

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

BETWEEN:

KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

Plaintiff/Respondent

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, AND GREGORY HARRIS SOLELY IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST

Defendants/Appellants

RESPONDING FACTUM OF THE PLAINTIFF/RESPONDENT
(Motion to Admit Fresh Evidence)

October 17, 2018

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Aeolian Investments Ltd. and John Davies

PART I – OVERVIEW

1. On June 7, 2017, an interim injunction Order was granted against the defendants, John Davies and Aeolian Investments Ltd., by the Honourable Justice Myers on an *ex parte* basis. The interim injunction Order was subsequently extended on the consent of the parties until the hearing and disposition of the interlocutory injunction motion.

2. On August 30, 2017, after a half-day hearing, Justice Myers granted the interlocutory injunction Order. The evidentiary record before Justice Myers in connection with the interlocutory injunction motion (and the motions leading up to the interlocutory injunction motion) was voluminous. The various records before Justice Myers totaled five volumes comprising over 1,500 pages of evidence, including multiple affidavits from the defendants (upon which they were cross-examined) and multiple Receiver's reports with supporting documentation detailing the results of its investigations and particularizing the fraud, including the defendants' dissipation of assets. That interlocutory injunction Order forms the subject matter of this appeal.

3. The defendants obtained leave to appeal Justice Myers' interlocutory injunction Order on January 19, 2018. The defendants perfected their appeal on or about February 28, 2018. At that time, the defendants filed their certificate confirming that their appeal book and compendium were complete. On April 30, 2018, the plaintiff delivered its responding appeal materials, including its factum and compendium.

4. Now, on the eve of the hearing of the appeal, the defendants move to adduce fresh evidence. None of the fresh evidence meets any of the criteria required for its admission: it could have been adduced at first instance; it is neither reliable nor credible; nor could any of it be expected to have

affected the result. As such, the defendants' motion to adduce fresh evidence ought to be dismissed.

PART II – ISSUES

5. The sole issue to be decided on this motion is whether the defendants should be permitted to adduce fresh evidence. The defendants seek to adduce four affidavits (and various court orders and endorsements) relating to two broad categories of fresh evidence: (1) evidence relating to Mr. Davies' assets; and (2) evidence relating to Mr. Davies' personal residence in King City (the "**King City Property**"). For the reasons described below, none of this evidence should be admitted.

PART III – FACTS, LAW & ARGUMENT

6. While the Court has the jurisdiction to allow parties to adduce fresh evidence on appeal, such an order will not be granted unless specific conditions are met. In particular, in order to adduce fresh evidence on appeal, the defendants must satisfy all four criteria of the test articulated by the Supreme Court in *R v Palmer* (the "**Palmer test**"):

- (a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
- (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief;
and

- (d) the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.¹

7. The defendants have failed to meet each of the four factors for the fresh evidence they seek to adduce on this appeal.

The evidence could have been adduced at first instance through due diligence

8. Fresh evidence should generally not be admitted if, by due diligence, it could have been adduced at first instance.² As a general rule, this means that evidence should not be admitted in civil cases if it could have been adduced in the court below.³

9. Where a party is aware of the evidence at the time of the hearing but does not raise it or attempt to rely upon it, the party cannot then seek to adduce it at a later date.⁴ Parties have the responsibility to bring relevant evidence forward at first instance, and they cannot attempt to belatedly bolster the record with additional evidence on appeal.

10. The defendants seek to adduce, among other things, two affidavits that Mr. Davies swore after the interlocutory Order was granted in support of his position on this appeal that there were no hidden or undisclosed assets. Leaving aside the self-serving nature of these affidavits, they contain no information that was unavailable to Mr. Davies at the time of the return of the

¹ *R v Palmer*, [1980] 1 SCR 759 (SCC) at para 22, 1979 CarswellBC 533, Book of Authorities of the Plaintiff/Respondent for Motion to Adduce Fresh Evidence ("**BOA**"), Tab 1; *Monteiro v Toronto Dominion Bank*, [2005] OJ No 4749 (Div Ct) at para 3, 2005 CarswellOnt 6285, BOA, Tab 2.

