Court File No. CV-18-00611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the Companies' Creditors Arrangement Act, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS LP, SPE MASTER I LP, ESL INSTITUTIONAL PARTNERS LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI and DONALD ROSS

Defendants

JOINT BOOK OF AUTHORITIES OF THE MONITOR AND THE LITIGATION TRUSTEE
(MOTION FOR PRE-PLEADING PRODUCTIONS AND PARTICULARS)
(RETURNABLE MARCH 20, 2019)

March 15, 2019

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TO: **LITIGATION SERVICE LIST**

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TAB 1

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2014 ONSC 5588
Ontario Superior Court of Justice

Janza v. Nicholson

2014 CarswellOnt 13168, 2014 ONSC 5588, 246 A.C.W.S. (3d) 65

Paul Janza, Vlado Zupanec and Nahanni Steel Prodcuts Inc. carrying on business as, "Jancox Stamping" v. Joseph Nicholson, Brim Holding Corp., Brim Roofing Inc., Brim Supply Inc. and Brim Ipco Inc. and Joseph Nicholson, Brim Holding Corp., Brim Ipco Inc., Brim Supply Inc., and Brim Roofing Inc. v. Paul Janza, Vlado Zupanec, Sebastijan Zupanec, Nahanni Steel Products Inc. (d.b.a. Jancox Stampings), Stephen Horbatiuk, Richard Myers, Corinne Myers (a.k.a. Cori Pratt), Facilitator Xtreme Corp., Jason Lagadin, Roch Beaulieu, Bobbi Jo Beaulieu, R. Beaulieu Roofing Ltd., RVP Roofing Systems Inc. and Joseph Nicholson, Brim Holding Corp., Brim Ipco Inc., Brim Supply Inc. and Brim Roofing Inc. v. Paul Janza, Vlado Zupanec, Sebastijan Zupanec, Nahanni Steel Products Inc. (d.b.a. Jancox Stampings), Stephen Horbatiuk, Richard Myers, Corinne Myers (aka Cori Pratt), Bobbi Jo Beaulieu, R. Beaulieu Roofing Ltd., Rvp Roofing Systems Inc.

Emery J.

Heard: August 11, 2014
Judgment: September 25, 2014
Docket: CV-14-0103-00, CV-14-1168, CV-14-1169-00

Counsel: E.J. Battiston, Harold Rosenberg, for Janza, Zupanec, Nahanni Steel & RVP Roofing
Andrey Pinsky, for Nicholson and Brim
Tibor Sarai, for Horbatiuk

***Emery J.*:**

1 Counsel for the parties in the three proceedings appeared before me on August 11, 2014 to address the motions scheduled for hearing that day pursuant to my Endorsement dated July 10, 2014. Under that Endorsement, the motions to be heard on August 11, 2014 were confined to all conflict motions in any of the three proceedings where a party was moving for an order to disqualify or remove the lawyer of record for any other party. That day was also reserved for submissions on the terms of adjournment for any status quo motion served to date.

2 Mr. Pinsky requested an adjournment of all motions to disqualify other counsel he had brought on behalf of his clients Joseph Nicholson, BRIM Holding Corp., BRIM IPCO Inc., BRIM Supply Inc., and BRIM Roofing Inc. (collectively the "Nicholson Group"). The Nicholson Group are the plaintiffs in actions commenced under court file numbers CV014-1168 and CV-14-1169. The Nicholson Group are also named as Respondents in an application commenced under court file number CV-14-0103 by Paul Janza, Vlado Zupanec and Nahanni Steel Products Inc. doing business as "Jancox Stampings" (the "Janza Group").

3 In support of his request for an adjournment, Mr. Pinsky made submissions that Mr. Battiston and Mr. Rosenberg had not responded to an Notice of Examination he had served on them to appear and be cross-examined as the sources of information and belief stated in the affidavit of Sandra Belisamo. That affidavit had been filed by the Janza Group in

response to Mr. Pinsky's written argument that his client was entitled to production of documents in advance of cross-examinations.

4 Despite the service of a Notice of Examination to examine certain witnesses on the conflict motions under Rule 39.03, counsel for the Nicholson Group was not permitted to examine those witnesses. Two cross-examinations on affiants had been scheduled or started since the last case management conference, but little progress was made on either of those examinations and they were left until the parties obtained further directions from me.

