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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

- and -

TEXTBOOK (256 RIDEAU STREET) INC.

Defendant

BOOK OF AUTHORITIES OF THE PLAINTIFF

(Motion for Certificates of Pending Litigation – Returnable May 16, 2017)

May 16, 2017

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INDEX

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INDEX

TAB 1

1999 CarswellOnt 234
Ontario Court of Justice, General Division [Commercial List]

Transmaris Farms Ltd. v. Sieber

1999 CarswellOnt 234, [1999] O.J. No. 300, 30 C.P.C. (4th) 369, 86 O.T.C. 190

Transmaris Farms Limited, Bruce Energy Centre Syndicate Anstalt, Merkur Treuhand-Und Vervaltungs-Gesellscchart MBH, Maius AG and Christian Straube, Plaintiffs and Helmut J. Sieber, B.A.L. Financial Corporation, B.A.L. Holdings Inc., B.A.L. Developments Limited Partnership, Raika Financial (Canada) Corporation, Raika Leasing (Canada) Corporation, Canadian Agra Cubing Limited, Bruce Energy Centre Limited, Gerd Merz and Wolf Von Teichman, Defendants

Blair J.

Heard: January 13-15, 1999
Judgment: February 4, 1999 *
Docket: 98-CL-2661

Proceedings: additional reasons at (February 8, 1999), Doc. 98-CL-2661 (Ont. Gen. Div. [Commercial List])

Counsel: *Alan H. Mark* and *Kelly Friedman*, for the Plaintiffs, Moving Parties.
Ian C. Wallace and *David S. Swift*, for the Defendant, Respondent, Gerd Merz.

Subject: Property; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Real property

II Registration of real property
II.5 Certificate of pending litigation (lis pendens)
II.5.d Right to register
II.5.d.i Interest in land

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.F Miscellaneous

Headnote

Real property — Certificate of pending litigation (lis pendens) — Right to register — Interest in land

Defendant accountant managed and supervised plaintiff's investments in Canada — Defendant and another employee made secret profits by misappropriating funds advanced to limited partnership for purchase of lands — Plaintiff and his companies brought action alleging self-dealing and fraud or wilful blindness by defendant — Plaintiffs brought motion for certificates of pending litigation against certain lands transferred to defendant's company — Motion granted in part — Plaintiffs established strong prima facie case that defendant knew employee's company purchased lands and sold them to plaintiff's company at 30 per cent mark-up, and that defendant breached fiduciary obligations with respect to secret profits — Sufficient evidence existed that plaintiffs had reasonable claim to interest, and raised triable issue which had chance of success, to justify granting certificates of pending litigation for all specified lands but one — Properties transferred from partnership were intricately bound up in allegations of self-dealing and diversion of funds — Expanded view of constructive trust could create interest in properties transferred from employee's companies — Defendant's residence fraudulently conveyed since transfer occurred after action was commenced.

Injunctions --- Availability of injunctions — Mareva injunctions — Threshold test — General

Defendant accountant managed and supervised plaintiff's investments in Canada — Defendant and another employee made secret profits by misappropriating funds advanced to limited partnership for purchase of lands — Plaintiff and his companies brought action alleging self-dealing and fraud or wilful blindness by defendant — Plaintiffs brought motion for Mareva injunction restraining defendant from dealing with lands transferred to his company from partnership and from employee's and plaintiff's companies, and defendant's residence, which was transferred after action was commenced — Motion granted in part — Plaintiffs established strong prima facie case and would suffer irreparable harm if injunction not granted — Balance of convenience favoured plaintiffs — Real risk existed that defendant would remove assets from jurisdiction to avoid possibility of judgment, or otherwise dispose of assets so as to defeat future tracing — Circumstances were sufficiently suspicious and cogent, evidence sufficiently lacking or tenuous, and lands sufficiently connected to case to justify relief on additional bases of fraud and constructive trust — Mareva injunction granted for specified lands — Broader relief not required.

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Cases considered by *Blair J.*:

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Bank of Montreal v. Ewing (1982), 35 O.R. (2d) 225, 135 D.L.R. (3d) 382 (Ont. Div. Ct.) — referred to

Brown & Collett Ltd., Re (1996), 11 E.T.R. (2d) 164 (Ont. Gen. Div. [Commercial List]) — referred to

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Clock Investments Ltd. v. Harwood Estates Ltd. (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 (Ont. Div. Ct.) — considered

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Hanson v. Clifford (1994), 59 C.P.R. (3d) 465, 21 B.L.R. (2d) 108 (B.C. S.C.) — referred to

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Homebuilder Inc. v. Man-Sonic Industries Inc. (1987), 22 C.P.C. (2d) 39, 14 C.I.P.R. 229, 28 C.L.R. 18 (Ont. Master) — referred to

Memphis Holdings Ltd. v. Plastics Land Partnership (1989), 35 C.P.C. (2d) 177, 4 R.P.R. (2d) 169 (Ont. H.C.) — referred to

Mills v. Petrovic (1980), 30 O.R. (2d) 238, 18 C.P.C. 38, 12 B.L.R. 224, 118 D.L.R. (3d) 367 (Ont. H.C.) — referred to

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West v. West (1997), 28 R.F.L. (4th) 399, 33 O.R. (3d) 472 (Ont. Gen. Div.) — referred to

572383 Ontario Inc. v. Dhunna (1987), 24 C.P.C. (2d) 287 (Ont. Master) — referred to

931473 Ontario Ltd. v. Coldwell Banker Canada Inc. (1991), 5 C.P.C. (3d) 238 (Ont. Gen. Div.) — applied

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 103 — considered

s. 103(6) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 37.07(1) — referred to

R. 37.07(2) — referred to

MOTION by plaintiffs for certificates of pending litigation and Mareva injunction.

Blair J.:

I - Overview

1 On this Motion the Plaintiffs seek interlocutory relief in the form of certificates of pending litigation, a Mareva injunction and ancillary discovery relief in aid of the Mareva injunction. They also seek leave to amend their Statement of Claim in certain ways, including the adding of defendants. The relief was sought originally against the Defendant Sieber (and his related corporations) and against the Defendant Dr. Gerd Merz. However, as a result of interim settlement agreement between the Plaintiffs and the Sieber Defendants, the claim for relief against them has been adjourned on the basis of certain terms providing, amongst other things, for,

a) an interim order prohibiting the Sieber Defendants from dealing with various properties and assets; and,

b) a collaborative forensic investigation involving the forensic accountants of both the Plaintiffs and the Sieber Defendants.

2 The Motion to amend the Statement of Claim was not opposed, and on January 14, 1999, the Motion Record was endorsed granting leave to amend in the form of a draft *Amended* Statement of Claim filed and, in addition, granting leave to add Moka Holdings Limited as a party.

3 The Motion accordingly proceeded only as against Dr. Merz for the granting of certificates of pending litigation and Mareva injunctive relief. It is alleged that Dr. Merz, with his fiduciary responsibilities for the supervision and management of Mr. Straube's Canadian investments, was in breach of those obligations by engaging in self-dealing on his own behalf, and that he was either complicit in a massive fraud perpetrated on the Plaintiff's by Mr. Sieber or he was wilfully blind as to what was transpiring and is equally liable for breach of trust.

II - Background and Facts

Background

4 The action in which this Motion is brought arises out of dealings between the Plaintiff, Christian Straube, and the corporate Plaintiffs related to him, on the one hand, and Helmut Sieber, Dr. Merz and WolfVon Teichman, and companies owned or controlled by one or more of them, on the other hand. Mr. Straube is a European investor of considerable wealth, and is said to be the heir to the Opal car manufacturing fortune. Dr. Merz — now 73 years old, and a retired chartered accountant — was a financial advisor and a senior executive employed by the Straube family and by Mr. Straube and/or his companies over many years. Mr. Von Teichman, who is a Defendant but against whom no relief is claimed on this Motion, is an Ontario lawyer who performed services for Messrs. Sieber and Merz.

5 Between 1982 and 1995 Mr. Straube sent something in the neighbourhood of $200 million to Canada to be invested there on the recommendation of Mr. Sieber and Dr. Merz and under their direct management and supervision. Dr. Merz was the general manager and chief executive officer of the Plaintiff, Merkur Treuhand-Und Verwaltungsgesellschaft MBH ("Merkur"), a company controlled by Mr. Straube and used as an investment vehicle for the Straube interests. Although Dr. Merz has recently become a resident of Canada, he was operating at the time from Germany [1]. He controlled the flow of funds out of Merkur and requisitioned further funds for Merkur as and when required, and had decision making authority on behalf of Mr. Straube regarding the Canadian investments. Dr. Merz acknowledges that

he was responsible for the Straube Canadian investments, that they were under his supervision, and that it was his responsibility to monitor and supervise the work of Mr. Sieber. Mr. Sieber was the manager of the investments in Canada.

6 The Canadian investments made by Mr. Straube fall generally into two categories, namely,

> a) a first phase in the early to mid-1980's, involving the advance of about $4.9 million through the Plaintiff Transmaris Farms Limited ("Transmaris") for the acquisition of Canadian farmlands; and,
>
> b) a second phase, representing the bulk of the investment, and concerning the creation and development of the Bruce Energy Centre (the "BEC") near Kincardine, Ontario — a phase which itself involved three different stages of investment, and while I will outline more fully momentarily.

7 Mr. Sieber was engaged, through Dr. Merz, to manage the investments in Canada. He was Mr. Straube's agent in connection with the initial farmland purchases through Transmaris. He was the manager of the BEC Project, with responsibility to manage all aspects of that investment. B.A.L. Holdings Inc., a corporation wholly-owned and controlled by Mr. Sieber was the general partner. Mr. Sieber reported to Dr. Merz in respect of these matters.

The Bruce Energy Centre

8 The Bruce Energy Centre was to be a large industrial complex, with related facilities, in the Kincardine area of Ontario. The idea was to take advantage of cheap steam and electricity that would be available as by-products of the manufacture of heavy water at Ontario Hydro's nearby Bruce Nuclear Plant. An infrastructure to harness the steam energy was to be constructed (largely with government monies) and the park and facilities developed to attract industry to the area. The land, which would be assembled at farmland prices, was to be sold to investors as industrial lots at a profit, as industries — attracted by the cheap stream and electricity — moved to the area.

9 The Straube investment in the Bruce Energy Centre was made by way of loans to a limited partnership, B.A.L. Developments Limited Partnership. Although there is a major issue raised in the action as to whether the Straube investment was to be by way of loan or by way of equity in the project, it was clearly structured as a loan, recorded as a loan in all relevant books and documents, and treated as a loan for tax purposes by all concerned. Mr. Straube, through an entity wholly owned by him, became a limited partner to the extent of an 80% interest in the Limited Partnership. Mr. Sieber and Dr. Merz each received a 10% interest, although they paid no monies for that interest.

10 Monies were invested in the BEC by the Straube interests in three stages. First, the lands required were assembled in the late 1980's, at a cost of approximately $38 million. These funds were arranged by Mr. Straube in Europe through a loan from the Fontra Finanz Anstalt ("Fontra") in Germany, personally guaranteed by him, and advanced on the Canadian side through Transmaris. Secondly, the Alfalfa Plant was constructed as a "proof of concept", in order to demonstrate to businesses thinking of locating in the BEC that the cheap steam and electricity concept was a viable one. Mr. Straube provided approximately $57 million between 1991 and 1994 to fund the construction of the Alfalfa Plant and its operating losses. These funds were arranged by him through a loan from Credit Suisse in Europe, again supported by his personal guarantee. Thirdly, between 1993 and 1995 a net amount of about $77.2 million (after interest payments) was advanced by Mr. Straube with respect to the BEC through Merkur to Transmaris, and from Transmaris to the Limited Partnership.

11 The foregoing figures are net of certain other payments made for interest on the monies borrowed by Mr. Straube or his European entities[2] in order to fund the Canadian investment.

12 Unknown to Mr. Straube, a company called Raika Financial (Canada) Corporation ("Raika Financial") — owned and controlled by Mr. Sieber — was interposed in the chain of disposition between Transmaris and the Limited Partnership. Raika Financial, after receipt of the funds from Transmaris, in turn loaned funds to others, including the Limited Partnership, but also including Sieber entities. The role of Raika Financial and the questions surrounding the

recipients of the Raika Financial loans and the uses to which they were put, are central to the dispute between the parties in the main action. I shall return briefly to those issues later.

13 The Bruce Energy Centre project failed. Ontario Hydro adopted a position in 1992 or 1993 which resulted in the cheap steam and electricity not becoming available as expected. There is a difference of opinion between the parties as to whether or not the project was "effectively dead" from that point on. The Sieber Defendants and Dr. Merz argue that negotiations were ongoing and that Mr. Sieber remained hopeful that the project could be saved. Indeed, there is correspondence in the record indicating that matters were at least still under discussion as late as October 1994. The Straube Plaintiffs argue, however, that the project was clearly not going to proceed further, and question why further advances in excess of $77 million were justified in such circumstances.

The Concerns and Allegations of the Straube Interests

14 In 1995 Mr. Straube became concerned about the BEC project and tried to obtain an accounting of his funds and the assets acquired, from Mr. Sieber and Dr. Merz. He was not satisfied with the response he got and retained KPMG to make initial enquiries. This led ultimately to the formal retainer of KPMG, in November 1996, to conduct an investigation into the financing and investment transactions entered into between 1981 and 1995 by the Defendants. KPMG has issued several reports subsequently, and in May 1997 this action was commenced.

15 To understand the case against Dr. Merz it is necessary to consider the case against the Sieber Defendants. Dr. Merz is alleged not only to have benefitted personally from his self-dealings as a Straube fiduciary; it is asserted with equal vigour that he was either complicit in the self-dealing and fraud said to have been perpetrated by the Sieber Defendants against the Straube interests[3], or to have been wilfully blind to that conduct in circumstances which constitute him personally in breach of trust for the Sieber wrongdoings as well.

16 The wrongdoings asserted against the Sieber Defendants and Dr. Merz fall under a number of headings, the most significant of which, for the purposes of this Motion, are the following:

1) Secret profits earned upon the acquisition of lands during the first phase purchase of farmland;

2) Secret profits earned upon the assembly of lands for the BEC;

3) Secret profits earned through Raika Leasing (Canada) Corporation ("Raika Leasing");

4) The diversion of approximately $33 million of funds forwarded by Merkur and destined for the Limited Partnership, to finance the operations of Sieber related entities by means of the interposition of Raika Financial (Canada) Corporation ("Raika Financial") — a Sieber corporation — in the chain of disposition;

5) The misappropriation of the Alfalfa Plant;

6) The funding of Bruce Foods Inc. and St. Lawrence Technology

7) Bridge financing and undisclosed profits regarding the Pelee Island Vineyard;

8) The misappropriation of land and other assets from the Limited Partnership.

17 What follows is a brief summary of each of the foregoing allegations, and the evidence respecting Dr. Merz regarding them.

(a) Profits on the Purchase of Agricultural Lands

18 The Straube interests in the first phase acquisition of farmlands in the early 1980's were taken through Transmaris. Mr. Sieber, whose business interests involved the location, acquisition and management of farm properties, located the

prospective investment properties. Purchases of farm lands by foreign investors attracted a high rate of land transfer tax, however, and solicitor Von Teichman came up with a proposal to minimize the impact of that policy. His scheme was that the farmers would transfer their lands to a Canadian corporation prior to selling them to Transmaris and that Transmaris would then acquire the shares of the vendor corporations.

19 The evidence is that Mr. Sieber and Mr. Von Teichman took the scheme one step further, though. They interposed *another* corporation — a Sieber controlled company — between the vendor corporation and Transmaris. The purchase price was marked up by 30% over what the farmer was paid, and the difference between what the farmer was paid for the lands and what Transmaris (and hence Mr. Straube) paid for the lands found its way into the pockets of Mr. Sieber and Mr. Von Teichman in a direct or indirect fashion. A total of 11 farms were acquired by Transmaris in this fashion, for a price of $4,811,450. The evidence indicates that approximately $1.25 million of those monies were paid to Messrs. Sieber and Von Teichman. Mr. Straube was unaware of these secret profits being made.

20 Dr. Merz's evidence is that he, too, was unaware that the secret profits were being taken on the land transactions and that he believed the price paid for the shares by Mr. Straube was the same as the price paid to the farmers. However, this testimony is dramatically inconsistent with a statement made in a written Acknowledgement signed by him and placed in evidence in these proceedings by Mr. Sieber. The document forms part of what Mr. Sieber described as "certain confirmations and acknowledgements ... which were executed by [Mr. Sieber] on behalf of Algonquin Farms Ltd.[4] as 'vendor' *and by Dr. Merz in his capacity as a representative of Straube's interests (as 'purchaser')*" (my emphasis). It was executed, according to Mr. Sieber's affidavit, in the mid-1980's. In the Acknowledgement Dr. Merz stated:

> a) All of the shares of all of the companies eventually amalgamated into the company owned by the undersigned (Dr. Merz) were purchased directly from Algonquin Farms Ltd. and/or Helmut Sieber (hereinafter called the "Vendor"). The purchase was not, nor was it intended or understood that purchases would be directly from the farmer, original land owner.
>
> c) ...I was informed that the Vendor purchased the farms and/or Share Purchases to resell to me[5] by way of share sales at the price that the undersigned and the Vendor agreed to pay as set out in the Financial Statements of my company prior to my providing the purchase funds. *I was not concerned with the purchase price paid by the Vendor to the farmer but only with the purchase price paid by myself to the Vendor for the shares of the various companies and that the land company or companies under the prices that I agreed to pay and regardless of the amount of money made by the Vendor. I was advised that the purchase price paid by me to the Vendor might exceed 30% of the purchase price paid by the Vendor to the farmer* and was asked whether I wished independent legal advise but declined same.

(emphasis added)

21 On behalf of Dr. Merz, Mr. Wallace submitted that there was nothing in the foregoing documentation to link it with the Limited Partnership, and that Dr. Merz had not admitted his signature or the authenticity of the document because he had not been asked about it on cross-examination. It may well be that the documentation did not relate to the Limited Partnership, given the evidence as to the timing of its execution. However, Mr. Sieber's affidavit attaching and explaining the documentation was filed in the proceedings *before* Dr. Merz swore his own affidavit. Dr. Merz says nothing about the issue of the secret profits in his affidavit and, more pointedly, he does not contest the statements of Mr. Sieber regarding it. There was no need for Mr. Straube's counsel to cross-examine on it. The evidence relating to the documentation remains uncontested.

22 While it is not possible on a Motion of this nature to make final findings of credibility, it is sufficiently clear from that documentation to create a strong *prima facie* case, in my opinion, that Dr. Merz was fully aware of the 30%+ mark-up on the sale of the farm lands and that Mr. Sieber and/or his companies were receiving the secret profits. It is not denied — and indeed, it is admitted by Mr. Sieber at least — that Mr. Straube was not told of these profits. It follows that there is

an equally strong *prima facie* case that Dr. Merz was in breach of his fiduciary obligations to Mr. Straube and the Straube entities with respect to those secret profits. There is no evidence that Dr. Merz, himself, received any of the profits.

(b) Assembly of the BEC Lands

23 The evidence is that Mr. Sieber and/or his companies continued to take similar profits on the land purchased and assembled for the Limited Partnership, and to share those profits with the Von Teichman interests, without disclosure of this practice to Mr. Straube. Of the approximate $44.1 million paid by the Limited Partnership for the lands, more than $5 million was paid over in this fashion. Again, there is no evidence that Dr. Merz received a share of any such profits.

24 Although the written Acknowledgement referred to above may well not refer to the acquisition of the BEC lands, it is difficult to accept that if Dr. Merz were aware of the secret profits being taken with respect to the earlier Transmaris acquisitions, and the practice continued — as it appears to be admitted it did — he was unaware of that continued practice concerning the Limited Partnership lands. In spite of Dr. Merz's denials in this regard, I am satisfied that there is at least a strong *prima facie* case that he was aware of it, and that his breach of fiduciary obligation in that regard continued as well.

(c) Raika Leasing (Canada) Corporation

25 Dr. Merz invested $150,000 of his own monies for a 50% interest in Raika Leasing. Mr. Sieber holds the remaining 50% interest. Raika Leasing is a leasing company which leased the dryers to the Alfalfa Plant and other equipment to the BEC project. It received revenues from that endeavour, at least $10,000 per year of which are admitted in relation to the dryers, but the total amount is unknown. Dr. Merz acknowledges that Mr. Straube was not told about this or that Dr. Merz was a shareholder of the Company. Raika Leasing's financial statements as at October 31, 1997 show it with retained earnings of $1,090,242.00.

26 Dr. Merz testified that he is only holding his shares in Raika Leasing as "a favour to Mr. Sieber" because if Mr. Sieber were to hold more than 50% of the shares he would have to consolidate Raika Leasing's financial position with that of his other companies in the statements. What difference this would have made to Mr. Sieber is not clear in the explanation. When asked if Mr. Sieber was going to pay back the $150,000 which Dr. Merz invested in the company, Dr. Merz's only response was: "We didn't speak about that, but I had intended not to stay too long with that Company". The company has been in existence for several years, however. In any event, I do not see what difference in substance this explanation makes. No disclosure was apparently made to Mr. Straube of the arrangement at all, and one way or another, it should have been disclosed. Apart from the Merz funds, the remaining funds for Raika Leasing's operations came from Straube sources.

(d) Raika Financial (Canada) Corporation

27 The Plaintiffs allege that commencing in about 1993 Mr. Sieber and Dr. Merz began channelling funds destined from Merkur for the Limited Partnership in connection with the BEC project through an intermediary, Raika Financial, a company controlled by Mr. Sieber. The role played by Raika Financial in the disposition of the Straube monies to be invested in the Project is a central bone of contention in the lawsuit. The evidence supports the contention that monies dispersed through Raika Financial went not only to fund the Limited Partnership operations, but also to fund the operations of various Sieber entities. Whether these latter funds were in turn used to advance the BEC project, what were the reasons for the Raika Financial involvement in the first place, and the knowledge and role of Dr. Merz in relation to it, are all issues on which there is a conflict of evidence. Nonetheless, Mr. Straube alleges that something in excess of $33 million was misappropriated by Mr. Sieber in this fashion and used to finance Mr. Sieber's other businesses, rather than the BEC. Lindquist, Avey, Macdonald Baskerville Company ("Lindquist Avey") — Mr. Sieber's forensic accountants — acknowledge that $30.8 million of monies coming from Merkur through Raika Financing were used by Sieber and Sieber related companies, but they conclude that at least $29 million of those monies were utilized by the Sieber companies for goods and services relating to Straube companies.

28 The chain of funding went like this. Funds coming from Europe via Merkur through Transmaris and intended by Mr. Straube for use by the Limited Partnership, did not go to the Limited Partnership. Instead, they were deposited into a Raika Financial bank account. From Raika Financial, the funds were then advanced to various entities — some of which were Limited Partnership related entities, and some of which were not. Raika Financial, a Sieber company, received a fee for performing these services — which are rationalized by the Sieber/Merz interests as being justified on the basis of Raika Financial's superior computer accounting package.

29 When Raika Financial advanced funds to an entity, it set up a loan account for that entity. In this way, the Limited Partnership became indebted to Raika Financial, which was in turn indebted to Transmaris. The Plaintiffs assert that this arrangement permitted an "artificially created debt" to be established in relation to the Limited Partnership, and that this debt was utilized to "credit" the Limited Partnership in circumstances where no money was actually received by it but rather monies were diverted to Sieber entities. In support of this, they rely upon the KPMG Reports which indicate, for example, that if Raika Financial received funds in respect of the sale of a Limited Partnership asset, it would not remit the funds to the Limited Partnership but would disburse or lend the money out to some other entity — often a Sieber company — but "credit" the Limited Partnership loan account, thereby decreasing the Limited Partnership's indebtedness to Raika Financial.

30 In this and in similar ways — the Plaintiffs argue — millions of dollars of proceeds of assets, rental income and other receipts were "credited" to the Limited Partnership and Mr. Straube's interests without any money ever being remitted to them.

31 KPMG has reported that of the $95 million advanced by Merkur through Transmaris for purposes of the BEC project as of the end of 1996, over $33 million was advanced to Sieber and Sieber-related entities and not repaid. Mr. Sieber's personal holding company, H.J. Sieber Corp. received over $17 million from Raika Financial. The response of Mr. Sieber and Dr. Merz to this, as appears from the materials, is that the funds were used for the BEC project. They rely on the Report of Lindquist Avey in this regard.

32 Clearly a trial will be required to resolve this central issue in the case, and findings cannot be made in this regard on a motion of this nature. It can be noted, however, that while Lindquist Avey was retained by Mr. Sieber for the express purpose of determining — amongst other things — what use was made of the funds received by the various entities from Raika Financial, it acknowledges that it did not complete that task. Moreover, in drawing its conclusions with respect to the use of the monies by Sieber companies for BEC related purposes, it appears not to have done an independent investigation in that regard but rather to have relied primarily upon what it was told by Sieber staff.

33 What is the evidence regarding Dr. Merz's involvement in or knowledge of the Raika Financial activity? First, he acknowledges being aware of the Raika Financial set-up; indeed, his evidence is that he wanted Raika Financial to be involved because of its sophisticated accounting package, something which he says was required because the volume of loans coming to Canada was noticeably rising and had to be administered professionally. He knew that Raika Financial was a Sieber company. He knew that the monies were being loaned from Transmaris to Raika and then from Raika to other companies — he says — "for the projects that were initiated by the limited partnership". He knew that the projects would have to repay the monies to Raika Financial, which in turn would have to repay it to Transmaris, which in turn as well would have to repay the funds to Merkur or others who had given the loans to Transmaris. He categorically denies being aware that any of the monies that went over Raika Financial were loaned by it to Sieber companies.

34 Mr. Mark vigorously attacks the credibility of this testimony on the part of Dr. Merz. He submits it is simply inconceivable that Dr. Merz — a chartered accountant and investment manager, adviser to the Straube family for over 20 years, and the man responsible for supervising and managing the investment of over $200 million in Canada — would never have asked for or looked at a year-end financial statement for the Project, or sought an accounting of how the $200 million invested by Mr. Straube and being managed in Canada by Mr. Sieber was being spent. Dr. Merz, however, professes that such was the case. Mr. Mark contends that the rationale put forward for inserting Raika Financial into

the chain of disposition because of the need to take advantage of its sophisticated accounting software package does not justify or require a change in the fundamental nature of the flow of monies — by interposing a Sieber company between Transmaris and the Limited Partnership. And he points out that Mr. Sieber's evidence is clear that Dr. Merz was aware of the flow of funds from Raika Financial to the Sieber companies and agreed to it. At paragraph 102 of his affidavit sworn on June 17, 1998, Mr. Sieber deposes:

> I acknowledge that there were times when monies received by Raika Financial from Merkur were advanced to my companies for business not directly related to the Limited Partnership; *however, the Defendant, Merz, was aware and agreed that the monies could be used for that purpose.* The accounting records prepared by Raika Financial include accrued interest on those sums, all of which have been fully repaid to the best of my knowledge. (emphasis added)

35 This evidence cannot be weighed and assessed, and these conflicts in testimony resolved on a motion of this nature as they can be at trial. At the same time, however, it seems to me that the force of these submissions — in spite of Dr. Merz's denials — cannot be ignored altogether.

(e) The Sieber Acquisition of the Alfalfa Plant

36 As previously noted, Mr. Straube agreed to finance the construction of the Alfalfa Plant as a "proof of concept" and to provide the funding for its operations. The Plant was to utilize the cheap steam concept in order to dehydrate alfalfa, which would subsequently be sold for animal feed. This was done on the recommendation and advice of Mr. Sieber and Dr. Merz. About $57 million in financing and funding for the operating losses was provided by Mr. Straube through borrowings from Credit Suisse.

37 In 1995 Messrs. Straube and Sieber agreed that the Alfalfa Plant should be sold. It was. Mr. Sieber caused it to be transferred to one of his companies, Canadian Agra International Corporation ("CAI"), in consideration of preference shares in that Company valued at $17 million. The Plant was to be sold by CAI and the Straube $17 million paid off out of the proceeds. What happened was that Mr. Sieber effected a reverse take over of a public company now called Canadian Agra Foods Inc. ("CAFI")[6], and the Alfalfa Plant was transferred to the public company for a price of $34 million in CAFI shares valued in that amount. The Straube interests never received anything for their interest in the Alfalfa Plant, the construction and operations of which had been financed with their $57 million.

38 Dr. Merz testified that he was not aware of what the Plaintiffs call "the flip" of the Alfalfa Plant for a 100% profit. However, he was involved in the reverse take-over transaction and he received 1% of the shares of CAFI in the transaction. His explanation for the latter is that he is holding the 1% interest in trust for a Mr. Roelen, another shareholder of CAFI, so that it would appear for Canadian tax purposes that CAFI was 51% Canadian owned (50% by Mr. Sieber and 1% by Dr. Merz). The public disclosure documents issued in connection with the reverse take-over do not disclose this additional shareholding of Mr. Roelen being held in trust; thus, if Dr. Merz's explanation is true, it follows that Messrs Sieber, Merz and Roelen must have deceived the public and the regulators in the disclosure documents.

(f) Pelee Island Vineyard

39 In 1994 Dr. Merz invested in a Sieber project called the Pelee Island Vineyards. No complaint is made about this in itself, but it appears that Dr. Merz obtained bridge financing for the investment from Straube monies, through Raika Financing. Neither the investment opportunity nor the fact that Dr. Merz was using Straube monies for bridge financing was disclosed to Mr. Straube. In a period of 9 months, Dr. Merz made a return of $57,500 on his investment.

(g) Bruce Foods Inc. and St. Lawrence Technologies

40 Bruce Foods is a Sieber company incorporated in 1992 to construct an apple juice concentrating plant at the EEC. The Limited Partnership had no interest in the company, and both Mr. Sieber and Lindquist Avey say that this plant had nothing to do with the Limited Partnership's BEC activities. Nonetheless, the $7.1 million which was used to construct the plant was advanced by way of loan from Raika Financial (i.e., from Straube monies), and when the plant was later sold

for $13 million most of the proceeds were remitted to the Sieber companies, CAI ($11 million) and CAC ($1.5 million). The Raika Financial loans were not repaid (and, accordingly, neither was the corresponding Raika Financial Debt to Straube). The Plaintiffs also allege that lands owned by the Limited Partnership, valued at approximately $940,000 was transferred to Bruce Foods. None of this, it is said, was disclosed to Mr. Straube.

41 St. Lawrence Technologies is another Sieber company which the evidence indicates was funded by Straube monies through Raika Financial. It acquired land and buildings in the BEC from the Limited Partnership and its operating losses were funded by the Limited Partnership. In 1995 the Company was recapitalized. The Limited Partnership became a 25% shareholder and Sieber related entities acquired a 75% interest. The Sieber entities did not advance any money, however; instead, they assumed a portion of St. Lawrence's debt to Raika Financial. Those loans have not been repaid.

42 Mr. Mark argues that Dr. Merz must have been aware that Mr. Sieber was using Straube monies to finance Bruce Foods and St. Lawrence Technologies for his own benefit. Dr. Merz does not deny that he was aware of the Bruce Foods transaction and he admits that he knew at some time that Mr. Sieber was a shareholder of the Company. He says, however, that he cannot remember if he knew Mr. Sieber was a shareholder at the time the monies were being advanced to Bruce Foods. His explanation with respect to St. Lawrence Technologies is along the same lines.