² *Lafontaine-Rish Medical Group Limited v Global TV News Inc.*, [2008] OJ No 76 (Div Ct) at para 34, 2009 CarswellOnt 78, BOA, Tab 3.

³ *Nissar v Toronto Transit Commission*, 2013 ONCA 361 at para 38, 2013 CarswellOnt 7174, BOA, Tab 4.

⁴ *Payne v Law Society of Upper Canada*, 2014 ONSC 1083 (Div Ct) at paras 4-6, 2014 CarswellOnt 3668 BOA, Tab 5; *Clark v Clark*, 2014 ONCA 175 at para 28, 2014 CarswellOnt 2477, BOA, Tab 6.

interlocutory motion. Indeed, at paragraph 12(a) of the defendants' factum, they readily acknowledge that this information existed at the time of the motion:

“With respect to the Fresh Evidence regarding Mr. Davies' assets, while this information existed, it could not have been reasonably adduced through due diligence as the Receiver did not raise the issues to which this evidence was responsive until after the hearing”.

11. With respect, the defendants' position on this point is baseless.

12. At its core, the very nature of a Mareva injunction is that it seeks to enjoin the defendants' dissipation of assets. The status and whereabouts of Mr. Davies' assets were central issues on the interlocutory motion and these issues were raised by the plaintiff as early as the initial *ex parte* motion (which pre-dated the interlocutory injunction by several months), where Justice Myers found that Mr. Davies was “actively selling his assets – including his cottage and home” and that “proof of wrongdoing including likely defalcation by a fiduciary coupled with asset sales, readily leads to an inference that absent injunctive relief the defendants will dissipate their assets to avoid recovery by the receiver and the investors and at issue at the hearing of the motion).”⁵

13. The defendants' assertion that these issues were not raised until after the hearing of the interlocutory injunction motion is plainly incorrect. The defendants filed and relied upon at least three affidavits on the interlocutory motion addressing their assets and liabilities, including: (i) an affidavit sworn by Mr. Davies on June 14, 2017 (which enclosed as Exhibit “A” a statement of assets and liabilities of Mr. Davies and Aeolian Investments Ltd.); (ii) an affidavit sworn by Mr. Davies on July 24, 2017 (which enclosed as Exhibit “A” an updated a statement of assets and

⁵ Unofficial Transcript of Justice Myers' Endorsement from Interim Mareva Motion dated June 7, 2017, Respondent's Compendium, Tab 6A, p 138; Justice Myers' Endorsement from Interim Mareva Motion dated June 7, 2017, Respondent's Compendium, Tab 6, p 137.

liabilities of Mr. Davies and Aeolian Investments Ltd.); and (iii) an affidavit sworn by Mr. Davies' spouse, Judith Davies, on July 24, 2017 (which included as Exhibit "A" her own statement of assets and liabilities).⁶ Although these affidavits were all filed and relied upon by the defendants on the interlocutory injunction hearing, the defendants now seek to belatedly file different affidavits, relating to the very same subject matter, as fresh evidence on this appeal in a thinly veiled attempt to bolster the record.

14. The defendants also seek to rely on evidence regarding the King City Property, which they assert did not arise until after the Mareva Order hearing. Although the defendants are correct that the affidavits upon which they seek to rely were not sworn until after the interlocutory Mareva hearing, the substantive information contained in those affidavits (e.g. that Mr. Davies had listed the King City Property for sale with the consent of the lender, Moskowitz Capital Mortgage Fund II Inc., who had forborne on its enforcement rights to allow Mr. Davies to try to sell the King City Property) was available at the time of the interlocutory injunction hearing, and beforehand. Indeed, the defendants also tendered evidence on the interlocutory motion relating to the King City Property, including evidence relating to their listing of the King City Property for sale. For instance, in his affidavit sworn July 14, 2017, which was relied on by Mr. Davies at the interlocutory injunction hearing, Mr. Davies stated: "I have taken no steps to liquidate assets and put them beyond reach of my creditors, and I have no further assets that could be liquidated...I have already explained the rationale behind the Residence above: we are taking steps to market

