

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BETWEEN:

**KSV KOFMAN INC., IN ITS CAPACITY AS RECEIVER AND  
MANAGER OF CERTAIN PROPERTY OF SCOLLARD  
DEVELOPMENTS 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

and

**TEXTBOOK (256 RIDEAU STREET) INC.**

Defendant

**BOOK OF AUTHORITIES**

June 23, 2017

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**TAB 1**

1987 CarswellOnt 551  
Ontario Supreme Court

572383 Ontario Inc. v. Dhunna

1987 CarswellOnt 551, [1987] O.J. No. 1073, 24 C.P.C. (2d) 287, 7 A.C.W.S. (3d) 67

**572383 ONTARIO INC. v. DHUNNA; DHUNNA v. 572383 ONTARIO INC. et al.**

Master Donkin

Judgment: November 9, 1987

Docket: No. 20019/87

Counsel: *M. Cavanaugh*, for moving party (defendant and plaintiff-by-counterclaim).  
*B. Zarnett*, and *B. Fish*, for responding parties (plaintiff and defendants-by-counterclaim).

Subject: Civil Practice and Procedure; Property

MOTION by defendant and plaintiff-by-counterclaim for order discharging certificate of pending litigation.

***Master Donkin:***

1 This is a motion brought by the defendant, plaintiff by counterclaim for an order discharging the certificate of pending litigation. As originally framed, the grounds for the motion included the fact that the plaintiff purchaser had no reasonable claim to an interest in the land, and failure by the plaintiff to make full and fair disclosure of all material facts. These grounds were not pursued. The remaining grounds are that the plaintiff numbered company is without assets, the lands are of a commercial or investment nature, the defendant is experiencing high costs associated with continued ownership of the land but is receiving no income, and cannot sell the land until the certificate is discharged.

2 The lands are in downtown Hamilton in an area experiencing re-development. There are three buildings which are presently warehouses. The offer was conditional on the vendor presenting verification of an amendment to permit the construction of residential units with commercial zoning on the main floor. The agreement contained the following sentence, "the vendor warrants the building contains 30,500 sq. ft. price shall vary according to each sq. ft. shall be priced \$13.77 and purchaser shall not pay for any excess sq. footage or subgraded floor footage".

3 The matter of the amendment to the zoning was successfully dealt with and the plaintiff waived the condition. The plaintiff purchaser obtained figures as to the building area, and, according to the figures the plaintiff obtained, the area was considerably less than 30,500 square feet. There is dispute as to whether the closing date was extended. On the original closing date, nothing happened. On the alleged extended date the plaintiff tendered on the defendant, but tendered only the amount produced by \$13.77 times the number of square feet which the plaintiff contended that the building contained. The defendant did not close.

4 The defendant's affidavit does deal with the question of the alleged extension of the closing date, but it does not deal in any extensive way with the plaintiff's allegation that the purchase price tendered by the plaintiff was correct according to the proper interpretation of the sentence in the agreement, although the statement of defence does deal extensively with the matter of the proper price. Counsel for the plaintiff submits that, on the face of the affidavits, the plaintiff has a strong case and that this is one element which should be considered along with the other elements in deciding whether to remove the certificate of pending litigation. Counsel for the defendant takes the position that because the defendant could not show that the plaintiff has "no reasonable claim" because of the conflicts of evidence, and because of the fact that the proper price will turn upon the interpretation of the clause in the agreement, and possibly the negotiations surrounding

that clause, that the defendant therefore decided that it was pointless to go deeply into the merits of the action in the affidavit. It was his view that the merits of the action are a matter for trial, and that at this stage he would not attempt what he suggested was the impossible task, of showing that, in the face of the contradictions, and in the face of the clause, the plaintiff had no reasonable claim. He therefore submits that while it may be that, on the face of the affidavits, at the present time the plaintiff may appear to have a case which is, at least in part, not answered by the defendant, the Court should not make the assumption that the plaintiff has a strong case. I agree with the defendant's submission in this regard. No authority was cited to me by the plaintiff for the proposition that the apparent strength of the case is a factor to be taken into consideration, and it seems to me that a consideration of the merits beyond consideration of the relatively simple question of whether the plaintiff appears to have a reasonable case, if he can prove his facts, would be a dangerous endeavour at this stage of the action.

5 It appears from the evidence that the purchaser is a corporation without assets. There is a counterclaim for interference with contractual relations. It is unlikely that the plaintiff could pay the costs of the action if the action failed. On the other hand, it is open to the defendant to move for security for costs, if, in fact, the plaintiff is without means.

6 The claim is for specific performance and damages, or damages in the alternative.

7 The land is commercial, consisting of warehouses at the present time which have been re-zoned to permit re-development. The parties do not agree as to whether this property is unique. The plaintiff says it is unique because it has been re-zoned for re-development, and that re-zoning was a condition of the agreement. The defendant says that it is not unique because there was little difficulty in having it re-zoned, and the civic authorities at the present time, are in favour of having the area re-developed along the lines permitted by the present re-zoning of this property.

8 At the present time the buildings are not occupied, and the defendant submits that he cannot either sell, or lease in any meaningful way, and that the delay in being able to deal with the land is costing him mortgage interest, carrying charges, taxes etc. The plaintiff entered into the agreement not with the object of occupying the property itself, but with a view to re-developing it, and leasing it, or selling it as a commercial venture, and in that sense it is an investment property. It appears the land is increasing in value.

9 The defendant submits that the certificate of pending litigation should be removed because of the *Courts of Justice Act*, S.O. 1984, c. 11, s. 116(6)(a)(1); that is, that the plaintiff claims a sum of money as an alternative to the interest in the land claimed; and also under subs. 6(b) in that the plaintiff's interests can be adequately protected by another form of security, and subs. 6(c) which allows removal on any other ground which is considered just. The plaintiff points out that all these grounds are not grounds on which the Court must remove the certificate, but that the Court may remove the certificate.

10 While the decided cases contain statements of general considerations entering into the decision of a motion such as this, most of them contain a combination of facts not present in this case. Further, the presence or absence of some particular factors give grounds to remove the certificate, but do not require that the certificate be removed. The claim of damages in the alternative does not bind the Court to vacate the certificate, see *Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd.* (1985), 5 C.P.C. (2d) 97 at 102, 37 R.P.R. 157 (Ont. H.C.). The factors taken into account in the decided cases appear to include:

11 1. whether the plaintiff is, or is not a shell corporation — *Pete & Martys (Front) Ltd. v. Market Block*, supra, at p. 99 [C.P.C.].

12 2. whether the land is, or is not unique (*ibid*) bearing in mind that in a sense any parcel of land has some special value to the owner — *Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 (Ont. Div. Ct.).

13 3. the intent of the parties in acquiring the land — *Tru-Style Designs Inc. v. Greymac Properties Inc.* (1986), 56 O.R. (2d) 462 at 479, 11 C.P.C. (2d) 117, 31 D.L.R. (4th) 253 (Ont. H.C.).

- 14 4. whether there is an alternative claim for damages
- 15 5. the ease or difficulty of calculating damages — *Holden Corp. v. Gingerfield Properties Ltd.* (1987), 59 O.R. (2d) 304 at 310, (Ont. H.C.).
- 16 6. whether damages would be a satisfactory remedy — *Pete & Martys (Front) Ltd. v. Market Block*, supra, at pp. 101 to 102.
- 17 7. the presence, or absence of another willing purchaser — *Holden Corp. v. Gingerfield Properties Ltd.*, supra, at 310.
- 18 8. the harm done to the defendant if the certificate is allowed to remain, or to the plaintiff if the certificate is removed, with or without the requirement of alternative security — *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338 at 339 (Ont. H.C.).
- 19 In this case, the plaintiff is a shell corporation; [it] is not clear whether the land is unique, and there is an alternative claim for damages. Since the plaintiff proposes not only to buy, but also to develop the lands, the calculation of damages would be difficult, and therefore the calculation of appropriate security would be difficult. There is no new purchaser in the wings, although there is apparently some interest expressed by prospective purchasers. The defendant is incurring expenses to carry the property, and it is of course removed from the market. The property is said to be increasing in value at the present time, but of course whether that condition will continue is problematical. On the other hand to allow the certificate to be removed would put an end to the plans which the plaintiff claims to intend to carry out.
- 20 Having looked at all these factors, it now becomes a matter of discretion as to whether to remove the certificate or not: *Clock Investments Ltd. v. Hardwood Estates Ltd.*, supra, at 674. On balance, it is my view that the certificate should be removed. Counsel have requested that in the event of an order removing the certificate, an opportunity be given to speak to the question of whether terms should be imposed by way of the posting of security or otherwise, and if so what terms should be imposed, and to speak to the question of costs. I would ask counsel to contact me with respect to a date.
- Motion granted.*

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**TAB 2**

1991 CarswellOnt 460  
Ontario Court of Justice (General Division)

931473 Ontario Ltd. v. Coldwell Banker Canada Inc.

1991 CarswellOnt 460, [1991] O.J. No. 1150, 28 A.C.W.S. (3d) 638, 5 C.P.C. (3d) 238

**931473 ONTARIO LIMITED v. COLDWELL BANKER CANADA INC.,  
INDUCON DEVELOPMENT CORPORATION and 616964 ONTARIO INC.**

Sutherland J.

Heard: June 4-5, 1991

Judgment: July 4, 1991

Docket: Doc. Toronto 70342/91

Counsel: *P.J. Cavanagh* and *R. Cuerve-Lorus*, for moving parties Inducon Development Corp. and 616946 Ontario Inc.  
*Elizabeth Ackman*, for responding party (plaintiff).

*W. Chalmers*, for defendant Coldwell Banker Canada Inc.

Subject: Civil Practice and Procedure

Motion by defendants to discharge certificate of pending litigation; motion by defendants for order under R. 20 dismissing action and discharging certificate of pending litigation and for order for security for costs.

***Sutherland J.:***

1 This is a motion by the defendants for an order under r. 42.02 [Ontario *Rules of Civil Procedure*] and under subs. 116(6) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, as amended, discharging the certificate of pending litigation ("CPL") obtained by the plaintiffs, without notice to the defendants, and registered against the title to a commercial building (the "property") known municipally as 41 Peter St. in the city of Toronto.

2 The defendants, Inducon Development Corp. and 616964 Ontario Inc. (hereinafter sometimes referred to collectively as the "vendors") are the registered owners of the property. The defendant Coldwell Banker Canada Inc. ("Coldwell") is a registered real estate broker carrying on business in the city of Toronto.

3 The plaintiff is an Ontario corporation incorporated for the purpose of acquiring and operating the property as a sports bar. The plaintiff is owned in whole or in significant part by William Balkou and Brad Kinsella, the operators of an innovative and successful sports bar at 49 St. Clair Ave. E. in Toronto.

4 Desiring to acquire a property suitable for the development of a sports bar and situate in the vicinity of the SkyDome in downtown Toronto, Balkou and Kinsella approached Mr. Z. Glogowski, a sales representative with Coldwell. Mr. Glogowski specializes in leases and so he brought in Mr. Richard Freedman, a Coldwell sales representative specializing in sales and leases of commercial real estate in the area in question. Mr. Freedman was familiar with the property; knew that it had previously been offered for sale and then taken off the market, and that the vendors were considering relisting it for sale. After learning of the plans of Kinsella and Balkou, Freedman negotiated an agreement with the vendors whereby Coldwell would receive a commission from the vendors if it was able to secure an acceptable offer for the property within 60 days of January 9, 1991.

5 It is common ground that on or about January 11, 1991, Glogowski and Freedman showed Balkou and Kinsella through the property. Subsequently an exclusive sales listing agreement was entered into between Coldwell and the

vendors for a period commencing on February 7, 1991 and ending on May 31, 1991. A copy of that agreement is annexed as Exhibit B to the affidavit of Richard Freedman, filed, and it discloses that the formal asking price for the property was \$6 million.

6 Upon receiving the exclusive listing, Coldwell arranged to have four "For Sale" signs posted on the property, and prepared a marketing letter with regard to the property. The marketing letter was soon distributed to Coldwell salespeople generally, and later distributed, according to Mr. Freedman, to approximately 100 real estate brokers. The property was also featured early in March 1991 in a Coldwell publication entitled "The Downtown West Report" annexed as an exhibit to Freedman's affidavit. Mr. Freedman has deposed that the publication was sent to approximately 2,900 tenants and owners throughout the downtown west market area and also to approximately 1,000 Coldwell clients.

7 On or about February 19, 1991, the plaintiff submitted to Coldwell an offer (the "first offer") to purchase the property for a net price of \$3.2 million, which offer had been prepared by the solicitors for the plaintiff and contained no provision whereby the vendors would agree to keep confidential the fact or the terms of the offer, the identity of the interests behind the offeror corporation or the use that the offeror planned to make of the property. That offer was rejected, without a sign-back.

8 It is deposed by Balkou and Kinsella that they had repeatedly made it clear to Coldwell's representatives from the outset that they wished their interest in the property and the purpose for which they wanted it to be kept confidential. It is also deposed that in connection with the first offer Balkou and Kinsella made it clear to both Freedman and Glogowski that all terms of the first offer were to be kept strictly confidential and that under no circumstances were competitors, and especially members of the Bitove family, to be informed of the intention of the plaintiffs to open a sports bar at the property, i.e., in close proximity to the SkyDome. It is common ground that the Bitove family directly or indirectly control all of the food and drink concessions at the SkyDome as well as at Terminal 3 at Pearson International Airport.

9 The plaintiff expected to do extensive renovations, the cost of which figured in the net price offered by the plaintiff in that the plaintiff sought from the vendors a contribution of approximately \$1 million toward the cost of proposed renovations. To explain the requested contribution, which in effect lowered the net purchase price, the plaintiff explained to Freedman and Glogowski and directly and indirectly to Inducon its proposed use of the property. It is not denied by Freedman or Glogowski that the plaintiff wanted its offer and its plans kept quiet.

10 On or about February 28, 1991, the plaintiff submitted a second offer, for a net price of \$4 million. That offer was signed back by way of a counter-offer on March 8. A meeting was held on March 15, 1991, between representatives of the plaintiff, the vendors and Coldwell.

11 On March 18, 1991, the plaintiff submitted a new offer (the "third offer") with a gross offering price of \$5.3 million (net \$4.3 million), which was signed back by way of a vendor's counter-offer, at a gross price of \$5.55 million, that was to expire at 4 p.m. on April 2, 1991.

12 On April 1, Mr. Balkou met with Freedman to advise that the plaintiff would sign back the last-mentioned counter-offer. There is conflicting evidence as to other statements made at the time (about how flexible the plaintiff was prepared to be about matters not then agreed and, allegedly from Freedman, that the plaintiff had the deal). It is clear, however, that the plaintiff submitted its counter-offer, expiring at 4 p.m. on April 3, 1991.

13 In the meantime, members of the Bitove family had inspected the property, they say under their own names, being taken through the building by Mr. Freedman, who has deposed that he then believed their surnames to be "Minto". It is also clear that an employee of the Bitoves, namely, John McManus, their comptroller, who is a stepson of Andrew Zsolt, the chairman of the defendant Inducon, was in attendance, as he often was, as an invitee at meetings of the board of directors of Inducon. McManus was present at two meetings of the Inducon board at which the property was discussed, one in January and one in March. At the March meeting he would have heard discussion of the then current offer from the plaintiff and would also have heard that the plaintiff was controlled by the "Kinsella group".

