF/1395, Defendants (Respondents)

[2006] O.J. No. 5081
Dockets: C44657 and C44659

Ontario Court of Appeal
Toronto, Ontario
S. Borins, R.P. Armstrong and R.A. Blair JJ.A.

Heard: October 10-11, 2006.
Judgment: December 21, 2006.
(56 paras.)

Civil procedure — Judgments and orders — Summary judgments — For part of claim — To dismiss action — Appeal from the dismissal of some of the appellant's claims in a complex fraud case by way of summary judgment — Appeal allowed, and summary judgment order set aside — All of the appellant's claims were interrelated — It was inappropriate that some of the claims be decided at the pleading stage and that others be decided at trial — To not interfere with the decision of the motion judge would result in a substantial risk of inconsistent findings — Ontario Rules of Civil Procedure, Rule 20.

Appeal from summary dismissal of some of the Royal Bank's claims. RBC had sued a number of parties for damages of approximately $100 million arising out of a protracted fraud committed by Loren Koval and her husband, Roman Koval, through a company controlled by them, BACC Capital Corporation. The fraud involved equipment leasing transactions for which no equipment was acquired or leased, and all of the supporting documents were allegedly forged. A large part of the proceeds of the fraudulent transaction were expended on the Kovals' failed medical facility in downtown Toronto, Kings Health Centre, that went bankrupt. For the purposes of the appeal, the principal defendants were Societe Generale (Canada) ("SoGen"), CitiCapital Limited ("CitiCap") and the Bank of Montreal ("BMO"). Against SoGen, RBC claimed damages for negligence, conversion, unjust enrichment and money had and received. It also sought a declaration that SoGen did not have the right to reverse clear a number of bank drafts and cheques through the Canadian Payments Association ("CPA") on the ground that under s. 48(1) of the Bills of Exchange Act, it was precluded from doing so as a result of its own negligence.

Against CitiCap and BMO, RBC claimed damages for conversion and money had and received. In a "preclusion claim" similar to the one against SoGen, RBC alleged that BMO was precluded from reverse clearing a number of cheques because of its own negligence. It also claimed damages for negligence against CitiCap. SoGen, CitiCap, and BMO each moved for summary judgment under Rule 20 of the Rules of Civil Procedure for the dismissal of all of RBC's claims. With respect to some of the claims, the defendants alleged that there was no genuine issue for trial. With respect to other claims, the defendants' position was, as the only genuine issue was a question of law, that it could be determined on a Rule 20 motion. Following an eight-day hearing, the motion judge dismissed some of RBC's claims and permitted the remaining claims to proceed to trial. RBC appealed the dismissal of its claims against SoGen and CitiCap for negligence, unjust enrichment, and money had and received. It also appealed the dismissal of its claims against BMO based on unjust enrichment, money had and received, and preclusion. It asked that the trial judge's judgment be set aside with respect to its claims that were dismissed and asked that these claims be sent to trial together with its claims that were not dismissed. SoGen and CitiCap cross-appealed from the dismissal of their motions to dismiss RBC's claims for conversion and preclusion. BMO cross-appealed from the dismissal of its motion to dismiss RBC's claim for conversion.

HELD: Appeal allowed, and the cross-appeals dismissed. The judgment of the motion judge was set aside, all motions for summary judgment were dismissed, and an order issued that RBC's entire action proceed to trial. The motion judge committed two principal errors that tainted the proper determination of a Rule 20 motion. He reversed the onus that applied to the genuine issue for trial analysis and he decided the motions on the basis of a critical fact that he assumed to be true for the purpose of the motion. In addition, the motion judge erred when he dismissed RBC's claims for negligence, unjust enrichment, and money had and received at the pleading stage of the proceeding. The factual matrix of the relationship between the parties and the Kovals spanned several years and gave rise to complex and difficult issues of fact and law. As all of RBC's claims were interrelated, in fairness to all of the parties it was inappropriate that some of the claims be decided at the pleading stage and that others be decided at trial on the basis of viva voce testimony and a complete evidentiary record. To not interfere with the decision of the motion judge would result in a substantial risk of inconsistent findings.

Statutes, Regulations and Rules Cited:

Bank Act, S.C. 1991, ch. 46, Schedule I, Schedule II

Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 48(1), s. 49(1), s. 55, s. 56, s. 57, s. 59(3), s. 61(1), s. 62, s. 130

Ontario Rules of Civil Procedure, Rule 20, Rule 21

Appeal From:

On appeal from the orders of Justice John D. Ground of the Superior Court of Justice dated November 18, 2005, and April 3, 2006.

Counsel:

Robert J. Morris, George S. Glezos and Lisa C. Munro for Royal Bank Canada

Peter R. Greene, W. Michael G. Osborne and Paul D. Emerson for American Home Assurance Company

V.R.P. Bersenas for Lloyd's Syndicates and Gulf Insurance Company UK Ltd.

David C. Rosenbaum and Jonathan F. Lancaster for CitiCapital Limited

Kenneth W. Crofoot and Jason Wadden for Bank of Montreal

Jamieson Halfnight and Christopher J. McKibbin for Chubb Insurance of Canada and Liberty Mutual Insurance Company as represented by Liberty International Canada

R. Paul Steep, Christopher A. Wayland and Heather L. Meredith for Société Générale (Canada) and Bert Coish

[Editor's note: A corrected version was released by the Court January 10, 2007; the corrections have been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

S. BORINS J.A.:—

I

¶ 1 In this proceeding the Royal Bank of Canada ("RBC") has sued a number of parties for damages of approximately $100 million arising out of a protracted fraud committed by Loren Koval and her husband, Roman Koval, acting through a company controlled by them, BACC Capital Corporation ("BACC"). The fraud involved equipment leasing transactions in respect of which no equipment was acquired or leased, and all of the supporting documents were allegedly forged. A large part of the proceeds of the fraudulent transaction were expended on the Kovals' failed medical facility in downtown Toronto, Kings Health Centre, that is now bankrupt.

