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

ONTARIO
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)

FACTUM OF JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.

February 28, 2018

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FACTUM OF JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.

PART I – NATURE OF APPEAL

1. The Appellants appeal, with leave of this Court, from a decision of the Honourable Justice Myers (the "**motions judge**") dated August 30, 2017 continuing a *Mareva* injunction, originally granted on June 7, 2017 without notice, against the Defendants (the "**Order**").[1]

[1] Order of Justice Myers dated August 30, 2017, Appeal Book and Compendium, Volume 1, Tab 2, pp. 6-12.

PART II – OVERVIEW

2. A *Mareva* injunction is a drastic and extraordinary remedy. The Supreme Court of Canada has cautioned against their use, stating that there is "a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets."[2] Given their potential impact, courts must be rigorous in applying the test for granting a *Mareva* injunction and, where satisfied the test is made out, provide detailed reasons supporting the issuance of such a draconian remedy. This did not occur here.

3. In deciding to continue the *Mareva* injunction, the motions judge failed to properly consider any of the steps of the test. This failure constitutes an error of law. The motions judge:

(a) failed to provide any analysis of the causes of action pleaded by the Plaintiff in order to determine whether there was a strong *prima facie* case;

(b) concluded there was a risk of dissipation of assets based on speculation, rather than on cogent evidence; and

(c) completely failed to address the issues of irreparable harm and balance of convenience.

4. In addition, through his failure to properly consider the test, the motions judge committed a further error of law as he did not provide reasons which would allow this Court to determine whether the applicable legal principles and evidence were properly considered.

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[2] *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 SCR 2 [***Aetna Financial***] at para. 43, Appellants' Book of Authorities ("**BOA**"), Tab 1.

5. Finally, the motions judge committed further errors by basing his decision on speculative conclusions in the face of uncontradicted evidence, and by waiving the customary undertaking as to damages on the incorrect basis that the Defendants "left themselves vulnerable" to a *Mareva* injunction and the Plaintiff, as a court-appointed receiver, had "no skin in the game".

6. This Court should allow the appeal and set aside the Order with costs, both here and below.

PART III – SUMMARY OF FACTS

The Defendants' Business

7. The Defendant, John Davies, is a real estate developer, and has been in this business for 25 years.[3] The Defendant, Aeolian Investments Ltd. ("**Aeolian**"), is Mr. Davies' personal holding company. Mr. Davies is Aeolian's sole director and officer.[4]

8. This action concerns 11 development companies (the "**Davies Developers**"), including the 7 development companies for which the Plaintiff has been appointed as Receiver (the "**Receivership Companies**"). Mr. Davies is a director and officer of the Davies Developers.[5] Each Davies Developer was associated with a specific real estate development project, including student housing developments, long-term care facilities, and low-rise condominiums.

9. The Davies Developers were responsible for advancing the development projects through predevelopment[6] to the point of construction readiness. For this work, they earned development

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[3] Affidavit of John Davies sworn July 27, 2017 ("**Second Davies Affidavit**") at para. 4, Appeal Book and Compendium, Volume 2, Tab 18, pp. 6-12.

[4] Affidavit of John Davies sworn July 14, 2017 ("**First Davies Affidavit**") at paras. 1 and 15, Appeal Book and Compendium, Volume 1, Tab 17, pp. 169 and 174.

[5] Fourth Report of KSV Kofman Inc. ("**Fourth Report**") at ss. 2.1-2.5, Appeal Book and Compendium, Volume 3, Tab 19, pp. 645-648.

[6] Predevelopment work includes site acquisition and analysis, budget preparation, hiring of consultants, creation of pro-forma analyses, negotiation with City authorities regarding planning and approvals, site plan approval, design, density, building

management fees. These fees, and the scope of the Davies Developers' work, was disclosed to the Davies Developers' lenders (defined below as the "**Trustee Corporations**").[7]

10. Although each Davies Developer was responsible for a particular project and had a separate bank account, the Davies Developers were operated as an "umbrella" organization, with all of the projects being developed in parallel through predevelopment. This was also known to the Trustee Corporations, as described in greater detail below.[8]

The Loan Agreements

11. In order to fund the predevelopment work for the projects, each of the Davies Developers entered into loan agreements (the "**Loan Agreements**") with separate trust corporations (the "**Trustee Corporations**"),[9] who raised money in turn from the investing public through syndicated mortgages. The Davies Developers had no relationship or contact with individual investors; their only relationship was with the Trustee Corporations. That relationship was a conventional borrower-lender relationship. As described more fully below, at all times, the Davies Developers acted in accordance with the terms of the Loan Agreements.[10]

12. Tier 1 Transaction Advisory Services Inc. ("**Tier 1**"), a financial services advisory firm, was responsible for raising funds on behalf of the Trustee Corporations. Tier 1's sole director, officer and shareholder was Raj Singh. Mr. Singh incorporated each of the Trustee Corporations

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materials, site servicing and drainage, construction cost estimating, coordination with consultants, and preparation of various studies for the City and Region authorities including geotechnical, environmental, traffic/parking and storm water/servicing.

[7] First Davies Affidavit at paras. 8-12, Appeal Book and Compendium, Volume 1, Tab 17, pp. 171-173.

[8] Second Davies Affidavit at para. 22, Appeal Book and Compendium, Volume 2, Tab 18, p. 258.

[9] The Loan Agreements are attached to the Fourth Report as Appendix "A" – see Appeal Book and Compendium, Volume 3, Tab 19A, pp. 665-1015.

[10] First Davies Affidavit at para. 10, Appeal Book and Compendium, Volume 1, Tab 17, p. 172; Second Davies Affidavit at para. 3, Appeal Book and Compendium, Volume 2, Tab 18, p. 247.

and acted as their sole director, officer and shareholder.[11] Throughout the relevant period, Mr. Davies and the Davies Developers were in regular contact with the Trustee Corporations through Mr. Singh and Greg Harris, counsel to the Trustee Corporations.