(h) Other Matters

43 The Plaintiffs also complain about self-dealing on the part of Mr. Sieber, using Straube investment monies, in relation to other projects and properties. I will not deal with each in detail. The complaints relate to the alleged misappropriation of certain lands known as "Airport #1" and "Airport #2", by means of an unequal land exchange; to the funding a Double-compressed Hay Facility in Wingham, Ontario, and the eventual transfer of that property to another Sieber company, HWS Energy Corporation, which was in turn sold to an Austrian company, with monies going to Mr. Sieber and none to Mr. Straube; and to a disputed transfer of $22.5 million of Merkur funds to finance Sieber operations in the Baltic States. Again, the assertion is that Dr. Merz was either complicit in all of this Sieber self-dealing, or was willfully blind to it.

Conclusions for Purposes of the Motion

44 Again, I am aware of the imperatives against the weighing and assessing of evidence on interlocutory motions of this nature. Looked at globally, however, I am satisfied that there is sufficient evidence to conclude that the Plaintiffs put forward a strong *prima facie* case in respect of the allegations raised against Dr. Merz. Certainly, their case is not frivolous or vexatious, and there is a very arguable case to be tried — which, in the end, is the test which has to be met with respect to the claim for the granting of certificates of pending litigation, to which I will return in a moment.

45 However, the positions held by both Dr. Merz and Mr. Sieber in relation to the Straube Plaintiffs, the undisclosed dealings in and profits with respect to Raika Leasing and the Pelee Island Vineyards and the 1% shareholding in Canadian Agra Foods Inc., and the strong inference which arises from the evidence that Dr. Merz was aware of the secret profits being taken on the land deals — all suggest that the Plaintiffs have a good chance of succeeding at trial. From this evidence it is not a great leap to infer knowledge and awareness of the Raika Financial loans to the Sieber entities (he was at least aware that he, himself had participated in such an arrangement in relation to the bridge financing of the Pelee Island Vineyards). Also adding substance to the case against Dr. Merz are his admitted failure even to look at year-end financial statements or to request any accounting from Mr. Sieber regarding his principals $200 million investment in Canada, his apparent lack of interest in or concern about a Revenue Canada audit which led to potentially damaging discoveries, and his general professed unawareness of financial and accounting irregularities that became readily apparent to those who subsequently examined them.

46 So, too, do the transfer of certain lands out of the Limited Partnership to Dr. Merz or, more accurately, to Moka Farms Ltd. (a company he is said to control). I turn to those and other related land-transfer allegations now.

Properties Alleged to have been Transferred to or Acquired by Dr. Merz

47 The relief sought on this Motion relates specifically to certain properties acquired by or transferred to Dr. Merz or Moka Farms Ltd. in Canada. Broader relief of a Mareva nature is requested, as well, to reach and restrain the disposition of his assets generally, worldwide.

48 By Transfers registered on February 10, 1997 — less than one month after Mr. Straube had served notice on Mr. Sieber and Dr. Merz to attend a meeting to obtain an accounting of the Limited Partnership's affairs and to consider putting in a receiver — seven properties with a stated value of $2.2 million were transferred to Moka Farms. Five of these properties were transferred from the Limited Partnership; two were transferred from Sovar Farms Ltd. ("Sovar"), a Straube company with no relationship to the BEC, but which has now been named as a plaintiff in the action. The properties in question are farm properties in Huron and Bruce counties, in the Seaforth/Kincardine area of Ontario.

49 No cash was paid for the lands transferred. Instead, Dr. Merz himself transferred to the Limited Partnership some lands which he controlled through a company called Maitland Farms and which he valued at $436,000. The balance of the price ($1.723 million) was accounted for by the offset of a debt which the Limited Partnership was said to have owed to Merkur and which Merkur was said to have assigned to Dr. Merz.

50 The explanation for the loan set-off, according to Dr. Merz and Mr. Sieber, is that Dr. Merz had advanced monies to Merkur sometime in 1994 (about $3.5 million), that Merkur had assigned the Limited Partnership debt in payment of the loan, and that Mr. Straube had given Dr. Merz permission for the repayment of that loan through the transfer of Limited Partnership lands in Canada. Dr. Merz and Mr. Sieber both testified that this arrangement was agreed to at a meeting at Mr. Straube's residence in Europe. In addition, they say that Mr. Straube agreed that Dr. Merz was to get priority payment from BEC proceeds for the monies he had put in. Mr. Straube acknowledges that he was told by Dr. Merz that he (Merz) had advanced monies to Merkur and that he (Straube) told Dr. Merz that Dr. Merz would get priority payment. He says he did not agree to the exchange of properties in lieu of cash, however, although he is not clear on the particulars of the conversation at the meeting. There is thus a conflict in the evidence in this regard. In any event, even if Mr. Straube did give his consent to the transfer of properties, one wonders if it could have been an informed consent because it is clear on anyone's interpretation of the evidence that Mr. Straube was not fully informed as to many things that were going on with his $200 million in Canada.

51 A few months later, in May 1997, Moka Farms acquired three additional properties from the Limited Partnership, without the payment of any cash and, again, by way of set-off of the assigned loans. At around the same time, it also acquired certain lands, some of which are adjacent to the Limited Partnership lands acquired, from Sieber entities.

52 All of the foregoing properties are described in Schedule "A" to the Amended Notice of Motion, at pp. 43 - 59 of Volume 1 of 8 of the Motion Record. Those acquired from the Limited Partnership are designated as: "G. Merz — Seaforth Farm"; "Merz — Ripley Farm"; and "G. Merz — Hullett Farm". Those acquired from Sovar Farms are designated as: "G. Merz — Hullett Township"; "G. Merz — Morris Township". The properties transferred from Mr. Sieber and/or Sieber entities are described as: "G. Merz — Huron Township"; "G. Merz — McKillop Township"; and, "G. Merz — Ashfield Township".

53 The final specific piece of property which is the subject of the claim on the Motion is the residence in which Dr. Merz lives at 88 Forest Hill Road in Toronto. He purchased this property in his own name on March 14, 1997. On September 18, 1997 — after the commencement of this action — the property was transferred to Moka Farms for a consideration of $2.00.

Moka Farms Ltd.

54 I pause for a moment to consider the position of Moka Farms in all of this. Moka Farms Ltd. is wholly owned by Moka Holdings Limited. Sometime in 1996 Dr. Merz caused the shares in Moka Holdings to be transferred to a Liechtenstein trust of which his wife, daughter and granddaughters are the beneficiaries. There is considerable confusion in the evidence as to whether or not Dr. Merz was ever a shareholder in Moka Holdings, himself, but his case was

put forward — at least until the mid-point of his counsel's argument — on the basis that he personally had been the shareholder prior to the 1996 transfer. On the cross-examination on his affidavit in the proceedings, Dr. Merz appears to suggest that he was not the shareholder, personally, but rather that the shares were previously owned by another Liechtenstein trust with the same beneficiaries. In any event, in response to my question, Mr. Wallace indicated that I should assess the case on the basis that it was Dr. Merz who was the shareholder of Moka Holdings prior to the transfer in 1996.

55 Whether he was or remains the shareholder of Moka Holdings, however, it is apparent from the evidence that Dr. Merz is intimately involved with and controls the Moka companies. He is a director and officer of Moka Farms. He manages Moka Farms. He signs for Moka Farms. He guarantees the debts of Moka Farms. And he lives in a house that is registered in the name of Moka Farms. I am satisfied that he *is* Moka Farms, at least for purposes of determining what happens to the shares and/or assets of that Company.

Dealings with the Moka Farms Properties

56 The transactions in which the lands moved from the Limited Partnership, Sovar Farms, and the Sieber entities to Moka Farms were registered in February and May 1997. However, it is the evidence of Dr. Merz that the transactions actually took place during an earlier period between 1994 and 1996. He has no explanation as to why the solicitor, Von Teichman, did not register the documents until much later, nor was any such explanation tendered through Mr. Von Teichman, a party to these proceedings. The financial books of Raika Financial and Moka Farms record the transactions as having occurred in 1995 and 1996. The Plaintiffs are skeptical about this, and point out that even though Ernst & Young, who are Dr. Merz's forensic accountants, report that the transactions are recorded as having occurred on the dates mentioned, Ernst & Young are not able to confirm that the entries were not made at a later date. There appear to be no agreements of purchase and sale evidencing the terms of the transactions, at least with respect to those properties transferred from Mr. Sieber or the Sieber entities.

57 Whether the transactions occurred in 1977 or at an earlier time is relevant to all of the grounds asserted by the Plaintiffs. However, it is not dispositive of any of those grounds, and it is of lesser significance with regard to the tracing and constructive trust issues. In the end, I am not sure that a great deal turns on that timing issue for the purposes of this Motion.

58 It is not disputed, however, that the Moka Farms lands were all newly encumbered with a mortgage from Moka Farms to Bankhaus Aufliauser, initially in the amount of $3.5 million in May 1997 and later in the increased amount of $4.8 million in October of that year. The mortgages do not appear to have been given for any new consideration, but rather as a means of refinancing and securing past debts. They were clearly placed on the properties in the shadow of this litigation. It was not long before the initial encumbering of the properties that Dr. Merz caused the ownership of the shares in Moka Holdings to be transferred to a Liechtenstein trust of which his wife, daughter and granddaughters are the beneficiaries. Moreover, there is some evidence that in June, 1998, the Moka farm properties were placed on the market for sale. Dr. Merz's explanation for this is that an employee of Mr. Sieber had simply listed the properties in order to check out their price "to have an idea what the value [was]".

59 As for the property at 88 Forest Hill Road in Toronto — one of the two residences of Dr. Merz in Canada, the other being a property next to Mr. Sieber and acquired from Mr. Sieber in Kincardine — it was first acquired in the name of Dr. Merz on March 14, 1997. On September 18, 1997 — after the commencement of this action — it was transferred to Moka Farms for a consideration of $2.00. It, too, was encumbered with the BAH mortgages.

III - The Law and its Application in the Circumstances

60 As against Dr. Merz, the Plaintiffs seek,

> a) leave to issue certificates of pending litigation with respect to the lands set out in Schedule "A" to the Notice of Motion;

b) an Order restraining Dr. Merz from dealing with the properties set out in the Notice of Motion;

c) an Order restraining Dr. Merz from transferring, encumbering or otherwise dealing with his assets and property, generally, without further leave of the Court; and,

d) leave to examine Dr. Merz in aid of (c) above.

a) Certificates of Pending Litigation

61 The Plaintiffs assert their claim for certificates of pending litigation against the Merz/Moka Farms lands on the following legal bases:

1) fraud, leading to the right to trace funds or, alternatively to claim property on constructive trust principles: see, *Nelson v. Larholt*, [1947] 2 All E.R. 751 (Eng. K.B.); *Toronto (City) v. Bowes* (1854), 4 Gr. 489 (U.C. Ch.) at 503; affirmed (1856), 6 Gr. 1 (U.C. C.A.); affirmed (1858), 11 Moo. P.C. 463 (Canada P.C.); *Fern Brand Waxes Ltd. v. Pearl* (1972), 29 D.L.R. (3d) 662 (Ont. C.A.); *Hanson v. Clifford* (1994), 21 B.L.R. (2d) 108 (B.C. S.C.); *Brown & Collett Ltd., Re* (1996), 11 E.T.R. (2d) 164 (Ont. Gen. Div. [Commercial List]); *Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214 (S.C.C.).

2) breach of fiduciary duty, giving rise to a question of title to or interest in the properties based also upon constructive trust principles: see, *Hanson v. Clifford, supra*; *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (U.K. H.L.); and,

3) fraudulent conveyance and preference, giving rise to a question of title to or interest in the properties on those principles: see, *Vettese v. Fleming* (1992), 8 C.P.C. (3d) 237 (Ont. Gen. Div.); *West v. West* (1997), 33 O.R. (3d) 472 (Ont. Gen. Div.); *Bank of Montreal v. Ewing* (1982), 35 O.R. (2d) 225, 135 D.L.R. (3d) 382 (Ont. Div. Ct.); *Waterline Products Co. v. Lisaco Investments Ltd.* (January 24, 1991), Doc. 41431/89 (Ont. Gen. Div.), unreported decision of Rosenberg J..

62 Under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 103, a certificate of pending litigation may be issued by the court where a proceeding is commenced in which an interest in land is in question. The authorities cited above confirm the principle that if reasonable claims are put forward in an action for a constructive trust or a fraudulent conveyance in respect of a property, a certificate of pending litigation may issue pending trial. The party seeking the certificate need not prove its case at this point. The test is met where there is sufficient evidence to establish a reasonable claim to an interest in the land based upon the facts, and on which the plaintiff could succeed at trial: *Vettese v. Fleming*, *supra*, at p.p. 244-245 (per Chapnik J.); *931473 Ontario Ltd. v. Coldwell Banker Canada Inc.* (1991), 5 C.P.C. (3d) 238 (Ont. Gen. Div.), Sutherland J., at pp. 257-261.

63 It is not necessary for the Plaintiffs to prove that Dr. Merz actually participated in the fraudulent acts alleged to have been committed by Mr. Sieber, or even that he knew of them — although the Plaintiffs submit here that he did. It is sufficient that they show he was reckless or wilfully blind to the conduct, because in such a case he is equally liable for breach of trust, and the claim in respect of the interest in land arises: *Nelson v. Larholt*, *supra*. Constructive trust principles can also be established on the basis of an unjust enrichment, obtained to the detriment of the Plaintiff and without any juridical justification for the enrichment: see *Brown & Collett Ltd., Re*, *supra*. In *Soulos v. Korkontzilas*, *supra*, the Supreme Court of Canada ruled that the doctrine of constructive trust can reach even beyond cases of unjust enrichment. McLachlin J. said this (at p. 8):

> The history of the law of constructive trust ... suggests that the constructive trust is an ancient and electric institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain.

64 It seems to me, then, that this expanded view of constructive trust could arguably extend to create an interest on the part of the Plaintiffs in the properties transferred to Moka Farms from Mr. Sieber and the Sieber entities, given the overall nature of the relationship between the parties in this case, and given the proximity in time and location between the properties transferred from the Limited Partnership and the Sieber transferred properties.

65 On behalf of Dr. Merz Mr. Wallace submits that this is not a proper case for the issuing of a certificate of pending litigation. Where a motion for such relief is brought on notice, he points out, the test to be applied is the same as that for determining whether a certificated obtained *ex parte* should be discharged. In that regard, subsection 103(6) of the *Courts of Justice Act* provides:

> (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
>
> (ii) in place of or as an alternative to the interest in the land claimed,
>
> (iii) does not have a reasonable claim to the interest in the land claimed, or
>
> (iv) 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.

66 Mr. Wallace submits that the factors to be taken into account in making such a determination include such things as the uniqueness of the land, the intent of the parties in acquiring the land, whether there is a claim for damages and whether or not damages would be an adequate remedy. In particular he contends that where land is purchased as an investment — as is the case here — the argument about the uniqueness of land has limited application, and losses may more readily be compensated for in damages. Moreover, a certificate of pending litigation should not issue where the plaintiff fails to show a sufficient interest in land and is mainly concerned with whether the land will be available to satisfy a judgment. He relies upon the following authorities, which I have reviewed, in support of these submissions: *Homebuilder Inc. v. Man-Sonic Industries Inc.* (1987), 22 C.P.C. (2d) 39 (Ont. Master) at p. 40; *931473 Ontario Limited v. Coldwell Banker Canada Inc., supra*; *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 (Ont. Master); *Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd.* (1976), 2 C.P.C. 338 (Ont. H.C.), Weatherston J.; and *Memphis Holdings Ltd. v. Plastics Land Partnership* (1989), 35 C.P.C. (2d) 177 (Ont. H.C.), Callaghan A.C.J. H.C..

67 While none of the individual propositions cited are in dispute, the underlying principle that is to be applied — as garnered from the authorities gathered by Sutherland J. in the *Coldwell Banker* case, *supra* — is that summarized by Steele J. in *Clock Investments Ltd. v. Harwood Estates Ltd.* (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 (Ont. Div. Ct.) in the following way (p. 674 O.R.):

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

68 It is not necessary for the court to be satisfied that there is no triable issue as to an interest in land or that the claim is frivolous and vexatious, before a certificate of pending litigation may be set aside. Conversely, where the plaintiff's

claim is not frivolous and vexatious, and the evidence gives rise to a triable issue or a reasonable claim as to whether the plaintiff has an interest in the land, a certificate of pending litigation may be issued.

69 On the facts as I have outlined them, I am satisfied that there is sufficient evidence established in this case to demonstrate that the Plaintiffs have a reasonable claim to an interest in all the lands specified (except in what I shall describe momentarily as "the Kincardine property"), and have raised a triable issue in that respect, in order to justify the granting of a certificate of pending litigation on any of the three grounds of fraud, constructive trust or fraudulent conveyancing, asserted by the Plaintiffs. I do not think it would be just to leave the Plaintiffs to their remedy in damages in the circumstances.

70 The lands transferred from the Limited Partnership to Moka Farms are intricately bound up in the self-dealing and diversion of funds allegations involving both Mr. Sieber and Dr. Merz. While the circumstances surrounding the acquisition of the lands which were transferred to Moka Farms from the Sieber entities, including the source of financing, to support the original Sieber acquisitions, are unclear, at least some of the Sieber-transferred lands are adjacent to the lands acquired from the Limited Partnership, and I am satisfied that in all of the circumstances there is sufficient evidence to support the granting of a certificate of pending litigation with respect to those lands as well. The claim for the certificate in respect of 88 Forest Hill Road is justified on the basis of the fraudulent conveyance claim, since the lands were transferred out of Dr. Merz's name and into Moka Farms shortly after the action was commenced.

(b) The Mareva Claim

71 In view of the foregoing conclusions, the matter of a Mareva injunction becomes less central to the Motion in my view. However, lest there be some question concerning the granting of certificates of pending litigation, particularly in relation to the lands transferred to Moka Farms from the Sieber entities, I am prepared to grant a Mareva injunction restraining Dr. Merz, Moka Farms and Moka Holdings from dealing with the assets listed in Schedule "A" of the Notice of Motion.

72 This included the property I have referred to as the "Kincardine property", which is one of Dr. Merz's residences in Ontario. It is a valuable property next to Mr. Sieber's residence in Kincardine, and acquired from Mr. Sieber.

73 As I have already indicated, I am satisfied that the Plaintiffs have put forward a strong *prima facie* case in respect of their allegations — the first test which must be met for the granting of a Mareva injunction. I am also satisfied that the other general tests for the granting of an interlocutory injunction have been met. In my opinion, the Plaintiffs will suffer irreparable harm if the Defendants, Dr. Merz included, are not restrained from dealing with the lands pending trial, having regard to the tracing and trust nature of their proprietary claims. As well, the balance of convenience favours the Plaintiffs, and they have provided the necessary undertaking as to damages, the sufficiency of which is not contested by the Defendants.

74 In terms of the specific criteria relating to Mareva injunctions, the evidence as a whole persuades me that there is a real risk, if he is not restrained from doing so, that Dr. Merz will remove his assets from the jurisdiction to avoid the possibility of judgment, or otherwise dissipate or dispose of those assets in a manner clearly distinct from his usual or ordinary course of business or living so as to render the possibility of future tracing of the assets remote, if not impossible: see *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.), per MacKinnon A.C.J.O., at pp 532-533; *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.) at pp. 167-169 and 176. Here, the lands in question have been clearly identified and they are, indeed, at least in part, the very subject matter of the litigation. Moreover, the circumstances as a whole are sufficiently suspicious and cogent, the documentation and explanations provided sufficiently lacking and/or tenuous, the lands in question sufficiently connected to the entire narrative, all to justify the granting of Mareva relief on the fraud and constructive trust footings as well. I observe in passing that in parallel litigation between these various parties now pending in Germany, Dr. Merz has been restrained from removing his assets from Germany on the theory that there is a risk of his transferring them to Canada. Similar concerns therefore

exist as to his dealing with his assets in that jurisdiction. See also, *Mills v. Petrovic* (1980), 30 O.R. (2d) 238 (Ont. H.C.); *SCF Finance Co. v. Masri*, [1985] 1 W.L.R. 876 (Eng. C.A.), at p. 881.

75 Accordingly, an Order is granted restraining Dr. Merz, Moka Farms and Moka Holdings from dealing with the "Merz/Moka Farms" lands as described in Schedule "A" to the Notice of Motion in the form of the relief sought in paragraph (c) of the Notice of Motion.

76 That protection is sufficient, in my view, however; and I am not prepared in the circumstances to grant Mareva relief of the broader sort requested, restraining the disposition or other dealings with Dr. Merz's assets, or those of Moka Farms or Moka Holdings, generally and wherever situated. After balancing all of the considerations before me, I am not satisfied that such broad relief is required against Dr. Merz or Moka.

77 For similar reasons I am not inclined to grant the Plaintiffs leave to pursue those assets further, at this stage, in the form of an examination in aid of the Mareva injunction. The question of assets being affixed with a constructive trust as a result of what has transpired in connection with the Straube investments in Canada is very much in issue in the lawsuit, and it appears to me that such matters can properly be pursued in the normal pretrial discovery process.

Other Issues

78 Counsel for Dr. Merz raised several other issues which warrant brief comment.

Lack of Service on Moka Farms

79 Mr. Wallace initially contended that relief could not be granted in respect of the Moka Farms lands because Moka Farms was not a party to the action and had not been served with notice of the claim being asserted. The first aspect of this submission abated when the Order was granted adding Moka Farms Limited and Moka Holdings Limited as parties listed on Schedule "C" of the *Amended* Statement of Claim. However, the technical argument remains concerning the want of service.

80 Normally, of course, notice should be given to a person who will be affected by an Order sought: Rule 37.07(1). However, "where the nature of the motion *or the circumstances* render service... impracticable *or unnecessary*, the court may make an order without notice": Rule 37.07(2). The onus is on the moving party to adduce evidence that service is impracticable or unnecessary: *Resch v. Hamilton Civic Hospitals* (1996), 2 O.T.C. 75 (Ont. Gen. Div.).

81 Here, I am satisfied that the Plaintiffs have shown that service on Moka Farms and Moka Holdings was *unnecessary*. Dr. Merz is an officer and director of Moka Farms. The other officers and directors are Mr. Sieber and Mr. Von Teichman, both Defendants and both with notice of the proceedings. Who else was there to serve? I am not prepared, in the circumstances of this case, to defeat the Plaintiffs' claim on such a technicality.

Ontario as the Proper Forum and the Application of German Law

82 Mr. Wallace argued that since Mr. Straube and Dr. Merz were both in Germany at the time the events in question were unfolding, and since Dr. Merz's employment arrangement was entered into there, Ontario might not be the proper forum for determining this dispute and German law may the law applicable to the employment contract.

83 I can see no merit in this submission for the purposes of the present Motion. The action has been extent and the Motion pending for some considerable time, as the parties have prepared their respective positions. Dr. Merz has appeared and attorned to the jurisdiction. Insofar as foreign law is concerned, it is incumbent upon the party asserting that the foreign law applies to prove that law. In the absence of such proof it is presumed that the law of Ontario applies. There was no attempt to prove that German law was any different than that of the law of Ontario here.

II - Disposition

84 For the foregoing reasons, the Motion is allowed. The Plaintiffs are entitled to:

(a) an Order granting them leave to obtain and register certificates of pending litigation in respect of each of the lands and premises described in Schedule "A" to the Notice of Motion and attributed to Dr. Merz at pp. 43 - 59 inclusive of the Motion Record under the titles:

- G. Merz — Hullett Farm
- G. Merz — Huron Township
- G. Merz — Seaforth Farm
- G. Merz — McKillop Township
- G. Merz — Morris Township
- G. Merz — Hullett Township
- Merz — Ashfield Township
- Merz — Hullett Township
- Merz — Ripley Farm

(b) an Order granting an interlocutory injunction restraining the Defendants Merz, Moka Farms Limited and Moka Holdings Limited and their directors, officers, shareholders, employees or agents from disposing of, encumbering, removing from the jurisdiction, or otherwise in any way dealing with the aforesaid described properties, and in addition the residential premises of Dr. Merz located in Kincardine, pending the trial or further Order of this Court.

85 As previously endorsed on the Motion Record, the Plaintiffs are granted leave as of January 14, 1999, to amend their Statement of Claim in accordance with the draft *Amended* Statement of Claim filed on January 14, 1999, with leave additionally to add Moka Holdings Limited as a party listed on Schedule "C" thereto.

86 In other respects, the Motion is dismissed. I may be spoken to with respect to costs, if necessary.

Motion granted in part.

Footnotes

* Additional reasons were issued (February 8, 1999), Doc. 98-CL-2661 (Ont. Gen. Div. [Commercial List]).

1 He is now a resident of Canada, living in Kincardine and in Toronto, Ontario

2 For convenience, I shall refer to Mr. Straube and the various Straube controlled corporate entities, collectively, as "Mr. Straube" or "Straube", unless the context requires that a distinction be made.

3 As a result of the interim settlement between the Plaintiffs and the Sieber Defendants no one was present at the argument of the Motion to put forward the Seiber perspective on the evidence. It has been necessary, however, to proceed with case regarding Dr. Merz and to deal with the evidence nonetheless.

4 The Sieber corporation that sold the farmlands to Transmaris Farms.

5 That is, to Dr. Merz in his capacity as a representative of the Straube interests.

6 Canadian Agra Foods Inc. is now insolvent, and, with a number of other related Sieber companies is in CCAA proceedings under the protection of the Court.

TAB 2

2003 CarswellOnt 737
Ontario Superior Court of Justice

Hupka v. Aarts Estate

2003 CarswellOnt 737, [2003] O.J. No. 742, 120 A.C.W.S. (3d) 702, 49 E.T.R. (2d) 198

Glenna Marie Hupka, Plaintiff and Hari S. Nesathurai as Estate Trustee of the Estate of John Joseph Aarts and 756950 Ontario Ltd., Defendants

Ross J.

Heard: January 22-24, 28, 2003
Judgment: February 10, 2003
Docket: 39337

Counsel: *Lou-Anne Farrell*, for Plaintiff
Timothy G. Youdan, Andrea L. Burke, for Defendants

Subject: Family; Property; Estates and Trusts

Headnote

Family law --- Family property on marriage breakdown — Practice and procedure — Institution of proceedings — Registration of certificate of pending litigation (lis pendens)

Plaintiff and deceased had intimate relationship since 1993 but did not cohabit regularly until deceased and wife divorced — After divorce, plaintiff and deceased cohabited for at least 18 months before deceased's death — Deceased owned five cottage properties and he and plaintiff lived in one of them (home cottage) — Deceased also owned vacant land which plaintiff claimed they had purchased as retirement investment — Deceased's estate had net value of $6.7 million and by will deceased left residue of estate, which included all five cottages and vacant land, to three sons, and made no provision for plaintiff — Plaintiff was experienced in interior design and brought proceedings claiming declaration that she owned or had proprietary interest in all six properties — Plaintiff claimed interest by reason of express, constructive or resulting trust based on her contribution to upgrading, maintenance, management and upkeep of properties and spousal services to deceased — In alternative, plaintiff claimed interest in proceeds of sale of properties and in further alternative claimed damages for unjust enrichment — Estate trustee wished to sell properties in question to meet estate's tax liability — Plaintiff moved for order granting leave to issue certificates of pending litigation in respect of all six properties — Motion granted in part — Plaintiff had only to establish that facts raised triable issue — Trial issue with regard to express trust had not been made out — However, plaintiff had worked on all cottages although under no obligation to do so and value of properties had increased — Accordingly, determination of value of her contribution was matter for trial — Home cottage in which plaintiff was still residing had value approximately equal to combined value of other five properties — Therefore, leave was to be granted to file certificate of pending litigation against home cottage in order to avoid at early stage rendering mute plaintiff's claim to proprietary remedy.

Real property --- Certificate of pending litigation (lis pendens) — Right to register — Interest in land

Plaintiff and deceased had intimate relationship since 1993 but did not cohabit regularly until deceased and wife divorced — After divorce, plaintiff and deceased cohabited for at least 18 months before deceased's death — Deceased owned five cottage properties and he and plaintiff lived in one of them (home cottage) — Deceased also owned vacant land which plaintiff claimed they had purchased as retirement investment — Deceased's estate had net value of $6.7 million and by will deceased left residue of estate, which included all five cottages and vacant

land, to three sons, and made no provision for plaintiff — Plaintiff was experienced in interior design and brought proceedings claiming declaration that she owned or had proprietary interest in all six properties — Plaintiff claimed interest by reason of express, constructive or resulting trust based on her contribution to upgrading, maintenance, management and upkeep of properties and spousal services to deceased — In alternative, plaintiff claimed interest in proceeds of sale of properties and in further alternative claimed damages for unjust enrichment — Estate trustee wished to sell properties in question to meet estate's tax liability — Plaintiff moved for order granting leave to issue certificates of pending litigation in respect of all six properties — Motion granted in part — Plaintiff had only to establish that facts raised triable issue — Trial issue with regard to express trust had not been made out — However, plaintiff had worked on all cottages although under no obligation to do so and value of properties had increased — Accordingly, determination of value of her contribution was matter for trial — Home cottage in which plaintiff was still residing had value approximately equal to combined value of other five properties — Therefore, leave was to be granted to file certificate of pending litigation against home cottage in order to avoid at early stage rendering mute plaintiff's claim to proprietary remedy.

MOTION by plaintiff for order granting leave to issue certificates of pending litigation against six properties forming part of residue of her deceased common law spouses' estate.

***Ross J.*:**

1 This is a motion brought by the plaintiff for an order granting leave to issue Certificates of Pending Litigation in respect of six properties, the titles to which were, until the death of John Joseph Aarts, held by him either directly or beneficially through his companies.

2 The corporate defendant 756950 Ontario Ltd. was Mr. Aarts' holding company through which he beneficially held various other operating companies.

3 Hari S. Nesathurai is the estate trustee of the estate of the late John Joseph Aarts (trustee). Miss Farrell appeared for the plaintiff, the moving party. Ms. Burke and Mr. Youdan appeared for the defendants, respondents on the motion.

4 In her Statement of Claim the plaintiff seeks a declaration that she is the owner of or has an interest in the six properties by reason of an express, constructive, or resulting trust, by virtue of a contribution of labour and spousal services provided for the benefit of John Aarts. The contribution spoken of relate to improvements to and management of these properties. In the alternative, the plaintiff seeks an extension of the above declaration so that her interest extends to the proceeds of the sale of these properties. In the further alternative, she seeks a claim in monetary damages for unjust enrichment based in *quantum meruit*. The plaintiff pleads for leave to issue Certificates of Pending Litigation in respect of these properties. For purposes of this motion, all the properties in issue were, in one manner or another, beneficially owned by Mr. Aarts and formed part of the residue of his estate.

5 With the exception of the Andrea Street property, which is a 23 acre parcel of vacant land (the Andrea Street property), the remaining five properties, although having municipal addresses, were referred to in the materials and in counsels' submissions as Cottages A, B, C, D, E. Cottage E was the residence or home where Ms. Hupka and John Aarts were residing at the time of his death on February 8, 2002. For convenience in differentiating the properties, I shall refer to Cottage E as the home. It was purchased in June, 2000 for a price of $490,000. The funds were derived from mortgages placed on Cottage A and Cottage B totalling the purchase price of the home. It is free of encumbrance and has a market value of $650,000, and is valued by the trustee for estate purposes at that amount.

6 Cottage A was purchased by Mr. Aarts and his former wife, jointly, in March, 1991 for $360,000. It appears that as part of their divorce proceedings, Mr. Aarts' former wife conveyed her interest in this property to him. Mr. Aarts mortgaged this property to provide part of the funds used to purchase the home. In September, 2002, the trustee obtained appraisals of all six properties. Further reference to the market value of these properties refers to those values

as of September, 2002. Cottage A was appraised at $444,000 and subject to its mortgage has an approximately equity of $222,000.