¶ 2 For the purposes of this appeal, the principal defendants are Société Générale (Canada) ("SoGen"), CitiCapital Limited ("CitiCap") and the Bank of Montreal ("BMO"). Subsequently, I will review the allegations against these defendants on which RBC relies in support of its claims. For now it is sufficient to indicate in broad terms the claims made by RBC against these defendants.

¶ 3 Against SoGen, RBC claims damages for negligence, conversion, unjust enrichment and money had and received. It also seeks a declaration that SoGen did not have the right to reverse clear a number of bank drafts and cheques through the Canadian Payments Association ("CPA") on the ground that under s. 48(1) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 ("*BEA*") it was precluded from doing so as a result of its own negligence. This was referred to at trial as the "preclusion claim".

¶ 4 Against CitiCap and BMO, RBC claims damages for conversion and money had and received. In a "preclusion claim" similar to the one against SoGen, RBC alleges that BMO was precluded from reverse clearing a number of cheques because of its own negligence. It also

claims damages for negligence against CitiCap.

¶ 5 SoGen, CitiCap and BMO each moved for summary judgment under Rule 20 of the *Rules of Civil Procedure* for the dismissal of all of RBC's claims. With respect to some of the claims, the defendants alleged that there was no genuine issue for trial. With respect to other claims, the defendants' position was, as the only genuine issue was a question of law, that it could be determined on a Rule 20 motion.

¶ 6 Following an eight day hearing, the motion judge, in reasons reported in (2005), 13 B.L.R. (4th) 130, dismissed some of RBC's claims and permitted the remaining claims to proceed to trial. The chart below outlines the results of the motions and the motion judge's findings:

RBC's Claim	Party	Finding
Negligence	SoGen	The claim is dismissed against SoGen.
	CitiCap	The claim is dismissed against CitiCap.
Unjust Enrichment	SoGen	The claim is dismissed against SoGen.
	CitiCap	The claim is dismissed against CitiCap.
	BMO	The claim is dismissed against BMO.
Money Had and Received	SoGen	The claim is dismissed against SoGen.
	CitiCap	The claim is dismissed against CitiCap.
	BMO	The claim is dismissed against BMO.
Conversion	SoGen	SoGen's motion with respect to this claim is dismissed.
	CitiCap	CitiCap's motion with respect to this claim is dismissed.
	BMO	BMO's motion with respect to this issue is dismissed.
Preclusion	SoGen	SoGen's motion with respect to this claim is dismissed.
	CitiCap	CitiCap's motion with respect to this claim is dismissed.
	BMO	The claim against BMO is dismissed.

¶ 7 RBC appeals the dismissal of its claims against SoGen and CitiCap for negligence, unjust enrichment and money had and received. It also appeals the dismissal of its claims against BMO based on unjust enrichment, money had and received and preclusion. It asks that the judgment below be set aside with respect to its claims that were dismissed and asks that these claims be sent to trial together with its claims that were not dismissed. RBC also seeks leave to appeal the disposition on costs.

¶ 8 SoGen and CitiCap cross-appeal from the dismissal of their motions to dismiss RBC's claims for conversion and preclusion. CitiCap also seeks leave to appeal the disposition of costs of its summary judgment motion. BMO cross-appeals from the dismissal of its motion to dismiss RBC's claim for conversion.

¶ 9 For the reasons that follow, I would allow RBC's appeal and dismiss the cross-appeals. The grounds for doing so are that the motion judge committed two principal errors that tainted the proper determination of a Rule 20 motion. He reversed the onus that applies to the genuine issue for trial analysis and he decided the motions on the basis of a critical fact that he assumed to be true for the purpose of the motion. In addition, the motion judge erred in dismissing RBC's claims for negligence, unjust enrichment and money had and received at the pleading stage of this proceeding. The factual matrix of the relationship between the parties and the Kovals spans several years, and gives rise to complex and difficult issues of fact and law. In my view, as all of RBC's claims are interrelated, in fairness to all of the parties it is inappropriate that some of the claims be decided at the pleading stage and that others be decided at trial on the basis of *viva voce* testimony and a complete evidentiary record. To not interfere with the decision of the motion judge would result in a substantial risk of inconsistent findings.

II

¶ 10 To provide context for the issues raised both in RBC's claims and on this appeal, it is necessary to provide a description of the lengthy and complex factual background leading up to this proceeding. However, because there is to be a trial, I will limit the facts to those necessary to decide this appeal.

III

¶ 11 At the heart of RBC's action is a massive fraud carried out between 1994 and 2000 during which over $100 million was removed from the banking system. Part of the money has been restored, but most of it is lost. The fraud was carried out by Loren Koval, aided by her husband, Roman. The vehicle used to commit the fraud was the equipment-leasing brokerage firm that they owned, BACC. The Kovals' flight from Canada in 2000 triggered the discovery of their fraud by SoGen, CitiCap and BMO. Following the Kovals' return to Canada a few months later, they surrendered to authorities, pleaded guilty to the fraud charges brought against them and received substantial prison sentences.

¶ 12 RBC and BMO are Schedule I banks under the *Bank Act*, S.C. 1991, ch. 46. SoGen is a Schedule II bank under the Act. RBC, BMO and SoGen were member banks of the Canadian Payment Association ("CPA"). CitiCap is the successor to Associates Capital Limited ("Associates Capital") and is licensed to carry on business as a lender and financier. It was not a member of the CPA. At all material times, BACC maintained a bank account with RBC.

