

ONTARIO

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiff

- and -

JOHN DAVIES and AEOLIAN INVESTMENTS LTD.

Defendants

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE DIVISIONAL COURT

THE DEFENDANTS, John Davies and Aeolian Investments Ltd., will make a motion to a panel of the Divisional Court, in writing without the attendance of parties of lawyers, on a date to be fixed by the Registrar, in accordance with Rule 62.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing.

THE MOTION IS FOR:

1. An Order granting the Defendants leave to appeal to the Divisional Court from the decision of the Honourable Justice Myers dated August 30, 2017 which granted the Plaintiff's

motion for, amongst other things, an interlocutory Mareva injunction as against the Defendants (the “**Injunction Motion**”);

2. Costs of this motion and of the Injunction Motion to be reserved to the panel of the Divisional Court hearing the appeal; and

3. Such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The Defendant John Davies was the director and officer of the real estate development companies represented by the Plaintiff (the “**Receivership Companies**”). Each of the Receivership Companies borrowed funds from a number of trustee corporations (the “**Trustee Corporations**”) to develop real estate projects, pursuant to loan agreements between the parties. These borrowed funds were to be used to fund predevelopment expenses and advance the projects to construction, at which point construction financing would be obtained.

2. The sole director of the Trustee Corporations was Raj Singh, who is not a party to the within litigation. Mr. Singh was also President of Tier 1 Transaction Advisory Services Inc. (“**Tier 1**”), which raised funds for the Trustee Corporations from the public. The Receivership Companies had no relationship with the individuals who invested in the Trustee Corporations; their only relationship was with the Trustee Corporations as borrower.

3. The Receivership Companies operated as an umbrella organization, working to develop all of the projects in parallel. Between 2011 and 2016, the Defendants worked to advance the projects through predevelopment and towards construction, adding incremental development

value to the properties. During that period, for their work, the Defendants earned development management fees which were disclosed in detailed pro formas provided to the Trustee Corporations before any funds were advanced to the Receivership Companies.

4. From time to time, the Receivership Companies also made intercompany loans to pay liabilities as they came due until such time as additional financing was available. The Trustee Corporations consented to these loans, and were therefore permitted under the loan agreements. Each loan was recorded in the books and records of the Receivership Companies.

5. In October 2016, the Financial Services Commission of Ontario suspended Tier 1's operations. Grant Thornton Limited was subsequently appointed trustee over the Trustee Corporations. The Receivership Companies were unable to raise additional funds and defaulted on their loan agreements with the Trustee Corporations. Grant Thornton Limited applied to have the Plaintiff appointed as receiver of the Receivership Companies.

6. The Plaintiff, on behalf of the Receivership Companies, commenced the within action in June 2017 claiming, amongst other things, fraud and breach of fiduciary duty and alleging, amongst other things, that the development management fees were secretly and improperly paid, and that the intercompany loans were prohibited by the loan agreements with the Trustee Corporations. The Plaintiff also obtained an interim Mareva injunction against the Defendants without notice, which was extended on an interim basis on a number of occasions.

7. On August 30, 2017, the Injunction Motion was heard before the Honourable Justice Myers in which the Plaintiff sought to extend the Mareva injunction on an interlocutory basis pending a final disposition of the within action. That same day, Justice Myers granted the order sought on the basis of a handwritten endorsement (the "**Order**"). The Order also extended the

interlocutory Mareva injunction to Judith Davies (Mr. Davies' wife), and to Mr. and Mrs. Davies in their capacities as Trustees of the Davies Family Trust and the Davies Arizona Trust.

8. There is good reason to doubt the correctness of the Order:

- (a) A Mareva injunction is a drastic and extraordinary remedy, and constitutes an exception to the general rule that there can be no execution before judgment. In order to obtain a Mareva injunction, the moving party must establish, amongst other things, that there is a strong *prima facie* case on the merits. Courts have equated this standard to the moving party establishing that it is "clearly right" in its allegations, or that it is "almost certain to succeed at trial".¹
- (b) In making the Order, the motions judge failed to properly examine and consider the constituent elements of each cause of action pleaded by the Plaintiff and whether the Plaintiff was almost certain to succeed on each of those elements. In doing so, the motions judge erred in his decision-making process and failed to give sufficient reasons for his decision.
- (c) The motions judge also erred by drawing speculative conclusions and failing to consider or rely upon the uncontradicted evidence before him, including in the following instances:
 - (i) Concluding that "instead of using the funds for each corporation's corporate purpose, Mr. Davies paid himself and cohorts fees and dividends", and failing to consider or rely upon the uncontradicted evidence that (a) substantial funds were spent on developing the projects in

question and significant development work was completed, which work increased the value of the development properties, and (b) the management fees and dividends were disclosed to and approved by the Trustee Corporations;