7 Cottage B is next door to Cottage A. Both of these properties are lake front properties. Cottage B was acquired in 1994 by one of Mr. Aarts' companies for the price of $270,000. It was unencumbered until mortgaged in May, 2000 to provide funds for the purchase of the home. Its market value is $340,000 and subject to its mortgage has an equity of approximately $84,000.

8 Cottage C was purchased by Mr. Aarts in June, 1999 for the price of $85,000 and was subject to a mortgage for that full amount. Its market value is $105,000., The trustee estimates the equity in this property subject to the amount remaining outstanding on the mortgage at $64,000. It appears clear that this property was acquired as an investment rental property.

9 Cottage D was purchased by Mr. Aarts in July, 1999 for $100,000. Its market value is $118,000 and the trustee values it at that amount for estate purposes. From Ms. Hupka's cross-examination, this property was acquired for the purpose of turning it into an executive type cottage intended as an investment rental property. She indicates that for a period of time she and Mr. Aarts resided there prior to the purchase of the home.

10 Cottage E as previously mentioned is the home.

11 The Andrea Street property is a 23 acre parcel of vacant unimproved land. It was purchased by Mr. Aarts in October, 2001. Ms. Hupka says this property was for future development in the nature of constructing retirement residences and condominiums, with the construction to be done by Mr. Aarts' companies and Ms. Hupka to be in charge of the design of the decorating, furnishing and decor of the constructed residences. It was purchased for the sum of $112,000. It is now unencumbered and has a market value of $125,000 and is valued for estate purposes at that amount.

12 The respondents have annexed to their factum as Schedule "A" a chart setting out the six properties, listing the original purchase prices, market valuations as of September, 2002 and the trustee's estimate of the current equities in these properties. The schedule sets out the total of the original purchase prices of the properties as $1,417,000; the appraised market value at September, 2002 of $1,782,000. and the trustee's estimate of the current equity at $1,227,000. It is not disputed that all funds advanced towards the purchase of these properties, the renovations, mortgage payments, taxes and like expenses were provided either directly or indirectly by Mr. Aarts or through his corporate holdings. Although the plaintiff advanced approximately $1,500 towards the purchase of a wall unit and canopy bed in respect of one of the cottages, her claim for an interest in these properties is based chiefly upon the services which she rendered to Mr. Aarts in respect of these properties from the period November - December, 1998 to Mr. Aarts' death on February 8, 2002. It is her position that she and Mr. Aarts co-habited in a continuous spousal relationship during that period of time. Her evidence is that he and she had been involved in an intimate relationship, albeit, one carried on with discretion from 1993. In November, 1998 Mr. Aarts separated from his former wife. The plaintiff says that Mr. Aarts came to live with her at that time in her residence at Erieau, Ontario, a property to which the legal title was taken in Ms. Hupka's name and in respect of which Mr. Aarts provided her with $27,500 for the down payment and also provided her with advances towards the mortgage payments. That property was purchased in 1998.

13 The plaintiff says that some years prior to the purchase of the Erieau property, she and Mr. Aarts had an apartment in Ridgetown, Ontario which was leased in her name. The monthly rent was advanced by him to her in cash, as it was his wish that their relationship be kept discrete.

14 Ms. Hupka's principle place of residence was in the Windsor area. Her evidence is that when Mr. Aarts moved to Port Franks, in late November or December, 1998, he asked her to come to Port Franks. Her area of expertise is in the field of interior design, decorating and accessorizing. She first used these skills in a retail boutique shop which she operated in Windsor. She left the retail shop and devoted her efforts to the in-house servicing of customers with respect to design, renovating, furnishing and decorating the interior of their home. She would assist customers by attending at

their home and making suggestions as to paint colours, wallpaper, styles of furniture, window treatments such as sheers, valances, verticals and drapes and accessories. Where she was given the job of purchasing the furnishings and/or materials on behalf of the customer, her income came from mark-ups on the items in question or rebates from the suppliers. In some cases where she did not actually purchase any of the furnishings or materials, she would charge a consultation fee. Her consultation fee was $75.00 per hour. Although each job involved consultation with a customer, where she received the order for furnishings or material she would normally waive her consultation fee with respect to that job.

15 Ms. Hupka says that her move from Windsor to Port Franks was at the request of Mr. Aarts. He did not want her working for other people and wished her to provide her skills with regards to his properties in Port Franks. Her evidence is that the paramount reason for her moving to Port Franks was their relationship. Later Mr. Aarts proposed that they be married and gave her an engagement ring. While no specific date had been agreed upon, their wedding was to take place sometime during the summer of 2002. As mentioned earlier, Mr. Aarts died in February of 2002. I think it is fair to say upon the material on this motion that the relationship between Ms. Hupka and Mr. Aarts, during the period of time when she provided the services which constitute the basis of her claim, was not that of an interior decorator being engaged on a commercial basis.

16 The plaintiff asserts in her Statement of Claim, in addition to the property claims, a claim for support as a dependent spouse under the provisions of the *Succession Law Reform Act*. There is a dispute between the plaintiff and the defendant estate with respect to the validity of such claim. The issue between the parties is whether the plaintiff and Mr. Aarts continually cohabited for a period of three years. It is Ms. Hupka's position that she continually co-habitated with Mr. Aarts from at least January, 1999 continuously until his death in February, 2002. While the defendants do not dispute there existed some relationship between Ms. Hupka and Mr. Aarts prior to January, 1999, the position of the defendant estate is that their cohabitation only commenced when they moved into the home in June, 2000. It is the estate's position that the plaintiff does not come within the definition of common-law spouse under the *Succession Law Reform Act* and therefore has no claim to support as a dependent of the deceased. This issue is not before me on this motion.

17 Summarily stated, the period of cohabitation alleged by the plaintiff is from at least January, 1999 to February, 2002. Within that period of time Mr. Aarts prepared and executed his will. The will has two dates on it. The date of May 19, 2000 appears on the face page of the document and the date of May 19, 1999 on the attestation page. Both of these dates are typewritten. Basically stated, the will provides that two-thirds of the issued and outstanding common shares of the corporate defendant named in this action, which was Mr. Aarts' holding company, is to be divided equally amongst his three sons. The other one-third of the shares of the corporate defendant are to be divided equally amongst certain qualifying employees, they being employees of Mr. Aarts who had received a ten-year ring evidencing their service. The deceased left the residue of his estate in equal shares to his children who are his three sons. The six properties being the subject of this motion, along with other real property and personal property, would be part of the residue devised by the will. There is no provision made in the will for Ms. Hupka.

18 The contributions of the plaintiff upon which her claim is based may be categorized under three headings: (a) Services directly relating to these properties; (b) providing Mr. Aarts with personal transportation, and (c) Spousal services.

19 (a) The services directed to the properties have two aspects. One relates to the application of the plaintiff's talents as an interior decorator in respect of the five cottages and to her management of four of those cottages.

20 Ms. Hupka describes her efforts in the improvement of the properties as commencing in December, 1998. She states she designed and supervised the elaborate Christmas decorations for the exterior of Cottages A and B. The cost of the decorations was some $6,000. Mr. Manny Coutu, an employee of Mr. Aarts', did the physical work and labour involved in the outside work such as hanging and stringing the lights and decorations. Ms. Hupka attended to the Christmas decorations of the interior of Cottage B.

21 Over time, improvements were made to Cottage A. Again, her efforts were directed to the design of the interior layout. A bedroom was converted to a closet. She installed the wall racks in that closet area. She applied her skills in

choosing and coordinating paint colours, window treatments, making window flower boxes and planting the flowers. She, along with Mr. Aarts, was involved in the design of the landscaping and the deck which was built by a contractor. She was involved in acquiring the outdoor garden statues and a pond, as well as designing the layout for a walkway. She was also involved in selecting and obtaining the outdoor furniture for this cottage.

22 Renovations were done to Cottage B. Part of the interior was used as an office by Mr. Aarts. In order to accommodate working space for Maggie Brennan, who Mr. Aarts had hired as a secretary for his Port Franks office, a further office was constructed within the premises. Ms. Hupka designed the layout of that office, chose the floor coverings and coordinated the colour schemes and decorating. She was involved in selecting the furnishings for this office. In addition, over time, her talents were applied to other parts of the house and the grounds. These included coordinating colour schemes, window treatments, etc. The landscaping was upgraded. She planted flowers, stones were brought in as part of the landscaping and she retained an artist to paint these rocks.

23 Ms. Hupka refers to the acquisition of Cottage C as having been bought by she and Mr. Aarts. She did not contribute financially to the purchase of that property nor is her name on title. Her counsel suggests that what is meant was that she was involved with Mr. Aarts in the decision to purchase that property. Again, her skills were applied in designing and coordinating the upgrading of the property in respect of both the interior and exterior of the house and the grounds. She also engaged the services of an artist to paint a large mural on one of the inside walls of the house.

24 Upon the acquisition of Cottage D, she was similarly engaged. This property underwent more extensive renovations. Mr. Aarts intended that it would be a show place of Ms. Hupka's interior design and decorating talents. It was contemplated by them that she may attempt to reestablish her interior decorating business. A sign reading "New Life Creations" was placed outside the house. This was to be her business name. However, these plans for operating a new business did not come to fruition.

25 The home, (cottage E) was substantially upgraded. The front sunroom was converted to an office for Ms. Hupka, then changed into an office with a library. This was done by annexing an adjoining bedroom. Subsequently, it was changed into a formal dining room. An addition was built and stairs were removed to provide Mr. Aarts with an office. The basement was renovated to provide accommodation for Mr. Aarts' son when visiting with him.

26 Ms. Hupka advances that she spent a great deal of time in respect of the upgrading, renovating and decorating of this property. Her counsel, Ms. Farrell, characterizes the plaintiff's involvement in the improvements made to the home, as having put her heart and soul into that house.

27 On cross-examination, Ms. Hupka was asked to provide details of the work she had done on each property and indeed in some cases, room by room. She was asked to provide her best estimate of the time she had spent on each job at each property. She estimated her time engaged in the work she did at Cottage A at 128 hours; Cottage B at 316 hours; Cottage C at 111 hours; Cottage D at 324 hours and the home at 1,530 hours. This totals 2,409 hours during which the plaintiff says she was engaged in improving the defendant's property over the three-year period from December-January, 1999 to Mr. Aarts death in February, 2002.

28 The vacant land, being the Andrea Street property earlier referred to, was purchased as an investment for future development. Ms. Hupka says that she and Mr. Aarts discovered the property together and that she, along with Mr. Aarts, talked with the realtor and joined in the negotiations for the purchase. Her position is that this property was acquired by Mr. Aarts as a retirement investment for them. She views the property as having been acquired by she and Mr. Aarts together. Mr. Aarts approached a friend, James Marshall, inviting him to come in on the venture with he and Ms. Hupka. Mr. Marshall confirms he was approached by Mr. Aarts. He declined participation in the venture and understood that Mr. Aarts and Ms. Hupka had bought the land together. No improvements have been made to this vacant land.

29 Ms. Hupka described her involvement in managing cottages A, B, C and D. Cottages A and B were on hand in January, 1999 at the beginning of the three-year period. After Cottages C and D were acquired, some of the cottages were available to be rented out, usually on a weekly or a weekend basis. Ms. Hupka says that she was engaged to some extent in managing the rentals in 1999, but for the most part, Maggie Brennan, Mr. Aarts' secretary at his office in Port Franks, did a lot of the work relative to those 1999 rentals.

30 The term "rentals" is somewhat misleading. Mr. Aarts at various times allowed the cottages to be used by his family, friends and associates, some of his employees and some of Ms. Hupka's family members and friends. In other words, although a cottage was occupied, that did not necessarily generate revenue from that occupation. Ms. Hupka used a calendar to keep track of the reservations. For the year 2000, Ms. Hupka recorded 23 such rentals or occupations involving an estimated input of her time of 145 hours. She could not locate her calendar for the year 2001. Her counsel suggests a similar amount of time would probably have been expended for that year. Ms. Hupka says that she was better organized in 2001 than in the previous year.

31 Ms. Hupka's management of the cottages included some advertising by way of printed fliers, receiving inquiries from interested parties, showing the cottages to a potential renter, attending at the beginning of the rental or occupation, handing over the keys, showing the occupant the features of the property, outlining the rules and requirements in respect of the use of the premises and picking up the keys when the occupant left. She says that she supervised the cleaning and replenishing of the cottages between the exit of the one occupant and the arrival of the next. The cleanup of the cottages was done by housekeepers rather than Ms. Hupka herself. She states that when payment was made for a rental she would receive it and deposit it to Mr. Aarts' rental account at the bank.

32 Ms. Hupka's management services in respect to the cottages over the three-year period is disputed by the respondents. Ms. Karin Lang-Popp is the controller/office manager of Mr. Aarts' main business office which is located in London, Ontario. Her affidavit has been filed in response to the plaintiff's assertions with respect to property management. She deposes that after Maggie Brennan left Mr. Aarts' employment at the end of December, 1999, Mr. Aarts himself took over managing the cottages. She also states that the actual revenues from the cottages were insufficient to allow Mr. Aarts to write off all of the expenses associated with the rental of those properties against the revenues generated. The respondents' factum indicates that the rentals incomes generated for the year 2000 were approximately $7,700.

(b) Transportation

33 Mr. Aarts lost his driving privileges resulting in two suspensions periods of three months on the first occasion and one year on the second. Ms. Hupka asserts that whenever Mr. Aarts was with her during those suspensions, she would drive him to business appointments and other places. Her claim in respect of this service is also an area of dispute between the parties. The defendants' evidence from affidavit of James Aarts, an employee of Mr. Aarts' and that of James Marshall, is that during the period of the licence suspensions. Mr. James Aarts, for a period of time, was assigned the task of driving Mr. Aarts. Mr. Marshall was hired for a period of time to perform this service. Also, two of Mr. John Aarts' sons were engaged in chauffeuring him.

3. Spousal Services.

34 Ms. Hupka states that during the three-year period in question, she and Mr. Aarts lived in a spousal relationship. She attests to hosting parties and private dinners involving Mr. Aarts' business associates as well as dinner parties with his and her friends. It is not disputed that on one occasion, on Labour Day, 2000, a large party was held involving 100 guests or so. She attests to arranging and hosting this affair. Mr. Coutu, earlier referred to, deposes that he and his wife made the arrangements for the party by way of food and drink. He served as the bartender and that Ms. Hupka arranged the appitizers and attended to the decorations and hired the band.

35 Ms. Hupka says that Mr. Aarts was always looking for business opportunities and that he and she together would take time to visit and view potential real estate opportunities. They attended numerous auctions and spent time discussing the renovations and improvements to the properties; viewing samples of materials, furniture and furnishings that would be involved in the improvements and attending at various places in connection with these activities. In summary, she attests to assisting and supporting Mr. Aarts both in providing her professional skills and in her capacity as his spouse.

36 The respondents oppose the issuing of the Certificates of Pending Litigation against any of the six parcels of land. The trustee has filed material relative to the value of Mr. Aarts' estate. The estate is made up of shares in privately held companies ($7.4 million), cottages and related land ($2.5 million), cash and investments ($370,000), personal effects including boats, cars, clothing etc. ($100,000) totalling approximately $10,307,000.

37 Estate liabilities are estimated at $3,565,000, made up of income taxes due for the taxation year of death, 2002, at $2.6 million; outstanding mortgages against real estate of $865,000 and the probate fees at $100,000. The trustee estimates the net worth of the estate at approximately $6.7 million.

38 The issue which immediately confronts the trustee is raising funds for the payment of tax liability due in respect of the 2002 taxation year together with the Probate taxes totalling approximately $2.7 million. The trustee indicates that he has available to him elections under the *Income Tax Act*. From his cross-examination his plans for excersing those elections to minimize or defer the payment of tax would be in place by the end of December 2002. Such elections, he said, may save or defer payment of hundreds of thousands of dollars. The trustee does not specify the amount of tax that could be saved although he did not anticipate it would be significant. Since his cross-examination occurred in November 19, 2002 and he was yet to meet with his advisers, the exact amount of cash immediately needed to satisfy the tax liabilities had not then been determined..

39 The trustee indicates that initially he had proposed to sell the six properties in question but refrain from taking any steps towards that objective once this claim was commenced by the plaintiff. Depending on the outcome of this motion, the trustee will probably sell some or all of these properties to provide part of the cash needed to pay the tax liabilities. He views these properties as the most convenient and easiest to sell and since recently acquired, would attract a less capital gains tax.

40 Miss Farrell submits that the trustee appears to have focused on these properties in which Ms. Hupka asserts a claim, to the exclusion of other available options open to him to obtain the required funds. Ms. Farrell submits that the trustee has wide powers under the will and could borrow against the assets of the estate. The trustee responds that to draw down the operating companies' lines of credit to furnish cash would adversely affect the operating capital needed to carry on the various businesses. Miss Farrell points out that one of these operating companies owed Mr. Aarts at his death, personally, the sum of $1,076,702 and that another of his companies owed him the sum of $880,551. She further points to another company which has cash on hand and large receivables. Miss Farrell submits that the trustee could realize upon the debts owed personally to Mr. Aarts from his companies which appear to be in the neighbourhood of $1.8 to $1.9 million. The trustee responds that those companies are not in a position to retire those debts immediately.

41 In the case of one of those debtor companies, its assets are land which would have to be sold to retire the debt and may not provide cash in a timely manner for the needs of the trustee. Miss Farrell submits that companies or their assets be sold. The trustee responds, that to attempt to do so in a limited time frame, would not be in the best interests of preserving the estate since such a premature attempt to sell could result in a "fire sale" type situation.

42 The trustee was also Mr. Aarts' solicitor prior to his death. He states his understanding of Mr. Aarts' intention to have been to preserve the businesses for his three sons who would eventually take over their operation.

43 The contest between the parties on this motion is the trustee's need for cash and the plaintiff's request that her interest in the properties be preserved in species pending final determination of her claim at trial.

44 Section 103(6) of the *Courts of Justice Act* sets out the grounds upon which the court may make an order discharging a Certificate of Pending Litigation. It reads:

> 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 interest 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.

45 The test for granting a Certificate of Pending Litigation, where the motion is on notice, is the same as that applied on a motion to discharge a certificate. *Homebuilder Inc. v. Man-Sonic Industries Inc.*, [1987] O.J. No. 862 (Ont. Master) (Master Donkin) followed in *Waxman v. Waxman*, [1991] O.J. No. 89 (Ont. Gen. Div.). The onus is upon the party moving for the certificate to establish that she has a claim to the interest in the land claimed. That claim must be a reasonable one. The term "reasonable" is not defined in s. 103 of the *Courts of Justice Act* but its meaning has been considered, In *Waxman supra*, Lane J. equates the raising of a triable issue with a reasonable claim. At p. 4 he said:

> In my view, the issue does raise a triable issue or a reasonable claim.

46 Kozak J. in *Bajada v. Bajada* (1991), 32 R.F.L. (3d) 70 (Ont. Gen. Div.) said that a claim for a constructive trust is a claim for ownership in property. He stated at p. 75:

> The pleadings and the affidavits filed disclose an arguable case which could result in the wife obtaining a declaration that she has an ownership...

47 In *Lawrence Avenue Group Ltd. v. Innocan Realty Inc.*, [1999] O.J. No. 1213, 44 O.R. (3d) 155 (Ont. Gen. Div.) Lax J. viewed the threshold in these words,

> A threshold requirement is that the plaintiff's claim to an interest in the land must be reasonable and at least raise a triable issue with respect to the interest in the land claimed. The court must then go on to consider the equities between the parties.

48 Czutrin J. in *West v. West* (1997), 33 O.R. (3d) 472 (Ont. Gen. Div.) said in respect of this issue at p. 476:

> I must first determine whether there is an interest in land that raises a triable issue.

49 In *572383 Ontario Inc. v. Dhunna*, [1987] O.J. No. 1073 (Ont. Master) Master Donkin states:

> 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.

50 While not having to prove her entitlement to an interest in the land claimed to the extent of satifying the onus she must discharge at trial, on this motion the plaintiff is required to raise a triable issue with respect to that interest, which if found in her favour at trial could result in her being found to have or to be awarded an proprietary interest in the land claimed.

51 One of the grounds pleaded by the plaintiff is that of an expressed trust. I accept Mr. Youdan's submission that the plaintiff has not made out a triable issue for an expressed trust. "An expressed trust is one in which the intention of the person creating it signifies that the property is to be held on trust" *Anger and Honsberger Real Property* (2d) p. 577. Section 9 of the *Statutes of Fraud* requires that all declarations or creations of trust of any lands shall be manifested and proved by a writing signed by the one declaring the trust. No writing has been produced on this motion manifesting an express trust.

52 The requirement that there be a manifestation of the trust in writing does not apply to a trust arising by operation of law pursuant to s. 10 of the *Statute of Frauds*. In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.) Dickson J., as he then was, said

> ...trusts created by operation of law are exempt from their requirement of being evidence by writing. Quasi-trusts are further divisible into resulting trusts and constructive trusts.

53 Generally speaking, a resulting trust is based on the contribution by a party in respect of the property, an acceptance of that contribution and a common intention on the part of the parties that the one party's contribution was to entitle him or her to some share or interest in the property. It is important in considering the overall circumstances in respect of establishing a reasonable interest in the defendant's property, to keep in mind that Mr. Aarts is deceased and cannot tell us directly what his intentions were. Section 13 of the *Evidence Act* provides that a party suing an executor, in this case the estate trustee, shall not obtain a verdict or judgment or decision upon his or her own evidence in respect of any matter occurring before the death of the deceased person, unless the claimant's evidence is corroborated by some other material evidence.

54 The plaintiff's claim is based on the work she did in respect of the properties and the representations of Mr. Aarts. The plaintiff states in part in her first affidavit at para. 17:

> The deceased consistently told me that I would be compensated for all the work I performed.

55 She is referring to her involvement in the renovations and her management of the cottages. In para. 18 she states the basis of her claim to an ownership interest is based on the contribution she made as well as the "representations made by the deceased that I was to have such an ownership interest".

56 On cross-examination, Ms. Hupka was questioned about what John Aarts actually said to her. She said: "It was ours together, is what he told me several times. Everything that we did together in Port Franks was to be ours together and we were to live and retire on this. He felt it was a joint effort between the two of us."

57 Ms. Hupka spoke of Cottage C being bought by "them". Miss Farrell, as I have mentioned earlier, suggests that this was to be interpreted that Ms. Hupka was involved in the decision that the property be acquired.

58 There are a number of affidavits from non-parties which the plaintiff has filed in support of her claim.

59 James Marshall's evidence from his affidavit and cross-examination is that John Aarts had told him that he and the plaintiff planned on being married in the summer of 2002. In his affidavit he deposes that Mr. Aarts always treated and referred to the properties as being his and Glenna's (Plaintiff), and that Glenna (Plaintiff) did all the renovation, redecorating, and redesigning and looked after the renting of all of the properties. He further deposes at para. 10 of his affidavit of having being invited to join in partnership with John and Glenna in respect of the Andrea Street property (23 acres vacant land). He deposes that "John originally took me to see the property, however, he later told me that he

and Glenna had purchased the land themselves". He also stated that Mr. Aarts was supporting Glenna financially and that it was his belief that Mr. Aarts wanted Glenna provided for. He went on to say that whenever he met Ms. Hupka, she always had one of John's credit cards. In cross-examination, he spoke of a conversation with Mr. Aarts, wherein Mr. Aarts commented that there should be plenty to look after his sons, the plaintiff and his mother. Mr. Marshall said that Mr. Aarts never made a statement to the effect that the plaintiff owned part of these properties, however, he went on to say that Mr. Aarts referred to them as "ours" all the time. The term "ours" was apparently used as a description of a place rather than legal ownership. Mr. Marshall states that Mr. Aarts did involve the plaintiff in decisions about renovations. He states that he has overhead them "talking over a piece of property and I used to wonder which one they were going to buy next." He acknowledges that he has no information in respect of how the title to the properties was held.

60 Michael Dunn was a long-time friend of Mr. Aarts. He deposes in his affidavit that without a doubt the home was always treated and thought of by John (Mr. Aarts) as their matrimonial home. In reference to the four cottages, he deposes that "whenever, the properties were mentioned, they were referred to as belonging to John and Glenna together." He advances his opinion that it was Mr. Aarts' intention that the Port Franks properties belonged to both him and Glenna. However, in cross-examination, Mr. Dunn acknowledged that Mr. Aarts never stated that he had given or promised an interest in the properties to Ms. Hupka. He says in referring to the properties, Mr. Aarts spoke of "we" rather than "I". The reference to "we" was in the context of "we are going to do this or that to that cottage". Again, using the term more in the context of plans or activities than a statement of ownership.

61 Mr. Dennis Durocher was a friend of Mr. Aarts. He recalls a conversation with Mr. Aarts in May, 2001 relative to his concerns about providing for the plaintiff. He was asked by Mr. Aarts what arrangements he, Mr. Durocher, had made to provide for his wife and family. He told Mr. Aarts he was leaving almost everything he had to his wife, including his house and that he had made some provision for his childrens' benefit. He said Mr. Aarts was concerned about ensuring Glenna was provided for and that he, Mr. Aarts, commented that he should make provisions similar to that of Mr. Durocher. He relates being told by Mr. Aarts that he told his lawyer, Mr. Nesathurai, (who is the estate trustee), that he wanted to make arrangements so that Glenna would be provided for. This matter did not arise either in the affidavit or cross-examination evidence of Mr. Nesathurai.

62 John Creamer was a friend of both Mr. Aarts and the plaintiff. In his affidavit he says that prior to his death, Mr. Aarts and the plaintiff were planning a large addition to the matrimonial home. He also refers to Mr. Aarts and the plaintiff having purchased the vacant 23 acres (Andrea Street property) as an investment which they planned on developing together at some point in the future.

63 Barry Place was a neighbour and friend of John Aarts and Glenna Hupka. He confirms that Mr. Aarts gave Ms. Hupka an engagement ring at Christmas of 2001. He refers to them as having planned to improve their home and that they had talked about the possibility of developing the 23 acres (Andrea Street property) that they owned, in the future. He recalls that in January, 2002, a month prior to Mr. Aarts' death, Mr. Aarts expressed that he was concerned about making provision for Glenna and that he wanted to ensure she would have an income.

64 In her first affidavit, Ms. Hupka states in reference to the home at para. 6:

> John and I considered that property to be a matrimonial home and he specifically told me that it had been bought for me.

65 Mr. Youdan, for the respondents, submits that a resulting trust is based on contribution by the one party and a common intention of both parties that the contributor should have an interest in the land. He submits that in the plaintiff's first affidavit, she speaks of being compensated. He suggests that Mr Aarts' use of the word "ours" was used in a general conversational sense rather than denoting a proprietary status. He submits that taken singley or cumulatively, the evidence of the non-parties does not reach the point of showing an intention on Mr. Aarts' part that Ms. Hupka had or would have a proprietary interest in the properties. Further, Mr. Youdan submits the comments of Mr. Aarts in regard to wishing to provide for Ms. Hupka does not refer to her being given a proprietary interest in all or any specific

property. He suggests that Mr. Aarts' discussion with Barry Place was in the nature of advice on estate planning and that in that conversation Mr. Place does not refer to Mr. Aarts referring to these particular properties. Mr. Youdan further submits that Mr. Aarts' intention or concern to provide for the plaintiff must be expressed in reference to the properties themselves in order to establish the common intention required for a resulting trust.

66 Mr. Youdan further submits that in making his will either in May, 1999 or May, 2000, in which no provision was made for Ms. Hupka, is some evidence of Mr. Aarts' intention in respect of Ms. Hupka. Further, he submits that title to the home was taken in Mr. Aart's name either for the benefit of himself or his corporations.

67 With respect to the very able submissions of Mr. Youdan, whether a common intention is or is not established upon the words and acts of Mr. Aarts and whether the plaintiff evidence is sufficiently corroborated are matters to be determined at trial It is only necessary that I determine if there is evidence raising a triable issue.

68 The law regarding unjust enrichment and constructive trusts has been dealt with by the Supreme Court of Canada in *Becker v. Pettkus* (1980), 117 D.L.R. (3d) 257 (S.C.C.) *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.) and *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.).

69 The plaintiff must first establish an unjust enrichment. This requires that she prove: (i) an enrichment; (ii) a corresponding deprivation; and (iii) the absence of any juristic reason for the enrichment.

70 There is evidence that the plaintiff did work on the four cottages and the home. Thus there is an nexus between the plaintiff's work and five of the properties She was under no obligation to provide those services. The value of the properties has increased. The determination of the value of her contribution is a matter for trial. The plaintiff submits that she suffered a deprivation in that she gave up her business in Windsor and moved to Port Franks at the request of Mr. Aarts. Mr. Youdan points out that her income tax returns prior to her move to Port Franks shows no income being derived from a business. On cross-examination, the plaintiff indicated her income was low, below $30,000; and in the last few years there wasn't enough income generated. Her loss from giving up her Windsor business has not been reflected in her tax returns. Mr. Youdan submits that there being no evidence of loss, there is no deprivation on that issue.

71 On the other hand, the plaintiff estimates 2,409 hours of her time spent in decorating and enhancing the five properties in addition to the time spent managing the rental properties. Again, she was under no legal obligation to provide those services.

72 Mr. Youdan points out that the plaintiff has not put a monetary value to her claim or specified the extent of her interest claimed in the properties. He proceeded to estimate a valuation of the plaintiff's claim in relation to a share or interest in those properties. He approaches the valuation from two perspectives, the "value received" and the "value surviving" method of valuation dealt with in *Peter v. Below*. I would note that such method of valuation is in respect of a constructive trust.

73 He submits that value received may be looked at as the 2,409 hours of the plaintiff's time multiplied by her consultation fee rate, as determined in her previous business, of $75.00 per hour. This produced a value received of around $181,000. Counsel arrives at a value surviving by deducting the total purchase price of the six properties ($1,417,000) from the total market value ($1,782,000) resulting in an increment in the six properties of $365,000. He proceeds on the assumed premise of the plaintiff receiving a half interest and concludes that her interest, at its highest, would be in the area of $180,000 to $185,000. Counsel asks the court to consider these valuations in comparison to the value of the property and from the magnitude of the estate, its ability to pay any judgment obtained by the plaintiff. Counsel submits that the finding of an unjust enrichment does not automatically give rise to a constructive trust. Where an unjust enrichment is found, a remedy may be by way of damages or the granting of an interest in the land by way of a constructive trust. It is further submitted that *Peter v. Beblow* states that to resort to the remedy of a constructive trust, a monetary award must be inadequate or insufficient remedy, such as when the payment of the judgment is problematic or where the claimant's efforts have given him or her a special link to the property.

74 McLachlin C.J.C. in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.) at p. 997 states:

> ...Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given him or her a spcial link to the property, in which case a constructive trust arises.
>
> For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 1023 that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circmstances that can arise in such cases.

75 Again, at p. 999 McLachlin C.J.C. states:

> To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Peptkus v. Becker* has been made out. If these questions are answered in the affirmative, the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient, the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions.

76 In *Rathwell v. Rathwell*, Dickson J., as he then was, referring to a resulting trust said:

> If there is a contribution in money or money's worth, but absence of evidence of an agreement or common intention as to the quantum of the interest, doubts may arise as to the extent of the share of each spouse in the property. Lord Reid in *Pettitt's* Case, supra, at p. 794, said that the respective shares might be determined in this manner:
>
> > ...you ask what reasonable people in the shoes of the spouses would have agreed if they had directed their minds to the question of what claim that contributing spouse ought to have.
>
> This is a sensible solution and I would adopt it.

77 Miss Farrell referering to the above statement of Dickson J. suggests that in determining the plaintiff's interest in respect of a resulting trust, more is involved than a simple mathematical calculation.