¶ 13 Loren Koval's scheme involved using SoGen and CitiCap to finance fictitious

transactions. Each transaction purported to be a lease of high-end medical or other equipment by a supplier to an end-user. Ms. Koval persuaded SoGen to make available credit facilities in the names of actual suppliers of medical equipment that she selected to facilitate her fraud. SoGen issued forty-nine bank drafts to the purported supplies, all drawn on itself, becoming a drawer of each instrument within the meaning of the *BEA*. Thus, on each occasion, as drawer SoGen issued a bank draft under the mistaken belief, induced by Ms. Koval's deceit, that the face amount thereof represented the price of equipment being delivered to clients of BACC as end-users, which equipment was to secure SoGen's advances until they were repaid by the end-users.

¶ 14 In reality, no such equipment was delivered to the represented end-users, or at all, and SoGen, as drawer, obtained no security interest in it. On each occasion, SoGen handed the bank draft to Ms. Koval without ever having received the named payee's authority to do so. All of the leases, security documents and related documents were fabricated by Ms. Koval, and the signatures on the documents were allegedly forged by her. SoGen was unaware that it was the victim of Ms. Koval's fraud because, throughout the six years, it never made any inquiries of any "supplier" or "end-user" that would have unmasked the deception. In all her dealings with SoGen, Ms. Koval dealt with the same employee, Bert Coish.

¶ 15 Ms. Koval perpetuated a similar fraud against CitiCap. As drawer, CitiCap prepared and issued five cheques, drawn on its banker, BMO, as drawee, each payable to the same payee, Picker International Canada Inc. ("Picker"), and handed each cheque to Ms. Koval, whom it knew was not a representative of that payee, without Picker's authority to do so. Again, Ms. Koval's deception induced CitiCap to do so.

¶ 16 Upon receiving the instruments from SoGen and CitiCap, Ms. Koval placed markings on the back of each instrument. These markings were not uniform. The threshold factual issue in this case is whether the markings amounted to a forged endorsement on each instrument. Although this issue was disputed and, as moving parties on the Rule 20 motions, the defendants, as drawers, had the onus of establishing that each instrument bore a forged or unauthorized endorsement, the motion judge relieved them of this onus by assuming that each endorsement was forged. RBC contends that the motion judge erred in making this assumption and that this error tainted the dismissal of the claims from which it appeals. A closely related issue is whether the markings on the instruments constituted "endorsements" within the meaning of the *BEA*.

¶ 17 Each of these instruments was tendered for deposit into BACC's business chequing account at the Waterdown, Ontario, branch of RBC. Ms. Koval deposited a number of instruments together, mixing in one of the instruments at issue with legitimate cheques payable to BACC, and listing them on the deposit slips that she completed. As the collecting bank, RBC accepted each of the bank drafts and cheques for deposit. It sent each deposited instrument through the clearing system ("the Clearing") maintained by the CPA to obtain the face amount from the drawee, and credited BACC's account with that face amount.

¶ 18 On all forty-nine occasions, the drawee SoGen accepted the bank draft, debited its own account as drawer, and credited RBC. Similarly, the drawee BMO honoured each of the five cheques, debited CitiCap's account for their face amounts, and credited RBC. The cancelled instruments were then returned to the drawers, along with account statements. Neither SoGen nor CitiCap inspected the markings and endorsements on these instruments upon receiving them back through the Clearing. If they had, they would have realized that each instrument had not been deposited to the account of the payee, but to the account of BACC that was controlled by the person to whom they had given the instrument, Ms. Koval.

¶ 19 The Kovals fled Canada in October, 2000. When news of their disappearance reached SoGen and CitiCap, they investigated their dealing with them and discovered not only that they been victimized, but that their losses were substantial. SoGen petitioned BACC into bankruptcy. Unable to recover their losses from BACC, from the absent Kovals, from "end-users" that had not in fact executed any equipment leases, or from "suppliers" who knew nothing of the negotiable instruments that had been issued, SoGen and CitiCap looked elsewhere for a means to transfer their losses. They found the means to do so in the rules and by-laws of the CPA.

¶ 20 On January 19, 2001, SoGen returned, or caused to be returned, to RBC 35 bank drafts in the total face amount of $80,658,064.36, thereby recovering that amount from RBC. It did so relying on s. 49(1) of the *BEA* and the Rules of the CPA. Section 49(1) gives a person on whose behalf a bill is paid containing "a forged or an unauthorized endorsement" the "right to recover" the amount paid from the person to whom it was paid, in this case the Kovals or BACC, or from any endorser who has endorsed the bill subsequent to the forged or unauthorized endorsement, in this case, RBC. Thus, an endorsement must be "forged" or "unauthorized" as a necessary precondition to a drawer ("the person ... on whose behalf the payment is made") having a right to recover the amount of the bill from a collecting bank ("any endorser who has endorsed the bill subsequent to the forged or unauthorized endorsement").

¶ 21 The CPA Rules facilitate the loss allocation provisions of the *BEA*. They enable a drawer to cause its own bank (the drawee) to reverse-clear negotiated instruments to the collecting back and recover the face value thereof automatically, as both SoGen and CitiCap did. SoGen was able to immediately obtain $80,658,064.36 through the clearing system which amount was debited to RBC's account with the Bank of Canada. It is the recovery of this amount that is central to RBC's claims against SoGen.

