Divisional Court File No.: 533/77
(Court File No. CV-17-11822-00CL)

*ONTARIO*

**DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Plaintiff

- and -

**JOHN DAVIES and AEOLIAN INVESTMENTS LTD.**

Defendants

# REPLY FACTUM OF JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.

November 9, 2017

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(Court File No.: CV-17-11822-00CL)

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

BETWEEN:

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

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# REPLY FACTUM OF JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.

1. In its responding factum, the Plaintiff fails to address the key deficiencies in the motion judge's Reasons which underpin this motion for leave to appeal: namely, the failure to consider any of the alleged causes of action or their elements, and the failure to address the issue of irreparable harm. Instead, the Plaintiff attempts to rely upon preliminary *ex parte* findings made by the motions judge, which were made on the basis of an incomplete evidentiary record and cannot be used to cure the insufficiency of the Reasons. Leave to appeal should be granted.

***Failure to Address Deficiencies Regarding Causes of Action***

2. As set out in the Defendants' initial factum, the test for establishing a strong *prima facie* case in the context of a Mareva injunction is whether the plaintiff is "clearly right" or "almost

certain to succeed at trial" in respect of the allegations made against the defendant. This required the motions judge to consider the constituent elements of each cause of action and their likelihood of success. He did not do so.[1]

3. Although the Plaintiff states at paragraph 30 of its factum that the motions judge appropriately applied this test, it fails to provide any support for this assertion or point to any specific portion of the motions judge's Reasons. Instead, the Plaintiff relies solely upon the motions judge's preliminary finding of a "strong *prima facie* case of fraud", which was made in the endorsement from the initial June 7th hearing for an interim Mareva injunction (which was heard *ex parte*).[2]

4. The Plaintiff also refers to this finding in the context of the motions judge's July 17th endorsement. No new or additional finding of a *prima facie* case was made at this hearing; rather, the motions judge merely referred to his prior preliminary finding from June 7th. In any event, the July 17th hearing was adjourned on consent and on the basis that the adjournment "cannot be used to answer any later arguments that [the Defendants] make".[3]

5. Where an *ex parte* order is revisited, the party who obtained the order cannot be put in a better position as a result of having obtained it without notice. The court must hear the matter *de novo* and take into account the full evidentiary record.[4] The preliminary *ex parte* finding that the Plaintiff seeks to rely upon was made without the benefit of any evidence from the Defendants,

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[1] Defendants' Factum dated October 13, 2017 at para. 35-36; *SLMsoft.Com Inc. v. Rampart Securities Inc.*, 2004 CanLII 6329 (ONSC) at para. 14, Defendants' Book of Authorities, Tab 3.

[2] Endorsement of Justice Myers dated June 7, 2017, Plaintiff's Responding Motion Record at Tabs 2 and 3.

[3] Endorsement of Justice Myers dated July 17, 2017, Motion Record of the Defendants, Volume 1, Tabs 7 and 7A.

[4] See *Promo-Ad & Associates Inc. v. Keller*, 2013 ONSC 1633 at para. 55, Defendants' Supplemental Book of Authorities, Tab 1; *PricewaterhouseCoopers LLP v. Phelps*, 2010 ONSC 1061 at paras. 7-10, Defendants' Supplemental Book of Authorities, Tab 2; and *Croucher v. Newfoundland & Labrador Housing Corp*, 1996 CarswellNfld 41 (SC TD) at para. 13, Defendants' Supplemental Book of Authorities, Tab 3. While these cases dealt with situations where a second judge was reviewing an *ex parte* order made by another judge, the principle that the review must be made on a *de novo* basis is equally applicable to this case.

and cannot be used to bolster the insufficient Reasons which were made on the basis of a full evidentiary record.

6. In any event, the motions judge did not examine or consider the constituent elements of the tort of fraud in either of his preliminary endorsements. As such, even if these endorsements could be relied upon as a supplement to the Reasons, there would still be good reason to doubt the correctness of the Order as the test for establishing a strong *prima facie* case has not been applied.

***Failure to Address Irreparable Harm***

7. The motions judge failed to address the issue of irreparable harm in any fashion in his Reasons.[5] Similar to the above, the Plaintiff asserts that the motions judge specifically found that irreparable harm would be suffered and, in support of that assertion, again seeks to rely upon a comment in the motions judge's initial June 7th endorsement. For the reasons described above, the motions judge's preliminary findings cannot be used to supplement deficiencies in the Reasons.

8. As an alternative, the Plaintiff suggests that the motions judge's finding of irreparable harm is implicit. Even if such a finding could be implicitly construed from the Reasons (which is disputed), it is trite law that a finding of irreparable harm must be clear and not speculative or implicit.[6] Indeed, as the motions judge noted in another recent decision concerning an interlocutory injunction (in which he extensively reviewed the issue of irreparable harm), the test

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[5] Defendants' Factum dated October 13, 2017 at para. 37.

[6] *1252668 Ontario Inc. v. Wyndham Street Investments Inc.*, 1999 CarswellOnt 3348 (Div. Ct.) at paras. 29-31, Defendants' Book of Authorities, Tab 6.

for an injunction needs to be met with clear, non-speculative evidence of irreparable harm.[7] It is unclear from the Reasons whether the Plaintiff met this test, which is good reason to doubt the correctness of the Order.