5 For reasons endorsed on the record that day, I granted the request made by counsel for the Nicholson Group to adjourn the conflict motions. In those reasons, I indicated that once I released my decision on the advance production of documents issue before any examinations on those motions, counsel would have until October 17, 2014 to complete those examinations, including all cross-examinations. In my endorsement read out to counsel in court on August 11, 2014 I addressed the issues raised to streamline the examination process.

6 In this Endorsement, I propose to make my ruling on the preliminary issue of whether the Nicholson Group is entitled to the production of documents in advance of examinations under Rule 39.03 and cross-examinations on affidavits (generally referred to as "cross-examinations") even though pleadings are not closed in either of the two actions. I propose to make this ruling in the form of a direction under the authority I am given under Rule 37.15(1.2).

7 Various parties have also brought motions for interlocutory relief of an injunctive nature against other parties to preserve rights, information or property pending trial. These motions have been referred until now as the "status quo" motions. Since I determined in the Endorsement dated July 10, 2014 that the status quo motions could not proceed before the issues on the conflict motions are determined, I indicated all status quo motions would have to be adjourned. I propose to deal with those terms of adjournment at the end of these reasons under the authority give to me by Section 101 of the *Courts of Justice Act* and Rule 40 of the (Ontario) *Rules of Civil Procedure* relating to interlocutory injunctions and mandatory orders.

Entitlement to Production of Documents

8 The Nicholson Group asks this court for a preliminary ruling on their entitlement to production of documents prior to cross-examinations on two grounds. First, counsel for the Nicholson Group argues that he and counsel for the Janza Group reached an agreement earlier in these proceedings for the parties to exchange affidavits of documents and to produce documents listed in those affidavits of documents. Alternatively, counsel for the Nicholson Group takes the position that the law permits this court to order the parties to serve affidavits of documents listing all documents relevant to the issues prior to the close of pleadings, and to order the parties to produce those documents listed in those affidavits of documents before the commencement of cross-examinations in respect of the motions to be heard on August 11, 2014.

Was there an Agreement reached?

9 Dealing first with the issue whether counsel for the Nicholson Group and counsel for the Janza Group had agreed to exchange affidavits of documents and to produce documents listed in those affidavits of documents, it is important to identify the proceedings and the dates on which they were commenced.

10 Paul Janza, Vlado Zupanec and Nahanni Steel Products Inc., (d.b.a. Jancox Stampings), commenced an application against Joseph Nicholson and the BRIM Group on January 9, 2014.

11 Subsequently, Joseph Nicholson and the BRIM Group of Companies commenced two actions against Paul Janza, Vlado Zupanec and Nahanni Steel Products Inc., (d.b.a. Jancox Stampings) and other defendants. The Statements of Claim in the actions commenced in court file numbers CV-14-1168 and CV-14-1169 were issued on March 21, 2014.

12 With the commencement dates for each proceeding in mind, I now turn to the exchange of correspondence between counsel for the Nicholson Group and counsel for the Janza Group to determine if an agreement was reached for the production of documents, and if so, the nature of that agreement.

13 Mr. Pinsky writes a letter on behalf of the Nicholson Group to Mr. Flavio Battiston on July 23, 2014. In that letter he asks that the Notice of Application be served on his office. Mr. Pinsky, from that point forward, represents the Nicholson Group and speaks for them as counsel.

14 The Janza Group has the Notice of Application issued at Brampton and first returnable on January 30, 2014. They also bring a motion within the application for interlocutory relief. The application and motion are subsequently adjourned on consent to a date to be fixed by the trial coordinator's office. Mr. Eddy Battiston confirms this adjournment with the Trial Coordinator of the Superior Court of Justice at Brampton on January 29, 2014.

15 Mr. Battiston also writes a letter to Mr. Pinsky on January 29, 2014 confirming the teleconference between them that morning. In that letter he confirms dates for the exchange of materials and for holding cross-examinations on affidavits in April 2014. It is in this letter that the first mention of early production of documents appears:

> During our teleconference I stressed the importance of early production of documents. As far as additional production by the applicants, I am currently exploring whether there are additional financial records or other material documents in possession of my clients. If so, we will provide them to you in a timely manner.
>
> Similarly, we repeat our request that the respondent, Nicholson, provide full and timely disclosure, as previously requested — in particular: ....