¶ 22 In October and December 2000, CitiCap similarly caused BMO to reverse-clear to RBC four of the five cheques, thereby recovering their full face amounts of $8,723,442.50 and causing RBC's account with the Bank of Canada to be debited in the same amount. RBC seeks to recover this amount from CitiCap and BMO.

¶ 23 It is RBC's position that the "right to recover" available under s. 49(1) of the *BEA* is subject to any defence that may be available to a collecting bank. It states that it has the right to challenge, or resist, the drawers' asserted right to recover by invoking s. 48(1) of the *BEA*, which provides:

> 48(1) Subject to this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, *unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority*. [Emphasis added.]

This is the basis of RBC's "preclusion claim" to which I referred earlier. In broad terms, RBC claims that SoGen and CitiCap are precluded from relying on the forged or unauthroized endorsements on the instruments by their own negligence in issuing the instruments without engaging in the required due diligence. Consequently, they could not rely on s. 49(1) of the *BEA* to reverse-clear the instruments. The facts on which the preclusion claim are made are virtually the same as those on which RBC bases its claim in negligence against SoGen and CitiCap. As I

earlier indicated, although the motion judge dismissed RBC's claims based on negligence on the ground that there was no genuine issue for trial, he permitted its preclusion claims to proceed to trial because he considered that it was a novel claim that should not be decided at the pleading stage.

¶ 24 RBC alleges that SoGen and CitiCap failed to carry out any due diligence in respect of the Koval transactions to protect their own interests by detecting and preventing fraud and, consequently, were negligent. It cites as examples of the absence of due diligence the following: giving the instruments to Ms. Koval rather than to the payees and failing to make inquiries to ensure that the payees received their funds; providing credit on the strength of lending transactions without verifying the transactions by confirming them with the suppliers and end-users; failing to inspect the leased equipment that was the security for the advances; and failing to examine the cleared instruments, which would have disclosed that they were deposited to the account of BACC and not to the accounts of the suppliers. Thus, SoGen and CitiCap were precluded by their negligence from reverse-clearing the instruments.

¶ 25 In efforts to prevent detection of the frauds being perpetrated on SoGen and CitiCap, and to continue extracting money from these financial institutions, Ms. Koval caused regular payments to be made by BACC to SoGen and CitiCap in accordance with the "repayment schedules" incorporated in the fabricated loan documents that she had prepared. SoGen and CitiCap applied these repayments to pay down the loans that they had made, thus getting back part of the money of which they had been defrauded by Ms. Koval.

¶ 26 With respect to the thirty-five bank drafts that SoGen reverse-cleared having a face value of $80,658,064.36, SoGen had previously recovered payments of $18,205,861.02 from BACC as loan repayments. Similarly, with respect to the four cheques it had reverse-cleared in the face amount of $8,723,442.50, CitiCap had recovered $1,062,600.00 in loan repayments from BACC. It is RBC's position that when SoGen and CitiCap reverse-cleared the instruments, they each effectively recovered amounts that exceeded their actual losses because each had received significant amounts in loan repayments from BACC. Thus, SoGen obtained a double recovery of $18,205,861.02, and CitiCap, of $1,062,600.00. RBC states that the double recoveries came at its expense and that SoGen and CitiCap were unjustly enriched in these amounts. In other words, by reverse-clearing the instruments for their full face amounts, SoGen and CitiCap recovered more money than they had lost as a result of Ms. Koval's fraud. The motion judge dismissed RBC's claims based on unjust enrichment, suggesting that the forged loan documents served as a juristic reason for the receipt of the impugned funds by SoGen and CitiCap. However, he permitted its closely related claims based on conversion to proceed to trial.

¶ 27 As I have stated, the issue of whether the instruments bear forged or unauthorized endorsements is central to this action. If one or more of the reverse-cleared instruments did not bear a forged or unauthorized endorsement, or an endorsement within the meaning of the *BEA*, the drawer had no "right of recovery" under s. 49(1) of the *BEA* and, it follows, no right to have the instruments returned through the clearing under the CPA Rules. On the other hand, if the instruments bear forged or unauthorized endorsements, RBC's insurers may be liable to indemnify it for its losses on the basis of coverage for losses caused by forged or unauthorized endorsements. [See Note 1 below] Although it was for the financial instruments to establish that the endorsements were forged or unauthorized, they did not rely on any affidavit evidence before the motion judge. They relied on the examinations for discovery of RBC's witness, Allan McGale, and Ms. Koval. They did not put before the court any of the unsworn documents and declarations consonant with the CPA's mandated form that they submitted to the CPA for the purpose of reverse-clearing the instruments.

Note 1: As part of this proceeding, RBC has sued its insurers to recover the amount of its loss based on coverage for loss resulting directly from forgery of, on, or in any negotiable instrument. Consequently, against their insurers RBC alleges that the endorsements were forged, while against the financial institutions, RBC alleges that they were not. The insurers have cross claimed against the financial institutions and pleaded that the endorsements were not forged. Although the motion judge gave the insurers a limited right to participate in the summary judgment motions, they have fully participated in the appeal, supporting RBC's appeal. In addition, Lloyds' and Gulf Insurance Company has filed its own appeal.

IV

¶ 28 Prior to the return of their motions for summary judgment, SoGen and CitiCap moved before the motion judge for an order precluding the insurers from participating in the summary judgment motions, or, in the alternative, limiting their position to the issues raised and positions taken by RBC in responding to the Rule 20 motions.