***Additional Reason to Doubt Basis for Waiving Undertaking as to Damages***

9. In support of its argument that the motions judge properly exercised his discretion to waive an undertaking as to damages, the Plaintiff points to the July 17th endorsement in which the motions judge stated that "if Defendants left themselves vulnerable to even such extraordinary relief as a Mareva injunction, then they have to bear the risk of costs incurred during the ensuing investigation of the plaintiff's strong *prima facie* case".

10. This cannot be a correct statement of the applicable legal test. Taken to its logical conclusion, this means that an undertaking as to damages will never be appropriate where a Mareva injunction is granted, as the party against whom the order is made will always have "left themselves vulnerable". There is serious reason to doubt the correctness of this decision to waive an undertaking.

***Plaintiff's Mischaracterization of the Facts***

11. At paragraph 20 of its factum, the Plaintiff accuses the Defendants of mischaracterizing the evidence before the motions judge. However, it is in fact the Plaintiff who has mischaracterized the evidence and continues to do so. For example:

(a) At paragraph 21(a), the Plaintiff alleges that there was considerable evidence contradicting the Defendants' assertion that dividends were

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[7] *Ferrero S.p.A. and Ferrero Canada Limited v. 218587 Ontario Limited d.b.a. Upper Crust*, October 26, 2016 (Ont. SCJ – unreported) at para. 11, Defendants' Supplemental Book of Authorities, Tab 4.

disclosed to and approved by the Trustee Corporations – yet it cites no such evidence, ignoring the fact that these payments were specifically disclosed in the relevant Loan Agreements executed by the Trustee Corporations.[8]

(b) At paragraph 21(b), the Plaintiff alleges that it tendered evidence in its Supplemental Sixth Report that the pro formas provided to the Trustee Corporations by the Defendants were "materially misleading". This conclusion is not actually found in the Report; rather, the Report simply notes that there are a number of issues with the pro formas that call their reliability into question.[9] When asked about these issues on cross-examination, Mr. Davies invited the Plaintiff to put its questions in writing to Walter Thompson and Andre Antonaidis (who prepared the pro formas), as Mr. Davies was not familiar enough with the documents to answer the Plaintiff's questions at the examination. The Plaintiff accepted this undertaking but failed to provide any such questions, in writing or otherwise.[10]

(c) Also at paragraph 21(b), the Plaintiff alleges that there was evidence that management fees were paid at an accelerated rate inconsistent with the stage of project development, and again relies upon its Supplemental Sixth Report. The relevant section of the Report qualifies this "evidence" by assuming a correlation between overall project costs and management fees earned.[11] On cross-examination, Mr. Davies explained that this assumption was incorrect and that management fees were earned when a project was ready to be built.[12]

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[8] Second Davies Affidavit at paras. 28-29, Motion Record of the Defendants, Volume 1, Tab 11, p. 166; Loan Agreements for 525 Princess and 555 Princess at ss. 7.01(m), Motion Record of the Defendants, Volume 3, Tab 14A, pp. 822 and 854.

[9] Supplement to Sixth Report at s. 4.0, para. 1, Motion Record of the Defendants, Volume 5, Tab 16, pp. 1370-1371.

[10] Second Davies Cross-Examination at qq. 371-380, Motion Record of the Defendants, Volume 5, Tab 17, pp. 1621-1624.

[11] Supplement to Sixth Report at s. 5.0, paras. 3-5, Motion Record of the Defendants, Volume 5, Tab 16, pp. 1372-1373.

[12] Second Davies Cross-Examination at qq. 395-400, Motion Record of the Defendants, Volume 5, Tab 17, pp. 1628-1630

(d) At paragraph 3, the Plaintiff states that the funds lent to the Receivership Companies were required to be used to develop the specific real estate for which the funds were advanced – again ignoring or failing to cite the sections of the Loan Agreements which permitted proceeds to be used for other purposes with the consent of the Trustee Corporations,[13] which consent was provided.[14]

12. These mischaracterizations are clear attempts to "tar and feather" the Defendants and distract the Court from the issues before it, which relate to the sufficiency of the Reasons and not the alleged wrongdoing of the Defendants.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9th day of November, 2017.

Kenneth Kraft

Michael Beeforth

Lawyers for the Defendants

[13] See, e.g., s. 7.02(g) of the Loan Agreement regarding 774 Bronson Avenue – Motion Record of the Defendants, Volume 3, Tab 14A, p. 599.

[14] Second Davies Affidavit at para. 3, Motion Record of the Defendants, Volume 1, Tab 11, p. 152.

**Schedule "A" – List of Authorities**

1. *Promo-Ad & Associates Inc. v. Keller*, 2013 ONSC 1633

2. *PricewaterhouseCoopers LLP v. Phelps*, 2010 ONSC 1061

3. *Croucher v. Newfoundland & Labrador Housing Corp*, 1996 CarswellNfld 41 (SC TD)

4. *1252668 Ontario Inc. v. Wyndham Street Investments Inc.*, 1999 CarswellOnt 3348 (Div. Ct.)

5. *Ferrero S.p.A. and Ferrero Canada Limited v. 218587 Ontario Limited d.b.a. Upper Crust*, October 26, 2016 (Ont. SCJ – unreported)

## Schedule "B" – Text of Statutes, Regulations & By-Laws

Nil.

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Proceeding commenced at TORONTO

# REPLY FACTUM OF JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.


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