16 There follows a list of documents Mr. Battiston is seeking on behalf of the Janza Group from the Nicholson Group.

17 On January 30, 2014, Mr. Pinsky writes to Mr. Battiston to confirm their agreement about dates for the exchange of affidavit material and for cross-examinations. Mr. Pinsky then states as follows:

> As far as production of the documents is concerned, as both yours and my clients are seeking extensive production of documents, perhaps we can agree to apply standards of discovery, production and examination determined by Rules 30 and 31 of the *Rules of Civil Procedure*. Further, to ensure that both parties are subject to the standards of discovery, production and examination determined by Rules 30 and 31 of the *Rules of Civil Procedure*, I am seeking your consent to convert your Notice of Application into an action.

18 Mr. Pinsky then goes on to list those documents the Nicholson Group is seeking from the Janza Group at the time, and concludes the letter with the following paragraph;

> This list may, **and most likely will**, change as we are going through preparation and delivery of responding materials. It is critical to produce these and other documents in control, possession or power of your clients at least two weeks prior to the cross-examinations of Paul Janza and Vlado Zupanec.

19 Up to this point in time, none of the other parties to the two later actions, namely Sebastijan Zupanec or a group consisting of Stephen Horbatiuk, Richard Myers, Corinne Myers, Facilitator Xtreme Corp., Jason Lagadin, Roch Beaulieu, Bobbi Jo Beaulieu, R. Beaulieu Roofing Ltd., or RVP Roofing Systems Inc. that Mr. Sarai now represents, had been named as parties to the application. The discussions between the Janza Group and the Nicholson Group regarding advance production of documents had never included or been extended to them.

20 The voice of the parties now represented by Mr. Sarai is first heard in a letter from Mr. Sarai dated January 15, 2014 to Mr. Nicholson giving notice that allegations made by him and posted on the BRIM website that Mr. Sarai's clients had committed certain misappropriations and given misrepresentations to customers was defamatory and libelous in

nature. Mr. Sarai's letter, referring to this posting as the so-called "Scam Alert", requests that Mr. Nicholson remove this posting forthwith, or alternatively that the names of his clients be removed from that posting immediately.

21 I find that as of January 30, 2014, while counsel for the Janza Group and counsel for the Nicholson Group had discussed the prospect of exchanging documents and had even provided a list of documents they were seeking from the other, no agreement had been reached between the parties within each group for the production of documents relating to the application. Neither Sebastijan Zupanec and those persons and companies that Mr. Sarai now represents were parties to the application and took no part in those discussions.

22 Mr. Pinsky writes to Mr. Eddy Battiston on February 5, 2014, to confirm that Mr. Battiston had left him a telephone message indicating that he would recommend that the Janza Group convert the application into an action. In his letter dated February 5, 2014, Mr. Pinsky makes the final comment that:

> I am perplexed by your question as to whether my client will produce documents in his possession. I am perplexed because if the application is converted in to an action, the parties will be subjected [sic] to discovery requirements of Rule 30 and Rule 31.

23 Mr. Battiston writes back to Mr. Pinsky on February 6, 2014, to suggest that the most expeditious way to convert the application into an action is by way of a consent order.

24 On February 6, 2014, Mr. Pinsky writes to Mr. Battiston and encloses drafts of a Notice of Motion, Consent and Consent Order for his review and approval to expedite the process to convert the application.

25 On February 6, 2014, Mr. Battiston writes to Mr. Pinsky to indicate that his clients are prepared to proceed with an order converting the application into an action, but expresses some concerns with the timelines set out in the draft Order. He suggests that:

- The plaintiffs deliver a Statement of Claim on or before February 21.
- The Statement of Defence be delivered on or before March 15.
- The delivery of Affidavit of Documents and Document Briefs should be exchanged on or before March 30.
- Examinations for Discovery be scheduled to take place before the end of April.