78 From the materials, some $48,645.00 was paid through Mr. Aarts' company to "New Life Creations", or in other words paid to the plaintiff. Some of that money appears to refer to payment for labour provided by the plaintiff. Whatever the purpose of those payments, the amount does not reach the amount arrived at for value received or value surviving as suggested above. Further, Mr. Aarts was apparently very generous in providing for Ms. Hupka's lifestyle. She had the use of his credit card with expenditures of $7,000 to $8,000 per month.

79 The respondents submit that in valuing any unjust enrichment of the plaintiff, the benefit she received should be brought into account. The point being advanced is that the plaintiff's unjust enrichment, if one is found, when compared with the increase in value of these six properties and the ability of the estate to pay any judgment which may be awarded to her, there is little likelihood that the plaintiff will be given interest in the land by way of a constructive trust. While that may or may not be, I must, in this motion, walk a narrow line in assessing whether the plaintiff has met the standard of putting forth a reasonable claim to the interest in the land claimed and the possible results of the main action. See *Waxman*, supra. Master Donkin in *Dhunna*, supra, put it in these words:

> ...A consideraiton 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.

80 On this motion, I am not to presume what will result at trial. The law in respect of constructive trusts as set out by the Supreme Court of Canada, while binding on all lower courts has, in my view, more direct reference to the trial judge's determination of a proper remedy than to the issue of whether the plaintiff's claim to a proprietary interest is a reasonable one.

81 Having considered the material and the submissions of counsel, I find in respect of the plaintiff's claim to an interest to the land claimed that she has raised a triable issue and thus her claim is reasonable.

82 The next issue to be addressed are the equities. The court's duty is succinctly stated in the words of Steele J. in *Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671 (Ont. Div. Ct.) at p. 674:

> I am of the opinion that the governing test is that the judge must exercise his diescrtion in equity and look at all the relative matters between the parties in determining whether or not the certificate should be vacated.

83 In *Dhunna*, supra, Master Donkin lists various factors which have been considered on motions such as this. One such factor is an alternative claim for damages. Miss Farrell states the plaintiff's primary objective is not an award of damages, rather it is directed to a proprietary interest.

84 The plaintiff has asserted an alternative claim for damages and a declaration that her interest follow the proceeds of the sale of these eproperties. This factor has, in my view, relevance to Cottages A, B, C, D and Andrea Street property.

85 Mr. Aarts, with the knowledge of the plaintiff, listed Cottages B, C, and D for sale in 2001. Those properties did not sell prior to the expiry of the listings in December, 2001. Mr. Aarts had again considered relisting these properties and apparently had scheduled an appointment to meet with a realtor to deal with that. The day scheduled for that meeting, as it turned out, was the day following his death. An attempt was made by the plaintiff and Mr. Aarts to sell Cottages A and B. privately. An exhibit to the plaintiffs cross-examination is a memo she prepared which recites in part that in December, 2001 she and Mr. Aarts tenatively sold Cottages A and B for $850,000 to Sherry Cook, a realtor. The memo recites that the deal did not close as John and Glenna decided to retain these properties as high-end rental properties. As earlier noted, the cottages did not have a history of generating significant revenue.

86 Cottages A, B, C and D may, in my view, be seen as investments, all of which at some point were being considered for realization through their sale.

87 The Andrea Street property was an investment for the future. With the death of Mr. Aarts, the plans, which Ms. Hupka said were that he would build the residences and condominiums and she would decorate them, came to an end. There would seem to be little purpose in retaining that vacant parcel of land. Had Cottages B, C, D been sold by listing or Cottages A and B sold through private sale, the plaintiff's claim at that point would have been for a monetary award. This involves one the factors mentioned in *Dhunna*, supra, whether damages would be a satisfactory remedy at least in respect of Cottages A, B, C, D and Andrea Street.

88 The expenses relating to all six properties, including the home, are still being met by the estate with no significant income being generated to off-set those expenses.

89 Another factor mentioned in *Dhunna* is the ease or difficulty of calculating damages. The respondents' position is that damages could be calculated. I have already referred to the defendants' position relative to value received and value surviving if approached as a constructive trust issue.

90 Miss Farrell's position is that the constructive trust approach is only one ground for the plaintiff's claim. She submits that relief by way of a resulting trust involves common intention and the reasonable expectation of the parties. Referring to the lifestyle Mr. Aarts provided the plaintiff and her reasonable expectations based thereon and on Mr. Aarts' representations, Miss Farrell suggests the trial judge may assess a share in the properties exceeding what may

result from a constructive trust approach. Earlier in these reasons I had noted her drawing the court's attention to the words of Dickon J. in *Rathwell v. Rathwell.*

91 I have already reviewed the opposing positions in respect of the trustee borrowing or selling other assets. There are other parcels of land beneficially held by the estate, which the trustee acknowledges are not integral to the businesses. One of those other properties is considered by the him to be integral to the interest of the businesses. It is a vacant parcel of land adjoining the present business premises, which in his view would provide for further expansion of the business facility. Ms. Burke points out that if all of those other parcels of land were sold they alone would not provide suffcient funds.

92 The respondents further submit that if the subject six properties were encumbered by Certificates of Pending Litigation, that would constitute an impediment in seeking a loan. However, I note that the trustee's initial estimated net worth of the estate is 6.7 million. The trustee has outlined the difficulties he foresees in borrowing the needed funds and considers it impractical. It is his preference not to borrow. He has not however, made an application to the corporations' bank. The will expressely empowers the trustee to borrow money for purposes connected with the administration of the estate and to mortgage, hypothecate and alienate all or some of the assets of the estate as in his absolute discretion he deems advisable. While the position of the trustee is a matter to be considered, it does not appear that these six subject properties are the estate's last and only refuge. The possibility that the trustee may be able to minimize the tax to some extent and/or defer payment of some of the tax is also a consideration.

93 Ms. Burke made submissions on the relative harm that will befall the respective parties if the certificates are granted or refused. She submits that the plaintiff has not demonstrated that she will suffer any harm if the certificates are refused and the home and other properties were sold. Ms. Burke points to the harm to the estate if the properties are tied up. She notes that the trustee had initially planned to sell these properties for the reasons earlier stated. To tie up the lands may require him to make choices and pursue other options that he would not otherwise have chosen. The ability to defer some of the tax has not yet been determined. To be forced to sell other assets would be premature and may result as being seen by a potential buyer as a fire sale producing less than full value. Ms. Burke submits that the trustee ought not to be forced to sell assets which would not be in keeping with his understanding of the deceased's intention that the businesses pass on to his sons.

94 Ms. Burke suggests that the consolidated financial statements of all of the companies show there is insufficient funds to meet the estate trustee's requirements and that the companies which owe debts to Mr. Aarts personally are not at this time in a position to repay.

95 Ms. Burke submits that if the other six properties, one of which is considered integral to the business, were sold, excluding the one, it would produce approximately $764,620 and that if all six were sold the proceeds would be approximately $929,620, an insufficient sum. She suggests by selling the six subject properties their equity is valued at $1,227,000 which would then provide from the sale of all 12 properties, $2,156,620 approximately towards the immediate liabilities. I would note, however, that if all 12 properties were sold with the liability sought to be covered being $2.7 million, the estate trustee would still have to find other funds.

96 Ms. Burke submits that even if the plaintiff establish an interest in the land that it would be a small interest compared to the value of these six subject properties. Miss Farrell disagrees with that conclusion. Ms. Burke submits that even if a partial proprietary interest were awarded to the plaintiff, it would eventually result in the property being sold by way of partition. Having reflected on that submission, while the same result may flow in any case where only a partial *in rem* remedy is awarded, the courts still award partial proprietary interests.

97 Ms. Burke submits that the plaintiff has not demonstrated that she will suffer harm if the home is sold and she is required to move out. Miss Farrell concedes that the plaintiff could move but in the circumstances it would involve some hardship in leaving what she thought as being their home.

98 Mr. Youdan suggests that "uniqueness of the property" is not in issue here in that such a factors is usually associated with the situation of a vendor and purchaser transaction. I am unable to say that the home brings into play any serious consideration of uniqueness. While no doubt a well-appointed residence, the plaintiff and Mr. Aarts only resided there for some 18 months prior to his death. The plaintiff's continued residence since then appears to be by leave of the trustee. He took no futhers steps to proceed to sell these properties once the plaintiff commenced her action and brought this motion.

99 Miss Farrell's position is that to deny the certificates in question will render issues of resulting trust and proprietary interest mute and tantamount to a dismissal of the plaintiff's claim to an *in rem* remedy, before the plaintiff has had the opportunity to place her case before the trial court.

100 Miss Farrell suggests, as a form of compromise, that a certificate be issued in respect of the home and if the other five properties are sold one-half of their proceeds be paid into court as security. The respondents' response is two-fold. First, because of the magnitude of the estate, no security in respect of the claim is required at all. Secondly, as submitted by Ms. Burke, it would be inconsistent with the plaintiff's claim to a proprietary remedy in all six properties, to free five of them if the plaintiff is seeking a proprietary interest in all of them. In Ms. Burke's submission, there really is no difference between any of the properties so far as this motion is concerned.

101 An answer to that submission may be found in the judgment of Cory J. in *Peter v. Beblow*, where he speaks of a monetary award or a constructive trust remedy being discretionary and that the court's discretion should be exercisd flexibly. He also deals with the problem where there are several parcels of land. At p. 1023 Cory J. states:

> It follows that in a quasi-marital relationship in those situations where the rights of third parties are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. Ordinarily, both partners will have an interest in the property acquired, improved or maintained during the course of the relationship. *The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. It, too, should be based on common sense and a desire to achieve a fair result for both parties.* (italics added)

102 As quote earlier, McLachlin C.J.C. echoed those comments of Cory J. where she said at p. 999 "..., I echo the comments of Cory J. at p. 1023 that the courts should exercise flexibility and common sense when applying equitable principle to family law issues which due sensitivity to the special circumstances that can arise in such cases."

103 Lastly, the respondents question, whether, with regard to the liablity to which the plaintiff may be exposed under s. 103 (4) of the *Courts of Justice Act*, the plaintiff could satisfy such liability. In Dhunna, supra, one of the considerations referred to is whether the plaintiff is a shell corporation. Upon moving to Port Franks, the plaintiff sold the Erieau porperty and purchased a property in Port Franks. That property is presently being rented out. Ms. Farrell advises that the plaintiff has a significant equity in that property. She also appears to have a source of income. Accordingly, I do not consider the plaintiff's situation to be analogous to that of a shell corporation.

Conclusions

104 I find it appropriate to grant leave to the plaintiff to file a Certificate of Pending Litigation against the property which I have referred to as the home. This is the property at 7406 Bond Road, where Mr. Aarts and the plaintiff resided from June, 2000 until his death. I wish to make it clear, however, that in exercising my discretion in granting the plaintiff's motion with respect to that property, it is not based on any factor of uniqueness, nor in respect of the plaintiff's view that it is a matrimonial home nor with regard to any inconvenience to the plaintiff if she has to move out. My reason in selecting the home is to avoid, at this early stage of the action, rendering mute the plaintiff's claim for a proprietary remedy. It will leave open to the trial judge, the flexibility spoken of in *Peter v. Beblow*, where several properties are in issue. If the trial judge should find that a proprietary interest has been established or is the appropriate remedy, there will be land upon which to declare an interest. With the words of Cory J. in mind, the trial judge will have the means to

grant an *in rem* remedy in respect of one of several properties. Otherwise, it would at least appear, that none properties may be on hand by the time of trial. The home is unencumbered, thus no third parties' rights are involved. The value of the home is approximately equal to the value of Cottages A, B, C, D and Andrea Street. I see no need for any further security. This will, in view my disposition with regard to the other five properties, provide a balance in respect of the parties' interests and provide some relief for the trustee.

105 As I have expressed earlier, Cottages A, B, C and D were all, at one point or another, to be sold. The future plans intended for Andrea Street are no longer viable in respect of the plaintiff.

106 The plaintiff's request for Certificates of Pending Litigation in respect of Cottages A, B, C, D and Andrea Street is denied and in respect of those five properties her motion is dismissed.

107 Counsel may speak to me regarding costs and their suggestion as to how that issue should be addressed.

Motion granted in part.

TAB 3

2002 CarswellOnt 219
Ontario Court of Appeal

G.P.I. Greenfield Pioneer Inc. v. Moore

2002 CarswellOnt 219, [2002] O.J. No. 282, 111 A.C.W.S. (3d) 356, 155 O.A.C. 305, 47 R.P.R. (3d) 169, 58 O.R. (3d) 87

G.P.I. Greenfield Pioneer Inc., Donald John Hyslop and Murray Ross Sylvester, Appellants and Nellie May Moore a.k.a. Nellie May Beatie and Allan John Beattie, Respondent

Finlayson, Catzman, Borins JJ.A.

Heard: November 30, 2001
Judgment: January 29, 2002
Docket: CA C34147

Proceedings: reversing (2000), 2000 CarswellOnt 1403, 32 R.P.R. (3d) 54 (Ont. S.C.J.)

Counsel: *Michael W. Kelly* , for appellants
David Thompson , for respondent

Subject: Property; Civil Practice and Procedure; Torts

Headnote

Real property --- Certificate of pending litigation (lis pendens) — Purpose and effect of certificate

Respondents husband and wife jointly owned matrimonial home — When respondents separated, husband transferred his interest in home to wife but retained right of first refusal to purchase if wife decided to sell — Wife entered into agreement of purchase and sale with appellants, conditional upon husband declining to exercise right of first refusal — In proceedings between husband and wife over exercise of right, husband registered certificate of pending litigation against property before appellants' closing date — Appellants' motion to discharge certificate was dismissed because husband had reasonable claim to interest in land — Husband purchased property and appellants commenced action against wife, seeking damages for breach of contract, and against husband, seeking damages under s. 103(4) of Courts of Justice Act — Damages were awarded against wife but action against husband was dismissed on basis that matter was res judicata, given order on motion to discharge certificate, which was characterized by trial judge as decision in rem — Appellants appealed — Appeal allowed — No rights are given by certificate of pending litigation — Registration of certificate serves as notice that rights in land are being claimed in pending litigation — Role of court on motion to discharge certificate under Act is limited to deciding whether there is triable issue in respect of whether registrant has reasonable claim to interest in land — Because no adjudication of registrant's interest in land is required on motion, finding on motion was not decision in rem and could not support plea of res judicata at trial of claim for damages under s. 103(4) of Act — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 103(4).

Real property --- Certificate of pending litigation (lis pendens) — Damages for improper filing

Respondents husband and wife jointly owned matrimonial home — When respondents separated, husband transferred his interest in home to wife but retained right of first refusal to purchase if wife decided to sell — Wife entered into agreement of purchase and sale with appellants, conditional upon husband declining to exercise right of first refusal — In proceedings between husband and wife over exercise of right, husband registered certificate of pending litigation against property before appellants' closing date — Appellants' motion to discharge certificate

was dismissed because husband had reasonable claim to interest in land — Husband purchased property and appellants commenced action against wife, seeking damages for breach of contract, and against husband, seeking damages under s. 103(4) of Courts of Justice Act — Damages were awarded against wife but action against husband was dismissed on basis that matter was res judicata, given order on motion to discharge certificate, which was characterized by trial judge as decision in rem — Appellants appealed — Appeal allowed — No rights are given by certificate of pending litigation — Registration of certificate serves as notice that rights in land are being claimed in pending litigation — Role of court on motion to discharge certificate under Act is limited to deciding whether there is triable issue in respect of whether registrant has reasonable claim to interest in land — Because no adjudication of registrant's interest in land is required on motion, finding on motion was not decision in rem and could not support plea of res judicata at trial of claim for damages under s. 103(4) of Act — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 103(4).

Real property --- Certificate of pending litigation (lis pendens) — Miscellaneous issues

Respondents husband and wife jointly owned matrimonial home — When respondents separated, husband transferred his interest in home to wife but retained right of first refusal to purchase if wife decided to sell — Wife entered into agreement of purchase and sale with appellants, conditional upon husband declining to exercise right of first refusal — In proceedings between husband and wife over exercise of right, husband registered certificate of pending litigation against property before appellants' closing date — Appellants' motion to discharge certificate was dismissed because husband had reasonable claim to interest in land — Husband purchased property and appellants commenced action against wife, seeking damages for breach of contract, and against husband, seeking damages under s. 103(4) of Courts of Justice Act — Damages were awarded against wife but action against husband was dismissed on basis that matter was res judicata, given order on motion to discharge certificate, which was characterized by trial judge as decision in rem — Appellants appealed — Appeal allowed — No rights are given by certificate of pending litigation — Registration of certificate serves as notice that rights in land are being claimed in pending litigation — Role of court on motion to discharge certificate under Act is limited to deciding whether there is triable issue in respect of whether registrant has reasonable claim to interest in land — Because no adjudication of registrant's interest in land is required on motion, finding on motion was not decision in rem and could not support plea of res judicata at trial of claim for damages under s. 103(4) of Act — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 103(4).

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Nature of prior proceedings — No decision on merits

Respondents husband and wife jointly owned matrimonial home — When respondents separated, husband transferred his interest in home to wife but retained right of first refusal to purchase if wife decided to sell — Wife entered into agreement of purchase and sale with appellants, conditional upon husband declining to exercise right of first refusal — In proceedings between husband and wife over exercise of right, husband registered certificate of pending litigation against property before appellants' closing date — Appellants' motion to discharge certificate was dismissed because husband had reasonable claim to interest in land — Husband purchased property and appellants commenced action against wife, seeking damages for breach of contract, and against husband, seeking damages under s. 103(4) of Courts of Justice Act — Damages were awarded against wife but action against husband was dismissed on basis that matter was res judicata, given order on motion to discharge certificate, which was characterized by trial judge as decision in rem — Appellants appealed — Appeal allowed — No rights are given by certificate of pending litigation — Registration of certificate serves as notice that rights in land are being claimed in pending litigation — Role of court on motion to discharge certificate under Act is limited to deciding whether there is triable issue in respect of whether registrant has reasonable claim to interest in land — Because no adjudication of registrant's interest in land is required on motion, finding on motion was not decision in rem and could not support plea of res judicata at trial of claim for damages under s. 103(4) of Act — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 103(4).

Damages --- Judgments and orders

Respondents husband and wife jointly owned matrimonial home — When respondents separated, husband transferred his interest in home to wife but retained right of first refusal to purchase if wife decided to sell — Wife entered into agreement of purchase and sale with appellants, conditional upon husband declining to exercise right of first refusal — In proceedings between husband and wife over exercise of right, husband registered certificate of pending litigation against property before appellants' closing date — Appellants' motion to discharge certificate was dismissed because husband had reasonable claim to interest in the land — Husband purchased property and appellants commenced action against wife, seeking damages for breach of contract, and against husband, seeking damages under s. 103(4) of Courts of Justice Act — Damages were awarded against wife but action against husband was dismissed on basis that matter was res judicata, given order on motion to discharge certificate, which was characterized by trial judge as decision in rem — Appellants appealed — Appeal allowed — No rights are given by certificate of pending litigation — Registration of certificate serves as notice that rights in land are being claimed in pending litigation — Role of court on motion to discharge certificate under Act is limited to deciding whether there is triable issue in respect of whether registrant has reasonable claim to interest in land — Because no adjudication of registrant's interest in land is required on motion, finding on motion was not decision in rem and could not support plea of res judicata at trial of claim for damages under s. 103(4) of Act — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 103(4).

APPEAL by prospective purchasers from judgment reported at 2000 CarswellOnt 1403, 32 R.P.R. (3d) 54 (Ont. S.C.J.), dismissing action for damages under s. 103(4) of *Courts of Justice Act* (Ont.).

The judgment of the court was delivered by *Borins J.A.*:

1 The issue in this appeal is the effect of an unsuccessful motion to discharge a certificate of pending litigation ("CPL") on a subsequent action for damages under s. 103(4) of the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"), by the prospective purchasers of the land against which the CPL had been registered. On a motion under s. 103(6)(a)(ii) to discharge the CPL, which had been registered by Allan Beattie, the respondent in this appeal, McTurk J., declined to discharge the CPL on the basis of his finding that Mr. Beattie had "a reasonable claim to an interest in [the] land." Lofchik J. dismissed the prospective purchasers' claim for damages against Mr. Beattie under s. 103(4) of the CJA on the ground that the order of McTurk J., being *res judicata* , precluded their action. The prospective purchasers have appealed from the dismissal of their action. For the reasons that follow, I would allow the appeal.

The Facts

2 The facts are brief and are contained in an agreed statement of facts. At the opening of trial, in reliance on the agreed facts, the respondent moved under R. 21.01(1)(a) of the *Rules of Civil Procedure* for the determination of a question of law that he contended was determinative of the appellants' claim for damages under s. 103(4) of the CJA. The question of law was whether of McTurk J.'s finding that Mr. Beattie had "a reasonable claim to an interest in [the] land" was determinative of the appellants' s. 103(4) claim.

3 The real property in issue had been the matrimonial home of the respondent and his estranged wife, Nellie May Moore, which they owned as joint tenants. Pursuant to the terms of their separation agreement, Mr. Beattie transferred his interest in the property to Ms Moore. However, he retained a right of first refusal to purchase the property in the event that Ms Moore decided to sell it.

4 Ms Moore decided to sell the property to the appellants. Their agreement of purchase and sale was conditional upon Mr. Beattie declining to exercise his right of first refusal prior to a specific time and date. A dispute arose between Mr. Beattie and Ms Moore over his purported exercise of the right of first refusal. This resulted in a legal proceeding between them commenced by Mr. Beattie in which he sought to enforce his right to first refusal to purchase the property.

Consequent to that proceeding he obtained and registered a CPL on the title to the property prior to the closing date for the appellants' purchase of the property.

5 As the appellants would not complete the transaction while the CPL was registered against the property, Ms Moore moved, unsuccessfully, for an order discharging the CPL. Subsequently, arising from circumstances irrelevant to this appeal, Mr. Beattie purchased the property. As a result, the appellants commenced this proceeding against Ms Moore and Mr. Beattie, seeking damages for breach of contract against her and damages under s. 103(4) of the CJA against him. Lofchik J. awarded the appellants damages of $50,430 against Ms Moore, who did not defend the action, and, as I have indicated, dismissed their claim against Mr. Beattie.

The Relevant Legislation

6 The relevant legislation is s. 103(1), (4) and (6) of the CJA, which reads as follows:

> 103.-(1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).
>
> . . . . .
>
> (4) A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration.
>
> . . . . .
>
> (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. [Emphasis added.]

Reasons of McTurk J.

7 It was in the context of the action brought against her by Mr. Beattie that Ms Moore moved under s. 103(6)(a)(ii) to discharge the CPL that Mr. Beattie had registered against the title to the property. The motion was heard one week before Ms Moore's transaction with the appellants was to be completed. Mr. Beattie filed an affidavit in response to the motion in which he provided facts in support of his claim against Ms Moore.

8 McTurk J. endorsed the following reasons for refusing to discharge the CPL:

> I find that the Plaintiff has a reasonable claim to an interest in land. Furthermore on the equities and considering the particular circumstances including the unique interest of the Plaintiff in the land; that there is no alternative claim for damages by the Plaintiff; that damages could adequately compensate the Defendant if she was successful

at Trial; that to vacate the Certificate of Pending Litigation would virtually erase the Plaintiff's claim, I hold that the Application to discharge the Certificate of Pending Litigation be dismissed. Costs in the cause.

9 It is significant to observe that Mr. Beattie's responding affidavit contained this acknowledgment:

> 41. I am aware of the provisions of Section 116(4) [now s. 103(4)] of the *Courts of Justice Act* , S.O. 1984, c. 11 as amended which provides that I can be held liable for any damages sustained by *any* person (including GPI Greenfield Pioneer Inc.) as a result of the registration of the Certificate of Pending Litigation if this Honourable Court should later determine that the Certificate was registered without a reasonable claim to the interest in the land.

Reasons of Lofchik J.

10 The appellants' claim for damages against the respondent is based on two causes of action: (1) the statutory claim created by s. 103(4) of the CJA, and (2) the tort of inducing a breach of contract or intentional interference with contractual arrangements.

11 At the opening of trial the respondent moved for the determination of two questions of law, which the trial judge described as follows:

> (i) Is the finding of McTurk, J., that the plaintiff has a reasonable claim to an interest in the land binding on the plaintiffs in this action so as to preclude a claim for damages under s. 103(4) of the *Courts of Justice Act* .
>
> (ii) Is a claim for damages founded on the tort of inducing breach of contract or intentional interference with contractual arrangements arising from a registration of a Certificate of Pending Litigation sustainable on the facts of this case as stated above.

12 The trial judge gave these reasons for deciding the first question in favour of the respondent:

> ***RES JUDICATA***
>
> The doctrine of *res judicata* or *issue estoppel* , in the context of an interlocutory motion, is limited to issues which the motions judge is required to decide in order to dispose of the motion before him. *VK Mason Construction Ltd. v. Canadian General Insurance Group Ltd.*, 42 OR (3d) 618 .
>
> In deciding whether or not to vacate the Certificate of Pending Litigation, McTurk, J. was required to decide whether Beattie had a reasonable claim to an interest in land. Having made this finding, his decision is a decision *in rem* and the matter is *res judicata* in respect of any claims for damages under s. 103(4) of the *Courts of Justice Act* , and it is not open for the plaintiffs in this action to re-litigate the issue. Therefore, any claim for damages in this action based on s. 103(4) of the *Courts of Justice Act* must fail.

13 The trial judge also answered the second question in favour of the respondent. Although the appellants have appealed from both findings, in oral argument their counsel conceded that the appellants' real attack is upon the correctness of the trial judge's answer to the first question. Although counsel contended that the trial judge had also erred in his answer to the second question, he did not pursue this ground of appeal, indicating that if the appellants were successful on the first ground they would only pursue their claim for damages under s. 103(4) of the CJA. Accordingly, I will express no opinion on the second ground of appeal.

Analysis

14 In my view, the trial judge erred in finding that the decision of McTurk J. was a decision *in rem* and that "the matter is *res judicata* in respect of any claims for damages under s. 103(4)" of the CJA. A brief review of the nature and purpose of a CPL and the nature of a motion to discharge a CPL will be helpful in explaining why I have reached this conclusion.

15 Section 103(1) of the CJA entitles a plaintiff, who has commenced a proceeding in which an interest in land is in question, to obtain a CPL and to register it against the title to the land. The registration of the CPL protects the plaintiff by effectively preventing disposition of the property prior to judgment. As such, a CPL can be as effective as an interlocutory injunction in restraining dealings with the property as, generally speaking, it is considered to be an encumbrance on the land. See *Brock v. Crawford* (1908), 11 O.W.R. 143 (Ont. Q.B.) , at 146. No rights are given by a CPL. The effect of registration of a CPL on the title to land is to give notice that rights in respect to the land are being claimed in a pending court proceeding.

16 As severe hardship may result to the owner of the land as the result of the registration of a CPL, s. 103(6) confers a broad discretion on the court to discharge a CPL and, depending on the circumstances, to impose appropriate terms. As the practical effect of a CPL is similar to that of an interlocutory injunction restraining dealing with the land, to discourage abuse s. 103(4) imposes liability for damages resulting from the registration of a CPL where the registrant is "without a reasonable claim to an interest in the land." For an historical discussion of a certificate of *lis pendens* , which was the term by which a CPL was previously known, see W.B. Williston and R.J. Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970), vol. 2, at 599-607, and *Brock v. Crawford* , *supra* , at pp. 145-147.

17 Subsection 103(6) confers a broad discretion upon the court to discharge a CPL upon a demonstration by the defendant in the action in which the CPL was obtained of any of the grounds contained in the subsection, the last of which invites an examination of the equities as between the parties. How such discretion is to be exercised was described by Steele J. in *Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671 (Ont. Div. Ct.) , at 674:

> 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 matters between the parties in determining whether or not the certificate should be vacated.

18 In this case, Ms Moore based her motion to discharge the respondent's CPL on s. 103(6)(a)(ii), contending that he did not have a reasonable interest in the land claimed. In *Procopia v. D'Abbondanza*, [1970] 1 O.R. 127 (Ont. C.A.) , at 128, this court stated that a certificate of *lis pendens* should not be discharged where "there is a triable issue as between the parties as to an interest in the lands in question." It is significant for the purpose of the issue raised in this appeal that at p. 128 the court went on to make it clear that in finding that there was a triable issue as to an interest in the lands it was "not in any way deciding the rights of the parties in any respect, either as to the lease, the assignment of the lease or the right to register the assignment of the lease," which were the issues to be decided in the pending action. See, also, *Brock v. Crawford* , *supra* , at p. 147, *Inwood v. Ivey*, [1939] O.W.N. 56 (Ont. H.C.) , at 58, *Willoughby v. Knight* (1973), 1 O.R. (2d) 184 (Ont. H.C.) , at 195, *Galinski v. Jurashek* (1976), 1 C.P.C. 68 (Ont. H.C.) .

19 Although the cases to which I have referred were concerned with the test to be applied on a motion to discharge a certificate of *lis pendens* obtained under the relevant provisions of the *Judicature Act* prior to its replacement by s. 103(1) of the CJA, which introduced the term CPL, there is no reason in principle why the earlier jurisprudence should not apply to a motion under s. 103(6) of the CJA. Indeed, cases which have been decided since the CJA came into force in 1984 continue to apply the earlier jurisprudence. See, e.g., *Graywood Developments Ltd. v. Campeau Corp.* (1985), 8 C.P.C. (2d) 58 (Ont. Master) , *Chiu v. Pacific Mall Developments Inc.* (1998), 24 C.P.C. (4th) 67 (Ont. Gen. Div.) .

20 It follows that on the motion to discharge the CPL the onus was on the moving party, Ms Moore, to demonstrate that there was no triable issue in respect to whether the respondent had "a reasonable claim to the interest in the land claimed." As such, the onus is analogous to that of a defendant seeking a summary judgment dismissing a plaintiff's claim under R. 20 of the *Rules of Civil Procedure* . As on a R. 20 motion, the role of the motion judge was not to find as a fact whether the respondent had, or did not have, "a reasonable claim to the interest in the land," which was the subject of the claim in his action against Ms Moore. That issue remained to be determined at the trial of the pending action. Just as the finding of a motion judge on a R. 20 motion that a genuine issue for trial exists in respect to a plaintiff's claim cannot support a plea of *res judicata* at the trial of that issue, neither can a finding of a motion judge on a s. 103(6) motion to discharge a CPL that there is a triable issue in respect to whether the registrant has a reasonable claim to the interest in

the land support a plea of *res judicata* at the trial of a claim for damages under s. 103(4) of the CJA. This is because no adjudication of the registrant's interest in the land is required on a motion to discharge a CPL.

21 Moreover, to preclude a claim for damages under s. 103(4) of the CJA on the basis of a ruling under s. 103(6) would be contrary to the principles on which a plea of *res judicata* is based. See, e.g., *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488 (Alta. C.A.) . If a ruling on a motion to discharge a CPL could properly be considered as determinative of whether a registrant had a reasonable claim to an interest in the land, this would render meaningless a claim for damages under s. 103(4).

22 Although in his reasons for declining to discharge the CPL McTurk J. appears to have made a finding that the respondent had a reasonable claim to an interest in land, it was not necessary for him to do so. Read as a whole, his reasons indicate that he appreciated that in ruling on the motion he was exercising the discretion conferred by s. 103(6). In my view, it is clear that in declining to discharge the CPL McTurk J. correctly applied the test on a motion under s. 103(6)(a)(ii), namely, whether there is a triable issue as to the reasonableness of the registrant's claim to an interest in the land. There is no doubt that the evidence in the respondent's affidavit opposing the motion to discharge the CPL supports such a result. The functional effect of McTurk J.'s ruling was to permit the registration of the CPL to remain on the title to the property pending the trial of the respondent's claim against Ms Moore. As he did not adjudicate the issue raised by the appellants in this action, his ruling cannot preclude the appellants from doing so.