14 From the affidavit of W.J. Eric Beverley, the vice-chairman of Inducon, and from cross-examination thereon, it appears that Beverley had numerous discussions with John McManus about the property and the possibility of it being purchased by the Bitoves. Beverley has deposed that, in error, he told McManus that under applicable zoning restrictions only 5,000 square feet of the ground floor of the property could be used for restaurant purposes and that after learning from Freedman that more than 15,000 square feet of the ground floor could be used for such purposes and after having Inducon employees check again, he had, on or about April 1, 1991, placed a telephone call to McManus and had explained his earlier error. Beverley further deposed that on hearing that the larger area was available for restaurant purposes, McManus had indicated that the Bitoves would be much more interested in purchasing the property. It emerges from the affidavit and cross-examination of Beverley that he did not believe that the vendors had given any commitment to or had been asked by anyone to withhold from the Bitoves or anyone else any information about the property or about the identity, offers or plans of anyone who was or might be interested in acquiring the property. In para. 11 of his affidavit Beverley deposes that:

At no time was I, or to the best of my knowledge, information and belief any other person at Inducon or 616964, informed by Mr. Balkou, Mr. Kinsella or anyone else during the course of the negotiations between the Vendors and 931473 [the plaintiff] that there was any information provided which should be kept confidential.

15 Beverley freely acknowledges that he did not even ask McManus to say nothing to the Bitoves about the plaintiff's offers and that he indeed expected that McManus would pass on to the Bitoves any information about the property that McManus thought would be of interest to them.

16 It is deposed by Kinsella and Balkou that, as stated in para. 19 of the statement of claim, Balkou met with Freedman on April 1 and told Freedman that the plaintiff would sign back the vendor's latest counter-offer, accepting the vendor's price but providing that the vendor's warranties were to survive for one year and that the \$1 million contribution by the vendors was to be paid on, not after, the closing. In the same paragraph of their statement of claim it is stated, and so by reference deposed by Balkou and Kinsella, that at their meeting on April 1 Balkou told Freedman that neither of the two changes made by the plaintiff — i.e., as to the survival of warranties or as to the timing of the payment of the vendor's \$1 million contribution — was to be regarded as a "deal breaker" and that Freedman was to "clearly imply that" to the vendors. It is stated in para. 19 that Freedman told Balkou not to worry, that they had a deal. Mr. Freedman deposes that Balkou did not advise him that neither of the changes referred to above would be a deal breaker nor that he should so imply to the vendors. Freedman further denies saying that the plaintiff had a deal, stating that the vendors had previously clearly rejected the provision for survival of the vendor's warranties for one year and that accordingly he did not know how the vendors would react to the reinclusion of that provision.

17 When the Bitoves approached Inducon directly (not through Coldwell) expressing an interest in purchasing the property, they were told that there was an offer which was outstanding for acceptance by another buyer until 4 p.m. on April 2. Later the further sign-back offer was made by the plaintiff with a deadline of 4 p.m. on April 3. The latter time came and went without there being any acceptance of what turned out to be the final counter-offer by the plaintiff. On April 3 there were discussions between representatives of the vendors and representatives of the Bitoves.

18 Also on April 3, in response to an enquiry from Balkou, Freedman spoke with Cook and Beverley of Inducon and was told that the vendor's response to the latest counter-offer of the plaintiffs would be delayed because one of the signing officers was out of town. That information was transmitted to Balkou by either Freedman or Glogowski. At the same time, Freedman heard from Cook or Beverley that the vendors were negotiating directly with the Bitoves. That information was not transmitted to the representatives of the plaintiff.

19 On the evening of April 3, 1991, at a dinner meeting at the SkyDome, John Bitove Sr. and Andrew Zsolt arrived at an oral agreement as to the terms on which the Bitoves would purchase the property. On April 4, 1991, the vendors and a corporation controlled by the Bitoves entered into a formal agreement of purchase and sale calling for a purchase price of \$4.45 million — \$100,000 less than the plaintiff's latest net offer — but providing that the purchaser would pay off

an existing mortgage in the amount of approximately \$127,000. That agreement provided for no continuing warranties as to the condition of the building.

20 On April 4, Freedman informed Balkou and Kinsella that the property had been sold by the vendors directly (i.e., not through Coldwell) to a purchaser whom Freedman then refused to identify.

21 Kinsella and Balkou depose that, several days after April 4, they heard rumours that members of the Bitove family had acquired a building close to the SkyDome and would use it for a sports bar.

22 On April 14, a Sunday, Kinsella placed a telephone call to Tom Bitove at his home. The conversation was mainly about the property and the acquisition thereof by a Bitove corporation. The accounts of that conversation given by Kinsella and by Tom Bitove are widely divergent and will be discussed further below. The thrust of Kinsella's account of the conversation, denied by Tom Bitove, is that Bitove told Kinsella that the Bitoves became involved with the property because of McManus and that Freedman disclosed to the Bitoves the identity of the plaintiff and the amount of the plaintiff's offer.

23 On April 17, the plaintiff obtained and registered against the title to the property a CPL, the application for which was made without notice to the defendants. The affidavit of Balkou on the motion before the master for the CPL had annexed thereto a copy of the statement of claim that the solicitors for the plaintiff were said to have been instructed to issue. The affidavit of Balkou identified him and the draft statement of claim and stated the statements in draft were and are in their entirety based on Balkou's personal knowledge except as to paras. 19 and 25 and based upon information from Kinsella as to those paragraphs. There was also filed on the application to the master an affidavit of Kinsella, also deposing as to the truth of the statements of fact in the statement of claim.

24 In its statement of claim, the plaintiff asserts that, but for breaches by the defendants of their duties owed to the plaintiff, the plaintiff would have entered into an agreement of purchase and sale to acquire the property and that the plaintiff is ready, willing and able to acquire the property "upon the terms of its final counter-offer or, upon such terms as to this court seem just". Paragraph 26 of the statement of claim is as follows:

26. The plaintiff states that the defendants Inducon and 616964 Ontario Inc. received confidential information from the plaintiff directly and through their exclusive listing agent, Coldwell and its employee Freedman, and owed a duty to the plaintiff during the course of negotiations not to disclose that confidential information to other prospective purchasers.

25 At para. 27 of the statement of claim, it is claimed that the vendors breached their duty of confidence by, either directly or through their agent, Coldwell, the latter acting through Freedman, disclosing to business competitors of the plaintiff the fact that the plaintiff was seeking to acquire the property, the plaintiff's offering price, and the plaintiff's intended use of the property.

26 With respect to the defendant Coldwell, the plaintiff alleges a breach of fiduciary duty in that it is alleged that Freedman, having a duty of confidentiality as agent for the plaintiff, disclosed to the Bitove family particulars of the plaintiff's offers to, and negotiations with, the vendors with respect to the property and failed to keep the plaintiff informed that other prospective purchasers were interested in the property.

27 The plaintiff's claims, as set forth in para. 1 of its statement of claim, are as follows:

**A. As Against The Defendants Inducon And 616964 Ontario Inc.:**

(a) A declaration that the property (together with all buildings and structures thereon) municipally known as 41 Peter Street, in the City of Toronto, and more particularly described in Schedule 'A' hereto ('the property'), together with any leases or agreements governing the use of the property, are held in trust by the defendants Inducon Development Corporation ('Inducon') and 616964 Ontario Inc. ('616964'), for the plaintiff.

- (b) A vesting order vesting the property with the plaintiff.
- (c) Delivery of the deed and other title documents thereto;
- (d) A certificate of Pending Litigation in respect of the property.
- (e) Damages for the misuse of confidential information and bargaining in bad faith in the amount of 5 million dollars.

**B. Against The Defendant Coldwell Banker:**

- (f) Damages for misuse of confidential information and breach of fiduciary duty owed to the plaintiff, in the amount of 5 million dollars.

**C. Against All Defendants**

- (g) Pre and post-judgment interest on all sums payable to the plaintiff pursuant to the Courts of Justice Act;
- (h) Costs of this action on a solicitor and client basis.

28 In their motion, the defendant vendors seek not only an order discharging the CPL but also an order for costs on a solicitor-and-client basis against the plaintiff and against the solicitors for the plaintiff.

29 This motion to discharge is based upon two main grounds, being:

1. failure to make full and fair disclosure of all material facts as required by r. 39.01(6) and several decisions of this court; and
2. that the plaintiff does not have a reasonable claim to an interest in the property, as
  - (i) its claim against the vendors is based upon a breach of confidence for which the usual remedy is damages;
  - (ii) the absence of evidence to support a finding of a fiduciary relationship between the plaintiff and the vendors;
  - (iii) the absence of evidence of disclosure to the Bitoves of the plaintiff's identity and interest until after the end of the period in which the plaintiff could have accepted the last counter-offer of the vendors;
  - (iv) the absence of any unjust enrichment of the vendors (who are not shown to have received more than the market price of the property) and therefore the absence of circumstances in which a constructive trust may be imposed for breach of the duty of confidentiality (where that is shown to exist).

30 It is also asserted on behalf of the vendors that the court, in considering what is "just" under para. 116(6)(c) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, as amended, should give weight to:

- (a) the defects in the disclosures made by the plaintiff before the master;
- (b) the fact that the plaintiff is a shell company;
- (c) the fact that a third party has a valid agreement for the purchase of the property, entered into at a time when there was no oral or written agreement between the vendors and the plaintiff;
- (d) the fact that the plaintiff has claimed damages not only against the agent, Coldwell, but also against the vendors;
- (e) the fact that there was a solicitor acting for the plaintiff at all material times and the plaintiff's offers were drafted by him and said nothing about the need for confidentiality; and

(f) the fact that neither Balkou nor Kinsella, nor any other representative of the plaintiff, ever spoke or wrote directly to any officer of either of the vendors about the desire of the plaintiff that its identity or the terms of its offers or its plans for the property not be communicated to any other person (including the Bitoves) notwithstanding that on March 15, 1991 there was a meeting with officers of the vendors at which meeting Balkou, Kinsella and Hoy (the solicitor for the plaintiff) were present. Kinsella has admitted that the question of confidentiality was not then raised with the vendors by any representative of the plaintiff.

31 The statements in clauses (b), (d), (e) and (f) are ungainsayably true on the record before me. As to clause (a) above, material nondisclosures will be discussed below. As to the statement in clause (c) above, it is clear that there is an executed and delivered agreement of purchase and sale between the vendors and Freedove Holdings Ltd., a corporation controlled by Tom Bitove, and that that written agreement and the oral understandings upon which it was based were entered into and arrived at, respectively, at times after the vendor's latest counter-offer to the plaintiff had expired by its own terms. It is not disputed that the written agreement between the vendors and Freedove was not entered into until even the plaintiff's last counter-offer had, by its own terms, expired.

### The Nondisclosure Issue

32 It is provided in r. 39.01(6) that:

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself a sufficient ground for setting aside any order obtained on the motion or application.

33 With respect to the contention by the vendors that the plaintiff on its motion without notice for a CPL did not make full and fair disclosure of all material facts, it is well to remember that the plaintiff's claim to an interest in the property is based upon an alleged breach of a duty of confidentiality and vicarious responsibility for alleged breaches of fiduciary duty on the part of Freedman at a time when he was representing Coldwell, acting as the agent of the vendors and continuing to have fiduciary obligations to the plaintiff. It is not alleged that there is, or was on April 4, 1991, when the vendors entered into an agreement of purchase and sale to sell the property to the Bitoves, any agreement of purchase and sale, written or oral, between the plaintiff and the vendors. Nor is it denied that before April 17 the vendors had agreed to sell the property to a Bitove-controlled corporation. This was thus not a simple or typical motion for a CPL such as arises where the party seeking the CPL alleges a written or oral agreement for the sale to him of the real property in question or asserts a beneficial interest in the property by virtue of an express trust.

34 It was important for the plaintiff's purposes that Freedman be shown to have broken, while acting as agent for the vendors, a promise to keep information about the plaintiff and its offers and business proposals away from competitors and potential competitors of the plaintiff.

35 It is also to be noted that Mr. Hoy, the solicitor for the plaintiff, was involved from an early stage and that such solicitor prepared the offers submitted by the plaintiff, supervised the counter-offers, and attended at least one meeting with officers of Inducon, the meeting on March 15, 1991. This is thus not one of those cases where the person preparing the affidavits and statement of claim used on a motion for a CPL had to gather all the information in a rush and so was more dependent upon what he was told by his clients.

36 With regard to the disclosure issue, the focus is on what was known, or known to be not known, by the plaintiff and its solicitors prior to and at the time of the motion before the master.

37 The plaintiffs assert that acting through Freedman and Glogowski, Coldwell *as agent of the vendors* agreed to keep the terms of the plaintiff's offers confidential — as well as the plaintiff's proposed use of the property. By way of paras. (e) and (b) of the statement of claim, Balkou and Kinsella have sworn that, through disclosures made by Freedman, Coldwell and the vendors have breached their duty of confidence by disclosing to the Bitove family the identities of Balkou and

Kinsella and the amount of the plaintiff's relevant offer. Although the plaintiff, as respondent on this motion, filed a supplementary factum, it has not challenged the assertion on behalf of the vendors that the only evidence of Balkou or Kinsella in support of the above-mentioned allegations of breaches of confidentiality that was before the master was that relating to the above-mentioned telephone call between Brad Kinsella and Tom Bitove on Sunday, April 14, 1991.

38 Brad Kinsella made notes during that telephone conversation and, within about an hour and a half of the end of the conversation, prepared a one-page statement or summary of the conversation. Both are before me. Neither was before the master.

39 Paragraph 25(e) of the statement of claim states as follows:

Mr. Freedman disclosed to the Bitoves the identity of the plaintiff, and the amount of the plaintiff's offer to purchase.

Before the solicitors for the plaintiff prepared the statement of claim and the affidavits of Balkou and Kinsella, they had access to the notes and the statement prepared by Kinsella.

40 The notes contain two brief statements that on their face appear to contradict para. 25(e), i.e.:

(i) "claims no knowledge of offer"; and

(ii) "claims no knowledge of us"!

Neither of those statements made it into the summary statement prepared by Kinsella — nor, more importantly, was any hint of them included in the material before the master.

41 Since then Kinsella and Balkou have each admitted that at the time they swore their affidavits they knew that in the telephone conversation Tom Bitove had expressly denied any knowledge of the plaintiff's offer, other than that there was an offer for the property. It was also admitted by Kinsella on cross-examination that Tom Bitove did not *state* that Freedman had told him or any other member of the Bitove family anything concerning the offers by the plaintiff. Kinsella, on cross-examination, maintained that Tom Bitove had said that Freedman had communicated the information to him by way of a "guessing game" in which the information was elicited by Bitove without Freedman making express verbal disclosures. Nothing of the alleged guessing game was put before the master. As indicated the statement of claim, at para. 25(e), states that "Mr. Freedman *disclosed*" the vital information. [Emphasis added.] Subsequently in their affidavits and on their cross-examinations Freedman and Tom Bitove have each denied that confidential information was disclosed — or that there ever was a "guessing game" between Freedman and Tom Bitove as alleged.