⁶ Affidavit of John Davies Sworn June 14, 2017, Exhibit Book, Tabs 1 and 1A, pp 1-8; Affidavit of John Davies sworn July 24, 2017, Exhibit Book, Tabs 2 and 2A, pp 9-17; Affidavit of Judith Davies sworn July 24, 2017, Exhibit Book, Tabs 3 and 3A, pp 15-20.

the Residence in order to avoid a forced sale and gain the best possible price for the benefit of my creditors”.⁷

15. The proposed fresh evidence upon which the defendants seek to rely fails to satisfy the due diligence prong of the Palmer Test. It is also notable that virtually all of the fresh evidence was available well-before the defendants perfected their appeal, but they again chose to sit on it and not bring it forward until they served this motion at the eleventh hour, only days before the hearing of this appeal.

16. The law is well-established that where admitting the evidence would, in essence, permit the defendants to reconstruct a better method of presenting their case and amount to a “second shot” at the desired relief, this would impugn the integrity of the court process.⁸ That is precisely the case here where the defendants seek to simply bolster and improve upon the record on which the interlocutory injunction motion was originally argued and decided.

17. For these reasons alone, the fresh evidence that the defendants seek to adduce on the appeal should not be permitted and the defendants’ motion should be dismissed.

The Evidence is Irrelevant, Unreliable and Could Not Reasonably Have Affected the Result

18. In any event, the defendants’ proposed fresh evidence must also be relevant, credible and sufficiently cogent such that, if believed, it could reasonably be expected to have affected the result

⁷ Affidavit of John Davies Sworn July 14, 2017, para. 32, Appellants’ Appeal Book and Compendium, Volume 1, Tab 17, p. 179.

⁸ *1307347 Ontario Inc. v 1243058 Ontario Inc.*, [2001] OJ No 257 (Sup Ct) at para 13, 2001 CarswellOnt 221, BOA, Tab 7.

reached by the motion judge.⁹ The evidence the defendants seek to adduce here is none of those things and it could have no bearing on the issues that were decided by Justice Myers.

19. The evidence that the defendants seek to adduce regarding Mr. Davies' assets attempts to explain away the dissipation by, for instance, using the purported consent of the secured lender, Moskowitz Capital Mortgage Fund II Inc., to justify Mr. Davies' sale of his home. However, even if this evidence were admitted and accepted by this Court, it would have no bearing on Justice Myers' finding that Mr. Davies listed his home for sale in the face of a Mareva injunction, particularly given that Mr. Davies already put evidence on the very issue of the listing of the King City Property before Justice Myers at the return of the interlocutory injunction hearing. It also ignores Mr. Davies' sale of his cottage, his lack of a bank account, his funding his personal lifestyle through Aeolian, his continued spending despite a Mareva (with funds being advanced from the architect for the projects), his refusal to put an order on title to his Arizona property, and all the other red flags and misconduct that formed the basis for Justice Myers' findings on this issue.¹⁰ Whether or not the lender consented to the sale of Mr. Davies' home is irrelevant, and when viewed in the context of the complete evidentiary record, it could not reasonably be expected to have affected Justice Myers' decision as it relates to the risk of Mr. Davies dissipating assets. Likewise,

⁹ *Nissar v Toronto Transit Commission*, 2013 ONCA 361 at para 38, 2013 CarswellOnt 7174, BOA, Tab 4.