¶ 29 The motion judge found, as the insurers are persons who will be affected by the result of the summary judgment motions, that they were entitled to file responding materials and facta and to participate in the hearing of the motions. In reasons reported at [2005] O.J. No. 2036, at paras. 5 and 6 the motion judge limited the extent of their participation. He said:

> That participation must, however, be strictly limited to the issues arising on the Defendant Banks' summary judgment motions which are *issues related strictly to whether the claims made by RBC in its Amended Statement of Claim establish genuine issues for trial as against the Defendant Banks*. Other claims made by the Insurers against the Defendant Banks in their cross claims are not issues arising on the summary judgment motions and are not issues which may be raised by the Insurers in responding to the summary judgment motions or to which the Defendant Banks need reply on the summary judgment motions.
>
> Accordingly, an order will issue that the Insurers may file responding materials and facta on the summary judgment motions but may not in their responding materials or affidavits in support thereof adduce any facts which are not strictly relevant to the claims asserted by RBC in its Amended Statement of Claim and may not advance in their facta or in their submissions on the hearing of the summary judgment motions any legal arguments that are not strictly relevant to the claims asserted by RBC in its Amended Statement of Claim. In particular, in view of the fact that the claims of RBC and the cross claims of the Insurers are diametrically opposed on the question of forged endorsements on the instruments that are the subject matter of this action. [*sic*] For the purposes of the summary judgment motions, RBC has asserted that the endorsements were forged and the Defendant Banks have accepted this assertion even though RBC in one paragraph of its Amended Statement of Claim makes an alternative claim based on the endorsements not being forged. *Accordingly, the Insurers may not, in their responding motion records or affidavits in support or in their facta or submissions at the hearing, adduce any facts or advance any legal arguments to support the proposition that the endorsements on the instruments were not forged.* [Emphasis added.]

V

¶ 30 It is RBC's position, which is supported by its insurers, that the motion judge made two fundamental errors each of which is sufficient for this court to allow its appeal, dismiss the cross-appeals and send its action to trial for disposition on a full factual record. If these errors did not taint the hearing of the Rule 20 motions, RBC contends that the motion judge erred in dismissing its claims in negligence, unjust enrichment and money had and received. It submits that we should reverse the motion judge's dismissal of these claims and permit them to go to trial together with its claims in preclusion (other than as against BMO) and conversion which the motion judge did not dismiss.

¶ 31 As for the motion judge's first error, RBC contends, in stating that on a Rule 20 motion the responding party must lead evidence to show that there is a genuine issue for trial, that the motion judge erred in reversing the onus and thereby committed an error in law. The second error in law made by the motion judge was in deciding the summary judgment motions on the assumption that the endorsements were forged on the thirty-five instruments that SoGen caused to be reverse-cleared. In my view, RBC is correct in asserting that the motion judge made these errors. As the errors went to the core of the hearing of a Rule 20 motion, they are determinative of RBC's appeal and the lenders' cross-appeals. As well, although it is unnecessary to do so for the purpose of deciding the appeal, I agree with RBC's submission that the motion judge erred in dismissing its claims in negligence, unjust enrichment and money had and received.

¶ 32 On three occasions in his reasons for judgment the motion judge erred in reversing the onus. In discussing the role of a motion judge on a Rule 20 motion, at para. 19 the motion judge stated:

> It has often been said that the onus is on the moving party to establish no genuine issue for trial or that the only genuine issue is a question of law. The responding party must, however, "put its best foot forward" and *lead evidence to show that there is a genuine issue for trial* or that the issue is not strictly a question of law. [Emphasis added.]

¶ 33 Elsewhere in his reasons for judgment the motion judge made the same error. In dismissing RBC's claim for unjust enrichment, at para. 27 he stated:

> Accordingly, in my view, *RBC is unable to establish* either a corresponding deprivation or the absence of any juristic reason for SoGen and CitiCap to receive the payments and I find no genuine issue for trial with respect to the claims of RBC for unjust enrichment as against SoGen and CitiCapital. [Emphasis added.]

¶ 34 Summarizing his findings in para. 91 and dealing with RBC's claims for unjust enrichment and money had and received, the motion judge wrote that he found no genuine issue for trial with respect to these claims as RBC had failed to establish the requisite elements. In addition, in para. 5 of his reasons deciding the earlier motion to preclude the insurers' participation in the Rule 20 motions, which I have reproduced in para. 29, the motion judge also erroneously identified the responding party's onus on a Rule 20 motion when he said:

> [The insurer's] participation must ... be strictly limited to the issues arising on the Defendant Banks' summary judgment motions which are issues related strictly to whether the claims made by RBC in its Amended Statement of Claim establish genuine issues for trial as against the Defendant Banks.

¶ 35 The law is settled that on a Rule 20 motion the onus is always on the moving party to satisfy the court that there is no genuine issue for trial with respect to a claim or a defence: *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.). See, also, *Irving Ungermann Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) at 551. As this court said in *Aguonie* at pp. 173-174:

> Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.

¶ 36 An example of a case where the motion judge erred in holding that there is an onus on the responding party on a Rule 20 motion to establish that there is no genuine issue for trial is *Lang v. Kligerman*, [1998] O.J. No. 3708 at paras. 8 and 9 (C.A.). See, also, *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 at paras. 29-31 (C.A.); *Meditrust Healthcare Inc. v. Shoppers DrugMart* (2002), 61 O.R. (3d) 786 at para. 23 (C.A.).

¶ 37 Therefore, I would give effect to RBC's contention that the motion judge erred in holding that on a Rule 20 motion there is an onus on the responding party to establish that there is a genuine issue for trial.