23 It follows that the trial judge was incorrect in holding that McTurk J.'s decision gave rise to a successful plea of *res judicata* in this action. It appears that the trial judge, in concluding that "McTurk J. was required to decide whether Beattie had a reasonable claim to an interest in land," did not appreciate that the role of the court on a motion to discharge a CPL under s. 103(6)(a)(ii) of the CJA is limited to deciding whether there is a triable issue in respect to whether the registrant has a reasonable claim to the interest in the land claimed.

24 This conclusion conforms with the caution issued by this court in *Procopia* , *supra* , at p. 128, that the result of a motion to discharge a certificate of *lis pendens* is not determinative of the issue of whether the registrant in fact has a reasonable interest in the land claimed. This was also the opinion of Henry J. in *Mormick Investments Inc. v. Khoury*, [1985] O.J. No. 1072 (Ont. S.C.) , which was a claim for damages arising out of the registration of cautions against the plaintiffs' lands. Prior to the action, Linden J. had vacated one of the cautions on the ground that the defendant had no interest in the land. Henry J. rejected the submission that the issue decided by Linden J. was *res judicata* . At para. 37, Henry J. stated:

> While [Linden J.] clearly found that the plaintiff had no interest in the lands the proceeding before him was interlocutory in nature, designed to decide only whether the cautions ought to remain on title until trial, or be vacated. The motion to vacate them was not appropriate to dispose of the issue finally; to say that it had that effect would have the result that, because the motions court judge found on affidavit evidence that the plaintiff could not succeed as the material before him disclosed no interest in the land, it would foreclose to the plaintiff the resolution of the action on its merits at a full trial.

25 It would also appear that the respondent, in para. 41 of his affidavit in response to the motion to discharge the CPL, which I have set out in para. 9, was of the opinion that the purpose of the motion was not to adjudicate whether he had a reasonable claim to an interest in the land. In his affidavit he acknowledged his potential liability under what is now s. 103(4) of the CJA should the court "later determine that the Certificate was registered without a reasonable claim to the interest in the land."

26 Finally, I would add that the trial judge also erred in characterizing the order of McTurk J. as "a decision *in rem* ." As McTurk J. was not adjudicating whether the respondent had a reasonable claim to an interest in land, his ruling did not amount to a judgment upon the rights and claims to the land asserted by the parties to the action in which the CPL had been obtained. Indeed, no rights are given by a CPL; its entire effect is only to serve as notice that rights in land are being claimed. Although obtaining and registering a CPL may have the effect of turning the action in which it

was obtained from an action *in personam* into an action *in rem* , it is only if the result of the action is a determination of the title to the property, or some interest therein, that the action would result in a judgment *in rem* . See *McTaggart v. Toothe* (1884), 10 P.R. 261 , at 262.

Conclusion

27 For the foregoing reasons, I would allow the appeal, set aside the judgment of the trial judge dismissing the appellants' action and order that the respondent's motion made at the outset of the trial be dismissed insofar as it pertains to the appellants' claim for damages under s. 103(4) of the CJA with the costs of the motion reserved to the judge hearing the appellants' claim. The appellants are entitled to their costs of this appeal.

Appeal allowed.

TAB 4

2011 ONSC 4964
Ontario Superior Court of Justice

Battistella v. Italian Home Bakery Ltd.

2011 CarswellOnt 9751, 2011 ONSC 4964, 207 A.C.W.S. (3d) 360

John Battistella (Applicant) AND Italian Home Bakery Ltd. (Respondent)

Italian Home Bakery Ltd. (Plaintiff) AND Elisabetta Battistella and John Battistella (Defendants)

D.M. Brown J.

Heard: July 27, 2011
Judgment: September 21, 2011
Docket: 07-CV-345634PD3, CV-11-421557

Counsel: M. Drudi, for Italian Home Bakery Ltd.
R. Aisenberg, for John Battistella, Elisabetta Battistella

Subject: Civil Practice and Procedure; Property; Corporate and Commercial; Insolvency

Headnote

Civil practice and procedure --- Judgments and orders — Setting aside — Practice on application to set aside — General principles

I Ltd., judgment creditor of EB, registered writ of execution against property owned jointly by EB and her son, JB — JB brought application to delete registration from title, and order was granted ("deletion order") on basis that I Ltd. did not appear to oppose it — JB then placed significant mortgage on property — I Ltd. contended it had not been served with application — I Ltd. brought action against EB and JB, seeking relief including order setting aside deletion order — I Ltd. also brought motion to set aside deletion order in application commenced by JB — JB brought motion to dismiss I Ltd.'s action and for order discharging certificate of pending litigation I Ltd. registered against property — I Ltd.'s motion granted; JB's motion granted in part — As regards issue of appropriate procedure to seek to set aside order, deletion order was made in application brought by JB — Of two means selected by I Ltd. to set aside deletion order, its motion within application commenced by JB was appropriate one, not commencement of new action — In light of holding that proper way to set aside deletion order was by way of motion within application and in light of granting of I Ltd.'s motion to set aside deletion order, relief sought by I Ltd. in certain paragraphs was rendered moot, and that part of its statement of claim was struck out — In all other respects, JB's motion was dismissed.

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Miscellaneous

I Ltd., judgment creditor of EB, registered writ of execution against property owned jointly by EB and her son, JB — JB brought application to delete registration from title, and order was granted ("deletion order") on basis that I Ltd. did not appear to oppose it — JB then placed significant mortgage on property — I Ltd. contended it had not been served with application — I Ltd. brought action against EB and JB, seeking relief including order setting aside deletion order — I Ltd. also brought motion to set aside deletion order in application commenced by JB — JB brought motion to dismiss I Ltd.'s action and for order discharging certificate of pending litigation I Ltd. registered against property — I Ltd.'s motion granted; JB's motion granted in part — In light of holding that proper way to set aside deletion order was by way of motion within application and in light of granting of I Ltd.'s motion to set aside deletion order, relief sought by I Ltd. in certain paragraphs was rendered moot, and that part of its statement of claim was struck out — In all other respects, JB's motion was dismissed — Balance of action alleged that fraud

had been perpetrated on I Ltd. and court in obtaining deletion order and that I Ltd. had suffered damages as result — Court refrained from making any finding of credibility on contested issue of service of application record — No reason was seen to restrain action from proceeding further — Although it was ordered that writ be restored on title register, it was appropriate to keep certificate of pending litigation on title given claims of constructive trust and unjust enrichment pleaded in action.

Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — Miscellaneous

I Ltd., judgment creditor of EB, registered writ of execution against property owned jointly by EB and JB — JB brought application to delete registration from title, and order was granted ("deletion order") on basis that I Ltd. did not appear to oppose it — JB then placed significant mortgage on property — I Ltd. contended it had not been served with application — I Ltd. brought motion to set aside deletion order — Motion granted — I Ltd. moved "forthwith" to set aside deletion order — I Ltd.'s solicitor's having missed reference to deletion order in certain review of title was oversight, and I Ltd. demonstrated it moved quickly once order came to its attention — Failure of JB's counsel to provide I Ltd.'s counsel with copy of deletion order following its granting weighed heavily against any reliance by JB on this part of test — I Ltd. failed to attend hearing through "accident, mistake or insufficient notice" — Counsel for JB failed to inform opposing counsel of fact of application and its return date, and later failed to send opposing counsel copy of deletion order — Failures by JB's counsel, when coupled with JB's failure to disclose to judge who heard his application purpose of application, being to refinance property immediately, and dispute about accuracy of affidavit of service, leads to conclusion I Ltd. provided adequate explanation about why it failed to attend on hearing — I Ltd.'s materials disclosed it had arguable case to resist effort by JB to remove writ from title — Preservation of overall integrity of administration of justice required setting aside deletion order — Unacceptable conduct of JB's counsel in failing to inform opposing counsel of pending application and deliver copy of deletion order was criticized — No real prejudice to JB seen in setting aside deletion order.

Real property --- Registration of real property — Certificate of pending litigation (lis pendens) — Vacating certificate — Miscellaneous

Real property --- Mortgages — Miscellaneous

MOTION by corporation to set aside certain order; MOTION by individual to dismiss corporation's action and for order discharging certificate of pending litigation.

D.M. Brown J.:

I. Motion to set aside order expunging from title a writ of execution

1 Italian Home Bakery Ltd. ("IHB"), a judgment creditor of the defendant, Elisabetta Battistella, registered a writ of execution against property owned jointly by Elisabetta and her son, John Battistella. The latter brought an application before Himel J. on February 15, 2008 to delete the registration from title. Himel J. granted the order on the basis that IHB did not appear to oppose it. John Battistella then placed a significant mortgage on the Property.

2 IHB contends that it was not served with the application brought before Himel J. and only recently discovered that its writ of execution had been deleted from title to the Property.

3 IHB initiated two different proceedings to set aside the order of Himel J. First, it commenced action No. CV-11-421557 seeking (i) a declaration that John Battistella perpetrated a fraud on IHB and the Court by obtaining the Order of Himel J. without notice to it and (ii) an order setting aside the Order of Himel J. IHB also moves in the application commenced by John Battistella - No. 07-CV-345634PD3 - to set aside the Order of Himel J.

4 John Battistella opposes the relief sought arguing that IHB had notice of the proceeding before Himel J. and therefore cannot seek to set aside her Order.

II. Procedural history

A. The consent judgment

5 Elisabetta Battistella had worked for IHB as a bookkeeper. IHB sued her and her husband, Giovanni Battistella, alleging fraud and embezzlement. The parties settled on the eve of trial. The Battistellas consented to a judgment against them in the amount of $90,000.00; the judgment included a declaration that "Giovanni Battistella and Elisabetta Battistella are liable to the plaintiff as a result of their fraud, embezzlement and misappropriation while acting in a fiduciary capacity to the plaintiff". Pepall J. granted the consent judgment on May 31, 2005 (the "Consent Judgment").

6 On June 8, 2005 IHB issued and filed with the Sheriff for the Regional Municipality of York a writ of seizure and sale against both Giovanni and Elisabetta Battistella (the "Writ").

7 Ms. Battistella provided IHB with post-dated cheques to satisfy a small portion of the Judgment. Some of the cheques were returned NSF.

B. The Property

8 The Property is located at 171 Parktree Drive in Vaughan, Ontario. On August 19, 2003 the Property was transferred into the names of Elisabetta Battistella and her son, John Battistella.

9 On July 11, 2005, some six weeks after the Consent Judgment was granted, a transfer was registered transferring the Property from Elisabetta and John Battistella into the name of John Battistella alone.

10 On March 20, 2007, counsel for John Battistella wrote to IHB's counsel advising that Mr. Battistella wished to refinance the Property with the Royal Bank of Canada. The letter stated:

> I am advised by Mr. Battistella that at the time he purchased the property in 2003 under Instrument Number YR343888, his mother, Elisabetta Battistella was named as an owner solely to assist him with qualifying for the loan from Xceed Mortgage/Funding Corporations, the former Charge on title.
>
> Transfer YR 665238 of course shows the transfer as subject to your client's Execution, (if applicable), as it relates to Elisabetta Battistella. I have been advised that there was a Trust Agreement at the time of the Purchase in 2003 and I should have a copy of same available to send to you.
>
> In order for me to complete the refinancing, assuming you are satisfied that John Battistella was the Beneficial Owner of the subject property at all material times, I would need your execution lifted and re-filed so that the date of the execution would be subsequent to the Trust Transfer.

11 Mr. Boccia subsequently delivered a statutory declaration from Elisabetta Battistella and John Battistella dated June 8, 2005, a few days after the Consent Judgment, in which they stated that notwithstanding the registered title showing them as tenants in common, Elisabetta Battistella had no beneficial interest in the property and her son, John, was the sole owner.

12 On March 29, 2007, counsel for IHB advised that his client was not prepared to lift the Writ. That led Mr. Boccia to take the position that his clients had told him that there had been a settlement of the Consent Judgment; counsel for IHB replied that no such settlement had been reached. Further discussions between counsel did not resolve the dispute. Then on June 18, 2007, IHB's counsel wrote to the first mortgagee for the Property to advise that IHB intended to direct the Sheriff to sell the Property in satisfaction of the Consent Judgment.

C. Elisabetta Battistella disputes the Judgment

13 In October, 2007, Mr. Edward Tonello, a lawyer for Elisabetta and her husband, wrote to counsel for IHB taking the positions that a 1996 bankruptcy of his clients had extinguished any claim of IHB against the Battistellas and, as well, that the Battistellas had signed the consent to judgment "involuntarily, uninformed as to its consequences and not unequivocally". Mr. Tonello asked IHB to consent to an order setting aside the Consent Judgment. By response dated October 23, 2007, counsel for IHB advised that his client would not so consent and planned to continue with its enforcement proceedings.

14 Mr. Tonello did not respond.

15 According to IHB's evidence on this motion, issues then arose with respect to the Sheriff's sale of the Property and IHB determined to "discontinue the enforcement proceedings and simply await the re-financing of the property which would then require payment based on the execution as filed".

D. The application before Himel J.

16 On December 17, 2007, John Battistella commenced Application 07-CV-345634PD3 (the "Application") against IHB seeking an order deleting the Writ from the title register. The Application was returnable on February 15, 2008. The basis for the Application was that at all material times John Battistella was the sole beneficial owner of the Property.

17 Mr. Tonello was listed as counsel of record for the applicant.

18 The Application came on before Himel J. on February 15, 2008. In her endorsement Himel J. wrote:

> Mr. Tonello appears for the applicant. No one appears for the respondent although duly served. Order to go in accordance with terms signed by me.

The order made by Himel J. deleted from the land registry reference to the Writ (the "Deletion Order").

19 A dispute exists as to whether the Applicant served IHB with the application record. I will return to that issue shortly. There is no dispute, however, that after obtaining the Deletion Order neither John Battistella nor his counsel, Mr. Tonello, sent a copy of it to IHB or its counsel.

E. What John Battistella did with the Property after obtaining the Deletion Order

20 On March 5, 2008, John Battistella granted a mortgage on the Property to RBC in the amount of $383,487.30, which was registered that day.

F. IHB's Discovery of the Deletion Order

21 IHB discovered the new RBC mortgage in the fall of 2010 when its counsel searched title to the Property following his client's decision to enforce the Consent Judgment. According to IHB's evidence, its counsel did not notice at that time that the Deletion Order had been registered against title.

22 Counsel for IHB wrote to RBC on November 8, 2010, advising it of IHB's Writ. No follow-up was conducted by IHB or its counsel until February, 2011, at which time IHB's counsel discovered the registration of the Deletion Order.

23 IHB then requisitioned the court file for the Deletion Order, which it obtained at the end of February, 2011. The court file contained an affidavit of service of the Application Record sworn on December 14, 2007 by Andre Corriveau which stated:

> 1. I am assistant to E. Tonello, solicitor for the applicant and as such have knowledge of matters to which I hereinafter depose.
>
> 2. On Monday, December 17, 2007 I served a true copy of the attached Application Record, inclusive of a true copy of the Notice of Application as tab "A" therein, on the respondent Italian Home Bakery Ltd. by serving the manager of Italian Home Bakery Ltd. at its registered office of 271 Attwell Drive, Toronto, Ontario. I was able to identify the person as the manager because I requested the manager and an adult male introduced himself as such to me.

I would observe that the date typed in the jurat - December 14, 2007 - was three days *before* the purported service of the Application Record.

24 Mr. John Rossetti, a principal of IHB, deposed as follows about his reaction to the discovery of this affidavit of service:

> 30. I was shocked by the news and in fact had expected Mr. Drudi to advise that he had received payment. I then spoke with anyone who would have worked in the office in December of 2007 and they have advised that they did not receive any Application Record. We had approximately 10 people working in the office at that time. Dennis Rossetti, my brother and I are the principals of the company and anything of a legal nature would come to us and we would have immediately contacted Mr. Drudi who has been our counsel for at least 10 years. Our financial controller, Ms. Sherry Harripersad, would be the only other person who might have received any legal documents; however, she denies receiving anything dealing with this matter which I believe to be true. As such, no one at IHB received the Application Record and we only received notice of what John Battistella had done from Mr. Drudi which occurred in late February, 2011.

G. Steps Taken by IHB to Set Aside the Deletion Order

25 On March 4, 2011, IHB issued the notice of action against Elisabetta and John Battistella in File No. CV-11-421557 (the "Action"). As mentioned, IHB seeks a variety of relief, including an order setting aside the Deletion Order and a certificate of pending litigation against the Property. IHB obtained a certificate of pending litigation on March 11, 2011; on March 21, 2011 it served its Statement of Claim in the Action.

H. The motion in the Application to set aside the Writ Deletion Order

26 On April 6, 2011 IHB brought a motion in the Application seeking an order setting aside the Deletion Order.

27 In response to that motion John Battistella has filed an affidavit from Mr. Andre Corriveau, the person who swore the affidavit of service in respect of the Application Record. In his May 25, 2011 affidavit Mr. Corriveau deposed, in part:

> 2/ I swore an Affidavit of Service in respect to the Application Record and Notice of Application. I affirm the contents of that Affidavit of Service as true.
>
> 3/ I recall going to Italian Home Bakery Ltd.'s office, entering a lobby, and speaking with a female receptionist or secretary. I requested a manager. After a short wait, a man came out. I am 6 feet tall. The man was a few inches shorter than me. He was partly bald, about 45-50 years old and European looking. I gave him the Application Record and Notice of Application.

28 Mr. Rossetti filed an affidavit in response to that of Mr. Corriveau. He stated, in part:

> 5/ We did not have a manger in December, 2007. We did not have any man working in the offices of IHB in December, 2007, much less a man fitting the description provided [by Mr. Corriveau].

6/ As such, I would repeat that no one at IHB received the Application Record and we only received notice of what John Battistella had done from Mr. Drudi which occurred in later February, 2011.

I. John Battistella's motion in the Action

29 On April 12, 2011 John Battistella brought a motion to dismiss the Action, largely on the basis that it was a collateral attack on the Deletion Order, and for an order discharging the certificate of pending litigation against the Property.

III. Analysis

A. The appropriate procedure to seek to set aside a court order

30 The Deletion Order was made in the Application brought by John Battistella. Rule 38.11(1) of the *Rules of Civil Procedure* provides:

> 38.11 (1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

31 IHB submitted that as an alternative to bringing a motion to set aside under Rule 38.11(1), it could commence an action to set aside the Deletion Order. In support of its position it pointed to the following comments made by Nordheimer J. in *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.*:

> The moving parties also submit that any attempt to set aside the consent order must be made within the former action and not by way of a new action. I do not agree. Rule 59.06 says that a party "may" move in the action to set aside an order on the ground of fraud. The provision is clearly permissive and not mandatory. Further, it appears that the practice under the former Rules of Practice permitted a separate proceeding for such relief — see, for example, *McGuire v. Haugh*, *supra*, and *Glatt v. Glatt*, [1936] O.R. 75. [1]

32 Recently the Court of Appeal disagreed with that interpretation of the Rules. In *Cunningham v. Moran* the Court of Appeal held:

> Absent special circumstances, in order to set aside an order in a particular proceeding, in our view, a party should apply for relief in *that* proceeding. To hold otherwise would be to sanction multiplicity of proceedings. To the extent that *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* 54 O.R. (3d) 795 (S.C.) may suggest otherwise, we disagree with it. [2]

33 Accordingly, of the two means selected by IHB to set aside the Deletion Order, its motion within the Application commenced by John Battistella was the appropriate one, not the commencement of the new Action. I therefore will consider the merits of IHB's motion within the Application.

B. Test Applicable to IHB's Effort to Set Aside the Deletion Order

34 In *Marino v. Marino Estate (Trustee of)* I held that it was appropriate on motions to set aside judgments under Rule 38.11 to apply the principles developed in the jurisprudence for motions to set aside default judgments. I continued:

> In *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.* (2007), 87 O.R. (3d) 479 (C.A.) and *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.*, 2008 ONCA 894, the Court of Appeal reiterated that when faced with a motion to set aside a default judgment, a court should be guided by three established principles - (i) whether the motion was brought without delay after the defendant learned of the default judgment; (ii) whether the

circumstances giving rise to the default were adequately explained; and (iii) whether the defendant has an arguable defence on the merits - in order to determine whether the interests of justice favour granting the order. To that end, the court should consider the potential prejudice to the moving party if the motion were dismissed, the potential prejudice to the respondent if the motion were allowed, and the effect of any order on the overall integrity of the administration of justice. [3]

35 Strathy J. took a similar approach when, in *Ontario (Attorney General) v. 15 Johnswood Crescent* [2009 CarswellOnt 5765 (Ont. S.C.J.)], he considered the factors which a court should take into account on a motion under Rule 37.14(1), the analogue to Rule 38.11 for orders obtained on motions:

It seems to me that the following factors should be considered and weighed in the exercise of the court's discretion in the application of Rule 37.14(1)(b):

(1) *Proof of accident or mistake*: The moving party must establish a failure to appear on the original motion through accident, mistake or insufficient notice. This is a precondition to relief under the rule. A party who has simply chosen not to appear on a motion cannot complain later if he or she does not like the outcome.

(2) The party must move forthwith after the order comes to his or her attention:

This is also a precondition to relief under the rule, but there is room for flexibility in the interpretation of "forthwith", depending on the circumstances. I will examine this requirement in more detail below.

(3) *The length of the delay and the reasons for it*: In considering whether to set aside an order, the court will consider whether there has been delay in bringing the motion and the reason for it. All other things being equal, the longer an order has been in effect, particularly where parties have acquired rights or changed their positions as a result of the order, the less likely it will be that the court will set it aside.

(4) *The presence or absence of prejudice*: The court should consider whether a party will be prejudiced by setting aside the order or by failing to set aside the order. There will always be prejudice if an order is made against a party without sufficient notice and there will always be some kind of prejudice to the other party if the order is set aside. Nevertheless, the exercise of the court's discretion may require an examination of the relative prejudice to the parties.

(5) *The underlying merits of the moving party's case*: It may be necessary to consider the underlying merits of the moving party's case in weighing the various factors, balancing the interests of the parties, and determining what is just in the circumstances. Lengthy delay in bringing the motion may be more readily forgiven if the moving party has a very strong case on the merits. It will be less readily forgiven if the party's case appears frivolous. [4]

36 Combining these approaches, I shall consider the following questions in examining IHB's motion to set aside the Deletion Order:

(i) Did IHB move to set aside the Deletion Order "forthwith" after that order came to its attention?

(ii) Did IHB fail to attend at the hearing before Himel J. "through accident, mistake or insufficient notice"?

(iii) Is there merit to IHB's opposition to an order deleting the Writ, in the sense that IHB can advance an arguable case on the merits?

(iv) What is the potential prejudice to IHB if its motion were dismissed, the potential prejudice to John Battistella if the motion were allowed, and the effect of any order on the overall integrity of the administration of justice?

C. Application of the test to the facts of this case

C.1 Did IHB Move to Set Aside the Deletion Order "Forthwith" After That Order Came to Its Attention?

37 John Battistella commenced his Application in December, 2007. Edward Tonello was listed as his solicitor of record. As recorded in the February 18, 2007 endorsement of Himel J., Mr. Tonello appeared on the return of the application. He also took out the Deletion Order, as can be seen from its back page.

38 Mr. Tonello knew that IHB was represented by counsel - Mr. Drudi. The two lawyers had exchanged correspondence in October, 2007, just prior to the commencement of the Application.

39 It is not disputed that after obtaining the Deletion Order Mr. Tonello did not send a copy to Mr. Drudi or to IHB. That was unacceptable conduct for a lawyer. I recognize that the *Rules* only deal specifically with the obligation of a party to serve on an opposite party an order made without notice: Rule 37.07(4). In the present case Mr. Battistella takes the position that proper notice was given to IHB. Nevertheless, even where proper notice has been given to an opposite party and that party does not appear at the hearing, the party securing the order must serve promptly a copy of it on the opposing party.

40 From the record placed before me, it seems likely that neither Mr. Battistella nor his lawyer delivered a copy of the Deletion Order to IHB because they did not want IHB to move to set aside any order before the refinancing of the Property which occurred within a few weeks of the granting of the Deletion Order. No mention was made of the pending refinancing in the Notice of Application or either of the affidavits of John Battistella or Elisabetta Battistella filed in support of the Application and considered by Himel J.

41 IHB discovered the new RBC mortgage in the fall of 2010 when its counsel searched title to the Property following his client's decision to enforce the Consent Judgment. IHB's counsel did not notice the Deletion Order at that time, only discovering it a view months later in February, 2011 upon a further review of title. IHB then requisitioned the Application file, and commenced the Action to set aside the Deletion Order on March 4, 2011 and served its motion record on April 12, 2011

42 I conclude that in the circumstances IHB moved "forthwith" to set aside the Deletion Order. Although its solicitor missed the reference to the Deletion Order in his fall, 2010 review of title, I accept that was an oversight, and IHB has demonstrated that it moved quickly once the Deletion Order came to its attention. Moreover, the failure of Mr. Tonello to provide Mr. Drudi with a copy of the Deletion Order following its granting by Himel J. weighs very, very heavily against any reliance by Mr. Battistella on this part of the test.

C.2 Did IHB Fail to Attend at the Hearing Before Himel J. "Through Accident, Mistake or Insufficient Notice"?

43 IHB filed evidence stating that Mr. Battistella did not serve it with his Application Record. Mr. Battistella filed evidence from Andre Corriveau, the assistant to Mr. Tonello at the time, deposing that he served IHB with the Application Record, providing his affidavit of service, and recounting his rather precise present recollection of the circumstances of the service which took place over three years before.

44 A credibility dispute obviously exists. I cannot resolve that dispute on a written record. I have pointed out above that Mr. Corriveau's affidavit of service purported to be sworn three days before service was effected. Whether that was a typographical error or the result of some other cause, I cannot tell.

45 Do I direct a trial of an issue or call for *viva voce* evidence on this motion to determine this issue of credibility regarding service? In the circumstances of this case I do not think that is necessary. Mr. Battistella's counsel was corresponding with IHB's counsel in the weeks immediately prior to the issuance of the Notice of Application. Yet, although Mr. Tonello had written Mr. Drudi on October 19, 2007 that if IHB declined to withdraw the Writ "I shall proceed accordingly in court", amazingly Mr. Tonello did not inform Mr. Drudi that his client had commenced the Application, nor did he send a copy of the Application Record to Mr. Drudi.

46 That, too, was not acceptable conduct by counsel. When the Toronto Region of this Court issued its *Practice Direction for Civil Applications, Motions and Other Matters in the Toronto Region* at the beginning of 2010, it also published a document entitled *Best Practices for Civil Applications and Motions* which described "the practices the Court encourages both lawyers and self-represented parties to use in preparing and conducting civil applications and motions." Part II of the *Best Practices* deals with "Co-operation and civility between counsel and between counsel and self- represented parties". Section 3 states:

> The Court expects counsel to conduct applications and motions having regard to the *Principles of Professionalism for Advocates* and the *Principles of Civility for Advocates* published by The Advocates' Society, found at: http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf

The *Principles of Civility for Advocates* have been in place since 2001. Section 6 provides:

> 6. When advocates are about to send written or electronic communication, or take a fresh step in proceeding which may reasonably be unexpected, they should provide opposing counsel with some advance notice where to do so does not compromise a client's interests.

47 Mr. Tonello knew that Mr. Drudi represented IHB. Disclosure of the existence of the Application would not compromise any interest of Mr. Battistella - on the contrary, he contends that he gave notice of the Application. In those circumstances Mr. Tonello was under an obligation to inform Mr. Drudi that his client had commenced the Application and tell him when the Application would be heard. In addition, he should have provided Mr. Drudi with at least a copy of the Notice of Application.

48 So, in the present case we have counsel for Mr. Battistella failing to inform opposing counsel of the fact of the Application and its return date, and subsequently failing to send opposing counsel a copy of the Deletion Order. That litigation conduct, even if driven by the instructions of the client, fell well below the accepted level of obligations owed by one counsel to another in litigation before this Court.

49 Those failures by Mr. Battistella's counsel, when coupled with Mr. Battistella's failure to disclose to Himel J. the purpose of his application - to refinance immediately the Property - and the dispute about the accuracy of Mr. Corriveau's affidavit of service, lead me to conclude that IHB has provided an adequate explanation about why it failed to attend on the hearing before Himel J. I conclude that IHB failed to attend that hearing through "accident, mistake or insufficient notice".

C.3 Is There Merit to IHB's Opposition to an Order Deleting the Writ, in the Sense That IHB Can Advance an Arguable Case on the Merits?

50 I am satisfied that IHB's materials disclose that it has an arguable case to resist an effort by John Battistella to remove the Writ from title to the Property.

51 IHB obtained the Consent Judgment on May 31, 2005 and filed the Writ on June 8, 2005. On July 8, 2005 Elisabetta and her son signed a declaration contending that John had always held the beneficial interest in the Property and on July 11, 2005 Elisabetta broke the co-tenancy and transferred any interest she had in the Property to her son. In its Statement of Claim IHB pleaded that this conveyance was fraudulent and aimed at defeating the creditors of Elisabetta Battistella.

52 The sequence of those events discloses an arguable claim by IHB that the July 11, 2005 conveyance was a fraudulent one, and therefore IHB has satisfied me that it could have advanced an arguable case before Himel J. to oppose John Battistella's effort to expunge the Writ from the title for the Property. I recognize that John Battistella and his mother filed affidavits in support of the Application and that such evidence stands opposed to that filed by IHB. I have read those affidavits. To my reading their evidence raises questions about Mr. Battistella's sole beneficial ownership of the Property

which are best resolved at a hearing on the merits. That is to say, I am persuaded that the issue of Mr. Battistella's sole ownership of the Property is a contestable one.

C.4 What Is the Potential Prejudice to IHB If Its Motion Were Dismissed, the Potential Prejudice to John Battistella If the Motion Were Allowed, and the Effect of Any Order on the Overall Integrity of the Administration of Justice?

53 I conclude that the preservation of the overall integrity of the administration of justice requires setting aside the Deletion Order. I have criticized the unacceptable conduct of Mr. Battistella's counsel in failing to inform opposing counsel of the pending Application and in failing to deliver a copy of the Deletion Order. As well, I see no real prejudice to Mr. Battistella in setting aside the Deletion Order. My order cannot affect the rights of the subsequent encumbrancer, RBC, but it can prevent Mr. Battistella from dealing further with the Property until a proper hearing on the merits to his claim of complete beneficial ownership can be held.

D. Conclusion

54 For these reasons I grant the motion of IHB to set aside the Deletion Order and I order that the Application to Amend the Register, Instrument No. YR1127534, be expunged from the title to the Property. I also order that the Writ be accepted for re-registration against title to the Property in order to return the parties to the position which existed between them prior to the Deletion Order.

55 The parties did not file a current abstract of title for the Property. RBC advanced funds and registered a mortgage after Himel J. granted the Deletion Order. I was not advised of any other post-Deletion Order encumbrance. RBC was not given notice of this motion. Consequently, my order setting aside the Deletion Order cannot affect the rights of RBC under its mortgage.

56 In his motion Mr. Battistella seeks to vacate the certificate of pending litigation IHB registered against the Property and to dismiss its action. In light of my holding that the proper way to set aside the Deletion Order was by way of motion within the Application and in light of my granting IHB's motion to set aside the Deletion Order, the relief sought by IHB in paragraphs 1(c), (d) and (e) is rendered moot, and I strike out that part of its Statement of Claim. In all other respects I dismiss Mr. Battistella's motion. The balance of the Action alleges that the Battistellas perpetrated a fraud on IHB and the Court in obtaining the Deletion Order and that IHB has suffered damages as a result. I have refrained from making any finding of credibility on the contested issue of service of the Application Record. Accordingly, I see no reason to restrain the Action from proceeding further. Although I have ordered that the Writ be restored on the title register, I conclude that it is appropriate to keep the certificate of pending litigation on title given the claims of constructive trust and unjust enrichment pleaded in the Action.

