

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiff
(Respondent)

- and -

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

Defendants
(Appellants)

NOTICE OF APPEAL

THE DEFENDANTS, John Davies and Aeolian Investments Ltd. (collectively, the
“Appellants”), **APPEAL** to the Divisional Court from the Order of the Honourable
Justice Myers dated August 30, 2017 made at 330 University Avenue, Toronto, Ontario
(the “Order”).

THE APPELLANTS ASK that the Order be set aside and that the Appellants be granted their costs of this appeal and the underlying motion.

THE GROUNDS OF APPEAL are as follows:

1. The Order granted a Mareva injunction against the Defendants and other defendants in the action, including Judith Davies (Mr. Davies' wife), on an interlocutory basis pending a final disposition of the within action.

2. A Mareva injunction is a drastic and extraordinary remedy, and constitutes an exception to the general rule that there can be no execution before judgment. In order to obtain a Mareva injunction, the moving party must establish, amongst other things, that there is a strong *prima facie* case on the merits (i.e. that the allegations are "clearly right") and that irreparable harm will result if the injunction is not granted.

3. The motions judge's reasons do not contain any such analysis. Rather, they contain only speculative factual conclusions that are unsupported by the evidentiary record. In granting the Order, the motions judge erred in failing to properly examine and consider the constituent elements of each cause of action pleaded by the Plaintiff and whether the Plaintiff was almost certain to succeed at trial on each of those elements. The motions judge also failed to address the issue of whether the Plaintiff would suffer irreparable harm if the injunction was not continued.

4. In granting the Order without providing any analysis, the motions judge failed to give adequate or sufficient reasons for his decision to enable the parties, the general

public and appellate courts to know whether the applicable legal principles and evidence were properly considered.

5. The motions judge also dispensed with the need to require an undertaking as to damages from the Plaintiff on the basis that the Plaintiff “has no skin in the game”. In doing so, the motions judge erred by misarticulating the test for dispensing with an undertaking for damages.

6. Finally, the motions judge erred in awarding substantial indemnity costs against the Defendants when counsel had agreed to deal with costs following delivery of the motion judge’s reasons. Although the motions judge later issued a further endorsement setting aside his original costs order, he then granted the same order in the same endorsement after a purported fresh review of the matter.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The Divisional Court has jurisdiction to hear this matter pursuant to section 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that an appeal lies to the Divisional Court from an interlocutory order of a judge of the Superior Court of Justice, with leave.

2. On January 19, 2018, a panel of the Divisional Court granted leave.

The Appellants request that this appeal be heard at Toronto.

January 29, 2018

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

KSV KOFMAN INC.
Plaintiff (Respondent)

and

ABOLIAN INVESTMENTS LTD. et al.
Defendants (Appellants)

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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