- (ii) Concluding that the Trustee Corporations “lent the investors’ funds to the developers ostensibly on a secured basis to fund the construction of 7 separate projects” and that “Tier 1 raised funds from real people on the basis that the funds would be lent to a developer on a secured basis to fund a building” [emphasis added], and failing to consider or rely upon the uncontradicted evidence that investors were advised that the loaned funds would be used for pre-development costs, not construction costs;
- (iii) Concluding that the intercompany loans made between the Receivership Companies were “not real loans” and that “there was no expectation of repayment”, and failing to consider or rely upon the uncontradicted evidence that the intercompany loans were known to and authorized by the Trustee Corporations, recorded in the financial books and records of the Receivership Companies, and were expected to be repaid once construction financing was secured;
- (iv) Concluding that “construction financing is used to build not to re-pay old debt...”, in the absence of any industry evidence regarding the permissible uses for construction financing; and

¹ *SLMsoft.Com Inc. v. Rampart Securities Inc.*, 2004 CanLII 6329 (ONSC) at para. 14.

- (v) Concluding that “Singh [the sole director of the Trustee Corporations] is not arm’s length [and] I doubt he could unilaterally give a valid consent given his personal conflicts of interest”, and failing to consider or rely upon the uncontradicted evidence that the only relationship between the Defendants and Mr. Singh was that of arms-length borrower and lender – and in the absence of any evidence from Mr. Singh which evidence was entirely in the control of the Plaintiff.
- (d) In granting the Order against Judith Davies without providing any analysis regarding whether the Plaintiff might succeed against her at trial, the motions judge failed to give sufficient reasons for his decision regarding Mrs. Davies.
- (e) The motions judge erred in dispensing with the need to require an undertaking as to damages from the Plaintiff on the basis that it has “no skin i
- (f) n the game” and creating a novel legal theory that the undertaking would cause more harm than good when there was no factual basis in the evidence to support such a conclusion.
- (g) The motions judge erred in awarding substantial indemnity costs when counsel for both parties after being asked about costs at the hearing had advised the motions judge that the costs should only be addressed after his decision on the merits was released.

9. The proposed appeal involves matters of such importance to the administration of justice that leave to appeal should be granted:

- (a) The Mareva injunction granted by the Order is a rare and extraordinary remedy, and it is in the interest of both the public and the administration of justice to ensure that such remedies are only granted after a careful consideration of the facts and a detailed analysis of the legal issues at play;
- (b) Permitting the Order to stand in light of the errors in the motion judge's decision-making process and the lack of sufficient reasons regarding the legal grounds that the Plaintiff advanced would result in a clear injustice and reflect negatively upon the administration of justice;
- (c) Dispensing with the undertaking as to damages requires much more detailed legal articulation given the extraordinary impact of a Mareva injunction should the Plaintiff not succeed at trial;
- (d) The impact of the Order on the Defendants is substantial as it essentially renders Mr. Davies unable to carry on business or to provide for his family, which factors the motions judge ignored; and
- (e) It is inappropriate for the motions judge to have made an award of costs on a substantial indemnity basis without counsel first having the opportunity to make submissions to the Court on the matter, particularly where counsel for both parties had advised the Court that the issue of costs should only be addressed after a decision on the merits.

10. The proposed questions for consideration by the Divisional Court should leave to appeal be granted include the following:

- (a) Can an interlocutory Mareva injunction be granted in circumstances where the motions judge did not examine the constituent elements of the causes of action pleaded to determine whether the Plaintiff was likely to succeed at trial?
 - (b) Did the motions judge fail to provide adequate reasons in granting the Order?
 - (c) Did the motions judge err in drawing speculative conclusions that were inconsistent with the uncontradicted evidence before him?
 - (d) Did the motions judge misarticulate the test for dispensing with an undertaking for damages?
 - (e) Did the motions judge err in making a decision regarding costs in circumstances where both parties agreed that costs would be addressed after a decision on the merits was released?
11. Section 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.
 12. Rules 1.04, 61.03 and 62.02 of the *Rules of Civil Procedure*; and
 13. Such further and other grounds as counsel may advise and this Honourable Court may accept.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. The Order and Endorsement of the Honourable Justice Myers dated August 30, 2017;

2. The Motion Records filed by the Plaintiff and the Defendants on the Injunction Motion;
and

3. Such further and other evidence as counsel may advise and this Honourable Court may
permit.

September 13, 2017

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Plaintiff

and

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Defendant

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Proceeding commenced at TORONTO

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