

ONTARIO
DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiff
(Respondent)

- and -

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

Defendants
(Appellants)

**FACTUM OF JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.
(Motion to Admit Fresh Evidence)**

October 12, 2018

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PART I – OVERVIEW

1. This factum is filed by John Davies and Aeolian Investments Ltd. (“**Aeolian**”, and together with Mr. Davies, the “**Appellants**”) in support of their motion to admit fresh evidence in their appeal before this Honourable Court.

2. The Fresh Evidence (as defined below) is properly admissible as it did not exist, or could not have been reasonably adduced, at the time of the motion hearing underlying this appeal. The Fresh Evidence is credible, potentially decisive and will impact this Honourable Court's decision as to whether to continue the Mareva injunction against the Appellants. In any event, given the draconian nature of this remedy and the potential impact of this appeal on the Appellants, this Honourable Court should exercise its discretion to admit the Fresh Evidence.

PART II - FACTS

Background

3. On August 30, 2017, a Mareva injunction was granted by the Honourable Justice Myers (the "**Motions Judge**") against the Appellants and certain other defendants in this action, including Judith Davies (Mr. Davies' wife), on an interlocutory basis pending a final disposition of the within action (the "**Mareva Order**").

Order of Justice Myers dated August 30, 2017, Motion Record, Vol. 2, Tab 6.

4. In his endorsement granting the Mareva Order, the Motions Judge noted that Mr. Davies had recently listed his house for sale (the "**King City Property**") despite the existence of a prior interim Mareva injunction. The Motions Judge concluded in his endorsement that he had "no hesitation finding a proven risk of dissipation given the listing of the house in [the] face of a Mareva", and also noted that based on the evidence before him, "there may well be hidden pools of funds yet undiscovered".

Endorsement of Justice Myers dated August 30, 2017, Motion Record, Vol. 2, Tab 7, pp. 431-432.

5. Leave to appeal the Mareva Order was granted on January 19, 2018.

Fresh Evidence

6. The Affidavits of John Davies sworn November 30, 2017 (the “**First Davies Affidavit**”) and February 8, 2018 (the “**Second Davies Affidavit**”, and together, the “**Davies Affidavits**”), the Affidavit of Brian Moskowitz sworn December 7, 2017 (the “**Moskowitz Affidavit**”) and the Affidavit of Alicia Haggart sworn October 11, 2018 (the “**Haggart Affidavit**”) contain fresh evidence that was not before the Motions Judge, but which has subsequently become available and is responsive to the above conclusions of the Motions Judge.

7. With respect to the listing of the King City Property, the First Davies Affidavit, the Moskowitz Affidavit and the Haggart Affidavit contain the following fresh evidence:

- (a) Mr. Davies had listed the King City Property for sale with the consent of the lender, Moskowitz Capital Mortgage Fund II Inc. (the “**Lender**”), who had forbore on its enforcement rights to allow Mr. Davies to try to sell the King City Property;
- (b) At the request of the Motions Judge, Mr. Davies proposed a sales process for the King City Property with the support of the Lender, which was approved on April 19, 2018 by the Motions Judge;
- (c) Mr. Davies will not receive any proceeds from the sale of the King City Property, as the anticipated sale proceeds were less than the debts owed to the Lender and to the Canada Revenue Agency (pursuant to liens registered on title to the property); and
- (d) In August 2018, the Lender entered into an agreement to sell the King City Property via power of sale, with the consent of the Receiver.

Affidavit of John Davies sworn February 8, 2018, Motion Record, Vol. 2, Tab 3.

Affidavit of Brian Moskowitz sworn December 8, 2017, Motion Record, Vol. 2, Tab 4.

Agreement of Purchase and Sale dated August 22, 2018, Exhibit "C" to the Affidavit of Alicia Haggart sworn October 12, 2018 ("**Haggart Affidavit**"), Motion Record, Vol. 2, Tab 5C.

Email correspondence dated August 23-30, 2018, Exhibit "D" to Haggart Affidavit, Motion Record, Vol. 2, Tab 5D.

8. With respect to the possibility that the Appellants had hidden assets, the First Davies Affidavit and the Haggart Affidavit contain the following fresh evidence:

- (a) Following the Mareva Order hearing, in reviewing documentation produced by the Appellants, the Receiver found historic net worth statements prepared by Mr. Davies that included assets that were not contained in Mr. Davies' then-current asset and liability statements; and
- (b) In response to the Receiver's inquiries, on October 16, October 23, November 1 and November 9, 2017, Mr. Davies provided detailed and extensive information in relation to his assets and liabilities, as well as those of Aeolian and Mrs. Davies. This disclosure confirmed that the Appellants have no hidden assets or pools of funds.

Affidavit of John Davies sworn November 30, 2017 ("**First Davies Affidavit**"), Motion Record, Vol. 1, Tab 2.

Letter from Jonathan Bell to Michael Beeforth dated September 11, 2017, Exhibit "A" to Haggart Affidavit, Motion Record, Vol. 2, Tab 5A.

Letter from Michael Beeforth to Jonathan Bell dated October 16, 2017, Exhibit "B" to First Davies Affidavit, Motion Record, Vol. 1, Tab 2B.