26 Mr. Battiston writes again to Mr. Pinsky on February 14, 2014, to confirm their teleconference earlier that day with regard to converting the application into an action. He states in that letter that they agreed to the following:

> The application will be converted to an action, on consent. The consent order will include following litigation timetable:
>
> 1. Statement of Claim to be delivered on or before February 21, 2014;
> 2. Statement of Defence to be delivered on or before March 21, 2014;
> 3. Proposals re: discovery plan to be exchanged by March 31, 2014;
> 4. Affidavits of Documents to be delivered (with document brief), by April 15, 2014;
> 5. Examinations for Discovery to be completed by May 30, 2014.

27 Mr. Battiston then asks Mr. Pinsky to provide him with a draft of the Order. He states that he would make any changes in accordance with the above agreement and send the final draft to Mr. Pinsky for approval. Once approved by both counsel, the order would then be sent by mail to the courthouse in Brampton to be entered.

28 It would appear that, as of February 14, 2014, counsel for the Janza Group and counsel for the Nicholson Group had agreed to the terms set out by Mr. Battiston in his letter dated February 14, 2014 to convert the application to an action. In fact, Mr. Pinsky writes back to Mr. Battiston on February 14, 2014 to confirm that the dates summarized in Mr. Battiston's letter are correct, but states that they had agreed to include in the Consent Order only the dates by which Mr. Battiston would deliver his client's Statement of Claim (February 21, 2014) and the date by which Mr. Pinsky would deliver his client's Statement of Defence (March 21, 2014). He states that all other dates should not be included in the Consent Order and that those dates were for the reference of counsel only. On that basis, he changed the proposed Consent Order accordingly.

29 Mr. Eddy Battiston writes back on February 18, 2014 to ask Mr. Pinsky to provide the proposed Consent Order described in his letter of February 14, 2014. He also states that his clients are content to proceed with Examinations in May and suggests times in May when he or his partner, Flavio Battiston, will be available. Mr. Battiston also mentions the estimated amount of time for the Examinations for Discovery of Mr. Nicholson, Mr. Janza, Vlado Zupanec and Sebastijan Zupanec. He states that he has yet to see the Statement of Defence and that counsel have yet to exchange discovery plans. He concludes by saying, "we reserve our rights accordingly".

30 On February 18, 2014, Mr. Pinsky writes back to Mr. Eddy Battiston to express disappointment in what he describes as Mr. Battiston's attempt to insert dates into the Consent Order that have never been agreed upon.

31 In a letter dated February 19, 2014, Mr. Battiston points out that Mr. Pinsky's draft Order contains the phrase, "after the conversion" as the time to have the Statement of Claim issued, which did not take into account the time it might take to have the Order entered at court before the Statement of Claim could be issued and served by February 21, 2014. He asks Mr. Pinsky to kindly advise whether he is in agreement to provide for a margin of time for that allowance, or to make any suggestion to avoid that problem.

32 In a second letter dated February 19, 2014 Mr. Battiston enclosed a draft Statement of Claim for Mr. Pinsky, recognizing that it could not formally be issued by the court office until the Order is signed and entered.

33 There follows an exchange of correspondence between counsel for the Janza Group and counsel for the Nicholson Group about the contents of the proposed Order to convert the application into an action and related issues. Mr. Pinsky ultimately writes a comprehensive letter dated February 20, 2014 to Mr. Battiston summarizing all of the issues from his perspective. In his letter, Mr. Pinsky considers the draft Statement of Claim not to be a valid Statement of Claim. He requires the consent Order to be changed to provide that Mr. Battiston would deliver the Statement of Claim by March 6, 2014, and that Mr. Pinsky would deliver his Statement of Defence by April 6, 2014.

34 The Consent Order under discussion between counsel for the Janza Group and counsel for the Nicholson Group, with respect to converting the application into an action, is never issued. The application was never converted into an action and both counsel have never agreed upon a Discovery Plan should it become an action. There is no evidence before me that counsel for the parties to the application reached an agreement for the production of documents in the course of discussions about converting the application, or at all.

35 The application remains an application. Rules 30 and 31 do not apply to those persons making up the Janza Group or to Mr. Nicholson and the BRIM companies making up the Nicholson Group.

36 Any terms of an Order to convert the application to an action would not apply in any event to Sebastijan Zupanec or to the parties that Mr. Sarai now represents in the two actions, as those persons or companies were never parties to the application.