Trustee Corporations Approve Management Fees

13. In its reports to the Court, the Plaintiff baldly alleged that the Loan Agreements prohibited management fee payments.[12] In fact, the Loan Agreements specifically permitted the payment of development management fees. Some agreements allowed payment of ordinary course amounts related to the management, development and operation of the relevant project (provided those amounts were reasonable for the services rendered),[13] while others permitted payment of fees with the consent of the relevant Trustee Corporation.[14]

14. Before the Trustee Corporations advanced funds, the Davies Developers prepared detailed development pro formas for each of the development projects setting out the projected costs and revenues. Each pro forma included line items relating to "development management" and "development management fees", which were consistent with industry standards.[15] The Plaintiff led no competing evidence regarding industry practice or the appropriate quantum of development management fees.

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[11] Fourth Report at s. 2.1, Motion Record of the Defendants, Appeal Book and Compendium, Volume 3, Tab 19, p. 645.

[12] Fourth Report at ss. 3.2, para. 3(d) and 6.0, para. 1(c)-(d), Appeal Book and Compendium, Volume 3, Tab 19, pp. 652-654 and663; Sixth Report of KSV Kofman Inc. ("**Sixth Report**") at s. 5.1.1, para. 2(a), Appeal Book and Compendium, Volume 4, Tab 20, p. 1164.

[13] These included the Loan Agreements for Textbook (525 Princess Street) Inc. and Textbook (555 Princess Street) Inc.

[14] These included the Loan Agreements for Scollard Development Corporation, Memory Care Investments (Kitchener) Ltd., Memory Care Investments (Oakville) Ltd., 1703858 Ontario Inc. and Legacy Lane Investments Ltd.

[15] First Davies Affidavit at paras. 7-8, Appeal Book and Compendium, Volume 1, Tab 17, pp. 171-172; Second Davies Affidavit at para. 16, Appeal Book and Compendium, Volume 2, Tab 18, p. 255; Pro Formas for the Development Companies, Appeal Book and Compendium, Volume 2, Tab 18B, pp. 338-398; Overview of Development Management Fees, Appeal Book and Compendium, Volume 1, Tab 17A, pp. 183-186.

15. The uncontradicted evidence before the motions judge was that the pro formas were provided to Mr. Singh for review before funds were advanced to the Davies Developers. Mr. Singh reviewed the pro formas, asked questions and, once satisfied, advanced funds under the Loan Agreements.[16] The Plaintiff did not provide any competing evidence from Mr. Singh, despite Mr. Singh being available to the Plaintiff.[17] In addition, although the Plaintiff alleged in its reports that there were reliability issues with the pro formas, it failed to put any questions regarding these issues to the individuals who prepared the pro formas – despite being invited to do so during Mr. Davies' cross-examination.[18]

Development Work Carried Out by Davies Developers

16. Between 2011 and 2016, the Davies Developers carried out significant predevelopment work on the development projects and, in some cases, initial construction work, creating incremental value supported by independent appraisals which incorporated the project pro formas.[19] The Defendants provided lengthy and detailed summaries of the work carried out on each of the projects.[20] The Plaintiff did not examine the Defendants on these summaries or provide any competing evidence regarding the Davies Developers' work.

17. Throughout this time period, the Davies Developers were paid the development management fees they had earned in accordance with the pro formas that the Trustee

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[16] First Davies Affidavit at para. 9, Appeal Book and Compendium, Volume 1, Tab 17, p. 172; Transcript of Cross-Examination of John Davies taken June 16, 2017 (**"First Davies Cross-Examination"**) at qq. 240-248, Appeal Book and Compendium, Volume 1, Tab 15, pp. 148-156; Correspondence regarding development management fees, Appeal Book and Compendium, Volume 1, Tab 17C, pp. 193-204.

[17] Sixth Report at s. 1.2, para. 5, Appeal Book and Compendium, Volume 4, Tab 20, p. 1155.

[18] Transcript of Cross-Examination of John Davies taken August 9, 2017 (**"Second Davies Cross-Examination"**) at qq. 371-380, Appeal Book and Compendium, Volume 1, Tab 16, pp. 159-162.

[19] Second Davies Affidavit at paras. 6 and 17, Appeal Book and Compendium, Volume 2, Tab 18, pp. 248 and 255; Executive Summaries of Appraisals for Development Projects, Appeal Book and Compendium, Volume 2, Tab 18A, pp. 272-336.

[20] Second Davies Affidavit at paras. 14(a)-(g), Appeal Book and Compendium, Volume 2, Tab 18, pp. 251-254; Summaries of Predevelopment Work for Development Projects, Appeal Book and Compendium, Volume 2, Tabs 18C-18I, pp. 400-427.

Corporations received and approved. These fees were in line with the time that had passed and the overall predevelopment progress on the projects.[21] Although the Plaintiff alleged in its reports to the Court that these fees were paid at an accelerated rate, this allegation was based on an erroneously assumed correlation between overall project costs and management fees earned – in practice, management fees are fully earned when a project is ready for construction.[22] There was no evidence to rebut Mr. Davies' evidence that this assumption was wrong.

18. In addition to development management fees, the Davies Developers also earned dividends in relation to Textbook (525 Princess Street) Inc. and Textbook (555 Princess Street) Inc. in recognition of the significant work conducted before acquiring these properties.[23] The relevant Loan Agreements specifically contemplated and permitted these dividends:

> "From any excess proceeds available after the Property has been acquired, the [Davies Developer] intends to pay a dividend of $250,000 to each of its four shareholders, in compensation of expenses incurred and efforts in locating suitable property, negotiating and structuring the purchase transaction and matters ancillary thereto…"[24]

Intercompany Loans between the Davies Developers

19. The amount of money that can be loaned in association with syndicated mortgages is restricted: it cannot exceed the appraised value of the development property with which those

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[21] Second Davies Cross-Examination at qq. 389-402, Appeal Book and Compendium, Volume 1, Tab 16, pp. 163-168; Second Davies Affidavit at para. 16, Appeal Book and Compendium, Volume 2, Tab 18, p. 255.

[22] Supplement to Sixth Report at s. 5.0, paras. 3-5, Appeal Book and Compendium, Volume 5, Tab 21, pp. 1454-1455; Second Davies Cross-Examination at qq. 395-400, Appeal Book and Compendium, Volume 1, Tab 16, pp. 165-167.