42 The successive offers by the plaintiff and the related counter-offers were not placed before the master. Nor was the master informed that the offers say nothing of an obligation of confidentiality, but do state that Coldwell is the agent of the vendors and not of the plaintiff and do contain a provision to the effect that upon acceptance the resulting agreement of purchase and sale will set forth the whole agreement between the parties. Counsel for the plaintiff makes the telling point that by the time the plaintiff's offer was accepted there would be no further need for confidentiality or any side agreement with regard to it.

43 That argument, however, does not apply to the omission to inform the master that at a meeting on March 15, 1991, attended by Balkou, Kinsella and Hoy and by ranking officers of the vendors, nothing was said about the need for, or obligation of, confidentiality. Kinsella has admitted that, saying that he meant to raise it but that other questions as to the transaction preoccupied him and so he did not raise it. There is no suggestion that Mr. Hoy said anything about the special understanding as to confidentiality. There is at the least a real likelihood that, had Inducon been asked to maintain the degree of confidentiality and nondisclosure that the plaintiff asserts that Freedman committed them to, Inducon would have refused. It is disclosed by the transcript of the cross-examination of Eric Beverley, vice-chairman and associate chief executive officer of Inducon, all of which I have read, that the pressing objective of Inducon was to get the best possible price for the property that was consistent with an early sale. Under questioning, Beverley stated

that if he had agreed to keep the terms of an offer confidential he, and Inducon, would have done so, but that he, and Inducon, would have been most unlikely to accept such a condition because it represented too much of a surrender of the flexibility that is important to a vendor trying to sell a property at an early date for a good price. It is apparent from the actions of Beverley and from the open way in which he spoke of them that he did not regard himself or Inducon as having an obligation to keep information about the plaintiffs, their offer or their business plans from the Bitoves or from any prospective or possible purchaser.

44 Nor was there any letter from Kinsella, Balkou, Hoy or any other representative of the plaintiff to any officer of either of the vendors claiming, or confirming an understanding as to, the obligations of confidentiality asserted before the master. The plaintiff cannot be expected to disclose such non-events, but in the whole picture the telephone conversation between Kinsella and Freedman, and the omissions by the plaintiff and its solicitors to indicate to the master that Tom Bitove had made statements contrary to the statements in para. 25(e) and (b) of the statement of claim, take on added importance. In my opinion, the plaintiff did not in that regard provide the "full and fair disclosure of ... material facts" called for by subrule 39.01(6).

45 In my view, the notes made by Kinsella, had they been disclosed, would have given the master the opportunity to question the meaning of the annotation that Tom Bitove (i) claimed to have no knowledge of the plaintiff's offer and (ii) claimed no knowledge of the plaintiff (and its involvement). It must be remembered that the master is not obligated to authorize the issuance of a CPL. Nor is he restricted to a simple authorization or refusal. He could have required the plaintiff to give notice to the defendant and the omitted information might well have caused him to do so.

46 There was no secret about the dimensions of the building or even about the fact that under applicable zoning controls 15,000 square feet of the ground floor could be used as a restaurant (or sports bar). On this point the breaches of confidence alleged by the plaintiff are not as to those non-confidential matters. What the plaintiff asserts is that the plan and intention of the plaintiff to use the whole 15,000 square feet as a restaurant *was* confidential and was a tip-off to any knowledgeable competition that something special was planned by the plaintiff. Freedman and Tom Bitove deny that the proposed use was disclosed at any material time. I agree with the plaintiff that disclosure of the business plans and not of the gross dimensions of the building is the issue. Still, the denials were not put before the master.

47 The vendors assert that para. 16 of the statement of claim, viz:

16. At the meeting [on March 15, 1991] a number of outstanding issues were apparently resolved to the mutual satisfaction of the parties. ...

is materially misleading in that *no* issues were resolved, and the statement therefore misleadingly and deliberately exaggerates the degree of agreement. I am not at all persuaded by the argument on behalf of the plaintiffs that because Kinsella and Balkou were prepared to give ground on a number of issues those issues were "resolved" even although the intent to give ground was not communicated to the vendors! That is a misleading statement and certainly not "full and fair disclosure". However, in my view, the statement in para. 18 of the statement of claim to the effect that, at a later date, only three identified issues remained outstanding has the effect of removing the materiality of any misrepresentation in para. 16.

48 The master was not informed that neither Glogowski nor Freedman was asked to convey to the vendors that there was a special agreement as to confidentiality. Nor was the master informed that, after the identity of the backers of the plaintiff was known to the vendors, at the latest at the time the plaintiff's first offer was submitted, no direct communication oral or written passed between representatives of the plaintiff and any officer of either of the vendors as to a special agreement as to the confidentiality of information concerning the plaintiff. Nor was the master informed that in February 1991 Coldwell was in fact appointed as exclusive listing agent of the vendor for the sale of the property and had posted the "For Sale" signs and initiated the other marketing activities referred to above. In such a role Coldwell was expected to use its best efforts to sell the property — and, if he had been told that, it is quite possible that he might

have viewed the alleged breaches of confidence against a different background and had more doubts as to the alleged agreement as to confidentiality, or as to its scope or effect upon the vendors.

49 Nor was the master informed that the plaintiff had tested the television reception at the property by placing a satellite-receiving "dish" on the roof — an activity that could have been a tip-off to interested persons of the plaintiff's proposed use of the property, and might, along with the "For Sale" signs, the exclusive listing and the marketing efforts, have made the whole sales effort appear less private and of less focus than the statement of claim suggests.

50 As has been stated many times before, the availability of a CPL confers a great power on the person who applies for it, and it is a power that can be abused by making the CPL apply to too much land or by obtaining a CPL where one should not issue or as a result of insufficient disclosure. The existence of the remedy reflects the need of a mechanism to prevent sales of land before reasonable claims to interests therein are decided. It is recognized that to be of any value the interlocutory remedy has to be available quickly and often without notice to the defendant. In order to balance the countervailing interests and to provide for a degree of control, full and fair disclosure of all material facts is required, as reflected in subrule 39.01(6). Cases involving certificates of pending litigation are usually hard fought and the requirement for full and fair disclosure can result in turn in the materials filed on a motion for a CPL being subjected, after the event, to intensive scrutiny — almost by way of the lawyerly equivalent of an electron microscope — in the search for deficiencies in the disclosures. Often the court on a discharge motion is urged to impose a standard of disclosure that makes little or no allowance for the speed with which the initial motion had to be brought.

51 In *J. & P. Goldfluss Ltd. v. 306569 Ontario Ltd.* (1977), 4 C.P.C. 296 (Ont. H.C.), Van Camp J. ordered that a *lis pendens* be vacated for what was described as a serious nondisclosure of a material fact, in circumstances where she stated that, had all the facts been properly disclosed, she would probably have refused to vacate the *lis pendens*. That decision is often quoted as standing for the principle that full and fair disclosure is required where the application is without notice to the other side. It has been followed often, for example, in *Hess v. Mandzuk* (1984), 44 C.P.C. 179, 34 R.P.R. 90 (Ont. H.C.), and by me in *Passarelli v. Di Cienzo* (1989), 34 C.P.C. (2d) 54, 67 O.R. (2d) 603 (H.C.), although in the latter case the nondisclosures clearly were material in that I did not believe the CPL would have been authorized had the omitted disclosures been made. In that decision, although there were also other reasons for discharging the CPL, it was stated that the material nondisclosures were alone a sufficient basis for the decision. In her later decision in *Notarfonzo v. Goodman* (1981), 24 C.P.C. 127 (Ont. H.C.), Van Camp J. appears to have narrowed the test applied by her in *Goldfluss* in that, with regard to the nondisclosure issue she stated, at p. 131:

The test of non-disclosure is whether the facts omitted would have made the order doubtful.

With respect, that appears to be in accord with the requirement of subrule 39.01(6) that the nondisclosure be material.

52 There was cited to me on behalf of the plaintiff the decision of Montgomery J. in *Mirrow Homes Ltd. v. Filice* ([1990] O.J. No. 28) [now reported (1989), 44 C.P.C. (2d) 204 (Ont. H.C.)], an appeal from the decision of Master Clark [(1989), 44 C.P.C. (2d) 198 (Ont.)] vacating a CPL for, among other reasons, nondisclosure of material facts. The appeal was allowed without reference to the nondisclosure issue. Subrule 39.01(6) by its terms does not require that a CPL be discharged for material nondisclosure but gives the court a discretion to act upon that ground alone. I do not take the decision in *Mirrow Homes Ltd.* to be a decision to the effect that a court cannot, as stated in subrule 39.01(6) set aside an order obtained without notice on the sole ground that material information known to the moving party was not disclosed on the motion without notice. If it were, I would, with respect, decline to follow it.

53 Here, although the disclosures fell below the standard of full and fair disclosure in the ways that I have mentioned, I would not on that ground alone discharge the CPL pursuant to the authority conferred by subrule 39.01(6). Had the omitted disclosures been made, they might have resulted in a situation where, in the words of MacKinnon A.C.J.O. at p. 533 [O.R.] of *Chitel v. Rothbart* (1982), 30 C.P.C. 205, 39 O.R. (2d) 513, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268 (C.A.), "the facts took on a different hue" and so they *might* have made the order doubtful. Certainly they would not have made the issuance of the order more likely. However, the master would still have been faced with affidavits of

Kinsella and Balkou that there had been breaches of confidence and breaches by Coldwell, acting through Freedman, at a time when Coldwell was the agent of the vendors. Disclosure that Freedman and Bitove denied that the alleged breaches of confidence took place might have been seen as giving rise to one of the issues for trial and not as a reason for refusing to authorize the CPL. The master would know that a motion, such as this, to discharge the CPL could be brought by the vendors. The master apparently was of the opinion that on the facts disclosed there was a reasonable chance that, for breach of confidence, a constructive trust would, as claimed, be imposed upon the vendors. Given that view of the law, it cannot be said, in my opinion, that disclosure of the omitted items referred to above would have made the issuance of the order doubtful. The plaintiff's material before the master does not assert that the plaintiff was a substantial company, or fail to state that the property was agreed to be sold to a third party, or fail to show that damages were also claimed against all defendants, or state that the vendors, other than by way of Freedman and Glogowski, had given any confidentiality commitment. Nor did the plaintiff purport to have a written or even an oral agreement for the purchase of the property. In these circumstances, although there are serious nondisclosures of facts which must have been known not only to the principals of the plaintiff but also to their solicitors, I would not exercise the discretion to discharge the CPL on the sole basis of material nondisclosure.

54 The nondisclosures remain a factor and will have a bearing upon the result and upon the award of costs.

#### Statutory Provisions re Discharge of CPL

55 The statutory provisions dealing specifically with a discharge of a CPL are found in subs. 116(6) of the *Courts of Justice Act, 1984*, and are as follows:

(6) The court may make an order discharging a certificate,

(a) where the party at whose instance it was issued,

(i) claims a sum of money in place of or as an alternative to the interest in the land claimed,

(ii) does not have a reasonable claim to the interest in the land claimed, or

(iii) does not prosecute the proceeding with reasonable diligence;

(b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

#### The Tests on a Motion to Discharge a CPL

56 It is common ground that the onus is on the party seeking the discharge of a CPL to persuade the court that its discretion ought to be exercised in favour of the discharge.

57 Relying principally upon *Inwood v. Ivey*, [1939] 2 D.L.R. 101, [1939] O.W.N. 56 (H.C.) and *Galinski v. Jurashek* (1976), 1 C.P.C. 68 (Ont. H.C.), counsel for the respondent-plaintiff submits that a CPL should be discharged before trial *only* where the court is satisfied that the plaintiff's claim can in no circumstances give it any right to the lands, i.e., that there is a certainty that the claim to an interest to the lands will fail even if the plaintiff is able to prove all the facts it alleges.

58 While I am in agreement that genuine disputes as to issues of fact should not be decided on a motion such as this and that the issue of credibility and the merits of the case as to the facts dependent upon credibility should be left for

decision by the trial judge (see in this regard: *Holden Corp. v. Gingerfield Properties Ltd.* (1988), 30 C.P.C. (2d) 302, 65 O.R. (2d) 454 (H.C.) (O'Driscoll J.) and the as yet unreported decision of Lane J. in *Waxman v. Waxman* (January 24, 1991), Doc. 33234/88, D. Lane J. (Ont. Gen. Div.), [1991] O.J. No. 89), I am unable to accept that the discretion of the court is as narrowly confined as stated in *Inwood v. Ivey* or in *Galinski v. Jurashek*.

59 In the Divisional Court decision in *Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 Steele J., speaking for the court, after stating at p. 673 [O.R.] that the point to be decided there was whether or not, under predecessor statutory provisions, there was power to vacate a certificate of *lis pendens* when the action had been found not to be frivolous or vexatious, said at p. 674:

If the decisions in *Inwood v. Ivey* and *Galinski v. Jurashek* are to be followed strictly, then, there is no room for s. (3) of s. 42 [of the *Judicature Act* as then in force]. In my opinion, the Legislature contemplated that there would be special or unusual cases in which a Judge should have the discretion to determine whether or not a certificate of *lis pendens* should be vacated.

And at p. 674 Steele J. made the following often-quoted statement:

I am of the opinion that the governing test is that the Judge must exercise his discretion in equity and look at all of the relative [sic, relevant?] matters between the parties in determining whether or not the certificate should be vacated.

While it is true that in *Freedman v. Lawrence* (1978), 6 C.P.C. 24, 18 O.R. (2d) 423, 82 D.L.R. (3d) 747 (H.C.), Steele J., sitting as a trial judge, expressed the opinion [at p. 425 O.R.] that the decision in *Clock Investments* applied "only [...] to unusual cases rather than normal cases", later decisions under the current s. 116(6) have not so confined *Clock Investments*.

60 With respect to *Clock Investments* I should note that subs. 42(3) of the *Judicature Act* [R.S.O. 1970, c. 228] is similar to clause 116(6) of the *Courts of Justice Act, 1984*.