IV. Costs

57 I would encourage the parties to try to settle the costs of this motion. If they cannot, IHB may serve and file with my office (c/o Judges' Reception, 361 University Avenue) written cost submissions, together with a Bill of Costs, by Wednesday, October 5, 2011. John Battistella and Elisabetta Battistella may serve and file with my office responding written cost submissions by Friday, October 14, 2011. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

Corporation's motion granted; individual's motion granted in part.

Footnotes

1 (2001), 54 O.R. (3d) 795 (S.C.J.), para. 16.

2 2011 ONCA 476 (Ont. C.A.), para. 52.

3 2010 ONSC 5237 (Ont. S.C.J.), para. 22.

4 2009 CanLII 50751, para. 34.

TAB 5

2004 BCSC 1658
British Columbia Supreme Court

De Cotiis v. De Cotiis

2004 CarswellBC 2932, 2004 BCSC 1658, [2004] B.C.J. No. 2597, [2005] B.C.W.L.D. 762, [2005] B.C.W.L.D. 832, [2005] B.C.W.L.D. 833, 136 A.C.W.S. (3d) 379, 27 R.P.R. (4th) 281, 8 C.B.R. (5th) 55

Nick Ninno De Cotiis, Marcangelo De Cotiisby, Donato De Cotiis, 438336 B.C. Ltd., and 592616 B.C. Ltd. (Plaintiffs) and Michael De Cotiis, Pinnacle International Realty Group Inc., Pinnacle International Realty Group II Inc., Amalio De Cotiis, Amacon Development Corporation, Amacon Management Services Corp., Innocenzo De Cotiis, Onni Development Corporation, Onni Property Management Services Ltd., all doing business as the Onni Group, Amalio De Cotiis, Concetta De Cotiis, Donato F. De Cotiis, Lilliana L. De Cotiis, Luca De Cotiis, Marcello De Cotiis, Teresa Sutherland, David Sutherland, all doing business as the Amacon Group Viam Holdings Ltd., Viam Properties Ltd., Newcorp Properties Partnership, Newcorp Properties Ltd., V.I.T. Estates Ltd., V.I.T. Estates Partnership, Viam Group Partnership, Allison De Cotiis, Carlo Meola, Concetta De Cotiis, David Sutherland, Donato F. De Cotiis, Donato I. De Cotiis, Giulio De Cotiis, Juanita De Cotiis, Les Steve Fovenyi, Lilliana L. De Cotiis, Luca De Cotiis, Marcello De Cotiis, Morris De Cotiis, Paulo De Cotiis, Rossano De Cotiis, Teresa Sutherland, Price Waterhouse Coopers LLP, John Kay, McCarthy Tetrault LLP, Peter Pagnan, Scott D. Smythe, Lisa Vogt, Robert W. Cooper, Velia De Cotiis, Vittorio De Cotiis, 366466 B.C. Ltd., 421734 B.C. Ltd., 421735 B.C. Ltd., 429131 B.C. Ltd., 291144 British Columbia Ltd., 337710 British Columbia Ltd., 337988 British Columbia Ltd., 392660 British Columbia Ltd., 477489 British Columbia Ltd., 553362 British Columbia Ltd., 587112 British Columbia Ltd., 587114 British Columbia Ltd., 587116 British Columbia Ltd., 594702 British Columbia Ltd., 594705 British Columbia Ltd., 594708 British Columbia Ltd., 594710 British Columbia Ltd., 615050 British Columbia Ltd., 632508 British Columbia Ltd., 632509 British Columbia Ltd., 640724 British Columbia Ltd., 677129 British Columbia Ltd., 2005 Holdings Ltd., 3494 Investments Ltd., Amacon Development (Bute) Corp., Amacon Development (Farrow Ridge) Corp., Amacon Development (Fir) Corporation, Amacon Development (Hartley) Corp., Amacon Development (Hastings) Corp., Amacon Development (Kingsway) Corp., Amacon Development (Pacific) Corp., Amacon Development (Ridley Place) Corp., Amacon Development (Saba) Corp., Amacon Development (Seymour) Corp., Amacon Development (West Fourth) Corp., Amacon Holdings Ltd., Amacon-Onni Management (Davie) Inc., Amacon-Onni Management Inc., Cariboo Business Park Ltd., Cariboo Management Inc., Coast To Coast Project Management Ltd., Gateway Pacific Construction Ltd., Gateway Pacific Estates Limited, Guadagno Holdings Ltd., Harris Road Manor Ltd., LMLTD Holdings Corp., Map Development Corporation, Mondi Holdings Ltd., Mondi Management Ltd., Mondi Properties (155 Glacier) Inc., Mondi Properties (1551 Broadway) Inc., Mondi Properties (1611 Broadway) Inc., Mondi Properties (1647 Broadway) Inc., Mondiale Development Ltd., Newcorp Construction Ltd., Newcorp Construction (148th Street) Ltd., Newcorp Construction (Nelson)

Ltd., OSFC Holdings Limited, Onni Development (66th Avenue) Corp., Onni Development (240 Street) Corp., Onni Development (1525 Broadway) Corp., Onni Development (1533 Broadway) Corp., Onni Development Capital Corp., Onni Development (Davie) Corp., Onni Development (Dominion) Corp., Onni Development (Firbridge) Corp., Onni Development (Halifax) Corp., Onni Development (Hastings) Corp., Onni Development (Imperial Landing) Corp., Onni Development (Ioco Road) Corp., Onni Development (Mayfair Place) Corp., Onni Development (Pacific) Corp., Onni Enterprises Ltd., Onni Holdings Ltd., Onni Project Management Services Ltd., Onni Property Management Services Ltd., Onni Real Estate Holdings Ltd.,Pacific Star Properties Ltd., Pinnacle International (Hastings 2001) Plaza Inc., Pinnacle International (Pender) Plaza Inc., Pinnacle International (Taylor) Plaza Inc., Pinnacle International (Westminster) Plaza Inc., Pinnacle International (Wilson) Plaza Inc., Pinnacle International (Pender) Properties Inc., Pinnacle International Hotels and Resorts Inc., Pinnacle International Lands Inc., Pinnacle International Management Inc., Pinnacle International Plaza Inc., Pinnacle International Properties (Bloor) Ltd., Pinnacle International Realty (Bloor) Ltd., Pinnacle International Realty Group I Inc., Pinnacle International Resort Club Inc., Pinnacle Market Development (US) LLC, Pinnacle Market Development (Canada) Ltd., RPMG (Broadway) Holdings Ltd., RPMG (Edmonton) Holdings Ltd., RPMG Holdings Ltd., Seven Star Development Ltd., Update Properties Ltd., York-Trillium Properties Inc., York-Trillium Realty Inc., Wentworth Properties Inc., Bloor Street Development Limited Partnership, Bloor Street Development Partnership, Carlton Place Hotel Limited Partnership, CRERAR Property Limited Partnership, Onni Firbridge Development Limited Partnership, Onni Imperial Landing Development Limited Partnership, Onni Halifax Development Limited Partnership, Onni Mayfair Place Development Limited Partnership, Onni Palladio Development Limited Partnership, Pinnacle Development Partnership, Pinnacle Pender Development Partnership, SRI Realty & Mortgage Partnership, SRMP Realty & Mortgage Partnership, The Brava Development Partnership, The Palladio Development Partnership, The Perla Development Partnership, Viam Properties #1 Limited Partnership, Viam Properties #2 Limited Partnership, John Doe, Jane Doe, and John Doe Company, (Defendants)

529616 B.C. Ltd. (Plaintiff) and Viam Properties Ltd. (Defendant)
and 438336 B.C. Ltd. (Defendant by Counterclaim / Third Party)

Sigurdson J.

Heard: March 10, 2004
Judgment: March 10, 2004
Docket: Vancouver S036386, S032609

Counsel: D.G. Sanderson, Q.C., S. Fitzpatrick, T. Mihoc for Plaintiff
D. Church, A. Pearson for Pinnacle Defendants
R. McFee, Q.C., M. Buhler for Amacon Defendants
R.J.R. Hordo, Q.C., P.R. Bennett for Onni Defendants
P. Freeeman, Q.C., T. Rogers for McCarthy Tetrault

Subject: Property; Corporate and Commercial; Estates and Trusts; Insolvency

Headnote

Real property --- Certificate of pending litigation (lis pendens) — Right to register — Interest in land

Both plaintiffs and main defendants were large successful property developers who were, or whose principles were, all from same family — Plaintiffs were one brother and his two sons and their companies, all of whom had been dismissed in 1992 from family business which four brothers had started in 1950's — Defendants were remaining three brothers, their individual companies and other related companies and family members — Dismissal led to court case following which parties reached settlement agreement — Plaintiffs claimed settlement agreement only compensated them for past monies owing them for past wrongs and liabilities — Plaintiffs claimed that they were still supposed to continue with partnership arrangement on ongoing basis and continue to have interest in partnership, and that therefore settlement payment had been only partial payment — Plaintiffs therefore claimed that they were entitled to claim interest in land where defendants had wrongfully taken partnership assets — Plaintiffs also claimed unjust enrichment entitling them to remedy in constructive trust — On this basis, plaintiffs filed certificate of pending litigation ("CPL") against some 86 properties — When defendants sought to cancel CPL, court ordered that it be removed on condition that defendants provide undertaking as to damages — Plaintiffs now applied to re-file CPL and defendants claimed that plaintiffs did not have interest in land on which to found CPL — Application to re-file CPL dismissed — There was triable issue that plaintiffs had interest in land — In order to succeed in application to re-file CPL plaintiffs must advance claim to interest in land — Given complex legal issues raised by extensive pleadings, factual disputes and caution expressed by authorities, together with relatively low threshold, it could not be said that there were no triable claims by plaintiff to interest in land.

Real property --- Certificate of pending litigation (lis pendens) — Practice and procedure — Miscellaneous issues

Both plaintiffs and main defendants were large successful property developers who were, or whose principles were, all from same family — Plaintiffs were one brother and his two sons and their companies, all of whom had been dismissed in 1992 from family business which four brothers had started in 1950's — Defendants were remaining three brothers, their individual companies and other related companies and family members — Dismissal led to court case following which parties reached settlement agreement — Plaintiffs claimed settlement agreement only compensated them for past monies owing them for past wrongs and liabilities — Plaintiffs claimed that they were still supposed to continue with partnership arrangement on ongoing basis and continue to have interest in partnership, and that therefore settlement payment had been only partial payment — Plaintiffs therefore claimed that they were entitled to claim interest in land where defendants had wrongfully taken partnership assets — Plaintiffs also claimed unjust enrichment entitling them to remedy in constructive trust — On this basis, plaintiffs filed certificate of pending litigation ("CPL") against some 86 properties — When defendants sought to cancel CPL, court ordered that it be removed on condition that defendants provide undertaking as to damages — Plaintiffs now applied to re-file CPL and defendants claimed that re-filing would cause them hardship and inconvenience — Application to re-file CPL dismissed — Given that defendants were active developers and that CPL was registered against 86 properties, it would cause defendants inconvenience and hardship if it was not removed — Scheme proposed by plaintiffs that CPL be dealt with on case-by-case basis as properties were sold was not workable — Furthermore, damages were adequate remedy since defendants' case was compelling while plaintiffs' case was not strong — In fact, given delay by plaintiffs in complaining and absence of expert advice or consultation concerning their alleged new interest in partnership, plaintiffs' case was weak — Accordingly, undertaking that defendants had already been required to provide was sufficient.

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Both plaintiffs and main defendants were large successful property developers who were, or whose principles were, all from same family — Plaintiffs were one brother and his two sons and their companies, all of whom had been dismissed in 1992 from family business which four brothers had started in 1950's — Defendants were remaining three brothers, their individual companies and other related companies and family members — Dismissal led to court case following which parties reached settlement agreement — Plaintiffs claimed settlement agreement only compensated

them for past monies owing them for past wrongs and liabilities — Plaintiffs claimed that they were still supposed to continue with partnership arrangement on ongoing basis and continue to have interest in partnership, and that therefore settlement payment had been only partial payment — Plaintiffs therefore claimed that they were entitled to claim interest in land where defendants had wrongfully taken partnership assets — Plaintiffs also claimed unjust enrichment entitling them to remedy in constructive trust — On this basis, plaintiffs filed certificate of pending litigation ("CPL") against some 86 properties — When defendants sought to cancel CPL, court ordered that it be removed on condition that defendants provide undertaking as to damages — Plaintiffs now applied to re-file CPL and defendants claimed that re-filing would cause them hardship and inconvenience — Alternatively, plaintiffs sought appointment of receiver — Application for appointment of receiver dismissed — Application to re-file CPL dismissed — Court dismissed application to re-file CPL on basis that defendants were active developers and that CPL was registered against 86 properties, so that it would cause defendants inconvenience and hardship if re-filed — Appointment of receiver was to preserve property from some danger threatening it and court must be satisfied that applicant has established good prima facie title — Weakness of plaintiffs' case, finding that damages were adequate remedy and existence of defendants' undertaking essentially protected plaintiffs in this case and preserved status quo — Appointment of receiver could in fact do great harm since it would be intrusive and potentially have adverse effect on defendants' operations.

APPLICATION by plaintiffs to re-file certificate of pending litigation and, alternatively, for appointment of receiver.

Sigurdson J.:

1 This is an application by the plaintiffs, Nick De Cotiis, Mark De Cotiis, Donato De Cotiis, 438336 B.C. Ltd. and 529616 B.C. Ltd., to re-file a certain certificate of pending litigation on approximately 86 properties. Alternatively, the plaintiffs seek the appointment of a receiver.

2 The matter came before Madam Justice Gerow in December 2003 when the application was to cancel the certificate of pending litigation. As a term of an adjournment to allow the plaintiffs to instruct new counsel, she ordered that the certificate of pending litigation be removed on the condition that the plaintiffs would be at liberty to apply to re-file it. The conditions for the removal of the certificate of pending litigation were that the defendants would provide an undertaking as to damages that may be occasioned as a result of the removal of the certificate of pending litigation and that the defendants were enjoined from disposing of their property or assets outside the ordinary course of business. The undertaking remains in place.

3 The precise undertaking ordered by Gerow J. is in these terms:

> The undersigned hereby undertakes to pay and to cause any corporate entity they own or control, either individually or collectively, to pay any damages that are proven by the Plaintiffs and which the Court may order relative to the cancellation, pursuant to the Order of Madam Justice Gerow made December 10, 2003, of the Certificate of Pending Litigation registered in the land Title Office under No. BV497636 against the properties registered in the name of any of the Defendants listed in Schedule "A" to this Undertaking.

4 The defendants oppose the application. They contend that the plaintiffs' claim in the amended statement of claim and the affidavit material filed on this application does not raise an arguable claim or triable issue that they have a claim to an interest in land. If it does, the defendants assert that they will suffer hardship and inconvenience if the certificate of pending litigation is allowed to be re-filed. Given what they argue is the demonstrably weak claim of the plaintiffs in this action, the defendants say that it should be removed upon adequate security being given. They contend that the undertaking required by the order of Madam Justice Gerow, which they are prepared to maintain, is adequate security for any damages the plaintiffs might possibly be entitled to. The defendants also oppose the appointment of a receiver.

5 To put in context the issue of whether the plaintiffs are in fact advancing a claim to an interest in land, whether the re-filing of the certificate of pending litigation would cause hardship and inconvenience, and the apparent merits of the plaintiffs' claims, some brief history is required.

6 Generally speaking, the plaintiffs and the defendants are large and, it appears, very successful property developers. They began their endeavours in the 1950s. Four brothers of the De Cotiis family, Marc, Mike, Inno and Amalio started a landscape business that became, in Mr. Justice Tysoe's words, "a very profitable real estate development and management business".

7 One of the plaintiffs in this action, Marc De Cotiis, suffers from a disability. His sons, Don and Nick De Cotiis, and two companies, 438336 B.C. Ltd. (owned and controlled by the three individual plaintiffs) and 529616 B.C. Ltd., are the other plaintiffs.

8 The defendants, of whom there are many, include the other three brothers of Marcangelo De Cotiis, their individual companies, which I will refer to as the Pinnacle Group (which are Mike's companies), the Amacon Group (which are Amalios'), and the Onni Group (which are Inno's). There are numerous other defendants who are related companies and family members of the defendants which I will identify as required during the course of these reasons.

9 First, some further background.

10 Marc and Don were dismissed from the family business in 1992 and brought oppression and related proceedings. Nick had apparently been dismissed from the family business in 1989 but subsequently settled his personal claims. In a trial heard in 1995, Tysoe J. considered a claim brought by Marc and Donato De Cotiis and others for a determination of the business affairs involving the brothers.

11 It appears to be common ground that at the time of the trial before Tysoe J., there was a partnership called Newcorp Properties Partnership, made up of Viam Properties Ltd. as to 99%, Viam Holdings Ltd. as to 0.65% and Newcorp Properties as to 0.35%. The plaintiffs held 20% of Viam Properties Ltd. through 438336 B.C. Ltd. and Marc and Don held a total of 1,590,000 Class B Preferred Shares in Viam Holdings Ltd. In Newcorp Properties Ltd., Marc had 1%, Don had 18% and 392660 B.C. Ltd. had 15%. (I pause to note that Viam Holdings Ltd., Newcorp Properties Partnership and Newcorp Properties Ltd. are also defendants, amongst other companies, in the current proceeding.)

12 Mr. Justice Tysoe in written reasons for judgment dated June 27, 1995 [see: (B.C. S.C.)] ruled that Newcorp Properties Ltd. and Viam Properties Ltd. should be wound up. He also ruled that it was not equitable to wind up Viam Holdings Ltd., but that the plaintiffs' shareholding interest should be purchased by the defendants in that proceeding.

13 Tysoe J. also ruled that the partnership was dissolved effective December 31, 1992. He also ruled that the new development projects that were undertaken through the defendants' companies, Amacon, Pinnacle, and Onni, which were then the relatively new companies of the three brothers other than Marc, were not corporate or partnership opportunities of the partnership as it was dissolved at the end of 1992, prior to the acquisition of the properties in question.

14 Tysoe J. noted at the end of his reasons, after mentioning the costs issue, that "the litigation is not over because Newcorp and Viam Properties are to be wound up and the shares of Marc and Don in Viam Holdings are to be purchased after they have been valued".

15 Following the decision of Mr. Justice Tysoe, it is acknowledged, I think, that a settlement agreement was reached among the parties. There is, however, a significant dispute about its terms. While it is generally acknowledged that tax issues caused the parties to settle on different terms than perhaps contemplated by the reasons for judgment of Tysoe J., the issue is whether the plaintiffs' interest in the joint business or partnership was fully satisfied by monies and property, with the parties essentially going their own ways, or whether there was a settlement that simply reflected the payment of

monies owing to the plaintiffs for past wrongs or liabilities and that the partnership continued, in fact expanded, with the plaintiffs having a more significant role.

16 The defendants say that the winding up of Newcorp Properties Ltd. and Viam Properties Ltd. as ordered by Mr. Justice Tysoe, would have serious tax consequences and the parties agreed to a settlement which would see Marc and Don's interest in the family business bought and paid out.

17 The defendants say that an agreement was reached over a period of time and is reflected by correspondence between counsel for the parties, memoranda from advisors, and the actions of the parties and their representatives. They say that it was agreed that the shareholding interest of the plaintiffs in Viam Properties Ltd. and Newcorp Properties Ltd. would be paid out by the plaintiffs taking properties or managing properties and bearing the tax consequences accordingly and in the case of Viam Holdings Ltd., that the shares of Marc De Cotiis and Don De Cotiis therein were purchased.

18 The defendants say that the first part of the settlement dealt with the distribution of assets and that the shareholders of Viam Properties, including 438366 B.C. Ltd. as to its 20% interest, could either take assets in kind or could manage those assets under a Management Agreement while legal title to the property remained in Newcorp Properties Ltd. or Viam Properties and if they chose the former, they would have to bear the tax consequences. If they chose the latter course, they were to manage the properties, collect the revenue and that under this agreement, specific properties and assets belonging to Newcorp Properties Partnership, Newcorp Properties Ltd. and Viam Properties were allocated to Amalio, Mike, Inno, Don and Marc and their respective companies. The defendants say the individual elements were documented by lawyers and other professionals.

19 The second part of the settlement which the defendants say is reflected in a letter agreement of February 28, 1997 deals with the purchase of Marc and Don De Cotiis' shares in Viam Holdings. Because of tax implications the defendants say the purchase was undertaken by having Marc and Don exchange their common shares in Viam Holdings for preferred shares and then by having Viam Holdings subscribe for $15.9 million dollars worth of preferred shares in Marc and Don's company, 529616 B.C. Ltd.

20 The plaintiffs as I said, agree, but only in part.

21 The significant disagreement between the parties is this. The plaintiffs say that the settlement, which contained the transactions which are mainly not disputed, was, however, only a settlement to compensate the plaintiffs for past monies owing for past wrongs or liabilities. The plaintiffs' allegation is that between 1997 and 1998 a settlement agreement was reached that the partnership would continue and the parties would share profits and assets along the same basis as they had in the past with the plaintiff entitled to a 20% interest. They say that it was agreed that as of July 1998, the plaintiff 438336 B.C. Ltd. would have a 20% interest in the Newcorp Properties Partnership and retain its 20% interest in Viam Properties after which the interest of Viam Properties would then be a 79% owner of the partnership. This, they say, effectively gave the plaintiffs' entities a 35% interest.

22 The plaintiffs say that they would be paid about $9,000,000 to compensate for property and cash wrongfully taken, which part of the settlement agreement made in June 1997 was documented. The plaintiffs contend that through their numbered company, 529616 B.C. Ltd., they would provide management services to the partnership through Viam Properties Ltd. The plaintiffs' position is that they were to be paid $24,000,000 in 1997 and 1998 and continue as well with the partnership arrangement on an ongoing basis. They contend that their partnership interest at that time was worth approximately $55,000,000; hence they only received a partial payment, the plaintiffs assert.

23 What are the claims upon which the plaintiffs say they have an arguable interest in land that entitles them to file a certificate of pending litigation? (Those are the claims in the statement of claim that I will focus on in these reasons.)

24 The allegation in the amended statement of claim is that 438336 B.C. Ltd. would become a 20% partner in Newcorp and would be entitled to 20% ownership interest in the assets, income and losses of that partnership after the implementation of the 1998 agreement, and Viam Properties ownership interest reduced to 79%. The plaintiffs contend

that Don, Marc and Nick would continue to hold their direct and indirect shareholders' interest in Viam Holdings, Newcorp Properties Ltd. and Viam Properties and that the partnership, including 438336 B.C. Ltd., would continue to carry on in the normal course of partnership business indefinitely. (It is alleged in the amended statement of claim that all assets of Viam Holdings, Viam Properties and Newcorp Properties Ltd. were and are held in trust for the Newcorp Properties Partnership.) This alleged agreement is described in some detail in the amended statement of claim and is referred to therein as the New Family Agreement. It is alleged that "Marc's brothers" would return to the Newcorp Properties Partnership all properties, monies, benefits, assets and things of value actually or beneficially transferred or paid without lawful justification to the brothers or to any company actually or beneficially controlled by them.

25 The plaintiffs' claim is that the defendants have failed to transfer properties to them as agreed and that they have conspired to misappropriate assets. That, as I noted, only touches on part of the allegations. The plaintiff says that there has been unjust enrichment that entitles them to a remedy in constructive trust.

26 As to the entitlement to file a certificate of pending litigation the plaintiffs in their argument refer to paragraphs 115C and D of the amended statement of claim. The plaintiffs have divided the properties into six categories which I will now describe:

> (i) The properties that they allege are in fact beneficially owned by the plaintiffs under what they call the 1997 Minutes of Settlement;
>
> (ii) The properties that are registered in the name of Viam Properties;
>
> (iii) The properties that are registered in the name of Newcorp and Viam Holdings;
>
> (iv) The properties transferred from Newcorp or Viam Holdings to the individual defendants or their companies allegedly without any or without adequate consideration;
>
> (v) The properties acquired by other related defendants through what they allege are the wrongful taking of corporate opportunities properly belonging to the Newcorp Properties Partnership; and
>
> (vi) The properties purchased or developed using money taken from the Newcorp Properties Partnership or one of the corporate partners.

27 The plaintiffs allege that a constructive trust claim based on unjust enrichment applies to categories (i), (iv), (v) and (vi). In each case, the actions of the defendants, the plaintiffs say, have resulted in a financial gain to the defendants and a corresponding loss to the plaintiffs, without a juristic justification therefore. The impugned actions of the defendants they allege have included:

> 1. reneging on the terms set out in the 1997 Minutes of Settlement;
>
> 2. knowingly accepting transfers of certain properties from Newcorp or Viam Holdings without giving consideration or adequate consideration;
>
> 3. wrongfully taking, with knowledge, corporate opportunities known to properly belong to the Newcorp Properties Partnership; and
>
> 4. using money taken from the Newcorp Properties Partnership or one of the corporate partners to develop their own projects.

28 Categories (ii) to (iv) are claimed as "partnership assets" in that they are allegedly owned by one of three alleged corporate partners, or that assets of the partnership were used to acquire the properties after 1995, or other partnership assets were conveyed or transferred to other corporate defendants or were corporate opportunities that were wrongfully taken. The plaintiffs say that they have claims in constructive trust to all categories, some based on the doctrine of unjust

enrichment, all based on the doctrine of "good conscience" and in all cases because, as partners, the plaintiffs say that they are entitled to claim an interest in land where defendants have wrongfully taken partnership assets.

29 Before I engage in any discussion of the merits of the plaintiffs' claim, I need to put in context why I am considering the merits of the application at this preliminary stage.

30 This is an application to reinstate the filing of a certificate of pending litigation against numerous properties. The amended statement of claim is a detailed, complex document, some 61 pages long. It seeks, *inter alia*, a declaration that all properties in the name of Viam Properties, Newcorp and Viam Holdings were at all material times held in trust for the Newcorp Properties Partnership.

31 This is not an 18A application, nor is it a Rule 34 or a Rule 19(24) application. Therefore, no order finally determining any aspect of the merits of this dispute would be appropriate but some consideration of the merits must be made for reasons that I will explain. In doing so, I proceed with caution, aware that at a trial with additional evidence and cross-examination the picture might appear quite different, when all of the evidence is fully canvassed, than it does now.

32 I first address the statutory provisions dealing with the removal of certificates of pending litigation.

Statutory Provisions

33 The *Land Title Act*, R.S.B.C. 1996, c. 250, provides:

> 215(1) A person who has commenced or is a party to a proceeding, and who is
>
> (a) claiming an estate or interest in land, . . .
>
> may register a certificate of pending litigation against the land in the same manner as a charge is registered, ...

34 Sections 256 and 257 state as follows:

> 256(1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
>
> (a) particulars of the registration of the certificate of pending litigation,
>
> (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
>
> (c) the grounds for those statements, apply for an order that the registration of the certificate be cancelled.
>
> 257(1) On the hearing of the application referred to in section 256 (1), the court
>
> (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
>
> (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
>
> (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
>
> (b) may refuse to order the cancellation of the registration, and in that case may order the party
>
> (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and

(ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.

(2) The form of the undertaking must be settled by the registrar of the court.

(3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

35 To maintain a certificate of pending litigation or to succeed in its application to re-file the certificate, the plaintiff must advance a claim to an interest in land.

36 Where it is shown that there is no serious question to be tried [*Kamil v. Transtide Industries Ltd.*, [1980] B.C.J. No. 1902 (B.C. S.C.)] or, put another way, that there is no merit to the claim [*Park & Tilford Canada Inc. v. Festival Markets Inc.* (1986), 30 D.L.R. (4th) 220, 6 B.C.L.R. (2d) 160 (B.C. S.C.)], or stated yet another way, no triable issue, the certificate of pending litigation may be struck, or in circumstances such as these, not reinstated.

37 As I noted earlier, even though there was a vast amount of material filed that touched upon the merits of the claim, this is not in any way a summary disposition of the claim and, in its assessment of the merits, the court must move cautiously.

38 The need to be cautious was referred to by Mr. Justice Lander in *309355 B.C. Ltd. v. Cambie Pacific Enterprises Ltd.*, [1988] B.C.J. No. 1529 (B.C. S.C.), where he said:

> While I might consider the case for the plaintiff "thin", I cannot on the affidavit evidence decide the issue. During the course of the trial when all the evidence is advanced *viva voce* an entirely different view of the matter might be created for the trial judge, than the one I have at the present moment. For these reasons, I am refusing the application under Rule 18 and also am declining to cancel the *lis pendens*.

39 Assuming the plaintiffs are able to establish that there is an arguable or triable issue that they are claiming an interest in land, the question often turns, as it does now, to an application to cancel the certificate of pending litigation under s. 256 and 257 of the *Land Title Act*. At this time the court addresses whether the person or persons against whom the *lis pendens* is filed, in this case the parties against whom it is sought to be re-filed, have demonstrated hardship and inconvenience, and if so, what is the appropriate order.

40 On that application the court may cancel or refuse to cancel the certificate of pending litigation and if it concludes that damage will provide adequate relief, section 257(3) allows the court to take into consideration the probability of the parties' success in the action, in respect of which the certificate of pending litigation was registered, in fixing the security.

41 In this case, the defendants say that the claim to an interest in land is not arguable or triable, but that if the case is found to be arguable damages provide adequate relief, the claim is extremely weak and the security that should be put in place by the defendants is the undertaking referred to by Madam Justice Gerow, which they argue is more than sufficient for the plaintiffs' claims.

Discussion

42 I will now embark on a brief discussion of the arguments concerning the merits of the plaintiffs' claim. There were five binders of affidavits filed. Argument on this motion took place over several days. I am mindful of the caution expressed about determining the issue of the merits when it is addressed in connection with s. 215 of the *Land Title Act*, but given the fact that I have been asked to consider the merits on the application to discharge the certificate of pending litigation if there is an arguable case, should I find hardship and inconvenience and that damages are an adequate remedy (as well as in the receiver application), I will address the merits in some detail at the present time.

43 Mr. Sanderson, counsel for the plaintiffs, argued that the defendants' contention of an overall final settlement is inconsistent with the fact of partnership/corporate assets worth in the range of $150 - $200 million dollars. That it was only a partial working out of past wrongs or liabilities and an agreement for the partnership to continue with the plaintiffs in it and having an expanded role, the plaintiffs say, is supported by the absence of a final general release. The plaintiffs suggest that their evidence was found credible before Tysoe J. and it will likely be found credible at trial again. Moreover, the plaintiffs point to the May 1998 Management Services Agreement, something that they say shows that the plaintiffs had a continuing role in the partnership regarding all properties and that the partnership continued. Notwithstanding past and significant acrimony, the plaintiffs say that this was put aside because of the impact of tax considerations. The plaintiffs assert that their interest in the partnership and their increased interest in the partnership is confirmed by correspondence: in particular there is a letter of July 15, 1998 from Nick De Cotiis for 438336 B.C. Ltd. to Mike De Cotiis at Viam Properties confirming the new interest of the numbered company and the fact that the plaintiffs together had a 35% interest. The letter closes with this reference: "looking forward to an ongoing profitable partnership".