[23] Second Davies Affidavit at para. 30, Appeal Book and Compendium, Volume 2, Tab 18, pp. 261-262.

[24] Second Davies Affidavit at paras. 28-29, Appeal Book and Compendium, Volume 2, Tab 18, p. 261; Loan Agreements for 525 Princess and 555 Princess at ss. 7.01(m), Appeal Book and Compendium, Volume 3, Tab 19A, pp. 905 and 937.

funds are associated. As a result, the Trustee Corporations made multiple loans over the course of predevelopment as the projects were developed and increased in value.[25]

20. From time to time, situations occasionally arose where either the proceeds of a loan were fully disbursed before the value of a development project had increased sufficiently to support a further loan, or Tier 1 did not have time to complete another round of financing in the short term. In these situations, an intercompany loan would be made from another Davies Developer in order to pay liabilities as they came due until such time as additional funds could be raised.[26]

21. The Plaintiff baldly alleged in its reports that the Loan Agreements prohibited intercompany loans.[27] However, the uncontradicted evidence before the motions judge was that:

(a) From the time of the first loan, the Trustee Corporations were aware of and consented to the practice of intercompany loans (as required and permitted under the Loan Agreements);[28]

(b) In many instances, Mr. Singh or Mr. Harris suggested or directed that specific intercompany loans be made;[29]

(c) The liabilities which intercompany loans were used to pay included costs associated with developing the projects (e.g. design costs, planning approvals, studies) and interest payments on loans;[30]

(d) Every intercompany loan was recorded in the companies' accounting records and stayed within the overall organization;[31] and

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[25] Second Davies Affidavit at para. 23, Appeal Book and Compendium, Volume 2, Tab 18, p. 258.

[26] Second Davies Affidavit at para. 24, Appeal Book and Compendium, Volume 2, Tab 18, pp. 258-259.

[27] Fourth Report at s. 4.0, para. 1, Appeal Book and Compendium, Volume 3, Tab 19, p. 662; Supplement to Sixth Report at s. 6.0, para. 3, Appeal Book and Compendium, Volume 5, Tab 21, p. 1456.

[28] Second Davies Affidavit at para. 21, Appeal Book and Compendium, Volume 2, Tab 18, pp. 257-258. See also, e.g., s. 7.02(g) of the Loan Agreement regarding 774 Bronson Avenue – Appeal Book and Compendium, Volume 3, Tab 19A, p. 682.

[29] Second Davies Affidavit at para. 21, Appeal Book and Compendium, Volume 2, Tab 18, pp. 257-258; Correspondence regarding intercompany loans, Appeal Book and Compendium, Volume 2, Tab 18P, pp. 528-556.

[30] Second Davies Affidavit at para. 22, Appeal Book and Compendium, Volume 2, Tab 18, p. 258.

(e) The intercompany loans would be repaid once construction financing was secured.[32]

22. The Plaintiff led no evidence to refute these facts or to support its blanket assertions that the loans were impermissible, including any evidence from Mr. Singh (despite his availability to the Plaintiff).[33]

Tier 1 Sanctioned by FSCO

23. On October 20, 2016, the Financial Services Commission of Ontario ("**FSCO**") issued a cease-and-desist order against Tier 1 in respect of its role in arranging and facilitating syndicated mortgage investments, preventing Tier 1 from raising any further funds. FSCO has never asserted any allegations against the Davies Developers. On October 27, 2017, Grant Thornton Limited ("**GTL**") was appointed as trustee over the Trustee Corporations.[34]

24. At the time that GTL was appointed, construction had begun on the Memory Care project located in Burlington (1703858 Ontario Inc.) and the Davies Developers were set to execute a $67 million construction financing contract for the Scollard project, which would have advanced the project through construction. This financing would have fully repaid the loans from the relevant Trustee Corporation. GTL did not allow the contract to be executed.[35]

25. As a result of Tier 1's suspension, the Davies Developers were unable to raise additional funds and defaulted on their loans to the Trustee Corporations. GTL subsequently sought and

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[31] Second Davies Affidavit at para. 24, Appeal Book and Compendium, Volume 2, Tab 18, pp. 258-259.
[32] Second Davies Affidavit at para. 25, Appeal Book and Compendium, Volume 2, Tab 18, p. 259.
[33] Sixth Report at s. 1.2, para. 5, Appeal Book and Compendium, Volume 4, Tab 20, p. 1155
[34] Fourth Report at s. 1.0, para. 2, Appeal Book and Compendium, Volume 3, Tab 19, p. 641.
[35] Second Davies Affidavit at paras. 14(à)-(b), Appeal Book and Compendium, Volume 2, Tab 18, pp. 251-252.

obtained orders appointing the Plaintiff as receiver and manager of the property of the Receivership Companies.[36]

The Injunction Motion

26. On June 6, 2017, the Plaintiff commenced the within action against Mr. Davies and Aeolian based in large part on the bald allegations made in the Plaintiff's reports – that, amongst other things, the development management fees were secretly and improperly paid and the intercompany loans were prohibited under the Loan Agreements. The next day, the Plaintiff obtained an interim *Mareva* injunction without notice, and without providing an undertaking as to damages, on the basis of these allegations.[37] The injunction was extended on consent for 30 days on June 16, 2017.[38]

27. On July 17, 2017, the Plaintiff brought a motion (the "**Injunction Motion**") to extend the *Mareva* injunction on an interlocutory basis pending a final disposition of the action. The parties consented to adjourn the hearing of the Injunction Motion, and extend the injunction on a no-admissions basis, to allow a timetable to be put in place. Pending the return hearing, the motions judge expanded the injunction to Judith Davies (Mr. Davies' wife), and to Mr. and Mrs. Davies in their capacities as trustees of two trusts.[39] The motions judge also declined to grant an undertaking as to damages.[40]

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[36] Fourth Report at s. 1.0, paras. 4-7, Appeal Book and Compendium, Volume 3, Tab 19, p. 641.

[37] Order of Justice Myers dated June 7, 2017, Appeal Book and Compendium, Volume 1, Tab 10, pp. 58-63; Endorsement of Justice Myers dated June 7, 2017, Appeal Book and Compendium, Volume 1, Tabs 11 and 11A, pp. 64-65.