37 On March 21, 2014, Mr. Pinsky writes to Mr. Battiston to inquire whether he had received the two Statements of Claim that had been faxed to his office earlier that day. Those Statements of Claim were issued at Brampton in Court File Numbers CV-14-1168 and CV-14-1169 on March 21, 2014. Mr. Pinsky also takes that opportunity to advise Mr.

Battiston that his clients wish to bring a motion on July 2, 2014 to seek an interlocutory injunction and he asks Mr. Battiston about his availability for that date.

38 Mr. Pinsky relies upon Rules 49.02(1) and 49.09 to enforce the alleged agreement as though it were a settlement. I have two difficulties with this argument. First, the terms under discussion between Mr. Battiston and himself, prior to March 21, 2014, applied only to the application. The terms under discussion related to a timetable and the production to be made voluntarily before the prospect of converting the application to an action arose, and in the context of the converted action after the necessary order was issued and pleadings exchanged. In either case, there was no offer to settle all or part of the claims made by the Janza Group in the Notice of Application. This is a necessary ingredient under Rule 49.02(1), which reads as follows:

> A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49A). R.R.O. 1990, Reg. 194, r. 49.02 (1).

39 Rule 49.09, deals with the circumstance where a party to an accepted offer to settle fails to comply with the terms of the offer, gives the other party with the following choices:

> Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,
>
> (a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or
>
> (b) continue the proceeding as if there had been no accepted offer to settle. R.R.O. 1990, Reg. 194, r. 49.09.

40 I need not make a ruling on whether the Nicholson Group has this choice to make in view of my findings on the evidence that no agreement was reached on the production of documents. In any event, Rule 49.02(1) would not apply.

41 It bears mentioning that, to date, neither the Janza Group or the Nicholson Group have provided the documents listed in Mr. Battiston's letter of January 29, 2014 or Mr. Pinsky's letter dated January 30, 2014 to the other. It therefore appears that counsel for all parties on the application treated the proceeding as continuing without having reached an agreement.

42 Counsel for the Nicholson Group seeks an order from this court compelling the defendants in the two actions to produce documents now if I make a finding that he reached a written agreement with counsel for the Janza Group to exchange affidavits of documents and to produce documents earlier in the three proceedings. I see no evidence with respect to the application or in the context of the two actions commenced on March 21, 2014 that counsel ever agreed in writing to exchange affidavits of documents or to produce documents before cross-examinations or the close of pleadings in the actions.

Right To Production of Documents under the Rules

43 I turn now to the argument that the court has discretion to order the advance production of documents prior to any examinations in the absence of any agreement between counsel. Mr. Pinsky relies upon Rule 29.1 relating to the rule based requirement that parties to an action have a duty to consult and to agree upon a Discovery plan, including the disclosure and production of documents. This is the entry point of the argument that, on the strength of Rule 29.1.03(2), the court should order the production of documents requested by the Nicholson Group at this time.

44 The *Rules of Civil Procedure* relating to the disclosure and production of documents for discovery should be read together as a cumulative and cohesive process. The term "discovery" is a defined term under Rule 1.03 to mean discovery of documents, examinations for discovery, inspection of property and medical examinations of a party, as provided under Rules 30 to 33. With the broadness of that term in mind, Rule 29.1 introduces the device of the discovery plan. It is instructive to note that Rule 29.1.03 has a stated purpose:

29.1.03 (1) Where a party to an action intends to obtain evidence under any of the following Rules, the parties to the action shall agree to a discovery plan in accordance with this rule:

1. Rule 30 (Discovery of Documents).

2. Rule 31 (Examination for Discovery).

3. Rule 32 (Inspection of Property).

4. Rule 33 (Medical Examination).

5. Rule 35 (Examination for Discovery by Written Questions). O. Reg. 438/08, s. 25.

45 Rule 29.1.03 relates to discovery *in an action.* There is significance to the language used in the stated purpose behind Rule 29.1.03. It applies to parties *to an action* and makes no reference to an application which as a proceeding does not have the express obligations for the disclosure of documents and discovery under the *Rules of Civil Procedure*. It does not include parties to an application. It is the intention or efforts of one or more of the parties *to an action* to obtain evidence under the enumerated rules that raise the mutual obligation of the parties to the action to agree to a discovery plan.