44 The plaintiffs say that a trust claim to a beneficial interest in land can ground a *lis pendens* [*Vancouver Lot 1, Block 19, District Lot 302, Plan 12150, Re* (1985), 63 B.C.L.R. 81, [1985] B.C.J. No. 1178 (B.C. S.C.)] and that the partnership claim and the claim to unjust enrichment gives rise to a remedy in constructive trust, both of which provide the proper foundation for a claim to an interest or an estate in land.

45 The defendants' position is that factually and legally the plaintiffs' claim is without merit. They say that there is no new Family Agreement as alleged. Factually, the defendants' counsel, Mr. Church, Mr. McFee, and Mr. Hordo, say that the whole of the evidence shows that the allocation of assets to the plaintiffs was a settlement in full, something which they say is supported by the value of the assets as reflected by the documents that were exchanged at the time. Mr. McFee argues that Viam is just holding properties that were allocated for the parties.

46 Given the longstanding and ongoing acrimony, the defendants say that the suggestion of a partial settlement with the plaintiffs participating fully in a revived partnership that brought in additional properties that were never before partnership assets is a ludicrous suggestion. Mr. Hordo describes the plaintiffs' claim as lacking an air of reality. He says that the false premise is that there were $150 million in assets to divide. He points to the lack of particularity in the oral contract that the plaintiffs allege.

47 The affidavits of the professionals including Richard Crosson, the chartered accountant John Kay, and Peter Pagnan, including the affidavits of Mr. Fovenyi, the principal financial person at Viam, which affidavits I was taken through in detail, all suggest that the working out and transfer of assets was part of the settlement of the plaintiffs' interest rather than a part payment and the beginning of an new and expanded relationship. (The schedule at Exhibit F to Mr. Fovenyi's third affidavit, taken in conjunction with other documents, I find, is particularly telling in this respect.)

48 The defendants argue that the July 15, 1998 letter, under which the numbered company is said to have received a 20% interest in the partnership, is of dubious validity. The defendants' argument is that the letter was never sent at the material time and did not surface until this litigation. The defendants says that receipt of this letter is unknown to any of the principals; in particular its receipt is denied by the person to whom it was allegedly sent, Michael De Cotiis, or seen by the other brothers. Litigation was started in the spring of 2003 between the parties and, it appears, this document was not produced in the initial list of documents.

49 Not only is its receipt unheard of and denied by the other defendants, but the letter's purported confirmation of an interest in a partnership is inconsistent with other documentation signed by Nick De Cotiis. I mention one example referred to by Mr. Church. In correspondence of September 9, 2003 signed by Nick De Cotiis, and apparently copied to his lawyers he wrote:

> The projects listed below are a partial list of projects that are beneficially owned by the Viam Group Partnership and Newcorp Properties Partnership. **Viam Properties Ltd. is a 99% owner of the Newcorp Properties Partnership.** (emphasis added)

50 This is inconsistent with the suggestion that 438336 B.C. Ltd. is a partner in Newcorp Properties Partnership as to 20 percent.

51 What of the conduct of the plaintiffs over the past several years if there was this ongoing relationship between the parties that they assert as the foundation for their claim to a certificate of pending litigation? The plaintiffs appear to have sat quietly by, which appears inconsistent with their claim to an ongoing interest in all of the projects of the defendants. One further example will suffice for the moment. In evidence was filed a transcript of the May 26, 2003 meeting of Viam Properties. Nick and Don attended as representatives of 438336 B.C. Ltd. They did not correct or state that the report "under company assets" that Viam Properties held a 99% interest in the Newcorp Partnership was wrong. It was not mentioned at the meeting that the interest was reduced to 79% under the new Family Agreement; it appears the opportunity to say so was available to Nick and Don.

52 The defendants argue that if the plaintiffs' position is meritorious that a new company was receiving an assignment of a substantial interest in a partnership, it presumably would have attracted tax consequences and one would expect at least, the defendants contend, a flurry of advice from the professional advisors who are around these litigants. There is no sign that happened.

53 I was taken through the affidavit material at some length by all counsel. It appears that the transactions between the parties, which were extensive and detailed, are far more consistent, on the evidence that I reviewed, with a working out as part of a final settlement than they were as partial payments made as part of an ongoing and revived relationship. Mr. Don De Cotiis filed an affidavit in this respect to suggest that the deal changed from what was proposed at an earlier stage. Mr. Hordo filed a written memorandum called "notes re Don De Cotiis affidavit number 2". I have read that document and find that it appears to largely explain and answer the points raised in that affidavit.

54 The defendants say that the affidavits of the professionals are consistent with a final settlement, but the professionals acting for the plaintiff have not filed materials to suggest that the deal was as the plaintiffs contend. The plaintiffs say that while its lawyers have not filed affidavits the same can be said for the solicitors acting for some of the defendants.

55 What of the conduct of the parties over the last few years? Although the plaintiffs point to the management agreement, which suggests an ongoing relationship, and the lack of a final general release, the conduct of the plaintiffs, the defendants suggest, in essentially that of sitting back quietly, something which seems inconsistent with the agreement that they say was made several years ago that they are now seeking to enforce. I understood the plaintiffs' position to be that they were silent partners. The conduct of the plaintiffs, however, appears inconsistent with their having an interest in the partnership that is ongoing with all the future projects going through it. In the amended statement of claim the plaintiffs allege that all properties registered in the names of Viam Properties, Newcorp Properties Ltd. and Viam Holdings were at all material times held in trust for Newcorp Properties Partnership although it appears that Newcorp never held Viam's assets, but now the plaintiffs allege that it does.

56 If the plaintiffs were entitled to the monies generally under the Management Agreement as opposed to in connection with the properties they received, or managed, the defendants say that one would have expected the plaintiffs to complain earlier.

57 The defendants suggest that the scope of the certificate of pending litigation itself, something they describe reveals a scattergun approach, suggests that there is little, if any, merit to the plaintiffs' claim. The defendants point to the fact that the certificate of pending litigation: attached properties that, they say, were clearly were not partnership properties, i.e. properties that Mr. Justice Tysoe held to be separate from the business carried on by Newcorp Partnership Properties; attached a property that was allocated to the plaintiffs in the settlement and then listed and sold by the defendants and

bought by a member of the Onni Group and now the subject of the pending litigation claim; and, attached another property which Mr. Justice Tysoe held had been properly acquired by the defendant Inno De Cotiis. The defendants argue that the rather "scattergun" approach of the pleadings and the breadth of the claim suggests an absence of merit.

58 The defendants say the evidence must be assessed in light of the longstanding and serious acrimony between the parties, which is sharply inconsistent, they say, with the alleged new Family Agreement that forms the subject matter of the action. The logic of the plaintiffs receiving a 35% interest, the defendants contend, is not properly explained.

59 Apart from the factual difficulties with the plaintiffs' claim, the defendants argue: in essence, as a matter of law, it is a damage claim; a partner does not have a direct interest in partnership assets; and, if assets were in fact misappropriated, there is no direct claim by a partner, given the rule in *Foss v. Harbottle* (1843), 67 E.R. 189, 2 Hare 461 (Eng. V.-C.).

60 The plaintiff argues that there is a direct claim or a claim that entitles them to file a certificate of pending litigation, because where assets have been improperly taken or used by a partner there is a claim in unjust enrichment. This is something, the defendants say, might give rise to a remedy in constructive trust, but not an interest in land. The plaintiff however relies on *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (S.C.C.), and *LeClair v. LeClair Estate* (1998), 159 D.L.R. (4th) 638, 48 B.C.L.R. (3d) 245 (B.C. C.A.), as support for the proposition that a claim in constructive trust, based on unjust enrichment, can ground a certificate of pending litigation. Given those authorities that touch on when a constructive trust may arise and that, in certain circumstances, constructive trust claims arising upon an unjust enrichment, may support the filing of a certificate of pending litigation, it is probably arguable, if the facts were as the plaintiffs assert them to be in the pleadings, that in some circumstances they would give rise to an interest in land.

61 However the defendants say more. They say that generally a partner does not have an interest in the underlying assets of the partnership, except on dissolution, and that to the extent that there are wrongs to the "reconstituted and continued partnership called Newcorp Properties Partnership", the rule in *Foss v. Harbottle*, *supra*, applies. In any event, the defendants say that if a general allegation was sufficient to support a claim of constructive trust, the beneficiary of such a trust is the partnership and not the partners and this pleading cannot, as a matter of law, support a claim.

62 Given the complex legal issues raised by the extensive pleadings, the factual disputes that appear in the extensive material, the caution expressed in the authorities, and what I think is a relatively low threshold, I find that I am unable to conclude that there are not triable claims by the plaintiffs to an interest in land. In other words, there is a triable issue that there are claims to an interest in land advanced by the amended statement of claim. I will however return to this question of the merits of the plaintiffs' claim in a moment.

Hardship & Inconvenience

63 The defendants all contend that the re-filing of the certificate of pending litigation will cause hardship and inconvenience to them.

64 That was described particularly in the affidavit of Rosanno De Cotiis of December 5, 2003 and the affidavit of Donato De Cotiis sworn December 5, 2003.

65 It is apparent that the defendants are substantial and it appears successful property developers. The evidence before me is to the effect that the certificate of pending litigation, if re-filed, would affect the defendants in a number of ways. It would prevent consolidation of properties that are in the early stages of development, prevent titles being delivered in the projects that are closing, restrict access to cash resources to meet trade payables and put at risk the defendant developer's ability to proceed with its ongoing projects and pursue other development opportunities. Rosanno De Cotiis suggests there would be an impact on the reputation, at least on the Onni group, as a reliable and reputable developer. The defendants also say that disruption to payment of contractors risks the loss of good contractors in a currently competitive building market, and potentially puts them in jeopardy with their lenders. They further say that some of the properties that have been subject to the certificate of pending litigation have no relationship to the plaintiffs at all.

66 The plaintiffs say that hardship and inconvenience must be proven, not simply assumed, and must not be the product of speculation.

67 The defendants say that the plaintiffs' contention ignores the fact that the defendants require equity from their projects and the ability to encumber them to carry on with their existing projects. There was some evidence that a bank advised its branch office to stop dealing with Pinnacle until the certificate of pending litigation was removed but the plaintiffs say that this evidence has not been produced.

68 The defendants do not assert issue estoppel but say that I should respect the findings of Gerow J. who found that there was hardship, in the circumstances, when she made the order that she did removing the certificate of pending litigation as a condition of an adjournment.

69 The plaintiffs say that the parties had made an arrangement in the past where certificates of pending litigation were removed on a case-by-case basis. The plaintiffs, as I understand it, suggest that on a sale there would be a payment on account of their alleged interest and payment of part in trust for the so-called additional interest in the partnership, or simply that the disputed monies be held in trust.

70 First of all, although I am not bound by her findings, I agree with Madam Justice Gerow that the filing of the certificate of pending litigation, particularly given its breadth and scope, will cause the defendant developers hardship and inconvenience. I find that has been clearly proven. I also agree with Gerow J. that the arrangement proposed by the plaintiffs is not workable, given the breadth of the certificate of pending litigation and the number of properties it was registered against. Although the defendants say that the certificates of pending litigation were registered against 1,500 properties, to which the plaintiff replies that it is really only 86, I think that, in itself, given that these are active developers, demonstrates the magnitude of the filing and suggests that inconvenience and the hardship will be experienced if it is not removed and must be dealt with on a case-by-case basis.

71 But there are other reasons why the plaintiffs' proposal is not a satisfactory method to remove the hardship and inconvenience. The past practice in the past litigation is not necessarily a guide, given that, as I was told, the certificate of pending litigation then was filed in connection with properties where the plaintiffs generally had a direct or indirect interest as opposed to here where the plaintiffs' interest is very much in issue. I think that I must also be mindful that the arrangement that is proposed may have to be resorted to in circumstances other than simply to effect sales. From the evidence that was put before me it is clear that the plaintiffs are well aware of the pressure that the filing of a certificate of pending litigation may have. In these circumstances, what the plaintiff proposes, I think, is not workable.

Merits of the Plaintiffs' Claim

72 I have found that there will be hardship and inconvenience if the certificate of pending litigation is re-filed. Under s. 257, I may either cancel the certificate (not allow it to be re-filed) in which case I must have been satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief, or I may refuse to cancel it (allow it to be re-filed) upon an undertaking as to damages, perhaps with security.

73 I find that damages would be an adequate remedy for the plaintiffs, or to use the language of the section, it will provide adequate relief. Let me address the issue of security and the probability of the plaintiffs' success.

74 As to the merits, I recognize that there may be different witnesses at trial and the deponents of the affidavit material may be cross-examined. The court at trial will be able to fully address credibility issues. However, based on the material that is before me on this application for the purposes of whether I should discharge of the certificate of pending litigation (or rather, the question of whether it should be re-filed), I find that the defendants' arguments are compelling that the plaintiffs do not have a strong case. In fact, the evidence suggests the plaintiffs have a weak or thin case.

75 The central question appears to be whether there was an arranged division of assets following Mr. Justice Tysoe's decision or whether there was an agreement for a reconstituted and expanded partnership which included the plaintiffs in an increased way and included assets that were earlier found not to be partnership assets or opportunities.

76 The evidence, that is extensive and was reviewed for me in detail, appears to support the defendants' contention of a settlement. The plaintiffs' contention of an ongoing active property development operation, with all parties involved, appears contrary to the longstanding friction. It also appears illogical given the extent of the properties that the plaintiffs suggest are included. Although the question of whether a letter confirming the numbered company's interest in the partnership and the plaintiffs' increased interest is an important piece of evidence and gives rise to a significant question of credibility that I can not resolve on this application, the objective evidence before me, on this application, including the delay in complaining, the recent inconsistent acts, and the absence of expert advice or consultation concerning the alleged new interest in the partnership, speaks against the plaintiffs' assertion.

77 Although I have not concluded that the plaintiffs' claim is not arguable, my assessment, for the purposes of this application, is that it is weak.

78 I have concluded that damages are an adequate remedy. In deciding what order to make I may take into account the strength of the plaintiffs' case. In this respect the statutory provisions dealing with the discharge of certificates of pending litigation are similar to the considerations on an interlocutory injunction application.

79 Given my assessment of the strength of the plaintiffs' case, I have concluded that the security that the defendants are prepared to provide, i.e. the undertaking required by Gerow J., is sufficient. Provided it remains in place, I order that the certificate not be allowed to be re-filed.

80 Before making any order, however, I must consider the plaintiffs' alternate application for a receiver.

Receiver

81 Ms. Fitzpatrick, on behalf of the plaintiffs, applies for the appointment of a receiver. This is done pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which allows for the appointment of a receiver or receiver-manager by an interlocutory order in all cases where it appears to be just or convenient.

82 The plaintiffs refer to the two general classes of cases where receivers are appointed: first, to enable persons who possess rights over property to obtain the benefits of those rights (which is not applicable here); and second (which is argued to be applicable), "to preserve property from some danger that threatens it".

83 The court must be satisfied that the applicant has established a good *prima facie* title, which has been interpreted to involve considerations similar to the injunction test of a fair question to be tried and that the balance of convenience favours the granting of the injunction. Therefore, if I find there is a fair question to be tried, as I have in connection with the certificate of pending litigation application, I must consider such factors as the likelihood that damages, if awarded, will be paid, which party acted to alter the balance of their relationship and affect the *status quo* and the strength of the applicant's case, among other things. Although there are cases where it is appropriate to appoint a receiver in the case of a partnership dispute, the question remains whether it is just or convenient to do so in the circumstances.

84 I think that the strength of the plaintiffs' case, the fact that I think damages are an adequate remedy, as well as the undertaking that remains, essentially protects the plaintiffs and preserves the *status quo*. I think the appointment of a receiver potentially could do great harm here. The appointment of a receiver has not been shown to be either just or convenient. Considering all of the circumstances, I do not think this is an appropriate case for the exercise of the court's discretion.

85 I have commented on the impact of the filing of a certificate of pending litigation against these defendants. As noted in *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Ont. Gen. Div.), the

appointment of a receiver may be particularly intrusive. I think it would have a serious and "potentially permanent adverse effect on the operations of the defendants". The plaintiffs, if their claim is valid, seem to have been content to sit by for some time. That reinforces my view that if there is liability, damages are an appropriate remedy and a receiver is unnecessary.

86 I have commented above that I do not think that the fact of a previous arrangement for removal of a certificate of pending litigation supports the re-filing, nor do I think that it is a good basis for the appointment of a receiver.

87 I think the plaintiffs' interests will be protected as well if they pursue this litigation expeditiously.

88 Accordingly the plaintiffs' applications are dismissed. Cost will be in the cause.

Applications dismissed.

TAB 6

2017 ONSC 1312
Ontario Superior Court of Justice

Romanelli v. Romanelli

2017 CarswellOnt 2724, 2017 ONSC 1312, [2017] W.D.F.L. 1902, 277 A.C.W.S. (3d) 563

JOANNE ROMANELLI (Applicant) and MARIO ROMANELLI (Respondent)

J.P.L. McDermot J.

Heard: January 19, 2017; February 2, 2017
Judgment: February 24, 2017
Docket: FC-16-372-00

Counsel: C.C. Sorley, B. Teskey, for Applicant
K.D. Zaldin, for Respondent

Subject: Civil Practice and Procedure; Family; Property; Restitution

Headnote

Family law --- Costs — In family law proceedings generally — Interim costs or disbursements

Parties lived together for 17 years, but man claimed that parties only had intimate relationship for one year and then woman was only his tenant, while woman claimed that there was joint family venture that allowed for accrual of assets in man's name throughout relationship and she was left with nothing — Woman sought spousal support and share of man's assets — Woman brought motion seeking interim fees and disbursements of $100,000 — Motion granted in part — Woman was impecunious and playing field between parties was not level — Man inherited property that sold for $13 million during relationship, which raised issues of whether value was accrued in property during relationship — Portion of proceeds of sale was used to purchase residence woman claimed to have trust interest as result of unjust enrichment — Evidence indicated that parties were known to outside world as common-law spouses — Factors pointed to fact that woman appeared to have been sufficiently involved in man's business affairs to present prima facie meritorious claim concerning joint family venture that might result in claim for unjust enrichment, and man acknowledged woman had meritorious claim for spousal support — Woman's claims were prima facie meritorious and were sufficient to support order for interim fees and disbursements — Litigation was hard fought, man was involved in number of corporations and his business affairs were complex, there were discrepancies respecting man's income, and there was lack of transparency on face of materials filed — Woman needed assistance of counsel to advance her claims, and interim fees and disbursements were necessary even if spousal support were only meritorious claim — Woman provided sufficient evidence to estimate fees and disbursements she would incur — Woman was entitled to $50,000 in fees and $10,000 for expert business valuator to review evidence, for total of $60,000 in interim fees and disbursements, which was reasonable figure and was loan to woman that was to be accounted for in final disposition at trial.

MOTION by woman seeking interim fees and disbursements of $100,000.

***J.P.L. McDermot J.*:**

Introduction

1 Joanne and Mario Romanelli lived together for some 17 years from 1998 to 2015. They never married. Ms. Romanelli changed her name to that of the respondent in 2010, apparently with his agreement. Ms. Romanelli separated from Mr. Romanelli in December of 2015 because, she says, he was angry and abusive.

2 Ms. Romanelli now requests spousal support and a share of Mr. Romanelli's assets. Mr. Romanelli objects. He says the parties were never in a relationship for the 17 years suggested by Ms. Romanelli. He says that although the parties had an intimate relationship for about a year after they began living together in 1998, that quickly faded away and Ms. Romanelli was only his tenant after 1999. The respondent says that Ms. Romanelli is not eligible for spousal support as the parties did not live together for three years and therefore were not spouses as defined by the *Family Law Act.* [1]

3 At the Case Conference on November 8, 2016, Graham J. apparently thought that Mr. Romanelli's position on cohabitation was without any merit. He awarded spousal support at the Case Conference in the amount of $1,000 per month.

4 Ms. Romanelli has now brought a motion for a number of heads of relief including orders for an increase in spousal support, disclosure and for a payment by Mr. Romanelli of interim fees and disbursements of $100,000. Mr. Romanelli brought a counter-motion requesting removal of a Certificate of Pending Litigation registered against the common residence in Gilford granted by me on March 21, 2016 as well as an order setting aside the spousal support obligation under the Graham J. order made on November 8, 2016.

5 This motion was originally returnable before me on January 19, 2017. It was apparent to me that all of the issues could not be argued within the one hour limited to regular motions under the *Central East Practice Direction.* [2] In fact Mr. Zaldin on behalf of the respondent had brought a 14B Motion requesting the court to prejudge that issue; that motion was dismissed by Quinlan J. stating that it was best left the motions judge. In the end the applicant decided to proceed only on the interim disbursements issue, leaving the remaining issues raised in the two Notices of Motion to another day.

6 Upon the return of this matter on January 19, 2017 the applicant had not filed any reply material other than an affidavit sworn by applicant's counsel Mr. Teskey, who was also arguing the motion. Mr. Teskey was apparently not aware of the rule against counsel giving evidence in proceedings; [3] it was necessary to adjourn the motion with costs to the respondent of $900 thrown away so that the applicant could file adequate reply material. The issue of interim disbursements was finally argued on February 2, 2017 and Mr. Sorley filed a reply affidavit sworn by his client. All of the other issues in the Notices of Motion are to be adjourned to a long motion day on a date to be fixed through the trial coordinators' office.

7 For the reasons set out below, I have determined that the respondent shall pay the applicant interim fees and disbursements in the amount of $60,000. All other issues to be adjourned to a long motion date to be set through the trial coordinator.

Positions of the Parties

8 As noted the applicant requests an advance by the respondent of $100,000 to pay interim fees and disbursements so that she can advance her case in this litigation. She says that these disbursements and fees are necessary because she is impecunious and all of the assets and income lie in the hands of the respondent. She notes that she is already facing unbilled legal fees and disbursements which total more than $50,000. As well, she claims fees for a future third party disclosure motion and for questioning. She requests disbursements for income and property evaluations necessary in order to make her case.

9 She says that these fees and disbursements are necessary in light of the complexity of the matter. She notes that she is has no assets whatsoever while the respondent discloses more than $2 million in assets. Until spousal support was ordered, she subsisted on Ontario Works. The applicant says that she will not be able to prosecute her case adequately

or for that matter at all if she does not receive financial assistance from the respondent who is well able to advance the sum requested.

10 The respondent strongly objects. He says that the case for division of assets is without merit. He notes that most of the assets that the applicant claims a share of originated through an inheritance from his father which he received in 1983, well before the parties began cohabitation. He notes that no case law has been produced permitting interim disbursements for a business valuation where the property came to the responding party by way of an inheritance. He says that there is insufficient merit in the applicant's case to warrant any need for a property valuation.

11 He says as well that even if the parties cohabited for 17 years as alleged by the applicant, that the income issues are relatively simply as his income comes only from investments and CPP disability. Therefore, no income valuations are necessary as spousal support is easy to determine. He says that proposed fees and disbursements are excessive and unnecessary.

12 Mr. Romanelli also says that he has made all of the disclosure that he can and that no further disclosure is necessary, and especially not a third party disclosure motion. He says that the information concerning the corporations in which he and his brothers have an interest are irrelevant to the applicant's property claims. Mr. Romanelli requests a dismissal of the motion with costs.

Analysis

13 This is a motion for interim disbursements and fees to be paid pursuant to rule 24(12) of the *Family Law Rules*[4] which permits the court to "make an order that the party pay an amount of costs to another party to cover part or all of the expenses of carrying on the case, including a lawyer's fees."

14 The case most often cited in Ontario interim disbursement motions is the decision of *Stuart v. Stuart*, [2001] O.J. No. 5172 (Ont. S.C.J.). In that case, Rogers, J. extensively reviewed the case law and determined that there were seven "themes" concerning the law of the granting of interim disbursements in family law matter which she sets out as follows [at para. 8]:

1. The ordering of interim disbursements is discretionary;

2. The claimant must demonstrate that the interim disbursements are necessary to pursue her case. She must, according to Rogers J., "demonstrate that absent the advance of funds for interim disbursements, the claimant cannot present or analyse settlement offers or pursue entitlement."

3. The interim disbursements must be shown to be necessary;

4. The claim advanced must be meritorious;

5. The exercise of discretion should be limited to exceptional cases;

6. Interim costs are for the purpose of leveling the playing field;

7. Monies may be advanced against an equalization payment.

15 Rogers J. also acknowledged that the granting of interim disbursements must be made in light of the primary objective in family law cases as set out in Rule 2(3) which requires that the procedure be "fair to all parties". Although that rule is most often cited as a basis for proportionality, Rogers J. relied upon this provision to temper the fifth "theme" noted above which requires that the exercise of discretion be limited to exceptional cases. That fifth theme is a requirement for civil cases pursuant to the judgment of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (S.C.C.) at para. 36. Rogers J. noted that she would interpret the *Family Law Rules* to "require the exercise of discretion in rule 24(12) on a less stringent basis than the cases that call for such only

an exceptional cases." She notes that the "discretion should be exercised to ensure that all parties can equally provide or test disclosure, make or consider offers, or possible (sic.) go to trial".

16 I note that there is support for this proposition in the *Okanagan Indian Band* case where Labelle J. noted that at para. 33 that interim costs were "most typically exercised in . . . matrimonial or family cases" and that interim costs will "be granted in family cases where one party is a severe financial disadvantage that may prevent his or her case from being put forward". It appears that in family law cases the issue of "exceptional circumstances" is secondary to the goal of levelling the playing field where one party is at an economic disadvantage, the basis most often cited in the case law to justify an order under Rule 24(12).

17 There was some suggestion by respondent's counsel that the ability of the claimant to repay the funds in the event that her case fails is a further essential factor. This requirement was suggested in *Rosenberg v. Rosenberg*, [2003] O.J. No. 2193 (Ont. S.C.J.). At para. 18 of the case E.M. Macdonald J. suggested that the factors "applicable to an application for interim disbursements" are,

> The merits of the matter, the hardship to the moving party if the relief is not granted and the ability of the moving party to repay any amounts ordered for interim disbursements in the event that the moving party is unsuccessful at trial in achieving at least the amount ordered for interim disbursements.

18 If the suggestion is that the court must find that the moving party is able to repay an order for interim disbursements as a "requirement" for such an order, I respectfully disagree. If the goal is to address economic disadvantage, making ability to repay a requirement then begs the question. If the party requesting interim disbursements was able to repay the disbursements, wouldn't that party be in a position to fund the litigation when the motion is made?

19 It appears that the fundamental basis for ordering interim disbursements is to even the playing field between an impecunious litigant and a much more prosperous opponent. To require the party to have the ability to replay the costs it defeats the purpose of the rule which is to allow an impecunious litigant to pursue a meritorious family law claim. In fact the requirement of Rogers J. that "the claimant must demonstrate that he or she is incapable of funding the requested amounts" would seem to directly conflict the requirement that the impecunious litigant be in a position to repay the amounts in the event of failure. As well, I note that there have been a number of cases which suggest that an equalization payment need not be available at the end of the day to repay the advance of interim costs and disbursements: see *Stuart* at subparagraph 14 of para. 8 and *Ma v. Chao*, 2016 ONSC 585 (Ont. Div. Ct.) at para. 10.

20 I also note that impecuniosity in itself cannot stand alone as a basis for a Rule 21(12) order for costs; other factors are necessary as suggested in *Stuart*. Conversely, then, why should an inability to repay the advanced costs alone then bar a claimant for interim disbursements under rule 24(12)?

21 There is little question that the applicant and moving party in this motion is impecunious and that the playing field between these two parties is not level. No issue was taken to these primary factors by Mr. Zaldin. Instead he based his argument on three issues:

> a. Mr. Zaldin suggests that the the claim for property division is not meritorious. He says that the only legitimate prima facie claim is that of spousal support, assuming that the parties cohabited for 17 years rather than the one year that the respondent suggests;
>
> b. This being the case, spousal support is based upon the respondent's income from disability insurance and investments. That is easy to determine, and there is no need for an income analysis beyond what is set out in his financial statement;
>
> c. The applicant has not sufficiently outlined or proven the expenses or disbursements to be funded through this motion.

22 I will deal with each of these issues in turn.

a. Meritorious Claim

23 It is apparent from the applicant's materials that many of the costs and disbursements claimed surround the property claim being made by the applicant. The respondent states that the applicant's claim is for unjust enrichment and constructive trust are not meritorious considering that Mr. Romanelli's wealth as brought into the relationship consisted largely of an inheritance received from his father who died in 1983. This inheritance included a farm property near Bradford which was sold for development purposes during cohabitation for $13 million.

24 It is clear that a case with little or no chance of success is not a "meritorious claim" for the purposes of Rule 24(12). However this does not mean that the claimant has to prove his or her case prior to obtaining an order for interim fees or disbursements. That would be too high a requirement: if someone has proven their case they would then not necessarily need an order for an advance to prove his or her case. For this reason the case presented at a motion must be a *prima facie* case only. It must be a case which, based upon the facts presented in the affidavits, makes sense to prosecute. It may be close to the test for approval of a legal aid certificate: Would counsel advise a client of modest means to proceed with the claim?

25 However interim fees and disbursements are not meant to fund a fishing expedition: see *McIlvenna v. Pinkowski*, [2010] O.J. No. 3963 (Ont. S.C.J.). In other words, if there is no reasonable case on the face of the facts before the court, interim disbursements should not be granted in order to track down evidence which might in the end prove there to be a meritorious claim. There must be enough on the face of the material filed to allow the court to find that the claims being made by the applicant are reasonable.

26 However I note that the issue of whether a claim is meritorious is a fairly low threshold. In *Rea v. Rea*, 2016 ONSC 382 (Ont. S.C.J.), Douglas J. noted as follows (at para. 24):

> At this early stage in the proceeding there is no reason to conclude that the claims advanced by either party are without merit. All claims advanced by the parties are *prima facie* meritorious at this early stage of these proceedings.

27 In the present case we are also at an early stage in the proceedings. It is clear that the respondent feels that none of the applicant's claims have any merit whatsoever. He claims that the parties only lived together a year. His financial statement does not disclose the assets he brought into the relationship. This may be because the financial statement speaks of a "date of marriage" value which of course is not the case here as the parties did not marry. However, had the financial statement indicated an estimate of the assets brought in, it would be easier to make a determination of the merits of the applicant's claim.

28 In essence the applicant is suggesting that there is a joint family venture which allowed for accrual of assets in the respondent's name throughout the relationship while the applicant ended the relationship with no assets whatsoever. The fact that the applicant ended the relationship with no assets does not in itself make for a meritorious claim. However conversely the fact that the respondent inherited property in 1983 which was sold for $13 million during the relationship does raise issues of whether value was accrued in that property (on which the applicant says she worked) during the relationship. A portion of the proceeds from the sale of this property was used to buy the residence in which the applicant claims a trust interest as a result of unjust enrichment. The evidence indicates that the respondent appears to have been known to the outside world as the applicant's common law spouse and the applicant appears to have been privy to the respondent's business affairs. For example, the applicant appears to have been involved in assisting the respondent's brother in reading through several affidavits used in litigation surrounding one of the corporations in which the respondent has an interest. The respondent acknowledges that the applicant met with their accountant, and states that she, in fact, was able to give instructions regarding the preparation of the parties' income tax returns. [5] All of these factors point to the fact that the applicant appears to have been sufficiently involved in the respondent's business

affairs to present a *prima facie* meritorious claim concerning a joint family venture which may result in a claim for unjust enrichment.

29 Moreover, as outlined below there are a number of corporate actors which in which the respondent is involved. I agree that if the only asset in issue were the respondent's shares in Triple R Ranch, which owned the development property sold for $13 million, there might be no meritorious claim for a share of those funds, because this farm property was part of the inheritance and there was apparently no contribution by anyone to the accrual in value of that land other than its location. [6] However, the respondent also has an interest in Tri Rom Enterprises which, according to the evidence, only began building homes in 1999, well after cohabitation; this property did not arise from the respondent's inheritance alone. As well, the respondent has two numbered companies, the function of which are, as yet, unexplained. It cannot be said that the inheritance alone is the basis of the respondent's assets owned on the date of separation.