[38] Order of Justice Myers dated June 16, 2017, Appeal Book and Compendium, Volume 1, Tab 8, pp. 53-55F; Endorsement of Justice Myers dated June 16, 2017, Appeal Book and Compendium, Volume 1, Tabs 9 and 9A, pp. 56-57.

[39] Order of Justice Myers dated July 17, 2017, Appeal Book and Compendium, Volume 1, Tab 6, pp. 36-43.

[40] Endorsement of Justice Myers dated July 17, 2017, Appeal Book and Compendium, Volume 1, Tabs 7 and 7A, pp. 44-52.

28. The Injunction Motion was heard on August 30, 2017. Argument lasted approximately 2 hours and concluded at approximately 4:00 pm. At the conclusion of the hearing, the motions judge inquired about costs and counsel agreed that costs would be dealt with following the delivery of a decision on the merits. As the injunction was set to expire the next day, counsel for the Davies Developers advised that they would consent to a short extension of the existing *Mareva* for a short period of time so as to allow the court to consider the issues raised.

29. That same day, the Order was granted on the basis of a handwritten endorsement delivered at 5:35pm (the "**Reasons**").[41] Other than a brief recitation at their outset ("Plaintiff sues John Davies and others ... for fraud, breach of fiduciary duty, conversion and other causes of action"), the Reasons contained no analysis of the various causes of action pleaded by the Plaintiff. They also failed to address the issues of irreparable harm and balance of convenience.

30. Regarding the undertaking as to damages, the motions judge held that:

> In my view this is a case to waive an undertaking on damages in accordance with the court's discretion. The receiver has no skin in the game. To go to the government or to investors to fund these proceedings is an affront to access to justice...
>
> ...this is a rare and unusual case where requiring an undertaking will do more harm than good.

31. The motions judge also awarded costs on a substantial indemnity basis, despite counsel's agreement at the hearing to deal with costs following the delivery of the motions judge's reasons.[42]

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[41] Endorsement of Justice Myers dated August 30, 2017 ("**Reasons**"), Appeal Book and Compendium, Volume 1, Tabs 3 and 3A, pp. 13-26.

[42] After inviting submissions regarding the appropriate quantum of costs, on October 3, 2017, the motions judge issued a further endorsement indicating that he was setting aside his original costs order but then, in the same endorsement, granting the same

PART III – STATEMENT OF ISSUES

32. This appeal raises the following issues:

(a) Did the motions judge fail to properly consider the test for granting a *Mareva* injunction, including a failure to properly examine the constituent elements of the causes of action pleaded to determine whether the Plaintiff was likely to succeed at trial?

(b) Did the motions judge fail to provide adequate reasons in granting the Order?

(c) Did the motions judge err in drawing speculative conclusions that were inconsistent with the uncontradicted evidence before him?

(d) Did the motions judge err in dispensing with the requirement to provide an undertaking for damages?

PART IV – LAW

33. Given the extraordinary and drastic nature of a *Mareva* injunction, the court is required to seriously consider the merits of the underlying claims and, if satisfied that a *Mareva* should issue, to provide clear and cogent reasons for the decision. Here, the motions judge failed to do so in several respects.

A. *The Motions Judge Failed to Properly Consider the Test for Granting a Mareva Injunction*

34. As with any injunction, the test for granting a *Mareva* injunction requires the plaintiff to establish that: (a) there is a strong *prima facie* case on the merits; (b) it would suffer irreparable harm if the injunction were not to issue; and (c) the balance of convenience favours the

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costs order on a substantial indemnity basis after a purported fresh review of the matter. See Order of Justice Myers dated October 3, 2017, Appeal Book and Compendium, Volume 1, Tab 4, pp. 27-29, and Endorsement of Justice Myers dated October 3, 2017, Appeal Book and Compendium, Volume 1, Tabs 5 and 5A, pp. 30-35.

plaintiff.[43] In addition, the plaintiff is required to demonstrate that there is good reason to believe that the defendant will dissipate its assets pending trial for the purpose of avoiding judgment.[44]

35. In this case, as discussed below, the motions judge failed to properly consider whether the plaintiff had established a *prima facie* case or whether there was a risk of dissipation of assets. Moreover, he completely failed to address the issues of irreparable harm and balance of convenience.

36. Failing to consider the requisite elements of a legal test amounts to an error in law that is reviewable on a correctness standard.[45] This has been specifically considered and decided in the context of the test to grant injunctive relief.[46] Accordingly, this Court is free to substitute the opinion of the motions judge with its own.

(i) There is no Prima Facie Case on the Merits

37. The requirement to establish a strong *prima facie* case on the merits has been equated to the plaintiff establishing that it is "clearly right" in its allegations against the responding party in the action, or that it is "almost certain to succeed at trial" in respect of those allegations.[47] This high threshold requires a judge to examine the evidence before him or her, and consider the constituent elements of each cause of action pleaded by the plaintiff against that evidence, to determine the plaintiff's likelihood of success.

38. Although the motions judge properly recognized the test to be applied at the beginning of his Reasons, he erred in failing to provide any analysis of the causes of action that the Plaintiff

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[43] *RJR –MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR –MacDonald*], Appellants' BOA, Tab 2.

[44] *Aetna Financial, supra* note 1 at paras. 25 & 30, Appellants' BOA, Tab 1.

[45] *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8 and 36, Appellants' BOA, Tab 3; *Creston Moly Corp. v. Sattva Capital Corp.*, 2004 SCC 53 at para. 53, Appellants' BOA, Tab 4.

[46] *Richardson v. Stonehouse*, 2006 NSCA 113 at paras. 19-20, Appellants' BOA, Tab 5.