61 In *Sandhu v. Braebury Homes Corp.* (1986), 8 C.P.C. (2d) 22, 39 R.P.R. 10 (Ont. H.C.), Rosenberg J., on an appeal from a refusal by a district court judge to discharge a CPL, where the refusal was based on the grounds that there was a triable issue in the action for specific performance and that the claim was not frivolous or vexatious, held that in so limiting the court's discretion under s. 116 the district court judge exercised his discretion on a wrong principle, and so allowed the appeal. Rosenberg J. found, as had the court below, that there was a triable issue and that the claim was not frivolous and vexatious and, further, he agreed that s. 116 made no significant changes in the law as stated in the predecessor statutory provisions. However, Rosenberg J. took issue with the proposition that under s. 116 the basic principle was that a CPL should not be discharged unless it is shown there is no triable issue as to the plaintiff's right to specific performance. At p. 14 [R.P.R.] he states as follows:

The 'basic principle' referred to, and apparently followed by the learned District Court Judge, is supported by a number of cases: *Freedman v. Lawrence* (1978), 18 O.R. (2d) 423, 6 C.P.C. 24, 84 D.L.R. (3d) 747 (Ont. H.C.); *Galinski v. Jurashek* (1976), 1 C.P.C. 68 (Ont. H.C.); *Notarfonzo v. Goodman* (1981), 24 C.P.C. 127 (Ont. H.C.); *515924 Ont. Ltd. v. Greymac Trust Co.* (1984), 45 C.P.C. 80 (Ont. H.C.); and *Bernhard v. United Merchandising Enterprises Ltd.* (1984), 47 O.R. (2d) 520 (Ont. H.C.). *Notwithstanding the number of times that the Ontario High Court has considered the matter and confirmed the 'basic principle', I am of the view that the appropriate approach was enunciated by the Ontario Divisional Court in the case of Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 where Steele J. stated [at p. 674 O.R.]:

... the governing test is that the Judge must exercise his discretion in equity and look at all of the relevant matters between the parties in determining whether or not the certificate should be vacated.

[Emphasis added.]

62 I am in respectful agreement with that statement. The discretionary nature of an order to discharge a CPL was emphasized by Anderson J. in *Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd.* (1985), 5 C.P.C. (2d) 97, 37 R.P.R. 157 (Ont. H.C.), albeit in a case where damages were also claimed and were found to provide a satisfactory alternative remedy.

63 In *Sandhu*, supra, Rosenberg J. applied the above-quoted passage from *Clock Investments* without confining it to "unusual cases" as had been done in *Freedman v. Lawrence*, supra. As stated, I am in agreement with Rosenberg J. and do not find the language of any of s. 116(6)(a)(i) or (iii), of s. 116(6)(b) or s. 116(6)(c) to require, as a condition of the exercise of the discretion to discharge a CPL, that the court be satisfied that there is no triable issue as to the plaintiff's claim to an interest in the land or that the plaintiff's claim is frivolous and vexatious. Only in s. 116(6)(a)(ii) is the question of the plaintiff's claim to an interest in the land dealt with directly in the section, as *one* of the reasons for which a CPL may be set aside and even then the subdivision (a)(ii) speaks not of a triable issue but of "a reasonable claim" to the interest in the land.

64 The plain language of s. 116(6)(c) confers upon the court the discretion to make an order to discharge a CPL "on any *other* ground that is considered just". [Emphasis added.] Clause (c) does not speak of an *additional* ground but of any other ground, as an independent head of discretion.

65 I am of the opinion that the general test in *Clock Investments*, quoted above, applies generally and not only in special or unusual cases, but even if the opposite view were to prevail on that point, such general test would still be applicable here, because the basis for the plaintiff's claim to an interest in the property would, in my opinion, make this, in the words of Steele J. in *Freedman v. Lawrence*, supra, one of the "unusual cases rather than normal cases".

66 *Queen's Court Developments Ltd. v. Duquette* (1989), 36 C.P.C. (2d) 297 (Ont. H.C.), a decision of McNeely L.J.S.C., is another recent case in which the general test in *Clock Investments*, as quoted above, was applied without a finding that the case was an unusual one.

67 In *Waxman v. Waxman*, supra, Lane J. was dealing with a contested motion for a CPL. After stating that the test for granting a CPL is the same as the test on a motion to discharge one, he applied the general test in *Clock Investments* without indicating that it should be confined to "unusual" cases. At the sixth and seventh pages of the printout of the judgment, the following passage appears:

In my view, my duty is to examine the whole of the evidence as it stands after cross-examination and, without deciding disputed issues of fact and credibility, consider whether on the whole of the evidence the plaintiff's case constitutes a reasonable claim to the interest in land claimed.

68 Lane J. found that the evidence *did* disclose a triable issue or a reasonable claim to an interest in the land. However, he went on to state:

That being so, it is necessary to consider the equities relating to the ... property.

69 Clearly the finding of a reasonable claim to an interest in the land did not end the matter in *Waxman*, contrary to what is urged here on behalf of the respondent plaintiff.

70 The eight factors suggested in the judgment of Master Donkin in *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 (Ont.), are set forth at pp. 290 and 291 as follows:

The factors taken into account in the decided cases appear to include:

1. Whether the plaintiff is, or is not a shell corporation — *Peter & Martys (Front) Ltd. v. Market Block*, supra, at p. 99 [C.P.C.].

2. whether the land is, or is not unique (ibid) bearing in mind that in a sense any parcel of land has some special value to the owner — *Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 (Ont. Div. Ct.).
3. the intent of the parties in acquiring the land — *Tru-Style Designs Inc. v. Greymac Properties Inc.* (1986), 59 O.R. (2d) 462 at 479, 11 C.P.C. (2d) 117, 31 D.L.R. (4th) 253 (Ont. H.C.).
4. whether there is an alternative claim for damages.
5. the ease or difficulty of calculating damages — *Holden Corp. v. Gingerfield Properties Ltd.* (1987), 59 O.R. (2d) 304 at 310 (Ont. H.C.).
6. whether damages would be a satisfactory remedy — *Pete & Martys (Front) Ltd. v. Market Block*, supra, at pp. 101 to 102.
7. the presence, or absence of another willing purchaser — *Holden Corp. v. Gingerfield Properties Ltd.*, supra, at 310.
8. the harm done to the defendant if the certificate is allowed to remain, or to the plaintiff if the certificate is removed, with or without the requirement of alternative security — *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338 at 339 (Ont. H.C.).

The foregoing list does not purport to be exhaustive. One would not, for example, ignore the fact that here, in contrast with the situation in *Dhunna*, the plaintiff was not a party to any agreement, written or oral, to purchase the property.

#### **Evidence as to Equity Factors**

71 In applying the above-quoted test from *Clock Investments*, and in considering the factors referred to in *Dhunna*, and other relevant factors, I am mindful of the statement of D. Lane J. in *Waxman*, supra, quoted above, as to the narrow line that a motions court judge must walk with regard to disputed facts and how he must avoid assessing the credibility of the deponents.

72 However, when it came to a consideration of the equities and the role of the motions judge, Lane J. held that different considerations applied. At the tenth printout page of *Waxman* the following appears:

The evidence as to the equities stands on a somewhat different footing from evidence relating to facts of the main action itself. Unlike the facts of the main case the facts relating to the alleged equities are squarely before me for decision. It is for me to decide whether delay has been explained or damages shown to be an adequate remedy or the like, and, in that process, to evaluate the evidence for and against.

I am fortunate in this regard in that there were extensive examinations and cross-examinations and much reference to transcripts during a hearing that took the better part of two days and also that many of the facts relevant to the equities, or *Dhunna* factors, are not in dispute. Moreover, on the key question of the availability of the remedial constructive trust remedy that is the only asserted basis for the plaintiff's claim to an interest in the property, I can ignore disputes as to facts and accept the plaintiff's factual assertions at their highest, thus avoiding evidentiary questions.

#### **Plaintiff Does Not Have a Reasonable Claim to an Interest in the Property**

73 It is my opinion, with reference to subdivision 116(6)(a)(ii) of the *Courts of Justice Act, 1984*, that the plaintiff does not have a reasonable claim to an interest in the property. Taking the plaintiff's factual assertions at their highest, the plaintiff cannot show that the defendant vendors have been unjustly enriched. Their profit on the sale of the property will arise from their receipt of the market value of their asset, the property. It can be stated with certainty on this record

that, unlike the situation in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 [hereinafter *LAC*], the total benefit to the defendant vendors does not accrue through a single misuse of confidential information or from misuse of confidential information at all. The juridical reason for the enrichment of the vendors will be the sale of the property. The plaintiff may be entitled to damages against all or some of the defendants, that is not for me to decide, but even if the plaintiff is found to have a claim for damages those damages will not represent a detriment corresponding to an unjust enrichment, because if the sale to the Bitove Corp., or to anyone else, goes through, the profit, if any, of the vendors will not be an enrichment corresponding to the detriment suffered by the plaintiff, let alone an *unjust* enrichment. The facts in the case are very different from those in *LAC* where the *total benefit* was found to have accrued to a wrongdoer through a single misuse of information. In *LAC* the misused information *was* the thing of value and it was found to have been wrongfully appropriated, all of it. It should be remembered that in *LAC* R.E. Holland J. had found that the appropriation of the information was contrary to an established practice or custom in the mining industry in question.

74 It is correct to say that the majority in *LAC* held that a constructive trust could be imposed as a remedy for the consequences of a breach of confidence. It is also true that the remedy is available in some cases of breach of fiduciary duties. However, whatever the defaulted obligation, the remedy is not available unless the basic requirements for a constructive trust, as stated and developed in the cases, including *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384, *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, [1989] 4 W.W.R. 97, 36 B.C.L.R. (2d) 145, 45 N.R. 1, 59 D.L.R. (4th) 161, 2 T.C.T. 4178, [1989] 1 T.S.T. 2126, 41 C.R.R. 308 and *LAC* itself, and as broadly stated above, are met. Here those requirements are not met, and so it avails the plaintiff nothing to submit that the remedy of constructive trust is available for breach of confidence as for breach of trust. Indeed it is, but not in these circumstances.

75 I will not say much of the decision of Master Clark in *Davidson v. Hyundai Auto Canada Ltd.* (1987), 59 O.R. (2d) 789, because it deals with a fiduciary duty in circumstances much closer to *LAC* than are the undisputed facts in this case. The master followed the decision of R.E. Holland J. in *LAC* on the point that a breach of a fiduciary duty can give rise to an equitable interest in land, and the master went on to hold that such an interest will support a claim for a CPL. I agree that where there is a reasonable claim to an interest in land the claim should, other things being equal, support a CPL, but that simply does not mean that every claim to an equitable interest in land is a reasonable claim to such an interest simply because there is a *prima facie* case, or even an established case, of breach of fiduciary duty. The other criteria for the imposition of a constructive trust still have to be satisfied, and here they are not satisfied.

76 To return to *LAC*, La Forest J. at p. 45 (D.L.R.) concluded that *LAC* had been enriched at the expense of Corona; on the same page he expressed the opinion that the enrichment was "also unjust, or unjustified" and, referring to words of Dickson J. in *Pettkus v. Becker*, *supra*, stated that there was "an absence of any juristic reason for the enrichment". The restitutionary basis of the remedy is discussed at length by La Forest. At p. 48 he quotes from p. 273 [D.L.R.] of *Pettkus*, *supra*, that "the principle of unjust enrichment lies at the heart of the constructive trust".

77 Here, in my opinion, taking the plaintiff's evidence at its highest, the plaintiff does not have a reasonable claim to an interest in the property. The court may exercise its discretion to discharge the CPL on that ground alone.

#### **Other Factors, With Reference to Para. 116(6)(c) and Subdivision 116(6)(a)(ii) of the Act**

78 Although it is my opinion, taking the plaintiff's evidence at its highest (and so eliminating questions of credibility with regard to disputed facts) that the plaintiff does not have "a reasonable claim to an interest in the land" as referred to in subdivision 116(6)(a)(ii) of the Act, it is prudent (and it is relevant with regard to issues as to costs) to consider for the purposes of this motion, the equities or other factors disclosed in the record. I do so with particular reference to para. 116(6)(c) of the Act, which states that the court may make an order of discharge of a CPL "on any other ground that is considered just".

79 It is clear, in my view, from the wording of subs. 116(6) and from decisions such as *Pete & Martys (Front) Ltd.*, supra, and *Waxman*, supra, not only that the subsection confers a broad discretion upon the court but that a CPL may in a proper case be ordered discharged notwithstanding that the plaintiff has shown that he *has* a reasonable claim to an interest in the land in question.

80 The plaintiff has claimed damages not only against the defendant Coldwell but also against the vendors. Under subdivision 116(6)(a)(i) of the Act, the court may discharge a CPL where a sum of money is claimed in place of or as an alternative to the interest in the land claimed. Here the damages claimed against the vendors are in the same amount, \$5,000,000, as the damages claimed from the agent, Coldwell. The amount suggests an alternative claim although the claim is not expressed to be in the alternative. I would not have exercised my discretion to discharge the CPL on this ground alone. On the record, the land was unique and especially suited for the plaintiff's purposes. It cannot be said that the plaintiff's main aim in instituting the action was not the attainment of ownership of the property. However, in combination with other factors, including the plaintiff's knowledge that it did not have an agreement, oral or written, to purchase the property, the claim for damages against the vendors, as distinct from a claim for damages against the defendant agent, Coldwell, is a factor telling against the plaintiff under para. 116(6)(c) of the Act.

81 Turning to the factors listed in *Dhunna*, supra:

1. The plaintiff is a shell corporation, formed as a vehicle for the purchase and ownership of the property and having no significant assets. At the hearing before me there was submitted a letter dated June 3, 1991, addressed to the accountant of the Ontario Court (General Division) by a large Canadian chartered bank, stating that the bank was willing to issue an irrevocable letter of credit in the amount of \$200,000 "to stand as security for damages finally awarded by the court to" [the defendant vendors] "and for their costs, resulting from negotiation of" [the CPL]. The document is not an irrevocable letter of credit, and, given the plaintiff's own damage claims against the vendors and against Coldwell, each in the amount of \$5 million, and given the very extensive examinations and cross-examinations in this action, and given the fact that the property is already agreed to be sold to a purchaser which plans to use it for the same basic purposes as the plaintiff has, and for the added purpose of housing office operations now based in the high rental SkyDome itself, the \$200,000 amount, even if firmly committed, tends to show that the plaintiff is without, and has not shown access to, sufficient assets to pay the damages and costs for which it could easily become liable if the CPL were contained until trial and the trial court concluded that the plaintiff did not have a right to acquire the property.

2. The property is unique, having adequate space on its ground floor and appropriate zoning to permit the type of state-of-the-art sports bar contemplated by the plaintiff. The property is, however, at least as suitable for the third party, Freedove Holdings Limited, which also plans to operate a sports bar on the ground floor. The property is also particularly suitable for the third party in that its upper floors are planned to be used to house administrative functions of the businesses of the Bitoves, allowing such functions to be moved out of the SkyDome and yet to be close to the food concessions operated there. There is evidence that the Bitoves have been searching for such space for some time. The purpose of the vendors is to sell the property at a good price. They have an agreement for its sale to a party for which the property is every bit as unique and particularly suitable as it is to the plaintiff. In such circumstances the factor of uniqueness gives rise to competing claims, the advantage, if any, going to the vendors because of the strength of the claims of the third party and the vulnerability thereto of the vendors.

3. The question of the intent of the parties in acquiring the land is subsumed in this case in the discussion in 2. above.

4. There is here an alternative claim in damages, as discussed above. That remains a factor to be considered under para. 116(6)(c), although, as stated, I would not in this case have ordered the discharge of the CPL on that ground alone.

5. As to the ease or difficulty of calculating damages, it is apparent that, either way, damages would be difficult of calculation. The third party has an executed agreement of purchase and sale, entered into after rights of the plaintiff under the final counter-offer by the defendants had expired — and also after the expiry of the time allowed for acceptance of the last counter offer of the plaintiffs. If the plaintiff were to be successful at trial, the third party would doubtless be seeking the same sort of damages for loss of bargain as one claimed by the plaintiff, with some addition for the convenience of the location of the property for office purposes. In the circumstances, the difficulty that would be experienced in calculating damages is not, in my opinion, a factor favouring the maintenance in place of the CPL.