30 The applicant does not have to prove her claim for unjust enrichment. She needs to present facts upon which a claim may be based. She has done so concerning the claim for unjust enrichment and in particular respecting the property in which she has registered a Certificate of Pending Litigation. I am not willing to find based upon the evidence before me that the applicant's property claims are without merit. Certainly they would not be dismissed if were there a motion for summary judgment alleging no genuine issue for trial.

31 In any event, the respondent acknowledges a meritorious claim for spousal support. Again this is a *prima facie* case only. However, apart from this acknowledgement, I find that both of the applicant's claims are *prima facie* meritorious and sufficient to support an order for interim disbursements and costs under rule 24(12).

b. Need for interim disbursements

32 The third criteria in the Rogers J. analysis in *Stuart* was that the expenses are necessary in order to prosecute the litigation by the claimant.

33 Mr. Zaldin suggests that the expenses are unnecessary. If it is assumed that the spousal support claim is the only meritorious claim (which I have found not to be the case), then he says that Mr. Romanelli's income determination is simple: he has income from CPP disability as well investment income as reflected in his tax return. There is no need for further analysis in order to determine spousal support. The only real issue is the length of cohabitation.

34 However necessity is not only based upon the complexity of the legal issues to be litigated in the matter. It is apparent that this is hard fought litigation. For example, Mr. Romanelli takes the position that the parties only cohabited a year and accordingly there is no spousal support claim under the *Family Law Act*. He says that the applicant was a tenant and paid him rent.

35 If there is an issue as to what is meritorious in this matter, then the claim that the parties did not cohabit other than for a year is, in fact, questionable on its face. Mr. Romanelli has not provided disclosure proving the purported rent paid by Ms. Romanelli through the 17 years of residence in the respondent's properties. His position flies in the face of evidence given in discoveries conducted during litigation between Mr. Romanelli and one of his brothers, Tony Romanelli. It also flies in the face of a joint declaration of conjugal relationship which was apparently signed by Mr. Romanelli. [7]

36 In a case where there are few, if any, admissions, it is obvious that there will be a need for the applicant to continue to retain counsel in order to prove her case. Litigation where nothing is admitted and everything is denied is expensive and time consuming for counsel. The amount of evidence gathered together by Mr. Sorley in order to prove cohabitation for the purposes of this motion proves how extensive the efforts that Ms. Romanelli will have to take in order to even prove her claim for spousal support.

37 As well, it is clear that there are a number of corporations involved in this proceeding and it is apparent that the respondent's business affairs are complex. There is firstly Triple R Ranch which owned the Bradford farm property that eventually sold for $13 million. The respondent used his share of these proceeds to purchase the property that he presently owns in Gilford. There is Tri Rom Enterprises in which the respondent is a one-third shareholder; that was a construction company for whom Mr. Romanelli worked during cohabition; however, his shares were held in his brother's name to avoid a claim against these shares by Mr. Romanelli's second wife and there is presently litigation between Mr. Romanelli and one of his brothers concerning this corporation. In this litigation, Mr. Romanelli has given inconsistent statements as to the purposes of this litigation. [8]

38 Finally, financial statements of two numbered companies, 2342576 Ontario Limited and 1711887 Ontario Inc., were also included in the disclosure provided by Mr. Romanelli. The former of those companies received the respondent's portion of the funds from the sale of the Bradford farm property.

39 Finally, there are discrepancies as to Mr. Romanelli's income. The credit card statements which had been provided to Mr. Sorley have indicated the expenditures to be well beyond the income that Mr. Romanelli claims that he has in his financial statement. There is an expressed concern that Mr. Romanelli is not being transparent in his income or assets from which income can be produced.

40 Regarding the issue of constructive trust, it is apparent that the parties' financial affairs were intertwined. That is apparent from the respondent's statement that the applicant gave his accountant instructions regarding the filing of his income tax returns as "common law". [9] Ms. Romanelli says that she completed significant improvements to both the Bradford farmhouse and the Gilford property, which Mr. Romanelli denies. Mr. Romanelli's involvement in Tri Rom only occurred after cohabitation, and he stated in in the Statement of Claim in the sibling litigation that he was only involved in Tri Rom in 1996, a year before cohabitation, and only after 1999 did the company begin to construct houses in Bradford, Keswick, Innisfil and Pembroke. That company grew during the period of cohabitation and its value appears to be independent from the inheritance received by Mr. Romanelli and his brothers from their father. These are all issues to be addressed at trial as there are inconsistencies on the evidence provided in this motion, and evidence that conflicts with the position of the respondent that there is no case that there was a joint family venture or unjust enrichment allowing for a trust remedy.

41 It might be suggested that the disclosure requested, including the third party disclosure is excessive and a fishing expedition. However, I go back to Rogers J.'s assertion in *Stuart* that the disbursements are to "primarily ensure that all parties can equally provide or test disclosure, make or consider offers, or possible (sic.) go to trial". The applicant cannot pursue settlement or consider settlement offers without knowing where she stands. The third party disclosure may be necessary to enable the applicant to consider a settlement position apart from litigation. This may, in fact, include valuations of the properties and income of the respondent.

42 In sum, even were spousal support the only meritorious claim, the positions taken by Mr. Romanelli in the litigation are such that Ms. Romanelli will have to continue to retain counsel in order to prove her claim for spousal support. Without assistance from counsel, she would be completely lost and the playing field would be completely uneven. I find that interim fees and disbursements are therefore necessary even were spousal support the only meritorious claim. There is a lack of transparency apparent on the face of the materials filed which leads me to make this finding and to find that these fees and disbursements are necessary.

c. Proof of Interim Fees and Disbursements

43 Respondent's counsel submits that the applicant has failed to adequately prove interim fees and disbursements necessary to continue with this litigation. He points out that without evidence of the fees and disbursements necessary and a proper breakdown of those fees and disbursements (including draft bills of costs) the applicant's motion must fail.

44 The case law appears to confirm that a motion for interim fees and disbursements must contain proper evidence of the reason for the fees and disbursements and the estimated costs of those disbursements. As noted in the *McIlvenna* case above, there must be a purpose behind the fees and disbursements and not just a fishing expedition.

45 In *Hall v. Sabri*, [2011] O.J. No. 4178 (Ont. S.C.J.) the applicant requested interim disbursements and costs. Based upon the lack of evidence provided by valuators or estimates of the cost of litigation, Bielby J. was unwilling to order interim disbursements or costs. He asserted that, "The amount claimed seems to have been pulled out of the air without any evidence of anticipated costs" [para. 78]. The motion was dismissed subject to leave to the applicant to reapply with "proper evidence".

46 In the present case, the applicant deposes that she requires $100,000 to make up the following:

1. Outstanding legal fees and disbursements (unbilled to date) - $52,796.93

2. The cost of a certified business valuation and income analysis - $25,000 (estimate)

3. Long motion for third party disclosure - $10,000

4. Motion to increase spousal support - $3,000 to $6,000

5. Settlement Conference and Trial Management Conference - $8,000 to $10,000

6. Questioning - $8,000 to $15,000

47 She says that these costs do not include the costs of the trial and she wishes to reserve her rights to bring a further motion to fund a trial if necessary.

48 It is concerning that the applicant has not broken down the legal costs already incurred in this litigation, by far the largest item in her list of litigation costs proposed to be funded by the respondent. [10] However, considering the energy that has been expended in gathering together evidence of cohabitation for this motion and meeting the respondent's assertion that the parties cohabited for only a year, the fact that significant costs have been incurred to date is not surprising.

49 The applicant does not provide the name of a proposed business and income valuator or his or her estimate of the anticipated costs; however this may very well be because she had not yet received a business valuation or adequate disclosure in order to estimate the costs of those valuations. The remainder of the figures are estimates of future legal costs. Although they lack specificity they are not what was referred to by Bielby J. as being "pulled out of the air". Although there is no formal bill of costs attached to the applicant's materials, there is a summary of anticipated steps and estimated expense of those steps which was also, at least, part of what was suggested to be necessary in a motion of this nature: see *Harbarets v. Kisil*, [2014] O.J. No. 4239 (Ont. S.C.J.) at para. 5. Indeed, other than fees and disbursements incurred to date, it would be difficult to produce a formal bill of costs as it is unknown exactly how long each of the steps would take.

50 The applicant cannot provide an exact estimate of her future costs as that is necessarily uncertain at this early stage of the litigation. She can only provide her plan of attack and the steps that she wishes to take to bring this matter to the commencement of trial and this she has done. She anticipates that the third party disclosure motion is necessary and supports the need for this in her materials; she deposes that the respondent's brothers will not consent to release of information about either of the corporations that they are involved in and it may very well be that that information is necessary to prove unjust enrichment or the applicant's contribution to any accrual in value of either or both of those assets. The applicant has also noted that questioning and a Settlement Conference and Trial Management Conference will be necessary and none of this is surprising or frivolous considering the nature of this litigation and the position taken by the respondent.

51 To summarize, I have before me a statement as to the legal fees and disbursements already incurred by the applicant as well as an estimate of legal fees and disbursements to be incurred in the future. Sufficient evidence has been supplied by the applicant for this purpose and I so find.

Result

52 We are at the early stages of the proceeding at this point in time. As discussed above, the applicant does not have to prove her case at this early stage; she need only show the *prima facie* meritorious case. The fact that the respondent inherited the assets which he had when the parties commenced cohabitation does not mean that there is no genuine issue for trial; that indeed difficult to determine without an estimate or disclosure of the assets that the respondent owned when the parties commenced cohabitation as compared to what he left the relationship with. Only once those values are proven is the applicant able to properly assess the merits of her property claim.

53 Once the materials are disclosed as requested in the applicant's motion (and in particular the disclosure set out in para. 14 of the Schedule 'A' to the applicant's Notice of Motion) the applicant may very well have to obtain assistance from a business valuator or accountant in order to determine values and to determine accrual and value over the length of the relationship. Certainly it is well known that the farm property in Bradford fetched $13 million when sold for development purposes. I have already commented that the applicant's claim to share in those proceeds may very well be problematic. However, at this point in time because of the deficiencies in the respondent's financial statement, the applicant is unable to rely upon anything other than the relative wealth positions of the parties on the date of separation as well as her contributions during cohabitation to the respondent, the respondent's family and the respondent's business.

54 The applicant has requested $100,000 in interim costs and disbursements. This is large amount. It is largely based upon the applicant's evidence of estimated costs and disbursements of $118,796.93 as set out in her affidavit, taking into account unbilled fees and disbursements presently owing to her lawyers.

55 It is clear that the playing field is not even between these parties. The respondent has assets in excess of $2 million. The applicant has no assets whatsoever and, until lately, subsisted on Ontario Works assistance. Her income is only recently slightly increased by the $1,000 per month spousal support award of Graham J. from November 2016.

56 It is also apparent that the applicant will not be able to prosecute this matter without an award of interim disbursements and fees.

57 E.M. Macdonald J. in *Rosenberg* stated that he had not seen a request for interim disbursements and fees in excess of $35,000. However that case was heard in 2003 and since then the complexion of things have changed. In *Rea v. Rea*, Douglas J. surveyed a number of interim disbursement awards. Out of the six cases reviewed, there is were examples of a range of interim disbursements awarded in various cases of $100,000 to $500,000. Douglas J. awarded $250,000 in *Rea*. The *Rosenberg* figure of $35,000 is now out of date.

58 The amounts set out for legal fees in the applicant's affidavit are reasonable estimates of the cost of each of the steps noted in that affidavit. It is unknown what a business valuator will cost but it is apparent to me that some expert assistance will be necessary in order to provide the applicant with advice and guidance as to the case that she is to make leading up to settlement and/or settlement or trial.

59 I note the words of Mesbur J. in *Gold v. Gold*, [2009] O.J. No. 4000 (Ont. S.C.J.) where the wife claimed $200,000 in advance costs for trial. Mesbur J. described this amount as "staggering" and stated that to grant this amount would "do more than level the playing field; it would give the wife *carte blanche* for the trial." She also noted that the wife had available to her $90,000 in assets as well as payments to be received for retroactive support of approximately $80,000, none of which is available to the applicant at present; she has no assets or resources whatsoever. Mesbur J. granted the wife $50,000 for advanced costs.

60 I agree with the comments of Mesbur J. *Carte blanche* is not what is intended by the rule. The rule is intended to level the playing field and not to cover all anticipated costs of the applicant leading up to the trial.

61 I cannot say how the more than $50,000 in fees and disbursements was expended by the Sorley & Still firm as I did not receive a Bill of Costs or dockets to justify this amount. I also do not have any evidence other than the judicial notice that I might take of the actual costs of a business valuation. A more reasonable amount is $10,000 for an expert to review the evidence on a preliminary basis and provide advice as to the income of the applicant and the value of assets and as to the actual costs necessary to provide clarity to the wife. This will only be available once the parties have argued disclosure, including presumably a request by the applicant to provide the valuations requested in paragraphs 5 and 6 of the applicant's notice of motion. That motion is yet to be argued.

62 Taking this $10,000 figure for the business valuator into account, the anticipated steps to be taken by the applicant to continue to a trial management conference may amount to just over $50,000 based upon the anticipated costs set out in the applicant's affidavit.

63 Considering the failure of the applicant to fully account for the costs expended to date, and the uncertainties surrounding a business and income valuation, the amount of $100,000 appears to be excessive. A more reasonable figure for interim fees and disbursements would appear to me to be $60,000. This accounts for much of the costs of the anticipated steps to be taken and allows for something for the business valuator.

64 There shall therefore an order that the respondent pay the applicant $60,000 for advance costs and disbursements. This amount is a loan by the applicant to the respondent and shall be accounted for in the final disposition at trial at the discretion of the trial judge.

65 This order does not specifically address the full costs of a certified business valuator to the applicant, or the costs of trial. This order is without prejudice to the applicant's right to bring a further motion for an advance prior to trial or upon receipt of an estimate of costs provided by a certified business valuator, as well as evidence confirming the necessity of such a valuation.

66 All other issues in the motion and counter-motion adjourned to a date for a long motion to be set through the office of the trial coordinator in Barrie.

67 The parties may speak to the issue of costs on a ten day turnaround with the applicant and then the respondent providing costs submissions. Costs submissions to be no more than 5 pages in length not including Bills of Costs and any offers to settle the motion.

Motion granted in part.

Footnotes

1 See the *Family Law Act*, R.S.O. 1990, c. F.3, s. 29

2 *Consolidated Practice Direction Concerning Family Cases in Central East Region* (May 1, 2016)

3 See *Rules of Professional Conduct* (Law Society of Upper Canada, 2000), s. 5.2

4 O. Reg. 114/99

5 The applicant denies this to be the case and says that the parties only met with the accountant together.

6 There was, however, another $60,000 paid in insurance proceeds for the farmhouse on that property which burned and to which the applicant says she added value.

7 I understand that Mr. Romanelli denies that this was his signature; however the signature on the declaration which is an exhibit to the applicant's affidavit sworn January 30, 2017 appears to be that of the respondent as it appears on his affidavit sworn in these proceedings as well as his affidavit sworn in the civil proceedings on July 11, 2013.

8 Mr. Romanelli originally said that this litigation involved a claim for expenses in a company in which he did not have an interest: see the respondent's answer at para. 13 and 18; however later in the material Mr. Romanelli acknowledges that he is a one-third shareholder in that company: see paragraph 7 of the Statement of Claim attached as Ex. A to his affidavit sworn January 13, 2017.

9 The statement from the accountant does not necessarily support Mr. Romanelli's assertion; in that letter filed as Ex. G to his January 13, 2017 affidavit seems to state that the accountant accepted Ms. Romanelli's instructions respecting the filing of her income tax returns only.

10 There was a summary of incurred fees passed up to me during initial argument of this motion on January 19, 2017; however, this was part of the applicant's solicitor's affidavit and I have disregarded that evidence as a result. No such summary was made a part of the applicant's reply affidavit sworn on January 30, 2017 and no time sheets or dockets were filed as exhibits to that affidavit justifying the legal costs and disbursements incurred to date.

TAB 7

2005 CarswellOnt 917
Ontario Superior Court of Justice

Firenze Exteriors Inc. v. Westwing Construction Group Inc.

2005 CarswellOnt 917, [2005] O.J. No. 934, [2005] O.T.C. 165,
137 A.C.W.S. (3d) 1047, 29 R.P.R. (4th) 179, 42 C.L.R. (3d) 129

FIRENZE EXTERIORS INC., THE OAK STAIR LIMITED, MOSE DRYWALL SYSTEMS LIMITED, DEARIE MARTINO CONTRACTORS LTD. and PRIMELINE PLUMBING LTD. and ANGELO LAFANTI cob as ONTARIO CONCRETE & DRAIN WESTWING et al v. WESTWING CONSTRUCTION GROUP INC., ANTHONY CIPRIANI, GENARO CIPRIANI, ADA CIPRIANI, JOANNA CIPRIANI, DOMENICO CIPRIANI, NOTTING HILL DEVELOPMENTS INC., HIGHVIEW DEVELOPMENTS INC. and ANTHONY CIPRIANI, GENARO CIPRIANI, ADA CIPRIANI, JOANNA CIPRIANI, DOMENICO CIPRIANI operating as NOTTING HILL EQUIPMENT

Master Albert

Heard: February 2, 2005
Judgment: March 9, 2005
Docket: 04-CV-270269CM1

Counsel: J. Lofaso, R. Hammond for Plaintiffs, Firenze et al
J. Diamond, M. Filderman for Defendants, Westwing et al

Subject: Property; Contracts; Corporate and Commercial; Estates and Trusts

Headnote

Real property --- Certificate of pending litigation (lis pendens) — Miscellaneous issues

Subcontractors provided construction materials and services to general contractor of construction project for principals — Subcontractors alleged that general contractor and principals diverted funds away from project in order to purchase property and build private residence for principals — Subcontractors, who had not yet been paid in full for their work, brought action against general contractor and principals claiming breach of trust in amount of $1,000,000 — Subcontractors were also granted certificate of pending litigation (CPL) against principals' residence on interim basis pending final disposition of action — Subcontractor's motion for CPL came back before court to be argued on its merits — CPL upheld — General contractor and principals had burden of proving essential elements necessary to remove CPL since knowledge of source of funds used to purchase property and build residence was particularly within their knowledge — Subcontractors' evidence, taken with general contractor and principals' lack of evidence as to source of funds used to purchase property and build residence, reasonably supported finding that trust moneys were diverted — Subcontractors raised triable issue that, if successful, entitled them to equitable interest in principals' residence — General contractor and principals failed to prove that funds other than those from trust were used to purchase property and build residence — CPL was to remain on principals' residence pending final disposition of subcontractors' action or posting of amount claimed as trust moneys with court accountant.

Construction law --- Construction and builders' liens — Trust fund — Breach of statutory trust

Subcontractors provided construction materials and services to general contractor of construction project for principals — Subcontractors alleged that general contractor and principals diverted funds away from project in order to purchase property and build private residence for principals — Subcontractors, who had not yet been paid

in full for their work, brought action against general contractor and principals claiming breach of trust in amount of $1,000,000 — Subcontractors were also granted certificate of pending litigation (CPL) against principals' residence on interim basis pending final disposition of action — Subcontractor's motion for CPL came back before court to be argued on its merits — CPL upheld — General contractor and principals had burden of proving essential elements necessary to remove CPL since knowledge of source of funds used to purchase property and build residence was particularly within their knowledge — Subcontractors' evidence, taken with general contractor and principals' lack of evidence as to source of funds used to purchase property and build residence, reasonably supported finding that trust moneys were diverted — Subcontractors raised triable issue that, if successful, entitled them to equitable interest in principals' residence — General contractor and principals failed to prove that funds other than those from trust were used to purchase property and build residence — CPL was to remain on principals' residence pending final disposition of subcontractors' action or posting of amount claimed as trust moneys with court accountant.

MOTION for certificate of pending litigation.

Master Albert:

1 The plaintiff subcontractors provided construction materials and services to the defendant Westwing's Islington Project. In this action they claim breach of trust against Westwing, the general contractor, and its principals, the Cipriani's, in the amount of $1,000,000.00.

2 The plaintiffs allege that the defendants diverted these funds to purchase a property and build a home at 76 Forest Fountain Drive, Kleinburg, Ontario (the "Cipriani residence"). Title to the Cipriani residence is held by Ada Cipriani, Anthony Cipriani's mother. The plaintiffs claim they are beneficiaries of the trust and seek an accounting and a tracing order.

3 On September 29, 2004 the court ordered a certificate of pending litigation (CPL) against the Cipriani residence on an interim basis, and scheduled the main motion for hearing on February 2, 2005.

Preliminary Issue #1: Appeal pending

4 Counsel advise the court that the defendants appealed the September 29, 2004 order for an interim CPL and question whether this motion should be deferred until after the appeal. The issue on the interim motion was whether an order preserving the status quo was necessary until the motion could be argued in full on its merits. The issue on the main motion is whether it is appropriate to order a CPL until final disposition of the action. These are two very different issues. The main motion can proceed.

Preliminary Issue #2: Burden of proof

5 Counsel disagree as to which party has the burden of proof. Generally a certificate of pending litigation is ordered in the first instance on an *ex parte* basis, and the motion to lift it is brought by the defendant. Master Donkin, in *Homebuilder Inc. v. Man-Sonic Industries Inc.* [1], said that on a motion by the plaintiff on notice to the defendants for a certificate of pending litigation the court should consider "all the elements which would be considered if the defendant were moving to discharge a certificate already granted".

6 In *Snell v. Farrell*[2] Mr. Justice Sopinka summarized the law on burden of proof as follows:

In a civil case the two broad principles are:

1. that the onus is on the party who asserts a proposition, usually the plaintiff;

2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

7 Applying *Snell v. Farrell, supra*, the knowledge of the source of funds used to purchase the land and build the Cipriani residence is particularly within the knowledge of the defendants. As in the *Homebuilder* case, *supra*, the defendant must establish the essential elements necessary to remove the CPL. In the absence of evidence as to the source of funds the court is entitled to draw an adverse inference.

The Construction Lien Act creates a statutory trust

8 Section 8 of the *Construction Lien Act* creates a statutory trust for all payments received by a contractor until the subcontractors are paid. Under the *Construction Lien Act* a contractor who receives payment for a project must apply it first to pay all subcontractors who provided services or materials on the project. This trust takes priority over the contractor paying himself. A contractor who fails to preserve and properly apply trust moneys is in breach of a statutory trust.

9 Where breach of trust is alleged the initial onus is on the subcontractor to prove the existence of the trust by showing that:

(i) the general contractor received money from the owner for the project,

(ii) the subcontractor supplied services or materials, and

(iii) the subcontractor was not paid.

The onus then shifts to the contractor to show that it applied the trust moneys as required by the *Construction Lien Act*. The contractor is accountable and must justify any expenditure of the funds. Failure to do so gives rise to liability for breach of trust (*St. Mary's Cement Corp. v. Construc Ltd.* [3]

10 A trustee has a higher duty to a beneficiary than does a debtor to a creditor. A trustee is in a fiduciary relationship. If the trustee converts assets to his own use then the beneficiary is entitled to trace the assets and preserve that to which the assets were converted. Until that issue is tried, a CPL operates as notice to any potential purchaser or mortgagee of a competing claim to an interest in the property to which the trust moneys were diverted.

Applying relevant factors

11 Section 103(6) of the *Courts of Justice Act* applies. A CPL may be discharged where the plaintiff claims a sum of money as an alternative, does not have a reasonable claim to an interest in the land, or can be adequately protected by another form of security. The relief is discretionary and the court may impose terms.

12 The plaintiffs argue that they have an interest in the Cipriani residence because they supplied materials and services directly to the property and because trust funds were diverted from the Islington Project to build the Cipriani's residence.

Is there a triable issue as to an interest in land?

13 The equitable interest in land asserted by the plaintiffs is founded in the statutory trust funds which the plaintiffs argue were diverted from the Islington Project to the Cipriani residence to defeat the plaintiff's claim for payment. The plaintiffs also claim an interest in land arising from their work on the Cipriani residence. There is admissible evidence of only the plaintiff Oak Stair on this issue [4]. Mr. Bonofiglio states that his company provided materials and services directly to the Cipriani residence. The portion of this affidavit that refers to other plaintiffs working on the Cipriani residence is inadmissible as being contrary to rule 39.01(4).

14 In *G.P.I. Greenfield Pioneer Inc. v. Moore*, [2002] O.J. No. 282 (Ont. C.A.) at paragraph 18, Mr. Justice Borins noted that a certificate of pending litigation should not be discharged where "there is a triable issue as between the parties

as to an interest in the lands in question". The court need not weigh the evidence or determine what the interest in land might be, but only that there is a triable issue.

15 In *Transmaris Farms Ltd. v. Sieber*, [1999] O.J. No. 300 (Ont. Gen. Div. [Commercial List]), Mr. Justice Blair applied earlier cases[5] when he said:

> Under the CJA, section 103, a certificate of pending litigation may be issued by the court where a proceeding is commenced in which an interest in land is in question...(I)f reasonable claims are put forward in an action for a constructive trust or a fraudulent conveyance in respect of a property, a certificate of pending litigation may issue pending trial. The party seeking the certificate need not prove its case at this point. The test is met where there is sufficient evidence to establish a reasonable claim to an interest in the land based upon the facts and on which the plaintiff could succeed at trial.

16 An interest in land sufficient to sustain a CPL must be supported by some evidence. Westwing argues that this CPL is nothing more than pre-judgment execution of the claim.

17 Ada Cipriani gave no direct evidence as to the source of funds used to purchase and construct her home. Best evidence would have been her own statement as to the source of the money used to acquire and build the Cipriani residence. Instead of putting "her best foot forward" the defendant instead challenged the plaintiff on the burden of proof issue.

18 This lack of evidence must be considered together with Anthony Cipriani's evidence. He swears that he was discharged from bankruptcy in February 2002, that he had no home or funds to buy a residence, that his mother purchased the Cipriani residence and he built a house on it for her and that his mother insisted that he and his family move in.

19 In September 2004 the defendant advised the court that better evidence was not available due to time sensitive circumstances. However, at the hearing in February 2005 no better evidence was filed as to the source of funds used to acquire and build the Cipriani residence.

20 Paragraph 30 of the Amended Statement of Claim alleges that the trust moneys were diverted to purchase and construct the Cipriani residence. The plaintiffs' evidence on this motion, taken together with the lack of evidence from the defendants as to the source of funds used, could reasonably support a finding that trust moneys were diverted to purchase and construct the Cipriani residence.

21 Applying *GPI Greenfield* and *Transmaris, supra*, I find that the plaintiffs have produced sufficient evidence to establish a reasonable claim to an equitable interest in the Cipriani residence.

22 Master Donkin described relevant factors in *572383 Ontario Inc. v. Dhunna*[6] The list is not exhaustive. Some of these factors apply to the present case and are discussed seriatim:

> (i) *whether the land is unique:* There is no evidence of any unique feature of the Cipriani residence. It is unique only because it is the property to which allegedly trust funds were diverted and at least one plaintiff provided materials and services.
>
> (ii) *whether there is an alternative claim for damages*: The plaintiffs claim damages in the alternative.
>
> (iii) *the ease or difficulty in calculating damages*: Damages are quantifiable.
>
> (iv) *whether damages would be a satisfactory remedy*: Damages would suffice if the defendants can pay.
>
> (v) When the interim motion was heard there was a willing purchaser. That is no longer the case.

the presence or absence of a willing purchaser:

(vi) *balancing the harm done to the defendant if the CPL remains, or to the plaintiff if it is removed:* There is no evidence of harm to the defendant if the CPL remains registered against the Cipriani residence. The potential harm to the plaintiff if the CPL is removed is greater. If the plaintiff can establish that trust moneys were used then unlike an ordinary creditor the plaintiff is entitled to some form of priority or enhanced security.

23 Notwithstanding that there is an alternative claim for damages, that damages are quantifiable and would suffice, I nevertheless find that these factors are outweighed by the trust and tracing elements of the claim which give rise to an equitable interest in the Cipriani residence.

24 My conclusion in the case before me is reinforced by a review of a case dealing with a certificate of pending litigation involving a claim for breach of trust arising from construction lien legislation in Manitoba. I found this case after the hearing, but do not need to hear from counsel as it merely reinforces the conclusion I had already reached.

25 In *Elgin Enterprises Inc. (Receiver of) v. Sopko*[7] the plaintiff alleged that certain officers of a contractor had diverted work and materials to their personal residences, resulting in lies and the failure of its one legitimate project. A certificate of pending litigation was granted and registered against the personal residences. The order granting the CPL was upheld on appeal from a Master's decision, partly on the basis of the trust established under the *Builders Lien Act*[8]

Conclusion

26 If the plaintiffs can prove at trial that trust funds owing to them were converted to the Cipriani's own use before the subcontractors were paid in full for the Islington Project, then they will succeed at trial. They have raised a triable issue which, if successful, entitles them to an equitable interest in the Cipriani residence.

27 The defendants have failed to discharge the onus on them to satisfy the court that the Cipriani property was purchased and the home constructed from funds raised through sources other than the trust moneys from the Islington Project.

28 In the circumstances of this case and for the reasons given the certificate of pending litigation shall remain on the Cipriani residence, Parcel 37-1, Section 65M2928, Lot 37, Plan 65M2928, in the City of Vaughan, in the Regional Municipality of York, designated as P.I.N. 03349-0080 (LT), pending final disposition of this action or the posting with the Accountant of the Superior Court of Justice the amount claimed in this action as trust moneys.

29 Accordingly, *THIS COURT ORDERS:*

1. The certificate of pending litigation shall remain on the Cipriani residence known municipally as 76 Forest Fountain Drive, Kleinburg, Ontario, and described legally as Parcel 37-1, Section 65M2928, Lot 37, Plan 65M2928, in the City of Vaughan, in the Regional Municipality of York, designated as P.I.N. 03349-0080 (LT), pending final disposition of this action or the posting[9] with the Accountant of the Superior Court of Justice the amount claimed in this action as trust moneys.

2. If the parties are unable to agree on costs of this motion then brief written submissions may be filed, with the plaintiffs serving their submissions on costs by March 16, 2005 and the defendants serving their submissions on costs by March 23, 2005, with all costs submissions filed with my registrar[10] on March 24, 2005.

3. The plaintiff shall serve a copy of this disposition on the mortgagee.

Order accordingly.

Footnotes

1 (Ont. Master).

2 (S.C.C.) at paragraph 16

3 (Ont. Gen. Div.) (per Molloy, J.).

4 Affidavit of Frank Bonofiglio sworn Sept 14, 2004, paragraph 5; Amended Statement of claim, paragraph 28.

5 *Vettese v. Fleming*, [1992] O.J. No. 1013 (Ont. Gen. Div.); *931473 Ontario Ltd. v. Coldwell Banker Canada Inc.* (1991), 5 C.P.C. (3d) 238 (Ont. Gen. Div.) at pages 257-261.

6 (1987), 24 C.P.C. (2d) 287 (Ont. Master) at pages 290 and 291.

7 (1991), 46 C.L.R. 193 (Man. Q.B.)

8 R.S.M.1987, c.B91,C.C.S.M., c.91.

9 Funds may be posted by cash, bond or letter of credit.

10 Fax to Registrar A. Bidlofsky at 416-326-5416.

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

v.

TEXTBOOK (256 RIDEAU STREET) INC.

Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE PLAINTIFF
(Motion for Certificates of Pending Litigation – Returnable May 16, 2017)

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