[47] *SLMsoft.Com Inc. v. Rampart Securities Inc.*, 2004 CarswellOnt 3246 (SCJ) at para. 14, Appellants' BOA, Tab 6.

pleaded or their respective elements, and whether the Plaintiff was almost certain to succeed on each of those elements. In fact, the motions judge's only finding regarding the requirement for a strong *prima facie* case was in his endorsement from the *ex parte* hearing on June 7, 2017, in which he merely stated that he was satisfied that there is a strong *prima facie* case without analyzing any of the underlying causes of action pleaded by the Plaintiff.[48] In addition, and as explained below, the Plaintiff changed the nature of its claim after initially obtaining the *Mareva*. This alone should be sufficient to show that there was no longer (if there ever was) a strong *prima facie* case.

39. At the Injunction Motion, the Plaintiff focused on its claims for fraud, conversion, unjust enrichment and breach of fiduciary duty. An analysis of the constituent elements of each cause of action makes it clear that the Plaintiff failed to establish a strong *prima facie* case.

(i) Fraud

40. To establish its case of deceit or civil fraud, the Plaintiff must prove that the defendants (i) made a false statement, (ii) with knowledge that it was untrue or with reckless disregard for its truth or falsity; (iii) with the intent that the plaintiff should act on it; (iv) that the plaintiff acted upon it, and (v) incurred damages as a consequence.[49]

41. The Plaintiff's fraud claim was initially grounded on allegations that the development management fees the Davies Developers received were prohibited under the terms of the Loan Agreements and were "secret profits", "fraudulent" and "covert". While these allegations may have appeared meritorious at the *ex parte* proceeding, they were not supported by the more

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[48] Endorsement of Justice Myers dated June 7, 2017, Appeal Book and Compendium, Volume 1, Tabs 11 and 11A, pp. 64-65.

[49] *Voketel Inc. v. More*, 2006 CarswellOnt 7555 (SCJ) at para. 9, Appellants' BOA, Tab 7.

fulsome factual record before the motions judge at the Injunction Motion. All fee payments were disclosed. Nothing was hidden or "secret".

42. In light of this evidence, the Plaintiff changed its initial allegations and now alleges other fraudulent acts by the Defendants, including that the project pro formas contained false or misleading information and that the Defendants misrepresented the development potential of the projects. These allegations are without merit. As set out above, the Plaintiff failed to provide any evidence in support of these allegations. There is no evidence that the Defendants made any false statements to anyone. The motions judge never considered that the Plaintiff altered the nature of its claims since the date that the original *Mareva* was granted.

(ii) Conversion

43. In order to establish that conversion took place, the Plaintiff must establish (i) a wrongful act by the defendants involving the goods of the plaintiff; (ii) the act must consist of handling, disposing, or destroying the goods; and (iii) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.[50]

44. There were no wrongful acts in this case. All management fees, dividends and loans were made with notice to and approval by the Trustee Corporations and, as such, permitted under the Loan Agreements. Loans were appropriately recorded as intercompany advances on the books and records of the Receivership Companies. No Davies Developer wrongfully interfered with the assets of any other.

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[50] *Boma Manufacturing Ltd. v. CIBC*, 1996 CarswellBC 2314 (SCC) at para. 31, Appellants' BOA, Tab 8. See also *Erhardt v. Kendrick*, 2017 BCSC 813 at para. 26, Appellants' BOA, Tab 9.

45. In addition, the management fees and dividends were earned for work performed. As such, the Plaintiff has no right to the funds that were used to pay such fees and dividends.

(iii) Unjust Enrichment

46. The test for unjust enrichment is well established. The cause of action has three elements: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) an absence of juristic reason for the enrichment.[51]

47. The Defendants were paid management fees and dividends in return for the development work they undertook, in accordance with the pro formas provided to the Trustee Corporations. The Loan Agreements contemplated such payments. There was nothing unconscionable about those contracts. As such, there is a juristic reason for what the Defendants received.

(iv) Breach of Fiduciary Duty

48. Corporate directors owe a fiduciary duty to the company. They are required to act honestly and in good faith with a view to the best interests of the company.[52] As a director and officer of the Receivership Companies, Mr. Davies was in a fiduciary relationship with them.

49. When dealing with closely-held corporate groups, it is axiomatic that a director can have due regard for the interests of the group as a whole. There is no evidence that Mr. Davies ever acted other than in the best interests of the Receivership Companies as a whole in order to move all of the development projects through predevelopment and into construction. Indeed, at the time that GTL was appointed as trustee, construction had begun on one project and a $67 million construction financing contract was set to be executed for another.

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[51] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 30 and 44, Appellants' BOA, Tab 10.

[52] *1217174 Ontario Ltd. v. 141608 Canada Inc.*, 2017 ONSC 7698 at paras. 106-107, Appellants' BOA, Tab 11.

50. The Plaintiff also alleged that Mr. Davies breached his fiduciary duties to the Receivership Companies by engaging in self-dealing and making "secret profits". For the reasons set out above, these allegations are without merit.

(ii) No Irreparable Harm

51. In order to obtain injunctive relief, the Plaintiff must demonstrate that it would suffer irreparable harm if the injunction were not to issue. Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured. It must be clear and not speculative.[53] In his Reasons, the motions judge provided no analysis regarding this requirement, making it impossible to determine whether he turned his mind to this issue and, if so, his conclusions. As such, the only point of reference is the Plaintiff's submissions on the point.

52. At the Injunction Motion, the Plaintiff argued that irreparable harm could be inferred from the risk that the Defendants might dissipate assets. The motions judge had "no hesitation finding a proven risk of dissipation" of assets given that Mr. and Mrs. Davies had recently sold their family cottage in April 2017 and had listed their personal residence for sale.[54] Aside from the fact that such an inference is entirely speculative, which is contrary to the case law, the evidentiary record contradicts it.[55]

53. The uncontradicted evidence before the motions judge was that both the sale of the cottage and the listing of the Davies' residence were done at the behest of Mr. Davies' mortgagees, as both properties were in default. Mr. Davies received no proceeds from the sale of the cottage and is unlikely to receive any proceeds if his residence is sold. Moreover, Mr. Davies

[53] *RJR –MacDonald, supra* note 43 at para. 64, Appellants' BOA, Tab 2; *Les Equipements de Ferme Curran Ltée v. John Deere Ltd.*, 2011 ONSC 3791 at para. 16, Appellants' BOA, Tab 12.