Email correspondence between Sean Zweig and Michael Beeforth dated October 23, 2017, Exhibit "D" to First Davies Affidavit, Motion Record, Vol. 1, Tab 2D.

Letter from Michael Beeforth to Jonathan Bell dated November 1, 2017, Exhibit "C" to First Davies Affidavit, Motion Record, Vol. 1, Tab 2C.

Letter from Jonathan Bell to Michael Beeforth dated November 9, 2017, Exhibit "A" to First Davies Affidavit, Motion Record, Vol. 1, Tab 2A.

Letter from Michael Beeforth to Jonathan Bell dated November 30, 2017, Exhibit "B" to Haggart Affidavit, Motion Record, Vol. 2, Tab 5B.

PART III – LAW AND DISCUSSION

9. Section 134(4)(b) of the *Courts of Justice Act* (Ontario) provides as follows with respect to the introduction of fresh evidence:

134(4) Unless otherwise provided, a court to which an appeal is taken may, in the proper case,

...

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(4)(b).

10. Rule 61.16(2) of the *Rules of Civil Procedure* (Ontario) provides as follows with respect to a motion under s. 134(4)(b) of the *Courts of Justice Act*:

61.16(2) A motion under clause 134(4)(b) of the Courts of Justice Act (motion to receive further evidence) shall be made to the panel hearing the appeal.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 61.16(2).

11. The test for the introduction of fresh evidence on appeal is set out by the Supreme Court of Canada in *R. v. Palmer*:

- (a) generally evidence should not be admitted if by due diligence it could have been adduced at trial;
- (b) the evidence must be decisive or potentially decisive;
- (c) the evidence must be credible;
- (d) if believed, the evidence, taken with the other evidence, could be expected to affect the result.

R. v. Palmer, 1979 CarswellBC 533, [1980] 1 S.C.R. 759 at para. 22.

Monteiro v. Toronto Dominion Bank, 2005 CarswellOnt 6285 (Div. Ct.) at para. 3.

12. All of the parts of the test in *Palmer* are met in this case:
 - (a) The Fresh Evidence regarding the King City Property did not arise until after the Mareva Order hearing. With respect to the Fresh Evidence regarding Mr. Davies' assets, while this information existed, it could not have been reasonably adduced through due diligence as the Receiver did not raise the issues to which this evidence was responsive until after the hearing.
 - (b) The Fresh Evidence is potentially decisive, as it is directly responsive to specific issues raised by the Motions Judge in support of his conclusion that there was a risk that the Appellants would dissipate their assets;
 - (c) Both the Second Davies Affidavit and the Moskowitz Affidavit were accepted and relied upon by the Motions Judge to approve the sales process for the King City Property, and are therefore credible. In addition, neither Mr. Davies nor Mr. Moskowitz were cross-examined on any of their affidavits.
 - (d) The Fresh Evidence is relevant to the Appellants' assertion that the Motions Judge concluded there was a risk of dissipation of assets based on speculation, rather than cogent evidence. Further, and in any event, the Fresh Evidence confirms that the Appellants have no remaining assets of value that are capable of being dissipated. As such, even if there was some justification for the Mareva Order being granted based on the then-available information, the Fresh Evidence makes it clear that such justification no longer exists.

13. In the event that this Honourable Court determines that one or more of the *Palmer* factors is not met, it has residual discretion to admit fresh evidence on appeal in the interests of justice, and has done so in the past.

Brace v. R., 2014 CarswellNat 1041, 2014 FCA 92 at para. 12.

APA Holdings Inc. v. Duscio, 2017 ONSC 957 (Div. Ct.) at para. 2, citing *R. v. A. (J.)*, 2011 SCC 178 at para. 8.

14. In this case, the Fresh Evidence is clearly relevant and will assist this court in deciding whether the Mareva Order – a drastic and extraordinary remedy – should be continued against the Appellants. This Honourable Court should exercise its discretion to admit the Fresh Evidence so that the appeal can be dealt with fairly and on the basis of all available evidence.

PART IV – ORDER REQUESTED

15. The Appellants respectfully request an order permitting the introduction of the Fresh Evidence at the appeal hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of October, 2018.


Kenneth Kraft


Michael Beeforth

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

CERTIFICATE

Counsel for the Appellants hereby certify that the time estimated for oral argument on behalf of the Appellants, not including reply, is ten minutes.

Schedule "A" – List of Authorities

1. *R. v. Palmer*, 1979 CarswellBC 533, [1980] 1 S.C.R. 759
2. *Monteiro v. Toronto Dominion Bank*, 2005 CarswellOnt 6285 (Div. Ct.)
3. *Brace v. R.*, 2014 CarswellNat 1041, 2014 FCA 92
4. *APA Holdings Inc. v. Duscio*, 2017 ONSC 957 (Div. Ct.)

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

Courts of Justice Act, R.S.O. 1990, c. C.43

Powers on appeal – Determination of fact

134 (4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

- (a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
- (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
- (c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

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

Motions in Appellate Court – Motion to Receive Further Evidence

61.16 (2) A motion under clause 134 (4) (b) of the *Courts of Justice Act* (motion to receive further evidence) shall be made to the panel hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.16 (2); O. Reg. 82/17, s. 18.