6. As to whether damages would be a satisfactory remedy, it can be seen that the plaintiff really does want the property, and so that damages would not be a satisfactory remedy. However, the same can be said for the third party, and about its strong claims against the vendors.

7. I have discussed in the foregoing the factor of the presence of another willing purchaser. Freedove has an executed agreement of purchase and sale, entered into by it in good faith and has demonstrated the unique value of the property to it, as part of the operations of the Bitoves.

8. As to the balance of the harms to be done to the plaintiff or the vendors, it has been made clear that the defendant, 616964 Ontario Inc., is in dire need of an early sale of the property. I have already discussed, above, the unique suitability of the property to the plaintiff. I should add an acknowledgement of the obvious competitive advantage that the plaintiff would obtain, as against the Bitoves, if it managed to acquire the property. It is reasonable to expect that the Bitoves would take steps to protect their position. Prima facie their agreement of purchase and sale would justify the issuance of an order permitting them to register a CPL of their own. In the delays that would ensue, Inducon would undoubtedly be hurt and the other vendor might be ruined. Although I have sought to examine this factor independently of my consideration of the plaintiff's claim to an interest in the land, it is not possible to divorce the two. The relative weakness in law of the plaintiff's claim to an interest in the land and the apparent strength of the claim of Freedove Holdings to the property, with its concomitant likelihood of delay and of heavy damage claims for the delay, make this a factor favouring the discharge of the CPL.

82 In addition to the factors above, and quite apart from my views on the question of the plaintiff's interest in the property, there are a number of factors militating in favour of the discharge of the CPL. First among these is the factor of the material nondisclosures referred to above. Nondisclosure of material facts is itself a factor in the balancing involved in determining what is just, and some of the matters not disclosed fall to be considered here as factors bearing independently upon the question of what is just. Thus, there is the evidence of both Tom Bitove and Freedman to the effect that Freedman did not disclose to the Bitoves details of the plaintiff's offer, or purposes, with respect to the property or at any material time their identity. Furthermore, there is the fact that the plaintiff at no time communicated directly with the vendors as to its desire for the utmost confidentiality with regard to its identity and business purpose and the fact and details of its offers — although there were meetings between the principals and the plaintiff's solicitor, Hoy, was in attendance. In the light of the testimony of Eric Beverley, there is at least a real possibility that the plaintiff's request for such confidentiality would have been refused — and it is quite possible that Hoy would have been aware of that. When it came to the motion for the CPL Mr. Hoy would have known through his involvement that the confidentiality requirement had never been pressed home directly with the vendors, despite many opportunities to do so. Certainly no option or right of first refusal was obtained, or paid for, by the plaintiff.

83 Taking all of the above-mentioned factors into consideration, including especially the claim for damages, the deficient disclosures, the existence of an agreement to sell to a third party, the fact that the plaintiff is a shell company, the knowledge that Tom Bitove and Freedman each denied the critical breaches of confidentiality, and the failure to communicate directly with the vendors, I find it just that the CPL be discharged notwithstanding the uniqueness of the property, the difficulties of calculating damages — and even if the plaintiff had been found by me to have had a reasonable claim to an interest in the property.

84 This is not in my opinion a case in which it is appropriate to provide the plaintiff with other security.

#### **Disposition**

85 Accordingly an order is to issue setting aside the above-mentioned order, dated April 17, 1991, of Master Clark and directing the discharge of the CPL.

86 With one exception the questions of the liability of the plaintiff for damages under subs. 116(4) of the Act and the quantum of any such damages shall be determined, as permitted by subs. 116(5) of the Act, in the action or in a separate proceeding. The one exception is that the plaintiff shall not be liable for any damage found to have been suffered by the vendor by virtue of the adjournment of the hearing of the motion from May 15, 1991, to June 5, 1991, as the delay suffered because of such adjournment resulted directly from the failure of the solicitors for the moving parties to provide a reasonably accurate estimate of the time to be taken by the hearing of the motion.

87 Even as it was, the almost two days taken for the hearing of this motion on June 5 and 6 resulted in my taking two days out of my ensuing judgment week to hear and dispose of other matters originally scheduled for June 5 and 6.

#### **Companion Motion under R. 20**

88 There was adjourned to be heard by me, at the same time as the motion to discharge the CPL, a motion by the vendors under R. 20 for a summary judgment dismissing the plaintiff's action and discharging the CPL, on the ground that the plaintiff is in default in respect of a statutory filing requirement and so not capable of maintaining the action except with the leave of the court. On behalf of the vendors it was submitted that there was accordingly no genuine issue for trial. In the companion motion there was also sought, under r. 56.01(1)(d), an order for security for costs. The companion motion was not seriously argued before me and the factums and oral arguments before me concentrated on the merits of the issues as to the discharge of the CPL.

89 In the circumstances, given the desirability of the determination of the CPL issue on its merits, the best way for me to deal with the companion motion was to grant leave to the plaintiff to respond to the motion for the discharge of the CPL without the plaintiff having cured the alleged default in respect of the filing requirement. I have done so, and have stayed the balance of the companion motion — in both its aspects — to be brought on by the plaintiff or any of the defendants on four days' notice to the other parties. My grant of leave is confined to the motion for the discharge of the CPL and is in no way intended to affect the balance of the companion motion as it may come before another motions court judge or the trial judge. I have so endorsed the record in the companion motion.

#### **Costs of the Motion to Discharge the CPL**

90 The vendors ask for their costs of this motion on a solicitor-and-client basis and that the order for costs be against the plaintiffs and against its solicitors.

91 I note that there is no provision in s. 116 of the Act or in R. 42 comparable to r. 20.06 stating:

20.06(1) Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party's costs of the motion on a solicitor and client basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.

Counsel for the vendors cites the decision of Reid J. in *Merker v. Leader Terrazzo Tile Mosaic Ltd.* (1983), 37 C.P.C. 1, 43 O.R. (2d) 632, 2 D.L.R. (4th) 117 (H.C.), where, on an appeal from an order of Master Peppiatt dismissing an application to set aside an ex parte order of Master Sandler that was obtained, as found by Reid J., on the basis of an utterly defective affidavit, it was ordered that costs throughout be paid to the opposite party on a solicitor-and-client scale, payable forthwith after taxation by the moving party's solicitor, without recourse. The main affidavit was that of a law student and it included the statement that specified facts were told to the deponent by a third party, which turned

out not to be true. The affidavit also lacked any statement that the deponent believed the statements to be true. Reid J. held that in the circumstances there was no legal basis for the order of Master Sandler, because the affidavit in question was not admissible. The information purported to be put forth was also held to be materially misleading and deliberately so. That case is different from this one in a number of obvious ways.

92 I have also been referred to my decision in *Passarelli v. Di Cienzo*, supra, where, on a successful appeal from a refusal to discharge a CPL obtained on a motion without notice [May 10, 1988, Master Garfield, Ont.], I allowed the appeal on the grounds of grossly inadequate disclosure of material facts on the ex parte motion and, in the alternative, because damages were claimed and were a sufficient remedy and, cumulatively, because the *Dhunna* factors made it just to do so. The appellant was awarded costs throughout and it was stated that, although I would not award costs against the solicitors without giving them an opportunity to be heard on the issue, I would, because the nondisclosures and the other weaknesses of the plaintiff's case and the impecuniosity of the plaintiff were all known to the plaintiff's solicitors, entertain a motion that any part of the costs that the appellants proved unable to recover from the respondent plaintiffs should be paid by the solicitors for such party. There the damages were not on a solicitor-and-client scale nor were they contemplated to be without recourse if paid by the solicitors.

93 Here a without-recourse award against the solicitors is not being sought nor will it be made.

94 However, the costs of this motion will be considerable, based not so much upon the two-day hearing as upon the very extensive examinations and cross-examinations of many persons.

95 The solicitors were involved throughout, and bear a significant share of the responsibility for the nondisclosures of material facts referred to above. They were in a position to assess the crucial differences between the facts in this case and those in *LAC*, supra, with regard to the availability of the constructive trust remedy. They knew that there was no option or right-of-first refusal agreement and that the plaintiff's desires for confidentiality were never brought home by them or by representatives directly to any officer of the vendors. They knew that the plaintiff was a shell company and that it was claiming damages from the vendors and that, after the expiry of all offers and counter-offers involving the plaintiffs, the property was agreed to be sold to a third party.

96 In the circumstances it would be unjust to confine the successful vendors to party-and-party costs against the plaintiff corporation alone, but it is reasonable to assume that the cross-examinations and other examinations will have some value in the action for damages. An order for solicitor-and-client costs of this motion would be excessive, notwithstanding the nondisclosures, because I held that I would not have ordered the discharge on the ground of nondisclosure alone. In my opinion, the appropriate order is that the vendors shall have two-thirds of their solicitor-and-client costs against the plaintiff and its solicitors, the obligations of the solicitors to be with recourse to the plaintiff and to any available guarantor of the plaintiff's obligations. Such costs are to be payable in any event of the cause and the amount thereof shall be excluded in any application for security for costs. Unless it can be agreed, written submissions as to the quantum of such costs are to be made to me, with the submissions on behalf of the plaintiff to be served and filed within 10 days of the service upon counsel for the plaintiff of the written submissions of the vendors as to such costs. The vendors are to make their submissions as to costs within a month of the date of issue of these reasons.

*Order accordingly.*

**TAB 3**

1988 CarswellOnt 408  
Ontario Supreme Court

Aztec Investments Ltd. v. Wynston

1988 CarswellOnt 408, 10 A.C.W.S. (3d) 259, 27 C.P.C. (2d) 238, 64 O.R. (2d) 733

**AZTEC INVESTMENTS LTD. et al. v. WYNSTON et al.**

Master Garfield

Judgment: June 3, 1988

Docket: No. 26477/87

Counsel: *S. Secord*, for moving parties (defendants).

*G. Shelley*, for responding parties (plaintiffs).

Subject: Civil Practice and Procedure; Property

MOTION by defendants for order discharging certificate of pending litigation.

***Master Garfield:***

1 The defendants seek to discharge the certificate of pending litigation based upon several grounds, namely:

(1) the plaintiffs have no reasonable claim to an interest in the material property pursuant to s. 116 of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11;

(2) the plaintiffs' real and in effect, only complaint, is that the material property was sold for an inadequate sum of money and that the defendants can be protected by another form of security under s. 116(6)(b);

(3) the property has been sold to a bona fide purchaser so that under equitable grounds under s. 116(6)(c) the certificate of pending litigation should be discharged on the balance of convenience;

(4) the plaintiffs failed to disclose all relevant facts on seeking the order of mine, dated February 25, 1988, for obtaining a certificate of pending litigation;

(5) the plaintiffs did not proceed expeditiously in pursuing their rights (they found out about the certificate in mid-August 1987 and failed to pursue this action until March 17, 1988, approximately 8 months later. Their lawyer sent a letter dated August 1987 complaining of the plaintiffs' non-consent to the agreement of purchase and sale, but nothing else).

2 Even granting the plaintiffs' interest in land, the material reveals that the plaintiffs were interested only in obtaining the maximum amount for the sale of the lands, being the owner of 50 percent of the syndicate formed to hold the material property. It is clear that the joint-venture agreement, dated May 10, 1979 between the parties and the further amending agreements (2) of even date, provided that the material property could not be sold except by the unanimous written consent of all the parties.

3 The evidence fails to reveal such written consent. It is contended by the defendants that the plaintiffs through Mr. Samuel Roy, general manager of each of the plaintiffs, consented to the sale of the property under the agreement of purchase and sale between Creanona Estates Ltd. (the joint venture vehicle for holding the material lands) as vendor,

and 344071 Ontario Ltd., in trust, as purchaser, for the sum of \$1.6 million. This offer was dated August 6 and 7, 1987, but apparently was finally completed by initialling of some minor amendments on August 13, 1987.

4 As mentioned, the main complaint of the plaintiffs is the inadequacy of the sale price. The plaintiffs' evidence is that 85 rather than 73 lots could readily be approved by the City of Stoney Creek, but the recommendation of the city's manager of development control and urban design, set out in subdivision report No. S87-32 indicates that Creanona Estates Limited's plan of subdivision asking for 83 rather than 73 lots through the addition of five culs-de-sacs was not recommended or approved. The evidence further reveals, in my view, that the application to the Ontario Municipal Board to obtain the added number of lots would be time consuming, creating delay and greater expenses, both legal and financing, negating any greater amount which speculatively might accrue from the sale of eight more lots (75 were eventually approved) even if the Ontario Municipal Board application was successful.

5 I have considered the substantial amount of material filed on this motion and have some doubts as to the lack of full disclosure on the motion without notice to obtain the order before me on February 25, 1988.

6 The letter of Mr. Roy to Prousky and Biback, dated August 17, 1987, was omitted. It would have demonstrated the delay from mid-August 1987 to the time of the Roy affidavit, sworn February 25, 1988, in instituting the action after learning of the sale, ostensibly without the plaintiffs' knowledge or consent. Similarly, the plaintiffs' lawyers' letter of Carson, Poultney, to Mr. Wynston, dated August 21, 1987. A combination of those two letters would have led to an inference that the plaintiffs were not concerned about the lack of consent but the inadequacy of the sale price.

7 In addition, the plaintiffs failed to include the letter of Gordon, Traub to Mr. Poultney, dated August 24, 1987, again relating to the delay and the possibility of damages as an alternative to the claim for an injunction preventing the exercising of further action by the defendants Michael Wynston and Paul Roth, trustees under their notice of sale under mortgage and an injunction restraining the defendants from selling the property under the agreement of purchase and sale, dated August 7, 1987.

8 Further lack of disclosure was reflected in the plaintiffs' failure to advise of the plaintiffs being in default of their agreements with the defendants to the amount of approximately \$400,000.

9 All of the above aside, the property has not been shown to be unique in nature, but simply one purchased for the purpose of developing and/or selling for a profit. A net profit of approximately \$200,000 can be achieved if the sale is made as scheduled on June 30, 1988. The deny the bona fide purchaser the right to purchase under its agreement with Creanona would be unjust and indeed, having regard to the evidence before me, patently unfair to the defendants.

10 Based on non-disclosure, this certificate of pending litigation could have been discharged, *see J & P Goldfluss Ltd. v. 306569 Ont. Ltd. (1977)*, 4 C.P.C. 296 (Ont. H.C.).

11 But under s. 116(6)(b) the most equitable determination is to give other security in lieu of the certificate of pending litigation. In *Clock Investments Ltd. v. Hardwood Estates Ltd. (1977)*, 16 O.R. (2d) 671, 79 D.L.R. (3d) 129, a decision of the Divisional Court, the certificate of pending litigation was discharged on the basis that the real estate was only an investment property with no unique value to any of the parties.