[54] Reasons, *supra* note 41, Appeal Book and Compendium, Volume 1, Tabs 3 and 3A, pp. 22 and 26.

[55] In addition, and although not argued before the motions judge, the potential availability of insurance proceeds in the event of a judgment against Mr. Davies is another reason why the Plaintiff cannot demonstrate irreparable harm.

disclosed at his cross-examination that he intended to list his property for sale if he was unable to reach an arrangement with his lender.[56] There is no basis upon which to infer from these facts a risk of irreparable harm to the Plaintiff.

(iii) The Balance of Convenience Favours the Defendant

54. The motions judge also failed to address the balance of convenience in his Reasons, which required him to determine which of the two parties would suffer greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.[57] The factors to be considered in assessing the balance of convenience include the nature of the transaction giving rise to the cause of action; the enforcement measures available; the amount of the claim; the history of the defendant's conduct; the relative strengths of the parties' cases; and evidence of irreparable harm either way.[58]

55. In *Encorp Pacific (Canada) v. Rocky Mountain Center Ltd.*, on a motion to set aside a *Mareva* injunction, the court re-evaluated the allegations in light of new evidence the defendant advanced in order to assess the relative strengths of the parties' cases and determine in whose favour the balance of convenience weighed. In reviewing the new evidence, the court held that the balance of convenience had "shifted" as the defendants' case was stronger than it appeared at the time of the original *ex parte* application. Thus, the *Mareva* injunction was set aside.[59]

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[56] First Davies Affidavit at paras. 16-23 and 30-32, Appeal Book and Compendium, Volume 1, Tab 17, pp. 174-177 and 179-180; First Davies Cross-Examination at q. 135, Appeal Book and Compendium, Volume 1, Tab 15, pp. 157-158.

[57] *RJR –MacDonald Inc., supra* note 43 at para. 67, Appellants' BOA, Tab 2.

[58] *Encorp Pacific (Canada) v. Rocky Mountain Center Ltd*, 2005 BCSC 1700 at para. 43, Appellants' BOA, Tab 13.

[59] *Ibid.* at paras. 45-51, Appellants' BOA, Tab 13.

56. When this exercise is conducted in respect of this case, a consideration of the evidence supports the conclusion that the balance of convenience has shifted in favour of the Defendants, and that it is no longer just and convenient to continue the *Mareva* injunction:

(a) The transactions giving rise to the claim were known to the Receivership Companies and approved by the Trustee Corporations as lender;

(b) If the Plaintiff succeeds at trial, it can rely upon the enforcement measures that would normally be available to a plaintiff in any other civil proceeding;

(c) Mr. Davies has been a successful real estate developer for 25 years and has built numerous developments over his career, borrowing and repaying over $200 million;[60]

(d) The Plaintiff has failed to make out a *prima facie* case; and

(e) The facts set out above in paragraphs 51-53 lead to the conclusion that the only party that is at risk of suffering irreparable harm is Mr. Davies who, as a result of the allegations in this lawsuit, has and continues to suffer damage to his reputation and an inability to earn a living.[61]

(iv) No Risk of Dissipating Assets

57. The plaintiff is also required to prove that the defendant is removing its assets from the jurisdiction, or that there is a "real risk" that it is about to do so, to avoid the possibility of a judgment or to render the possibility of future tracing of those assets remote or impossible.[62] The Court of Appeal for Ontario has suggested that the decisive question is the purpose of the defendant and, while hesitating to express a final view on the question, stated that the better view

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[60] Second Davies Affidavit at paras. 4-6, Appeal Book and Compendium, Volume 2, Tab 18, pp. 247-248.

[61] First Davies Affidavit at paras. 34-35, Appeal Book and Compendium, Volume 1, Tab 17, p. 180; Second Davies Affidavit at para. 49, Appeal Book and Compendium, Volume 2, Tab 18, p. 269.

[62] *Chitel v. Rothbart*, 1988 CarswellOnt 451 (CA) at para. 58, Appellants' BOA, Tab 14.

is that "it is only if the purpose of the defendant when removing assets from the jurisdiction or the dissipating or disposing of them is for the purpose of avoiding judgment that a *Mareva* injunction should be issued."[63] Where no such evidence exists, courts have refused to continue *Mareva* injunctions.[64]

58. As discussed above in paragraph 53, Mr. Davies has only sold assets, or attempted to do so, at the behest of his secured creditors who are (or were) in a position to enforce their security. There is no evidence that he has taken any steps to avoid a judgment – to the contrary, Mr. Davies has undertaken to refrain from selling or encumbering his property in Arizona, which is his last remaining asset of any potential value.[65] The motions judge's finding that there is a proven risk of dissipation of assets[66] was founded entirely on speculation rather than cogent evidence, which colours the entire judgment against the Defendants. This constitutes an error warranting this Court's intervention.[67]

B. *The Motions Judge Erred by Failing to Provide Sufficient Reasons*

59. While judicial reasons need not be perfect, they must be sufficient to enable the parties, the general public and appellate courts to know whether the applicable legal principles and evidence were properly considered in reaching the decision.[68] Failure to provide discernable

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[63] *R. v. Consolidated Fastfrate Transport Inc.*, 1995 CarswellOnt 993 (CA) at para. 48, Appellants' BOA, Tab 15.

[64] *Elsley v. Bordynuik*, 2013 ONSC 1210 at para. 66, Appellants' BOA, Tab 16. See also *Chitel, supra* note 62, Appellants' BOA, Tab 14.

[65] First Davies Affidavit at para. 27, Appeal Book and Compendium, Volume 1, Tab 17, p. 178.

[66] Reasons, *supra* note 41, Appeal Book and Compendium, Volume 1, Tabs 3 and 3A, pp. 22 and 26.

[67] *Kreft v. Mezo*, 2006 CarswellOnt 2700 (SCJ) at para. 10, Appellants' BOA, Tab 17.

