

Case Name:  
**Miller v. Sloan**

APPLICATION UNDER the Partition Act, R.S.O. 1990,  
C. P-4

Between  
Lorne Miller, Mink Printing Inc. and 1035353 Ontario  
Limited, applicants (respondents in the  
cross-application of Bernard Berkovitz, Sheila  
Berkovitz, Independent Life Services Ltd. and William  
Kassel) (appellants/respondents on cross-appeals), and  
Rita Sloan, Bernard Berkovitz, Sheila Berkovitz,  
Independent Life Services Ltd. and William Kassel,  
respondents (Bernard Berkovitz, Sheila Berkovitz,  
Independent Life Services Ltd. and William Kassel as  
applicants in the cross-application)  
(respondents/appellants on cross-appeals)

And between  
Rita Sloan, applicant (respondent on appeal), and  
Lorne Miller, Mink Printing Inc. and 1035353 Ontario  
Limited, respondents (appellants)

[2005] O.J. No. 5045  
Docket: C43211

**Ontario Court of Appeal**  
**Toronto, Ontario**  
**D.H. Doherty, E.A. Cronk and J.L. MacFarland JJ.A.**

Heard: November 18, 2005.  
Judgment: November 29, 2005.  
(12 paras.)

*Contracts — Interpretation — Ambiguity — Appeal and cross-appeal, from decision finding term of contract ambiguous, both allowed in part — Judge erred in interpreting contractual term that was not at issue — Contested term of contract properly interpreted by considering express language of contract.*

Appeal by Miller and two companies, and cross-appeal by Sloan and a group of investors, from a decision interpreting a term of a contract between them. The contract contained a profit-sharing clause, defining net profit as net sale proceeds of certain properties less their acquisition costs. Acquisition cost was defined as gross purchase price plus non-recovered expenses. Eligible non-recovered costs were mentioned. Miller and the two companies applied for a declaration that mortgage and loan interest was included in non-recovered costs. An applications judge considered the net profit definition ambiguous, as it failed to include revenue earned from the properties in net sale proceeds, and because it failed to include mortgage and loan interest as a permissible non-recovered cost.

**HELD:** Appeal and cross-appeal allowed in part. The interpretation of net sale proceeds was not an issue before the judge. The judge erred in interpreting the net profit definition. The definition was clear and unambiguous. The judge should not have substituted his interpretation, which was inconsistent with the language of the clause. If mortgage and loan interest was a non-recovered cost, the clause would have mentioned it.

Court Summary:

On appeal from the Judgments of Justice Victor Paisley of the Superior Court of Justice dated February 15, 2005 and June 2, 2005.

**Counsel:**

Ivan Y. Lavrence for Lorne Miller, Mink Printing Inc. and 1035353 Ontario Limited

Keith M. Landy for Bernard Berkovitz, Sheila Berkovitz, Independent Life Services Ltd. and William Kassel

Raymond H. Raphael for Rita Sloan

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#### ENDORSEMENT

The following judgment was delivered by

¶ 1 **THE COURT** (endorsement):— This litigation involves Mink Printing Inc. and 1035353 Ontario Limited, each of which owns a commercial real estate property in Toronto (the "Owners"), their principals (Lorne Miller and Rita Sloan), and several persons who invested in the two properties (the "Investor Group"). The individual members of the Investor Group are related to Rita Sloan's husband.

¶ 2 The main issue in contention concerns the interpretation of the phrase "net profit" as defined in a profit-sharing clause set out in agreements made between the Owners and the members of the Investor Group. The relevant "net profit" definition reads as follows:

Net Profit will be the difference between the Net Sale Proceeds (Gross Sale Proceeds less expenses such as commission, legal fees and closing costs related to sale) and Gross Purchase Price (being the original Purchase Price of One Million Five Hundred Ninety Thousand (\$1,590,000) Dollars plus all non-recovered costs such as Land Transfer Tax, legal fees, tenant inducements, leasehold improvements, lease commissions, non-recovered repairs and improvements, negative cash flow contributions, mortgage arrangement fees, appraisals and any other legitimate expenses relating to the Property).