12 Justice can be achieved by an order granting a discharge of the certificate of pending litigation with the plaintiffs, if successful at trial, in the position to achieve their goal of an increase in the sale price or net profit, through an award of damages against the defendants. In the result, the certificate of pending litigation shall be discharged, on the payment into Court of the net proceeds of the sale to the credit of this action pending further order of this Court or on the consent of the parties in writing. Rather than payment into Court, the net proceeds may be used to invest in bank certificates or other similar investments, if approved in writing by the parties pending the disposition of the action.

13 Costs shall be in the cause.

*Motion granted on terms.*

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**TAB 4**

2008 CarswellOnt 3311  
Ontario Superior Court of Justice

Baker v. Jakobek

2008 CarswellOnt 3311, [2008] O.J. No. 2221, 168 A.C.W.S. (3d) 199

**Baker v. Jakobek et al**

Master B. Glustein

Heard: May 26, 2008

Judgment: June 5, 2008

Docket: 07-CV-344278PD1

Counsel: J.W. Kramer, A. Dhillon for Plaintiff  
H.S. Dorsey for Defendants, Tom Jakobek, Romlek Enterprises Inc.  
G.R. Solomon for Defendant, Beach Park Homes Inc.

Subject: Property; Civil Practice and Procedure

APPLICATION by plaintiff for security as term of discharging certificate of pending litigation registered on title to property.

**Master B. Glustein:**

**Nature of the motion**

1 The issue before me is whether I should order security as a term of discharging the certificate of pending litigation (the "CPL") registered by the plaintiff Bruce Baker ("Baker") on title to the property municipally known as 12 and 14 Glen Manor Drive, Toronto, Ontario ("Glen Manor"). The CPL was registered pursuant to the *ex parte* order of Master Peterson dated November 27, 2007.

2 Baker seeks an order that 25% of the proceeds from the sale of the four town homes on Glen Manor less any payments in full to the mortgagees of Glen Manor be paid into court until trial of the action. The defendants Tom Jakobek ("Jakobek") and Romlek Enterprises Inc. ("Romlek") (collectively, the "Romlek Defendants") submit that no security should be ordered. The defendant Beach Park Homes Inc. ("Beach Park") adopts the submissions of the Romlek Defendants but made no submissions at the hearing.

**Earlier orders on this motion**

3 On February 11, 2008, Beach Park brought a motion returnable February 22, 2008 to discharge the CPL (the "Discharge Motion"). I adjourned the Discharge Motion to March 5, 2008 on terms including a schedule for cross-examinations and delivery of Baker's factum.

4 On February 25, 2008, the parties consented to an order under the following terms:

(i) The parties consented to a discharge of the CPL without prejudice to the rights of the parties to make submissions as to the terms of the discharge at the return of the Discharge Motion;

(ii) On an interim basis and without prejudice to the right of the Romlek Defendants to argue otherwise at the return of the Discharge Motion, no monies would be paid out of the "project" (a term not defined in the order) to the Romlek Defendants until further order of the court; and

(iii) Baker would formalize the terms he was seeking for the discharge of the CPL prior to the cross-examinations to be scheduled by the parties.

5 Given that the parties agreed to discharge the CPL, the remaining issue on the Discharge Motion is what terms, if any, ought to be imposed as a condition of discharging the CPL.

**The action**

6 The action arises from Baker's alleged agreement that he was to receive a 25% interest in Glen Manor and 25% of the gross profits of its redevelopment into four town homes.

7 The evidence below is taken from the many affidavits and transcripts of cross-examinations for this motion.

**(a) Background**

8 Baker is a former real estate agent with particular expertise in the redevelopment of in-fill properties in the Beaches area of Toronto.

9 Baker has known Jakobek for approximately 25 years. Jakobek and his wife own Romlek. Beginning in 2005, Baker assisted Jakobek and Romlek with the purchase and redevelopment of properties in and around the Beaches.

10 In August 2006, Jakobek requested Baker's assistance with respect to the purchase of Glen Manor.

11 Jakobek reached an agreement with a builder named Richard Wilson ("Wilson") whereby Wilson would acquire the adjacent property at 60 and 62 Hubbard Boulevard ("Hubbard") through LB Capitol Inc. ("LB Capitol"), a company owned by Wilson's wife.

12 The plan was for the two properties (Glen Manor and Hubbard) to be developed in one project of six town homes: four on Glen Manor Drive and two on Hubbard Boulevard (the "Project").

**(b) The parties' positions on the agreement concerning Baker's involvement in the purchase of Glen Manor**

13 The Romlek Defendants' position is that Jakobek retained Baker for an agreed fee of \$50,000 to assist the Romlek Defendants in the purchase of Glen Manor, with Baker agreeing to:

(i) act as nominee or bare trustee as the purchaser of Glen Manor; and

(ii) assist in (a) making arrangements to have the existing tenants of Glen Manor terminate their tenancies and (b) relocating these tenants.

14 Jakobek's evidence is that he wanted Baker to act as nominee or bare trustee in order to conceal Romlek and Jakobek's involvement in the Project from public knowledge. Jakobek's evidence is that he had encountered political interference and obstruction in other projects when his identity was publicly disclosed.

15 Baker's position is that he and Jakobek agreed that Baker would receive (i) a 25% equitable interest in Glen Manor and (ii) a 25% share in the gross profit from the sale of the four town homes to be constructed on Glen Manor.

16 Baker alleges that he and Jakobek agreed that:

(i) Baker would enter into an agreement of purchase and sale for Glen Manor for a company to be incorporated;

(ii) Prior to closing, Romlek and Baker would incorporate a company to close the purchase and hold Glen Manor in trust, 75% for Romlek and 25% for Baker;

(iii) Romlek would pay the deposit due under the purchase agreement, finance the closing of the purchase agreement, and finance the construction of the town homes for sale;

(iv) Baker would negotiate the agreements of purchase and sale for both Glen Manor and Hubbard, undertake the re-zoning for Glen Manor, obtain the necessary permits for demolition of the existing building on Glen Manor, terminate the existing tenancies that were on Glen Manor, and generally undertake other administrative steps to further the Project; and

(v) Baker would receive 25% of the gross profits from the sale of the four town homes to be constructed on Glen Manor.

17 There is no written agreement to support either of the positions described above as to the agreement between Baker and Jakobek. However, there is some evidence to support both positions.

18 Jakobek's position is supported by evidence that Baker and his brother Ronald Baker<sup>1</sup> acted in similar capacities for other Romlek-acquired properties, always on a fee for service basis. There is no prior course of conduct or dealings between Baker or Ronald Baker on the one hand, and Jakobek or Romlek on the other hand, similar to Baker's alleged agreement. Jakobek submits that it makes no commercial sense to agree to give Baker 25% of the profits in the sale of four town homes to be constructed on Glen Manor when Baker had no financial investment, no monetary risk, and a limited role.

19 Baker agrees that in his previous transactions for which he had assisted Jakobek (i) the purchaser was always Romlek and (ii) Baker was paid a fee for services provided. However, in this matter, Baker's evidence is that Jakobek told Baker that because of Baker's efforts and expertise, Baker should obtain an interest in Glen Manor together with Romlek so that Baker could earn some "real money". Baker's position is supported by the following:

(i) Jakobek's allegation that Baker was a bare trustee to conceal the Romlek Defendants' involvement in Glen Manor from public knowledge is belied by the fact that on at least ten written offers for properties in Toronto made by Jakobek or Romlek between December 2004 and May 2006, no trustee was used (the "Romlek Offers");

(ii) Jakobek's explanation is that no trustee was used in the Romlek Offers because a clause in those offers allowed rezoning applications to be made in the vendor's names (thereby avoiding disclosure of Romlek's identity until after permits were obtained). However, that explanation is belied by the fact that the Romlek Offers do not contain such a clause;

(iii) Further, a clause permitting rezoning applications by the purchaser in the vendor's name was contained in Baker's agreement of purchase and sale of Glen Manor (defined as the "Baker Purchase Agreement" below), so under the Romlek Defendants' position, no bare trustee would have been required; and

(iv) Jakobek's evidence is that he retained Baker's brother, Gordon Baker, to prepare a trust agreement to be signed by Baker. However, Jakobek cannot recall when or how he asked Gordon Baker to draft the trust agreement. Further, Jakobek took no steps to follow up with Gordon Baker to confirm that any trust document was created.

**(c) The Baker purchase of Glen Manor**

20 On August 16, 2006, Baker entered into an agreement of purchase and sale with the vendor Joe Klein ("Klein"), to purchase Glen Manor (the "Baker Purchase Agreement"). Baker purchased Glen Manor for a company to be incorporated. The purchase price was \$1.7 million and the closing was scheduled for September 2, 2007.

*(d) Retainer of O'Reilly, Moll and Forrest*

21 The defendant David J. Moll ("Moll") of the defendant law firm O'Reilly, Moll and Forrest was retained to act as solicitor for the purchase of Glen Manor.

22 Baker is a residential tenant in a building owned by Moll.

23 Baker's evidence is that he retained Moll on October 4, 2006 to act on the purchase of Glen Manor and that he delivered to Moll a copy of the Baker Purchase Agreement on that date (at the same time that Baker paid his rent to Moll and Moll gave Baker a receipt for the rent).

24 Moll's evidence is that Jakobek retained Moll on the Glen Manor purchase in late January or early February 2007 and that Moll only received copies of both the Baker Purchase Agreement and the agreement for purchase and sale of Hubbard at that time. Moll's evidence is that his client was Jakobek, not Baker.

25 There is evidence to support Baker's position that he retained Moll. Moll opened the Glen Manor purchase file under Baker's name and Moll's evidence is that it was his practice to open files under the names of his clients. By way of contrast, Moll opened a file in the name of "Tom Jakobek re Richard Wilson" in relation to Hubbard.

26 The Romlek Defendants adopt Moll's evidence on the retainer issue.

*(e) Events leading to the new agreement*

27 After December 31, 2006, the relationship between Baker and Jakobek became strained. There is a dispute as to the reason for the strained relationship. Baker's evidence is that the strain arose as a result of a dispute between Baker and Jakobek on an unrelated matter. Jakobek's evidence is that the strain arose because of Baker's alleged conduct in dealing with the tenants on Glen Manor.

28 Baker's evidence is that Jakobek became generally inaccessible and uncommunicative with Baker. Jakobek's evidence is that Baker became unavailable prior to closing, as discussed in more detail below.

29 On February 16, 2007, the Baker Purchase Agreement was amended to reduce the purchase price to \$1,665,000 and to move forward the closing date to May 1, 2007. The amended Baker Purchase Agreement referred to Baker as the purchaser for a company to be incorporated. Gordon Baker signed the amendment on Baker's behalf.

30 Moll's evidence is that he needed Baker to sign a direction prior to May 1, 2007 so that title to Glen Manor could be taken in the name of Beach Park. Moll's evidence is that (i) he told Jakobek that Moll needed Baker's signature on the direction and (ii) he tried to contact Baker in March and April 2007.

31 Jakobek also gave evidence that the Glen Manor purchase did not close on May 1, 2007 because Baker was unavailable. The Romlek Defendants allege that this position is supported by Moll's July 16, 2007 reporting letter on the new agreement in which Moll refers to difficulties in contacting Baker.

32 However, there is evidence to support Baker's position that he was available and never sought to avoid contact with Moll or Jakobek. The evidence can be summarized as follows:

(i) Baker's evidence is that he met with Moll at a political fundraiser on April 24, 2007 (a meeting which Moll acknowledges). Baker says he asked Moll about the progress of the purchase at the fundraiser. Baker's evidence is that at the fundraiser (a) Baker told Moll that Baker was expecting to receive a good deal of money from the transaction and (b) Moll advised Baker that the "matter was proceeding along the normal track". Moll says that he told Baker at the fundraiser that Moll needed to get the direction signed;

(ii) Moll's evidence is that he made no attempt to contact Baker after April 24, 2007, as a result of Moll's discussions with Jakobek. Counsel for the Romlek Defendants claimed privilege on the contents of those discussions; and

(iii) Moll had the opportunity to communicate with Baker if required since Baker was Moll's tenant. In fact, Moll served Baker with eviction proceedings in May 2007 at the rented premises Moll owned.

33 The Baker Purchase Agreement was extended to June 1, 2007, with Moll advising vendor's counsel that all other terms of the Baker Purchase Agreement were to remain the same. However, as discussed above, Moll made no further efforts after April 24, 2007 to contact Baker.

34 Jakobek's evidence is that he made phone calls to reach Baker prior to creating the new agreement and believes that he left messages to that effect. However, Jakobek cannot recall how many calls he made, the telephone numbers he called, or where or how he called Baker.

35 Further, immediately prior to the new agreement Baker executed and delivered a letter of authorization dated May 22, 2007, prepared by Moll, permitting the submission of an application for a demolition and construction permit for Glen Manor.

***(f) The new agreement***

36 On May 17, 2007, Moll and Jakobek had a conversation which caused Moll to create a new agreement of purchase and sale for Glen Manor which excluded Baker from the transaction (the "new agreement"). Moll refused to disclose any particulars of the conversation because the Romlek Defendants claimed privilege.

37 The purchaser in the new agreement was Moll's secretary, in trust for a limited company. Moll did not have an executed version of the new agreement in his file.

38 Without Baker's knowledge or consent, the new agreement closed on June 4, 2007. Baker did not agree to the assignment or transfer of the Baker Purchase Agreement to Beach Park, nor did he instruct Moll to assign or transfer the Baker Purchase Agreement to any party. Moll never advised Baker that the purchase of Glen Manor was going to proceed in a manner contrary to the Baker Purchase Agreement signed by Baker.

39 The vendor, Klein, consented to the cancellation of the Baker Purchase Agreement, but only after Klein demanded and received an indemnity from Jakobek and Romlek to protect Klein "from any and all liabilities of whatsoever kind arising out of [the Baker Purchase Agreement]".

***(g) Efforts by Baker to address concerns about the new agreement***

40 On or about May 22, 2007, upon hearing a rumour that the sale of Glen Manor had closed, Baker telephoned Jakobek to inquire as to what was happening and Jakobek told Baker that Baker was "fucked" and then hung up the phone.

41 After closing, Baker attempted to negotiate with Jakobek through Gordon Baker. In October 2007, Baker was advised that Jakobek was refusing to pay anything to him.

***(h) The current state of the project***

42 All six town homes on Glen Manor and Hubbard have been sold, and have scheduled closing dates in July 2008. The total proceeds from the sales will be \$9 million with an average purchase price of \$1.5 million.

43 Wilson, in his capacity as president of Beach Park (and the affiant for Beach Park on this motion) refused to produce copies of the agreements of purchase and sale for the town homes, or the Project's *pro forma* statements and budgets.

## Analysis

44 The Romlek Defendants raise three arguments as to why I should not order security as a term of discharge of the CPL:

- (i) Baker failed to make full and fair disclosure of all material facts when he obtained the *ex parte* order for the CPL;
- (ii) Baker does not have an interest in land; and
- (iii) In any event, security is not appropriate as there is no evidence as to the harm Baker might suffer if an order for security is not granted.

I address each of these arguments in turn.

### (a) Full and fair disclosure

#### (i) Applicable legal principles

45 Rule 39.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, requires that a moving party on a motion made without notice must make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion.