¹⁰ Unofficial Transcript of Justice Myers' Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2A, pp 47-49; Justice Myers' Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46; Sixth Report of the Receiver dated July 12, 2017, Respondent's Compendium, Tab 5, pp 113-129; Supplement to the Sixth Report of the Receiver dated August 8, 2017, Respondent's Compendium, Tab 1, pp1-14; Transcript of cross-examination of John Davies conducted on August 9, 2017, Respondent's Compendium, Tab 12, Qs. 13-30, p 200 (Line 22-25), pp 201-202 and p 203 (Lines 1-30) and Qs 434-435, p 303 (Lines 14-24). Also see: *Sibley & Associates LP v Ross et al*, 2011 ONSC 2951 at paras 62-67, Respondent's Book of Authorities, Tab 18; *East Guardian SPC v Mazur*, 2014 ONSC 6403 at para 68, Respondent's Book of Authorities, Tab 19; *Noreast Electronics Co Ltd v Danis*, 2018 ONSC 879 at paras 52-54, BOA, Tab 20; *Bank of Montreal v Misir*, 2004 CarswellOnt 5366 (Comm List) at paras 35-38, Respondent's Book of Authorities, Tab 21; *Massa v Sualim*, 2013 ONSC 7520 at para 12 (injunction continued 2014 ONSC 2103), Respondent's Book of Authorities, Tab 22

Mr. Davies' disclosure of assets following the granting of the interlocutory Mareva Order has no bearing on whether the Order was properly granted by Justice Myers on the evidentiary record then before him.

20. Similarly, the evidence that the appellants seek to adduce regarding the King City Property and the sales process for that property, which was ultimately approved by the Court some eight months after the interlocutory motion was decided, is similarly irrelevant and has no bearing on the matters at issue on the appeal.

21. Further, in connection with the interlocutory injunction motion, Mr. Davies was cross-examined at lengths on his affidavits. The evidence obtained on cross formed a central part of the evidentiary record and, ultimately, his Honour's reasons, where his Honour noted, for instance, that the specific arguments raised by counsel for the defendants "cannot survive the clear admissions in Mr. Davies own hands and on cross examination."¹¹ Importantly, Mr. Davies and the other affiants were not cross-examined on the affidavits that the defendants now seek to adduce as fresh evidence on this appeal as they were sworn in connection with non-contentious matters. As such, this evidence is untested, and it is unlikely to be credible if the defendants' earlier evidence that was tested and contradicted on cross is any indication.

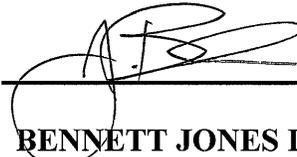
22. Given all the circumstances, the fresh evidence that the defendants seek to adduce on this appeal is neither relevant nor reliable, nor could it be reasonably expected to have had any impact on the decision that forms the subject of this appeal.

¹¹ Unofficial Transcript of Justice Myers' Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2A, pp 47-49; Justice Myers' Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.

PART IV – RELIEF SOUGHT

23. The plaintiff respectfully requests that this Honourable Court dismiss the defendants' motion seeking leave to adduce fresh evidence, with costs, and such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2018.



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SCHEDULE "A" – LIST OF AUTHORITIES

1. *R v Palmer*, [1980] 1 SCR 759 (SCC), 1979 CarswellBC 533.
2. *Monteiro v Toronto Dominion Bank*, [2005] OJ No 4749 (Div Ct), 2005 CarswellOnt 6285.
3. *Lafontaine-Rish Medical Group Limited v Global TV News Inc.*, [2008] OJ No 76 (Div Ct), 2009 CarswellOnt 78.
4. *Nissar v Toronto Transit Commission*, 2013 ONCA 361, 2013 CarswellOnt 7174.
5. *Payne v Law Society of Upper Canada*, 2014 ONSC 1083 (Div Ct), 2014 CarswellOnt 3668.
6. *Clark v Clark*, 2014 ONCA 175, 2014 CarswellOnt 2477.
7. *1307347 Ontario Inc. v 1243058 Ontario Inc.*, [2001] OJ No 257 (Sup Ct), 2001 CarswellOnt 221.

SCHEDULE "B" – LEGISLATION

Courts of Justice Act, RSO 1990, c C. 43, s 134(4).

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

**KSV KOFMAN INC. in its capacity as Receiver and Manager of
Certain Property of Scollard Development Corporation, et al.**
Plaintiff/Respondent

v.

AEOLIAN INVESTMENT LTD., et al.

Defendants/Appellants

Divisional Court File No.: 533/77

Court File No: CV-17-11822-00CL

**ONTARIO
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PROCEEDING COMMENCED AT
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**RESPONDING FACTUM OF THE
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