¶ 38 Moving to RBC's second fundamental ground for appeal, it was argued that the motion judge erred in deciding the motion on the basis of assumed facts. He assumed that the endorsements on the instruments issued by the lenders were forged. The origin of this assumption is found in the passage from the motion judge's reasons in the motion brought by SoGen and CitiCap to prelude the participation of the insurers in their Rule 20 motions, which I have quoted in para. 29. In para. 13 of his reasons in this appeal, the motion judge made reference to his ruling on the earlier motion. He referred to it again in para. 30:

> *As stated above, my ruling was that these motions would proceed on the basis that all of the subject bank drafts and cheques bore forged endorsements.* RBC has, in effect, pleaded in the alternative that if the endorsements on certain of the instruments were authorized and accordingly, there was no forgery, SoGen and BMO could be liable in conversion as a result of the reverse clearing of such instruments. In that respect, there is, in my view, clearly a genuine issue for trial as to the circumstances surrounding the Picker Authorization [in respect to the CitiCap instruments] or any other purported authorization given to BACC to execute endorsements on the instruments. In the submissions made to this court it is clear that there is conflicting evidence with respect to the Picker Authorization including its interpretation, purpose and delivery and so as to whether it was any way relied upon and with respect to the issue of whether certain of the subject instruments bore authorized endorsements by BACC. *These motions are, however, proceeding on the assumption that all of the subject instruments bore forged endorsements.* [Emphasis added.]

¶ 39 As I earlier stated, the issue of whether the instruments bear forged or unauthorized endorsements is central to the resolution of this action. If one or more of the returned instruments bore no forged payee endorsement, or a payee endorsement that was authorized, the drawer had no "right to recovery" under s. 49(1) of the *BEA* and, thus, no right to cause those particular

instruments to be reverse-cleared to RBC through the Clearing under the CPA Rules. Conversely, if the instruments do bear forged or unauthorized endorsements, then RBC's insurers may be liable to indemnify it under their insurance contracts. In allowing the motion to be argued on the assumption that all the endorsements were forged, the motion judge made an additional error with respect to the issue of which party bears the onus on a Rule 20 motion. He failed to recognize that the onus of establishing that an instrument bears a forged endorsement lies on the person asserting it - the drawers, SoGen and CitiCap. If this onus had been applied, as it should have been, they would have borne the burden of establishing that assertion on an instrument-by-instrument basis.

¶ 40 By proceeding on the assumption that the endorsements were forged and dismissing RBC's claims in negligence, unjust enrichment and money had and received, the motion judge prevented RBC from advancing its core defences before a trial judge on the basis of a full evidentiary record. The motion judge's assumption that the endorsements were forged precluded both RBC and its insurers from presenting evidence capable of demonstrating that there was a genuine issue for trial concerning the authenticity of the endorsements. Moreover, they were also precluded from presenting evidence relevant to their alternative position that some or all of the endorsements were not an endorsement within the meaning of ss. 55-57, 59(3), 61(1), 62 and 130 of the *BEA*.

¶ 41 With respect to the last point, I would add that the interpretation of "endorsement" under the *BEA* and the CPA Rules has yet to be the subject of considered and authorative judicial pronouncement. As a legal issue of first impression, it should be determined in the light of facts established at a trial: *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 547; *Bendix Foreign Exchange Corp v. Integrated Payment Systems Canada Inc.*, [2005] O.J. No. 2241 (C.A.)

¶ 42 Deciding a Rule 20 motion on assumed facts is contrary to this court's direction that on a Rule 20 motion all of the evidence that could be led at trial should be before the court. As this court stated in *Dawson, supra*, at para. 17: "At the summary judgment stage, the court wants to see what evidence the parties have to put before the trial judge, or a jury, if a trial is held." However, the motion judge prevented RBC, as well as its insurers, from presenting the evidence they would present at trial. In my view, it is unfair to dismiss a litigant's claim and to deprive the litigant of its right to a trial on the basis of an artificially curtailed record. Moreover, by artificially restricting the record on the summary judgment motions, the trial judge created a real risk of conflicting decisions on the same factual and legal issues within the same action were this court not to interfere. This is because the facts and legal issues with respect to RBC's various claims are so intertwined that it is logically impossible to confine the facts and legal issues to the several discrete claims that together constitute RBC's lawsuit.

¶ 43 Two decisions of this court explain why it is a reversible error for a motion judge to decide a Rule 20 motion on the basis of assumed facts: *Chitel v. Bank of Montreal*, [1999] O.J. No. 3988 (C.A.); *Law Society of Upper Canada v. Ernst & Young* (2003), 65 O.R. (3d) 577 (C.A.); leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 358.

¶ 44 In *Ernst & Young*, the defendants Ernst & Young moved under Rules 20 and 21 for a determination of whether the plaintiffs' claims for damages, as a matter of law, were a recoverable loss. The parties agreed that the motion judge should decide the issue on the basis of facts that were assumed to be true for the purposes of the motion. These facts, as pleaded in the statement of claim, were that the defendants were negligent and in breach of their contracts to the plaintiffs, and had negligently misrepresented certain facts. The motion judge agreed to do so

and dismissed Ernst & Young's Rule 21 motion. Under Rule 20, however, success was divided and both sides appealed. On the appeal this court set aside the judgment below in its entirety, and ordered that the entire action should proceed to trial. In so holding, this court held that the motion judge had erred in acceding to the parties' request that the motions be decided on the basis of assumed facts. What this court said in paras. 21-23 is particularly relevant to this appeal:

> The defendants moved under rule 20.04(4) and, alternatively, under rule 21.01(1)(a), to obtain an order either dismissing the plaintiffs' action or striking out their statement of claim on one, or both, of two legal grounds. It was their position that the plaintiffs did not sustain legally recoverable damages; however, if they did, the plaintiffs were precluded from recovering the damages because the LSUC passed on the damages to its members through supplemental and increased annual levies. Doctrinally, unless there were no facts in dispute, the defendants could not rely on rule 20.04(4), which permits the court to determine a question of law where it is the only genuine issue for trial: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.). *However, as the motion judge noted at p. 216, the parties had conceded there were material facts in dispute and a genuine issue for trial concerning the defendants' liability. Consequently, to permit the questions of law to be decided the defendants conceded that the plaintiffs could prove their alleged breach of contract, negligence and negligent misrepresentation. However, they did so only for the purpose of their motions.* Similarly, it would not have been appropriate for the motion judge to decide as a question of law under rule 21.01(1)(a) that the passing on defence precluded the plaintiffs from recovering the damages that they claimed if there was a factual issue whether the plaintiffs had sustained damages based on the defendants' alleged wrongful conduct: *cf. Lennon v. Ontario (Premier)* (1999), 45 O.R. (3d) 84 (S.C.J.).
>
> It follows that because there were facts in dispute concerning the defendants' alleged wrongful conduct, which facts the defendants were prepared to assume in the plaintiffs' favour but only for the purpose of their motions, *the motion judge was put in the position of being asked to decide two hypothetical questions.* Of course, had the defendants been prepared to admit for all purposes that they had breached their contracts with the plaintiffs or had performed their services negligently, that would have removed the hypothetical nature of the questions of law raised by their motions.
>
> Moreover, it appears from the reasons of the motion judge, as well as from the factums of the parties and the oral submissions of counsel that many underlying facts are in dispute. *This reinforces the importance of deciding significant substantive issues on a full factual background that forms the complete picture. Such factual background can best be developed at trial, rather than on an interlocutory motion.* I refer, for example, to the dispute among the parties as to the nature of the Insurance Plan, the role of the LSUC and LPIC in respect to the Insurance Plan and, in particular, their responsibility for liabilities and expenses they incurred in connection with the Insurance Plan. [Emphasis added.]

¶ 45 After reviewing a number of authorities, the court continued at para. 46:

> To succeed in this action, the plaintiffs must prove that one or both of the defendants were either in breach of contract or negligent, or both, and that as a result the plaintiffs sustained legally recoverable damages. Should the plaintiffs prove the alleged wrongful conduct, for the defendants to avoid paying damages

> they must persuade the court that their breach of contract or negligence did not cause the plaintiffs to sustain damages, or if their wrongful conduct caused damages to the plaintiffs, that they are precluded from recovering them because the damages were passed on to the members of the LSUC. Central to any recovery by the plaintiffs is whether they can prove that the defendants were in breach of contract or negligent, which allegations are denied by the defendants in their statements of defence. Although the defendants did not specify the particulars of their breach of contract or their negligence, they asked the motion judge to assume for the purpose of the motion only that they were in breach of contract or negligent. However, the defendants' concession of their liability for the purpose of the motion necessarily contains a concession that they committed the underlying acts, which the plaintiffs allege in their statement of claim. *As the above cases illustrate, because the motion judge's legal analysis was informed by the defendants' concession of their alleged wrongful conduct, it is not possible to say that any of the legal results that flow from the motion judge's order will survive a revision of the facts at the trial that is to be held consequent to the motion judge's order. As the defendants' motion was dismissed, there must be a trial at which the facts as found by the trial judge may differ from the facts assumed for the purpose of the motions. This possible revision of the facts on the basis of a complete trial record graphically demonstrates the hypothetical nature of the questions of law that the motion judge was asked to decide.* It is 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. [Emphasis added.]

¶ 46 What this court said in *Chitel* is also instructive. In that case the motion for summary judgment was decided on the basis of facts admitted only for the purpose of the motion. This court said that the problem of deciding a motion on the basis of facts admitted for the purpose of a motion could place the trial judge in a difficult position if he or she were to make a different finding of fact based on the evidence. This is a definite possibility in this case if we do not interfere with the decision reached by the motion judge on the assumption that the endorsements were forged because in the two claims which the motion judge ordered should go to trial - preclusion and conversion - it will be necessary for the trial judge to make findings with respect to each endorsement. Clearly, there is bound to be a conflict.

¶ 47 In allowing the appeal from the order granting summary judgment, the *Chitel* court stated at paras. 10 and 11:

> Besides this problem, it is unclear from the record and the reasons, what facts were found not to be in dispute in order to form the basis for the legal conclusions reached by the motions judge. *Rather, it appears that many important facts, as well as inferences from the facts, are very much in dispute in this case and that they are part of a complete story which must be told in its entirety at the trial. Furthermore, because the entire legal analysis was based on, and flowed from, at least one of the facts conceded for the motion only, it is not possible to say that any of the legal results would survive a revision of the facts.* This is not a case for partial summary judgment eliminating any of the claims. *Both the facts and the legal issues are complex and require a trial where they can be considered as a whole by one judge who will apply the law to the facts as ultimately found.* [Emphasis added.]

¶ 48 Both *Ernest & Young* and *Chitel* clearly illustrate why the motion judge should not have decided the financial institutions' motions for summary judgment on the assumption that the endorsements were forged. From the perspective of all of the parties, including the insurers, the authenticity of each endorsement was in dispute, as well as the threshold issue of whether the markings on the instruments were endorsements within the meaning of the *BEA*. It is important to recognize that this proceeding is not solely between RBC and SoGen, CitiCap and BMO. It also includes RBC's claims against its insurers, who in turn, have issued cross-claims against the lenders. Rather, the facts in this complex case, in which RBC's claims are interrelated, must be found in the usual way by a trial judge who will decide the issues raised in this appeal on a full evidentiary record. Each claim is to be decided on the basis of the governing legal principles applied to the factual findings. Accordingly, I would give effect to this ground of appeal. As in *Ernest & Young*, the judgment below must be set aside in its entirety and the entire action should proceed to trial.