46 The moving party on a motion without notice must go further than to simply annex exhibits to the supporting affidavit and instead must disclose in the body of the affidavit all of the material facts that are relevant to the consideration of whether the *ex parte* relief should be granted (*830356 Ontario Inc. v. 156170 Canada Ltd.*, 1995 CarswellOnt 4360 (Ont. Gen. Div.) at paras. 20, 23).

47 The moving party on an *ex parte* motion must not mislead the court by omission or attempt to paint a false picture of the material facts (*Passarelli v. Di Cienzo*, 1989 CarswellOnt 366 (Ont. H.C.)).

48 A material fact is a fact "non-disclosure of which may affect the outcome of the motion" (*Bronfman v. Bronfman* (2000), 51 O.R. (3d) 336 (Ont. S.C.J.) at para. 78, citing other relevant case law on this issue). Consequently, an inadvertent error about information superfluous to the relief sought is not sufficient to set aside an *ex parte* order (*Girsberger v. Kresz*, [1998] O.J. No. 911 (Ont. Gen. Div.) at para. 29; leave to appeal refused [1998] O.J. No. 2392 (Ont. Div. Ct.)).

#### (ii) Application of the law to the present case

49 The Romlek Defendants raise six instances of alleged failure by Baker to disclose material facts in his affidavit sworn November 23, 2007 in support of the *ex parte* order for the CPL (the "November 2007 Affidavit"):

- (i) Baker made no reference to Hubbard or the involvement of Wilson;
- (ii) Baker painted a false picture of the extent of his involvement with respect to Glen Manor, and in particular with respect to his role in (a) obtaining the rezoning of Glen Manor and (b) terminating the tenancies on Glen Manor;
- (iii) Baker misrepresented that he had no knowledge of what had happened to Glen Manor in the time period leading up to the new agreement, since he allegedly would have known of those events through his brother, Gordon Baker;
- (iv) Baker failed to disclose that he did not cooperate with the closing of the purchase of Glen Manor and that Baker did not respond to numerous telephone calls from Moll to Baker;
- (v) Baker failed to disclose that Jakobek had a longstanding relationship with Moll; and

(vi) Baker failed to disclose that prior to the alleged oral agreement upon which Baker relies, Jakobek agreed to finance the whole Project.

I will address each of these alleged misrepresentations or omissions in turn.

**(1) Hubbard**

50 Baker swore an affidavit on February 20, 2008 (the "February 2008 Affidavit"), in response to the affidavits filed by Wilson and Jakobek in support of the Discharge Motion.

51 Baker's evidence in the February 2008 Affidavit is that Baker was involved with Hubbard in that he (i) drafted and prepared the agreement of purchase and sale for Hubbard, (ii) negotiated the terms of the purchase and sale of Hubbard with the vendors, (iii) presented the offer to Wilson for review and execution, (iv) obtained and witnessed the signatures of Wilson and the vendors thereby finalizing the agreement of purchase and sale, and (v) negotiated an easement and right of way over 56 Hubbard Boulevard, a property adjacent to Hubbard, for parking and construction purposes.

52 Even though the defendants, including the Romlek Defendants, deny any involvement by Baker in Hubbard, the Romlek Defendants submit that Baker should have referred to Hubbard or the interest of Wilson in the November 2007 Affidavit since a certificate of pending litigation would affect both Hubbard and the interest of Wilson.

53 The issue for disclosure on the CPL was whether Baker knew or ought to have known of facts demonstrating a connection between the two properties that might have affected Master Peterson's decision to grant the CPL.

54 The Romlek Defendants rely on a mortgage which was referenced in one line of a title abstract of Glen Manor attached as an exhibit to the November 2007 Affidavit. The Romlek Defendants allege that the mortgage is registered against both Glen Manor and Hubbard and that disclosure of the mortgage might have affected Master Peterson's decision to grant the CPL.

55 None of the defendants filed evidence demonstrating that the mortgage in question was registered against both Glen Manor and Hubbard. However, in a separate motion by the mortgagee to discharge the CPL which was not pursued after the February 25, 2008 consent order, there was evidence that the mortgage was on both Glen Manor and Hubbard.

56 Given my analysis below, even if there was a single mortgage on Glen Manor and Hubbard, Baker did not know and ought not to have known of that fact. Consequently, while I do not decide whether there was admissible evidence as to the mortgage before me on the Beach Park motion, I accept for the purposes of my analysis that there was a single mortgage on Glen Manor and Hubbard.

57 I do not accept the submission of the Romlek Defendants that Baker should have investigated the mortgage on Glen Manor so that he could have (i) obtained an understanding that the mortgage affected both properties and (ii) then disclosed that information to the court. There is no evidence that Baker knew or ought to have known about the financing of Hubbard or Glen Manor.

58 Baker's evidence is that Jakobek was to arrange all corporate matters, and Jakobek's evidence is that Baker was a bare trustee or nominee. Under either version of the evidence, there is no basis to conclude that Baker knew or ought to have known about financing of Glen Manor or Hubbard.

59 Consequently, there is no evidence that Baker knew or ought to have known that the mortgage affected Hubbard based on a one-line reference to a mortgage in a property abstract on Glen Manor.

60 Even if the properties were treated as "effectively one property and cannot be dealt with separately or individually" (as alleged by Wilson in his affidavit), and even if the evidence of the single mortgage on both properties might have been relevant to granting the *ex parte* order for the CPL (an issue I do not decide as Baker may have

been entitled to a certificate of pending litigation even if another property were affected), there is no evidence that this information was in Baker's knowledge or reasonably ought to have been in his knowledge, and as such Baker could not have misled the court by failing to include it.

61 The mortgage against Hubbard is not mentioned in the abstract. The title abstract was attached only to demonstrate to the court that Beach Park had become the owner of Glen Manor. There was no attempt to mislead the court on that evidence.

62 The issue is not what Baker could have known about the mortgage by investigating the reference in the title abstract. Rather, the issue is what Baker knew or ought to have known about the mortgage. On the evidence before me on this motion, I find that Baker did not know or ought to have known that the same mortgage on Glen Manor would also have been on Hubbard.

63 There is no evidence that Baker had any knowledge about how a certificate of pending litigation on Glen Manor would affect Hubbard. Baker never claimed an interest in Hubbard, and while he swears in the February 2008 Affidavit that he was involved with Hubbard as part of his work to benefit the Glen Manor site, this evidence is led as additional information to support Baker's claim for an equity interest in Glen Manor.

64 Even if Baker had disclosed his involvement with Hubbard in the November 2007 Affidavit, that involvement *per se* (i.e. his involvement with the Hubbard agreement of purchase and his role in obtaining an easement and right of way over a property adjacent to Hubbard) would not have affected the granting of the CPL. Such evidence may have even assisted Baker in demonstrating why he claimed an equitable interest in Glen Manor, as Baker could argue that there was no reason for him to take all of these steps in relation to Hubbard if he were only acting as bare trustee or nominee.

## (2) Baker's involvement with Glen Manor

65 The Romlek Defendants submit that Baker painted a false picture in his November 2007 Affidavit as to his involvement with Glen Manor by (i) intimating that he was solely responsible for the rezoning application and dealing with the Committee of Adjustments and (ii) overstating his role in terminating the tenancies.

### A. Rezoning issues

66 With respect to the rezoning issues, as noted above, Baker swore in his November 2007 Affidavit that the agreement between Baker and Jakobek was that Baker would receive a 25% beneficial interest in Glen Manor and 25% of the gross profits of sale of the town homes in return for, *inter alia*, Baker's work to "undertake the re-zoning for the property". Baker's evidence in his November 2007 Affidavit was that:

(i) he "immediately proceeded with the rezoning of the property";

(ii) he "signed applications to the Committee of Adjustments and attended hearings of the Committee on November 22 and December 6, 2006";

(iii) "On December 7, 2006, my application to the Committee of Adjustments...to severe [sic] the property into four separate parcels was given conditional approval"; and

(iv) "On December 8, 2006, my minor variance application to the Committee of Adjustments...for consent to demolish the existing dwellings on the property and build town houses on the severed lots was given conditional approval".

67 Jakobek gave evidence that he retained Adam Brown ("Brown"), a lawyer in the firm Sherman Brown Dryer and Karol in respect of the rezoning of the Property, and that "at no time was the Plaintiff engaged or undertook, the rezoning of the property and/or to obtain permits for demolition".

68 In his February 2008 Affidavit, Baker swears that he attended at the hearings, appeared before the committee as the applicant, negotiated an agreement with a tenant during one committee meeting so that she would not oppose the application, met or spoke with various neighbours to seek their support, negotiated another agreement with a neighbour to approve the application, and attended at Brown's office to sign papers. At all times, Baker swears that both Brown and Baker understood that Baker was (i) the applicant and (ii) Brown's client in relation to the application before the Committee of Adjustments.

69 The above evidence does not demonstrate a failure by Baker to disclose material facts. Baker does not deny that Brown appeared at the meetings and made submissions, but this is not inconsistent with Baker's evidence that Baker took steps to ensure the rezoning would be approved. Having a lawyer act for an individual to obtain relief does not take away from that person's involvement in that process.

70 There is a difference of opinion as to who was principally involved in rezoning. This is a dispute for a trial judge to resolve, but not a failure to disclose material facts. Had Baker referred to Brown in his November 2007 Affidavit (as he did in his February 2008 Affidavit), it cannot be said that such information might have affected the decision to grant the CPL. To the contrary, working with counsel towards rezoning issues would have been just as consistent with Baker's position as to his involvement.

#### ***B. Termination of tenancies on Glen Manor***

71 With respect to the termination of tenancies on Glen Manor, Baker swore in his November 2007 Affidavit that:

- (i) he "contacted each of the seven tenants who were then living in the property and began what turned out to be lengthy negotiations to have them vacate";
- (ii) four of the seven tenants agreed to vacate the property and in fact vacated by Christmas;
- (iii) with respect to [the] remaining three of the tenants, I prepared and served notices to terminate their tenancies on December 31, 2006, effective April 30, 2007;
- (iv) "in late February or early March, Kevin Forrest ("Forrest"), a solicitor in Moll's office, contacted me about signing the certificates of service in relation to the termination of the tenancies"; and
- (v) I subsequently met with Forrest and signed the certificates.

72 The Romlek Defendants submit that Baker painted a false picture that (i) Baker had fulfilled all of his duties in respect to the termination of the tenancies and (ii) Forrest's role was limited.

73 The Romlek Defendants rely on Jakobek's evidence that "the Notices to Vacate that were executed by [Baker] were in fact prepared and served for the most part by Kevin Forrest". Jakobek acknowledges that "[Baker] may have prepared and served a few of the Notices to Vacate".

74 In his affidavit, Jakobek attaches, as an exhibit, an affidavit sworn by Forrest in which Forrest attests to his work. The Romlek Defendants did not file the Forrest affidavit in support of the motion. Jakobek did not state that he had read the evidence in the Forrest affidavit and believed it to be true.

75 There was debate at the hearing as to whether the Forrest affidavit was admissible for the truth of its contents. The Romlek Defendants ask the court to accept as evidence all of what Forrest states in his affidavit. Baker submits that the Forrest affidavit cannot be accepted for the truth of its contents because it was not filed as an affidavit but was instead attached as an exhibit to Jakobek's affidavit and relied upon only to support Jakobek's statement about the preparation of the Notices to Vacate.

76 I find that a party cannot seek to rely on the truth of the contents of an affidavit unless it files the affidavit with the court as evidence so that the affiant can be cross-examined, or possibly if the affiant who attaches the affidavit as an exhibit at a minimum states that the affiant has read the attached affidavit and believes it to be true (an issue I do not decide and in any event did not occur in this case). Consequently, I do not accept that the Forrest affidavit is proper evidence before the Court.

77 Even if I were to consider the Forrest affidavit, I do not find that Baker failed to disclose material facts. Baker does not agree that Forrest took over the work with respect to the tenancies. Baker set out his position in his November 2007 Affidavit, and Forrest replied with his position in the affidavit attached as an exhibit to Jakobek's affidavit. Baker did not need to further respond in his February 2008 Affidavit since he had stated his role. Baker did not omit any material facts, but rather has a different factual position than Forrest.

78 I cannot find that Jakobek's or Forrest's evidence on Baker's role (if admissible) would necessarily be accepted by a trial judge. The trial judge will have to assess credibility on this issue. A dispute as to events does not constitute a failure to disclose material facts. Baker did not fail to disclose any facts on this issue. Instead, there is a difference of opinion as to the extent and importance of Baker's role in the termination of tenancies on Glen Manor.

### (3) Gordon Baker

79 The Romlek Defendants submit that Baker's allegation in the November 2007 Affidavit that he did not know anything about Beach Park's acquisition of Glen Manor was not full and fair disclosure because his brother Gordon Baker was the sole director and officer of Beach Park. The Romlek Defendants submit that Baker ought to have disclosed this fact to the court on the *ex parte* motion. The Romlek Defendants further submit that Baker would have known of the status of Glen Manor because of Gordon Baker's involvement.

80 Jakobek's evidence is that Gordon Baker is the corporate solicitor for Beach Park and the nominee or bare trustee for Romlek's shares in Beach Park. Jakobek adds that Baker and his brother Gordon Baker have a very close sibling relationship, and that it is "incredulous" that Baker would not have known of Gordon Baker's involvement with Beach Park.

81 The only evidence relating to Gordon Baker in Baker's November 2007 Affidavit is that:

(i) Gordon Baker at one point was in touch with Forrest and then Gordon Baker "advised [Baker] that there was some delay in closing"; and

(ii) After Baker learned that Jakobek had said he sold all four town homes on Glen Manor in about a week at prices of \$1.5 million each, Baker "attempted to negotiate with Jakobek through my brother".

82 In his February 2008 Affidavit, Baker swears that (i) "the dealings between Beach Park, Romlek and my brother Gordon Baker Q.C. were not disclosed to me"; (ii) "Gordon Baker does not share such matters with me"; and (iii) "I was never privy to the information which I am alleged to have failed to disclose in my motion for the [CPL]".

83 There is no evidence that Baker knew or ought to have known that Gordon Baker was the sole officer and director of Beach Park. There is no evidence that Gordon Baker made any disclosure with respect to his involvement with Glen Manor or the Project.

84 Even if Baker and Gordon Baker had a close relationship as alleged by the Romlek Defendants, Gordon Baker in his role as solicitor for Beach Park would be bound by solicitor-client privilege not to disclose any information about Beach Park to his brother.

85 Even if Baker knew that Gordon Baker was the sole officer and director of Beach Park because Gordon Baker had disclosed such information, that information would not have been material in any event.

86 Baker's affidavit would only be misleading if he knew about the status of the project from Gordon Baker and even then, there would remain the issue of whether that fact was material. In any event, there is no evidence to that effect.

87 Consequently, the debate at the hearing as to whether the brothers had a close relationship is irrelevant. Even if they were close, there is no evidence that Gordon Baker disclosed any information about Beach Park, and as such Baker would not have had any information about the Project, or Gordon Baker's involvement.