¶ 3 In essence, therefore, "net profit" is defined in the agreements between the parties as the "net sale proceeds" of the properties in question less the acquisition cost of the properties. The acquisition cost is defined as the "gross purchase price" of the properties plus all "non-recovered costs".

¶ 4 The application judge held that the "net profit" definition was ambiguous because it failed to include "revenue earned" from the properties in "net sale proceeds" and because it failed to include mortgage and loan interest as a permissible "non-recovered cost" in the calculation of the acquisition cost of the properties. He concluded that, "The most reasonable interpretation of the definition of net profit ... requires that both revenue earned and legitimate non-recovered expenses be taken into account pursuant

to the clause in issue."

¶ 5 In our view, the application judge erred in law in his interpretation of the "net profit" definition. We reach this conclusion for the following reasons.

¶ 6 The only interpretive issue before the application judge was whether mortgage and loan interest was a "non-recovered cost" for the purpose of the expenditures part of the "net profit" definition. The meaning of "net sale proceeds" was not before him. More-over, no party argued for or introduced evidence relating to the inclusion of "revenue earned" in the term "net sale proceeds". In these circumstances, it was wrong for the application judge to impose his own interpretation of the phrase "net sale proceeds" on the parties. In any event, his interpretation is inconsistent with the language of the clause, which defines "net sale proceeds" in unambiguous and exhaustive language that does not include revenues, as distinct from proceeds of sale.

¶ 7 The sole issue for determination by the application judge was whether the phrase "non-recovered costs" in the definition of "net profits" extended to mortgage and loan interest. Several factors militate against this conclusion. First, although various types of expenses or costs are enumerated in the challenged definition as examples of "non-recovered costs", no express mention is made of mortgage and loan interest. This omission is telling where, as here, the transactions at issue involved the acquisition and financing of commercial real estate, in respect of which mortgage and loan interest rates and payments are typically material and often critical considerations.

¶ 8 Second, while the concept of "non-recovered costs" embodied in the challenged definition is initially cast in broad language, the enumerated examples of "non-recovered costs" operate to narrow the ambit of this phrase. In particular, we agree with the Investor Group that the enumerated items refer to episodic costs of an unknown amount that may or may not arise in the course of the ownership of the properties and that are not recoverable from other sources. They do not include, therefore, known recurring expenses that will inevitably arise, for at least some period, such as mortgage and loan interest.

¶ 9 Finally, the meaning of "non-recovered costs" must be ascertained in the context of the overall commercial transactions between the parties. The parties' arrangements contemplated that, while the properties were held by the Owners, the members of the Investor Group would be entitled to the receipt of interest on the funds loaned and the Owners would be entitled to any income earned from the properties. The profit-sharing arrangement applied only upon the sale of the properties. It contemplated that the profits from the sale of the properties, arising only on the disposition of these assets, would be shared among the parties in agreed percentages. In these circumstances, no commercial unfairness or absurdity results from an interpretation of "non-recovered costs" that excludes mortgage and loan interest paid by the Owners, in whole or in part, from rental or other income generated by the properties.

¶ 10 In varying ways, the parties all challenge the costs disposition of the application judge. In view of this court's disposition of these proceedings, the Investor Group should have succeeded on the only issue properly before the application judge. Rita Sloan and the Investor Group are each entitled, therefore, to the costs of those proceedings in the agreed amount of \$7,500, inclusive of disbursements and Goods and Services Tax.

¶ 11 Given the differing positions advanced by the parties before this court, it cannot be said that any party was entirely successful. In our view, Rita Sloan and the Investor Group are entitled to some part of their costs of the proceedings before this court, fixed in the sum of \$5,000 for Rita Sloan and the sum of \$5,000 for the Investor Group, in each case inclusive of disbursements and Goods and Services Tax.

¶ 12 Accordingly, for the reasons given, the appeal and the cross-appeals are allowed in part, the

judgments of the application judge are set aside and in place of the judgment dated February 15, 2005, judgment shall issue in the following terms:

THIS COURT DECLARES that revenue earned is excluded from the calculation of profit participation and mortgage and loan interest are not "non-recovered costs" for the purpose of the said calculation, as set out in the written memoranda of agreement among the parties.

D.H. DOHERTY J.A.

E.A. CRONK J.A.

J. MacFARLAND J.A.

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