[68] *Lawson v. Lawson* (2006), 81 O.R. (3d) 321 (CA) at para. 9, Appellants' BOA, Tab 18.

analysis, which prevents meaningful appellate review, constitutes an error of law.[69] As Borins J.A. stated in *Smyth v. Waterfall*:

> ... a failure to provide a reasoned decision tends to undermine confidence in the administration of justice as the absence of reasons may give the appearance of an arbitrary decision, particularly in the eyes of the unsuccessful party.[70]

60. In this case, the motions judge failed to provide any discernible analysis to support his conclusion that the *Mareva* injunction ought to be continued. While one might interpret, speculate or guess, his true motivations are unclear. Without this information, it is impossible for this Court to conduct any meaningful review of the decision on appeal. The motions judge's failure to provide adequate reasons constitutes an error of law.

C. *The Motions Judge Erred in Basing his Decision on Speculative and Groundless Conclusions*

61. In order to sustain factual findings that the test for a *Mareva* injunction has been met, cogent evidence is required, not inference and speculation. A failure to ground findings and conclusions in the evidence constitutes a palpable and overriding error.[71]

62. In this case, the motions judge based his decision on a number of speculative conclusions unsupported by the evidentiary record or, in some cases, directly contradicted by evidence from the Defendants that was not countered by the Plaintiff. These conclusions included:

(a) Mr. Davies paid himself fees and dividends instead of using funds for the Receivership Companies' corporate purpose – the uncontradicted evidence was that (a) more than $61 million was spent to acquire

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[69] *R. v. Sheppard*, 2002 SCC 26 at para. 28, Appellants' BOA, Tab 19; *Sahota v. Sahota*, 2015 CarswellOnt 6046 (Div. Ct.) at para. 7, Appellants' BOA, Tab 20.

[70] 2000 CarswellOnt 3324 (CA) at para. 13, Appellants' BOA, Tab 21.

[71] *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819 at paras. 98 & 105, Appellants' BOA, Tab 22.

development properties and pay for development costs[72] associated with significant development work carried out on the properties;[73] and (b) the management fees and dividends paid to Mr. Davies were disclosed to and approved by the Trustee Corporations;[74]

(b) the Trustee Corporations raised funds from investors and lent them to the Receivership Companies to fund the construction of buildings – the uncontradicted evidence was that both the Trustee Corporations,[75] and the investors who invested funds with them,[76] knew and understood that the Davies Developers had been retained to carry out predevelopment work rather than construction, and that loan proceeds would be used for this purpose;

(c) the intercompany loans made between the Receivership Companies were "not real loans" and that "there was no expectation of repayment" – the uncontradicted evidence was that the intercompany loans were (a) known to and authorized by the Trustee Corporations;[77] (b) recorded in the books and records of the Receivership Companies;[78] and (c) were expected to be repaid once construction financing was secured;[79]

(d) construction financing is used to build and not to repay old debt, in the face of the evidence noted above and in the absence of any industry evidence regarding the permissible uses for construction financing; and

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[72] Fourth Report at s. 3.0, Appeal Book and Compendium, Volume 3, Tab 19, pp. 649-650.

[73] Second Davies Affidavit at paras. 14(a)-(g), Appeal Book and Compendium, Volume 2, Tab 18, pp. 251-254.

[74] First Davies Affidavit at para. 9 Appeal Book and Compendium, Volume 1, Tab 17, p. 172; First Davies Cross-Examination at qq. 240-248, Appeal Book and Compendium, Volume 1, Tab 15, pp. 148-156; Correspondence regarding development management fees, Appeal Book and Compendium, Volume 1, Tab 17C, pp. 193-204.

[75] First Davies Affidavit at paras. 8-12, Appeal Book and Compendium, Volume 2, Tab 18, pp. 171-173.

[76] Acknowledgement and Direction provided to Kitchener syndicated mortgage investors, Exhibit "R" to the Fourth Report, Appeal Book and Compendium, Volume 4, Tab 19R, pp. 1109-1115.

[77] Second Davies Affidavit at para. 21, Appeal Book and Compendium, Volume 2, Tab 18, pp. 257-258; Correspondence regarding intercompany loans, Appeal Book and Compendium, Volume 2, Tab 18P, pp. 528-556.

[78] Second Davies Affidavit at para. 24, Appeal Book and Compendium, Volume 2, Tab 18, pp. 258-259.

[79] Second Davies Affidavit at para. 25, Appeal Book and Compendium, Volume 2, Tab 18, p. 259.

(e) Mr. Singh was not arm's length and was not in a position to consent on behalf of the Trustee Corporations to the payment of development management fees and the making of intercompany loans, (a) in light of the uncontradicted evidence that the only relationship between Mr. Singh and the Defendants was that of arm's length lender and borrower,[80] and (b) in the absence of any evidence from Mr. Singh, who had previously been in contact with and available to the Plaintiff.[81]

63. In failing to rely upon the uncontradicted evidence before him, the motions judge erred in his decision-making process. It was not open to him to draw speculative conclusions that the evidence either did not support or directly contradicted.[82]

D. *The Motions Judge Misarticulated the Test for Dispensing with an Undertaking as to Damages*

64. The motions judge erred in dispensing with the undertaking as to damages. His basis for refusing to grant the undertaking was flawed and runs the risk of seriously prejudicing the Defendants. An undertaking as to damages is presumptively required as part of any injunction and can only be dispensed with in exceptional circumstances. This is particularly so in respect of a *Mareva* injunction given its extraordinary nature.[83] As such, an order dispensing with an undertaking must be clear and reasoned. In this case, it was not.

65. In his reasons for decision on July 17, 2017, the motions judge dispensed with the requirement to order an undertaking as to damages on the basis that "if the 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 ensuring investigation of the plaintiff's strong *prima*

[80] First Davies Affidavit at para. 10, Appeal Book and Compendium, Volume 1, Tab 17, p. 172; Second Davies Affidavit at para. 3, Appeal Book and Compendium, Volume 2, Tab 18, p. 247.
[81] Sixth Report at s. 1.2, para. 5, Appeal Book and Compendium, Volume 4, Tab 20, p. 1155.
[82] *Tsiolakis v. Sethi*, 2007 CarswellOnt 6864 (Div. Ct.) at para. 21, Appellants' BOA, Tab 23.
[83] *SFC Litigation Trust (Trustee of) v. Chan*, 2016 ONSC 3226 (Div. Ct.) at para. 31, Appellants' BOA, Tab 24.

facie case".[84] 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".