88 The Romlek Defendants could have examined Gordon Baker as a witness prior to the motion under Rule 39.03(3), but did not do so. Consequently, the evidence before me does not demonstrate that Baker failed to disclose a material fact on this issue.

#### **(4) Baker's cooperation on the closing**

89 The Romlek Defendants submit that Baker failed to disclose that he did not cooperate with the closing of the purchase of Glen Manor and did not respond to numerous telephone calls from Moll to Baker.

90 However, there is evidence on this motion that Baker did not seek to avoid contact with Moll prior to the initial or later closing dates, as summarized at paragraphs 32, 33 and 35 above. While the Romlek Defendants take the position that Baker did not cooperate prior to the closing, that position is vehemently contested by Baker and there is no factual evidence that Baker failed to put before the court on this issue.

91 A trial judge will have to assess the credibility of Baker, Jakobek, and Moll on this issue in light of the evidence at trial.

92 The evidence before this court on this motion establishes a credible argument that Baker did cooperate, and there are no facts that Baker failed to provide to the court on the issue. A credibility dispute on an issue does not mean that there has been a failure to disclose material facts. The party seeking to discharge the *ex parte* order must demonstrate that material facts were omitted, which is not supported on the evidence before me.

#### **(5) Jakobek's relationship with Moll**

93 The Romlek Defendants submit that Baker failed to disclose that Jakobek has a longstanding relationship with Moll.

94 First, this fact is not a material fact to the decision to grant the CPL. Regardless of Jakobek's relationship with Moll, Baker alleges an agreement for a 25% interest in Glen Manor and 25% of the gross profit from the sale of four town homes on Glen Manor. The CPL did not depend on the retainer issue.

95 Second, if Baker had disclosed the longstanding relationship between Jakobek and Moll, such evidence might have supported Baker's position that Jakobek and Moll worked together to defraud Baker of his interest.

96 Third, the issue of whether Baker was Moll's client does not depend solely on who placed the call to request counsel or paid Moll's fees. If Moll was acting on Baker's behalf as a client as alleged, then Baker may be able to pursue his remedies against Moll in Moll's capacity as counsel, regardless of who retained Moll.

97 Consequently, while Baker's position that he retained Moll may assist his claim against Moll as a client, it is not a necessary element.

98 Finally, while there is a dispute as to whether Baker was Moll's client, there is evidence supporting Baker's position, as summarized at paragraph 25 above. Disclosure of Jakobek's past relationship with Moll would not have affected this issue, let alone the outcome of the *ex parte* motion for the CPL.

#### **(6) Jakobek's role in financing the Project**

99 The Romlek Defendants submit that Baker failed to disclose that in discussions leading up to the alleged agreement between Jakobek and Baker, Jakobek agreed to finance the whole Project.

100 In his November 2007 Affidavit, Baker never stated, or gave the impression, that Baker had invested any money in Glen Manor or had any financial risk. Baker set out the terms of the alleged agreement, which included that "Romlek would pay the deposit under the purchase agreement, finance the closing of the purchase agreement, and finance the construction of four town homes for sale on the property".

101 Baker's evidence in the November 2007 Affidavit was that his role was to negotiate the agreements of purchase and sale for both Glen Manor and Hubbard, undertake the re-zoning for Glen Manor, obtain the necessary permits for demolition of the existing building on Glen Manor, terminate the existing tenancies that were on Glen Manor, and generally undertake other administrative steps to further the Project.

102 Consequently, Baker fully disclosed Romlek's financing role with respect to Glen Manor. Baker did not omit any material fact in this regard.

103 To the extent that Baker did not refer to any financing by Romlek on Hubbard, I have addressed that issue above and the same analysis applies. There is no evidence that Baker knew or ought to have known about the financing arrangements for Hubbard.

#### (7) Conclusion

104 For the reasons discussed above, Baker did not fail to disclose any material facts on the *ex parte* motion.

#### (ii) Interest in land

105 The second argument raised by the Romlek Defendants is that the CPL should not have been granted since Baker is not claiming an interest in land. For the reasons discussed below, I reject this submission.

106 There must be a triable issue of whether a party has an interest in land in order to obtain a certificate of pending litigation. In *1152939 Ontario Ltd. v. 2055835 Ontario Ltd.*, 2007 CarswellOnt 756 (Ont. S.C.J.), van Rensburg J. held (at para. 17):

**The threshold in respect of the "interest in land" issue in motions respecting certificates of pending litigation is simply whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed** (*Transmaris Farms Ltd. v. Sieber*, [1999] O.J. No. 300). In my view, there is such an issue in this case. The plaintiff has placed in issue the defendant's right to possession of the Leased Premises and its interference with the plaintiff's leasehold interest. [emphasis added]

107 In his statement of claim, Baker seeks a declaration that he is the beneficial owner of *both* 25% of Glen Manor and 25% of the gross profits on the sale of four town homes being constructed on the property. Baker further alleges in his statement of claim that the agreement was that "*prior to closing, [Baker] and Romlek would incorporate a company to close the purchase and hold the [Glen Manor] property in trust, 25% for [Baker] and 75% for Romlek*" (emphasis added). This is a definitive claim for an interest in land, to be held for Baker personally by a company to be incorporated (which became Beach Park).

108 Baker reiterated his position in his affidavit, as summarized at paragraph 16 above.

109 Based on the statement of claim, Baker's affidavit evidence, and the evidence described at paragraphs 19 and 40 above, there is a triable issue that Baker is entitled to a 25% interest in Glen Manor and a 25% share of gross profits from the sale of the four town homes.

110 Counsel for the Romlek Defendants argued that Baker was not seeking an interest in Glen Manor, relying on the terms of a letter sent by Baker's counsel to Moll on November 8, 2007. In that letter, Baker's counsel states that "it was agreed that *Mr. Baker would receive a 25% beneficial interest in [Glen Manor] and receive 25% of the gross profits on the sale of the townhomes* which was projected to be \$300,000 (based on an estimated cost of \$900,000 per townhome and an estimated selling price of \$1.2 million per townhome)" (emphasis added). This statement is consistent with Baker's claim that he has both a 25% interest in Glen Manor and a right to 25% of the gross profits on the sale of the four town homes.

111 In the November 8, 2007 letter, Baker's counsel also claimed Jakobek "*is refusing to acknowledge Mr. Baker's 25% interest in the property or to pay him 25% of the gross sale proceeds*"<sup>2</sup> on the sale of the four townhomes" (emphasis added). This statement is also consistent with Baker's claim that he has both a 25% interest in Glen Manor and a right to 25% of the gross sale profits.

112 While Baker's counsel asks Moll in the November 8, 2007 letter to "please confirm that Mr. Jakobek and Beachpark [sic] will pay 25% of the gross profits on the sales to Mr. Baker and make appropriate arrangements to secure such payment", this statement must be read in light of the clear position taken in the letter and in the pleadings that Baker is claiming a 25% interest in Glen Manor and 25% of the gross profits on the sale of the four town homes. The failure of Baker's counsel to ask for confirmation that Baker also had a 25% interest in Glen Manor cannot be read as a waiver of his client's claim to that interest.

113 Similarly, when Baker's counsel requested by letter dated March 7, 2008 that the term of discharge be that "25% of the gross profits on the sale of the four townhomes on [Glen Manor] will be paid into court to the credit of this action to secure the plaintiff's claims", the request for such a term cannot be read as a waiver of the claim for a 25% interest in Glen Manor, but simply a term for the discharge of the CPL, which Baker's counsel believes would be appropriate in this case.

114 Baker's counsel confirmed at the hearing that Baker claims, as set out in his statement of claim, both a 25% interest in Glen Manor and a right to 25% of the gross sale profits.

115 Finally, the cases relied upon by both parties on whether a certificate of pending litigation can be ordered when the plaintiff was to have an interest in a company which was to own land do not apply. Baker's evidence is that he had a personal interest in Glen Manor, not a share of a corporate interest, since Baker was to have a 25% interest in Glen Manor, and Romlek was to have a 75% interest in Glen Manor, both interests which were to be held by the company to be incorporated.

116 For the above reasons, I find there is a triable issue as to whether Baker has an interest in land.

(iii) *Security as a term of discharge of the CPL*

117 The Romlek Defendants submit that security is not appropriate as there is no evidence of the harm Baker might suffer if an order for security is not granted. However, I do not believe that such a position reflects the law on ordering security as a term of a discharge of a certificate of pending litigation.

118 Section 103(6) of the *Courts of Justice Act* provides the court with a broad equitable discretion to "impose such terms as to the giving of security or otherwise as the court considers just", when making an order to discharge a certificate of pending litigation.

119 Courts have frequently ordered security as a term of the discharge of a certificate of pending litigation, even though there was no evidence of the impecuniosity of the defendant. The courts consider all factors of the case in making such an order (*Getz v. Barnes*, 1989 CarswellOnt 920 (Ont. H.C.) at para. 19; *Baluster Investments Ltd. v. Iona Corp.*, 1987 CarswellOnt 480 (Ont. Master) at para. 9; affirmed 1987 CarswellOnt 585 (Ont. H.C.); *Aztec Investments Ltd. v. Wynston*, 1988 CarswellOnt 408 (Ont. S.C.) at para. 12; and *Sandhu v. Braebury Home Corp.*, 1986 CarswellOnt 554 (Ont. H.C.) at para. 21).

120 By way of example, in *876761 Ontario Inc. v. Maplewood Ravines Ltd.*, 2001 CarswellOnt 693 (Ont. S.C.J.), the court ordered the defendants to post security even though "there is no evidence of an inability on the part of the defendants to pay damages", since "the circumstances of this case require[d]" such an order (at para. 40).

121 The Romlek Defendants rely on my earlier decision in *Seaton v. Bolton*, 2007 CarswellOnt 7046 (Ont. Master) ("*Seaton*"), in which I refused to order security as a term of discharge of a certificate of pending litigation. In *Seaton*, I stated that "there is no evidence as to the harm the plaintiffs might suffer if an order for security is not granted" (*Seaton*, at para. 24). However, I specifically noted that my decision was based on all of the evidence in that case, not only on the fact that there was no evidence as to the harm the plaintiffs might suffer. I held (*Seaton*, at para. 24):

While this evidence [as to harm the plaintiffs would suffer if the certificate were not granted] alone may not be sufficient to obtain security, **its non-existence in this case, in addition to the facts discussed above**, provide no evidentiary basis to make the equitable order of security. [emphasis added]

122 In the present case, there are many factors which support an order for security. These can be summarized as follows:

- (i) There is an allegation of fraudulent conduct against the defendants which is supportable under the evidence before the court (although I make no findings of credibility or findings of fact);
- (ii) The alleged inability of Moll and Jakobek to contact Baker, a key defence raised in the litigation and affidavit material, is contradicted by evidence before me (again without making any findings on fact or credibility);
- (iii) The issue of whether the agreement between Baker and Jakobek was for (i) a 25% interest in Glen Manor and 25% of the gross profit from the sale of the four town homes on Glen Manor or (ii) \$50,000 to be paid for acting as a bare trustee and dealing with tenancies, is a matter of credibility, as there is no document reflecting the agreement.

There are serious issues of credibility arising from:

- (a) Jakobek's evidence that a bare trustee was needed to hide his identity (when Jakobek and Romlek had acquired properties in the Beaches in their own names),
- (b) Jakobek's evidence that in those circumstances when Romlek and Jakobek acquired properties in their own names there were clauses allowing the vendor to apply for rezoning (which was not the case in the agreements filed with the court),
- (c) the evidence that such a rezoning clause existed in any event in the Baker Purchase Agreement, which would have meant that a bare trustee was not required,
- (d) Jakobek and Moll's evidence that Baker was unavailable prior to closing (when Baker lived in premises owned by Moll, Baker was served with notice of eviction documents at that residence, and Baker signed a letter of authorization on May 22, 2007 to permit the submission of an application for a demolition permit on Glen Manor), and
- (e) Jakobek's response to Baker when Baker contacted Jakobek after Baker heard a rumour that that Glen Manor sale had closed.

A trial judge will have to weigh all of the evidence in assessing credibility, but there is an arguable case that Baker will be believed as to the terms of the agreement;

- (iv) Beach Park's sole purpose is to develop the town homes on both the Glen Manor and Hubbard properties, and once the town homes are sold, Beach Park's only asset will be the cash from those sales; and

(v) Since the CPL is discharged, Beach Park can complete all of the sales. Beach Park led no evidence that it would be prejudiced if it had to post 25% of gross profits into court. Further, the Romlek Defendants would get their share of the gross profits less only 25% of that amount to be paid into court.

123 Based on the above factors, it is appropriate to order security as a term of discharge of the CPL.

#### **Terms of security**

124 The Romlek Defendants argued that the term initially sought by Baker that "25% of the gross profits on the sale of the four town homes on [Glen Manor] will be paid into court to the credit of this action to secure the plaintiff's claims" was vague and unworkable. However, the defendants denied all requests by Baker's counsel at cross-examination for financial information about the town homes built and sold on Glen Manor. Consequently, there is no mechanism for the court to determine gross profit at this time.

125 As a result of the defendants' refusal to produce financial information relevant to the terms for security sought on this motion, I agree with Baker's counsel that the only way to ensure proper security is granted is to require that 25% of the gross profits be paid into court as security, with gross profits defined as the proceeds from the sale of the four town homes on Glen Manor less any payments in full to the mortgagees of Glen Manor. To the extent that sale proceeds from the four town homes are obtained at different times, security shall be paid on the same basis but on a proportionate scale, including a proportionate payment of the amount owed to mortgagees.

126 The Romlek Defendants raised the issue that others involved with the Project might seek to vary the order for security to ensure payment. However, no evidence of the need for such payments was provided to the court on the motion, as the defendants refused to produce financial information when requested by Baker's counsel during the cross-examinations. In any event, this order is without prejudice to the defendants or any person with a proper interest to return to court to modify the order for security, albeit with proper evidence.

#### **Order and costs**

127 I order that a term of the discharge of the CPL is that 25% of the gross profits from the sale of the four town homes on Glen Manor be paid into court as security, with gross profits defined as the proceeds from the sale of the four town homes on Glen Manor less any payments in full to the mortgagees of Glen Manor. If sale proceeds from the four town homes are obtained at different times, security shall be paid on the same basis but on a proportionate scale, including a proportionate payment of the amount owed to mortgagees.

128 At the conclusion of the hearing, all counsel provided me with cost outlines but agreed that they would make written cost submissions after my disposition of this matter. If counsel cannot agree on costs of the hearing, the parties may deliver written costs submissions no later than two weeks from this order, with responding written costs submissions due no later than three weeks from this order.

129 I thank all counsel for the quality of the written and oral argument before the court.

*Application granted.*

#### **Footnotes**

1 I refer to Bruce Baker throughout these reasons as "Baker". I refer to Baker's brothers, Gordon Baker and Ronald Baker, by their full names.

2 The reference should likely be to "gross sale profits" which is consistent with the earlier statements in the letter and the relief Baker seeks in his claim.

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Court File No.: CV-17-11805-00CL

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

- and -

TEXTBOOK (256 RIDEAU STREET ) INC.

Defendant

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
(COMMERICAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**BOOK OF AUTHORITIES**

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