¶ 49 Accordingly, I would allow RBC's appeal, dismiss the cross-appeals of SoGen, CitiCap and BMO, set aside the judgment of the motion judge and order that the entire action proceed to trial.

VI

¶ 50 Although I have decided the appeal and the cross-appeals for the above reasons, because considerable argument was directed to the motion judge's dismissal of RBC's claims based on negligence, unjust enrichment and money had and received, I feel that it is appropriate to comment briefly on the motion judge's summary dismissal of these claims.

¶ 51 In his analysis of RBC's negligence claims against SoGen and CitiCap, the motion judge was dealing with a novel claim. There has been no judicial consideration of the duty of care owed by the drawer of an instrument to a collecting back. He rejected RBC's submission that he should follow the position of this court, as articulated in such cases as *Spasic Estate, supra* and *Bendix Foreign Exchange Corp., supra*, that matters of law which are not settled, or have not had the benefit of contemporary judicial consideration, should not be determined at the interlocutory stage but should be sent to trial to be determined on a full factual record. See, also, *R.D. Belanger & Associates Ltd. v. Stadium Corporation of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.); *Romano v. D'Onofrio* (2005), 77 O.R. (3d) 583 (C.A.); *Lawrence v. Peel Regional Police Force* (2005), 250 D.L.R. (4th) 287 (Ont. C.A.). Ultimately, the motion judge granted the respondents' motions for summary judgment on the ground that no duty of care was owed due to a lack of proximity between the banks on which the instruments were drawn and RBC as the collecting bank.

¶ 52 The motion judge granted the respondents' motion to dismiss RBC's claim in unjust enrichment based on the windfall obtained by SoGen and CitiCap pursuant to the "lease payments" they received from Ms. Koval in her attempt to mask her fraud. In my opinion, the motion judge erred in his view that the fictitious leases created by Ms. Koval constituted a juristic reason for SoGen and CitiCap to have received these funds and to deny RBC recovery: *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629. Moreover, the broader issue arising from RBC's unjust enrichment claim, of whether excess funds obtained through resort to the procedures of the CPA Rules are subject to restoration under restitutionary principles, like the duty of care issue, is a novel issue that has not had the benefit of contemporary judicial scrutiny and which remains unsettled.

¶ 53 In my view, the motion judge erred in failing to apply the decisions of this court when he

dismissed RBC's novel claims in negligence and unjust enrichment at the interlocutory stage rather than sending them to trial. As RBC's claim for money had and received closely parallels its claim for unjust enrichment it too should not have been dismissed. The motion judge should have permitted it to go to trial with the other claims.

¶ 54 The motion judge was aware of the principle that novel claims should not be determined at the interlocutory stage. He sought to distinguish *Bendix* by suggesting that recent unnamed Supreme Court of Canada decisions had "expanded" the role of a judge hearing a Rule 20 motion "where the only genuine issue is a question of law" that involves applying "established" legal principles to new fact situations. However, indicative of an inconsistency in his application of the principle that novel claims should be determined at trial, he applied it when he dismissed SoGen and CitiCap's motions to dismiss RBC's conversion claim, stating at para. 41:

> In my view, the claim in conversion against the Defendant Banks as a result of the reverse clearing of the subject bank drafts and cheques through the CPA clearing system raises novel issues on which there is no definitive authority and are questions of law which should go to trial on a full record and accordingly constitute genuine issues for trial.

¶ 55 Although in the final analysis the motion judge sent RBC's preclusion claims to trial because they raised evidentiary and legal issues that could not be decided on a summary judgment motion, in my view, from reading his analysis of this issue, he was also concerned about apparent novel aspects of the preclusion claims. I find what the motion judge said in para. 87 about the state of the record on the preclusion claim to be instructive:

> I am of the view that there is not a full factual record before this court as to the manner in which the bank accounts of SoGen and CitiCapital were operated, the manner in which the subject bank drafts and cheques were drawn, issued and delivered to BACC and the lack of due diligence on the part of SoGen and CitiCapital with respect to the lease transactions. There would have to be further evidence before this court in this regard. There would also have to be additional expert evidence to determine whether such conduct constituted negligence on the part of SoGen and CitiCapital and to determine whether such conduct was "in the transaction itself" and whether it was the proximate cause of RBC's loss.

In my view, what the motion judge stated with respect to the deficiencies in the record relating to the preclusion claims must necessarily apply to the record with respect to RBC's negligence claims, which are essentially based on the same facts, and constitute further reasons why the negligence claims should have been sent to trial.

VII

¶ 56 For all of the above reasons, I would allow RBC's appeal and dismiss the cross-appeals of SoGen, CitiCap and BMO, set aside the judgment of the motion judge, substitute a judgment dismissing all of the motions for summary judgment and order that RBC's entire action proceed to trial. I would award RBC its costs of the motions. Failing agreement by the parties on the amount of costs, I would order that they be assessed. RBC is to have its costs of the appeal on a partial indemnity basis fixed in the amount of $85,000, inclusive of disbursements and GST.

S. BORINS J.A.

R.P. ARMSTRONG J.A.:— I agree.
R.A. BLAIR J.A.:— I agree.

* * * * *

Corrigendum
Released: January 10, 2007

A correction has been made to Footnote 1. It should read: "... In addition, Lloyds' and Gulf Insurance Company has filed its own appeal."

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