66. Subsequently, in his Reasons, the motions judge stated that the basis for refusing to grant an undertaking as to damages was that "the Receiver has no skin in the game" and that going to the government or investors "to fund these proceedings is an affront to access to justice".[85] The motions judge did not rely on any authority in support of this decision. There was no balancing of interests between the parties.

67. The latter of these statements appears to presume that providing an undertaking would somehow prejudice the Plaintiff, which wholly misses the point. An undertaking as to damages does not require or compel the moving party to "fund" anything; rather, it provides the responding party with the assurance that it will not be prejudiced in the event it is ultimately determined that the moving party was unjustified in seeking an injunction.

68. With respect to the motions judge's conclusion that the Plaintiff "has no skin in the game", the fact that an officer of the court – be it a receiver or a trustee in bankruptcy – is seeking injunctive relief does not preclude a court from granting an undertaking as to damages. Rather, it is one factor the court may consider in its analysis, not the determinative factor.

69. In deciding whether to dispense with an undertaking, the court must consider the particular facts and legal arguments of each individual case weighing the relative strengths of the

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[84] Endorsement of Justice Myers dated July 17, 2017, Appeal Book and Compendium, Volume 1, Tabs 7 and 7A, pp. 44-52.

[85] Reasons, *supra* note 41, Appeal Book and Compendium, Volume 1, Tabs 3 and 3A, pp. 23 and 26.

case and the balance of convenience.[86] It is a fact-specific exercise. Although one appellate court upheld a decision to dispense with the need for an undertaking by a receiver,[87] other courts (both appellate and first instance) have granted the undertaking against trustees in bankruptcy[88] and receivers (or would have done so but for the injunction being dissolved upon appeal).[89] Here there was not even an attempt at such a balancing, which is an error in law.

70. In the circumstances of this case, given the gravity of the allegations made against the Defendants, and the reputational and business harm that Mr. Davies has suffered and will continue to suffer, if the *Mareva* is not set aside then it should only be maintained on the usual condition that the Plaintiff provide an undertaking as to damages.

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[86] *Points of Call Airlines Ltd., Re*, 1990 CarswellBC 428 (Sup. Ct.) at para. 59, Appellants' BOA, Tab 25.

[87] *Business Development Canada v. Aventura II Properties Inc.*, 2016 ONCA 300 at para. 25, Appellants' BOA, Tab 26.

[88] See *Points of Call Airlines, supra* note 86, Appellants' BOA, Tab 25.

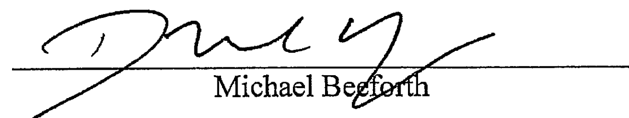
[89] *Vue Weekly v. See Magazine Inc. (Receiver of)*, 1995 ABCA 461 at para. 36, Appellants' BOA, Tab 27.

PART V – ORDER REQUESTED

71. The Defendants respectfully request an order setting aside the Order of the Honourable Justice Myers dated August 30, 2017, together with costs of this appeal and the underlying motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2018.

Kenneth Kraft



Michael Beeforth

Lawyers for the Defendants (Appellants), John Davies and Aeolian Investments Ltd

CERTIFICATE

Counsel for the Appellants hereby certify:

A. An order under subrule 61.09(2) is not required, and

B. The time estimated for oral argument on behalf of the Appellants, not including reply, is two hours.

Schedule "A" – List of Authorities

1. *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 SCR 2
2. *RJR –MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311
3. *Housen v. Nikolaisen*, 2002 SCC 33
4. *Creston Moly Corp. v. Sattva Capital Corp.*, 2004 SCC 53
5. *Richardson v. Stonehouse*, 2006 NSCA 113
6. *SLMsoft.Com Inc. v. Rampart Securities Inc.*, 2004 CarswellOnt 3246 (SCJ)
7. *Voketel Inc. v. More*, 2006 CarswellOnt 7555 (SCJ)
8. *Boma Manufacturing Ltd. v. CIBC*, 1996 CarswellBC 2314 (SCC)
9. *Erhardt v. Kendrick*, 2017 BCSC 813
10. *Garland v. Consumers' Gas Co.*, 2004 SCC 25
11. *1217174 Ontario Ltd. v. 141608 Canada Inc.*, 2017 ONSC 7698
12. *Les Equipements de Ferme Curran Ltée v. John Deere Ltd.*, 2011 ONSC 3791
13. *Encorp Pacific (Canada) v. Rocky Mountain Center Ltd*, 2005 BCSC 1700
14. *Chitel v. Rothbart*, 1988 CarswellOnt 451 (CA)
15. *R. v. Consolidated Fastfrate Transport Inc.*, 1995 CarswellOnt 993 (CA)
16. *Elsley v. Bordynuik*, 2013 ONSC 1210
17. *Kreft v. Mezo*, 2006 CarswellOnt 2700 (SCJ)
18. *Lawson v. Lawson* (2006), 81 O.R. (3d) 321
19. *R. v. Sheppard*, 2002 SCC 26
20. *Sahota v. Sahota*, 2015 CarswellOnt 6046 (Div. Ct.)
21. *Smyth v. Waterfall*, 2000 CarswellOnt 3324 (CA)
22. *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819
23. *Tsiolakis v. Sethi*, 2007 CarswellOnt 6864 (Div. Ct.)
24. *SFC Litigation Trust (Trustee of) v. Chan*, 2016 ONSC 3226 (Div. Ct.)

25. *Points of Call Airlines Ltd., Re*, 1990 CarswellBC 428 (Sup. Ct.)

26. *Business Development Canada v. Aventura II Properties Inc.*, 2016 ONCA 300

27. *Vue Weekly v. See Magazine Inc. (Receiver of)*, 1995 ABCA 461

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

RULE 40 – INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

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

KSV KOFMAN INC.
Plaintiff (Respondent)

and

AEOLIAN INVESTMENTS LTD. et al.
Defendants (Appellants)

ONTARIO
DIVISIONAL COURT,
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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