46 Rule 29.1.03(2) then addresses the timing for agreement to the discovery plan, which reads as follows:

(2) The discovery plan shall be agreed to before the earlier of,

(a) 60 days after the close of pleadings or such longer period as the parties may agree to; and

(b) attempting to obtain the evidence. O. Reg. 438/08, s. 25.

47 Mr. Pinsky argues that he triggered subrule 29.1.03(2)(b) when he attempted to obtain evidence by asking for specific documents from the Janza Group on or about January 30, 2014. Mr. Pinsky will remember that his request for the documents he listed in his letter of January 30, 2014 to Mr. Eddy Battiston was written in the context of obtaining productions on the application. The request for documents was written in concert with discussions between counsel to convert the application to an action. The application was never converted to an action. All requests pursuant to the application should be dealt with by following the process related to the development of evidence for use of hearing on an application under Rules 38 or 39. The attempts to obtain evidence by Mr. Pinsky before the two actions were commenced, in my view, were not attempts to obtain the evidence in an action within the meaning of Rule 29.1.03(2)(b).

48 I am also of the view that the language of Rule 29.1.03 implies that the parties must have a discovery plan in place before the obligations of any party arise to make documentary disclosure in an action. The discovery plan is the ways and means of bringing all discovery together by coordinating the disclosure rights and obligations of the parties who intend to obtain evidence under the various discovery rules enumerated under Rule 29.1.03. It is not, and should not be considered the source of those substantive rights and obligations. It is intended to be, as its name suggests, a plan for discovery.

49 I also point out that Rule 29.1.03(2) on its face does not apply to a party bringing or opposing a particular motion. The procedure set out under Rule 37 relating to the giving of affidavits in support of or in response to a motion, and Rule 39.02 and 39.03 relating to examinations and cross-examinations of witnesses and affiants, set out the appropriate process for the gathering of evidence for use on a motion.

50 The changes to the *Rules of Civil Procedure*, effective on January 2010, included a change to the language in Rule 30.03 that the parties shall exchange affidavits of documents "within ten days after the close of pleadings" and replaced it with the regime to consult and cooperate to form a discovery plan. The case law under the previous Rule that affidavits of documents are normally not exchanged until the close of pleadings remains relevant notwithstanding this change. It is necessary for all parties to plead in an action in order for a party to disclose to the full extent of that party's knowledge,

information and belief all documents relevant to any matter in issue in the action. Until that time, all material facts in issue have not been alleged, issues made known and claims, counter-claims and cross-claims pleaded to allow the parties to the action to determine the full extent of the disclosure required.

51 In *Crysdale v. Carter-Baron Drilling Services Partnership*, 1985 CarswellOnt 400, [1985] O.J. No. 1672, 37 C.P.C. (2d) 222 (Ont. H.C.), the court held that under Rule 30.03(1) the parties are required to serve an affidavit of documents after the close of pleadings, the rule does not sanction the delivery of such documents before the pleadings are closed.

52 In *Hong Kong (Official Receiver) v. Wing*, [1986] O.J. No. 1104 (Ont. H.C.), the court reviewed the case law under sub-Rule 30.04(5), as it applied to the Rules then in force. The court determined the governing principle to be that production normally should not be ordered prior to pleading, unless the court is satisfied that the documents are essential to enable the party to plead.

53 Here, the Nicholson Group has served an extensive Statement of Claim in each action.

54 Any parties seeking documentary disclosure prior to the close of pleadings must have affidavit evidence before the court supporting the essential nature of the disclosure in order to plead, *HSBC Securities v. Davies*, [2001] O.J. No. 3375 (Ont. Master).

55 In the two actions, I am not persuaded by the affidavits filed that the requested production of documents at this time is essential.

56 The defendants represented by Mr. Battiston and Mr. Rosenberg and the defendants represented by Mr. Sarai in the two actions have not delivered a Statement of Defence in those actions. Therefore, it is premature for the Nicholson Group, as plaintiffs in those actions to ask for a discovery plan. On my reading of Rules 29.1.03 and 30.03(1), it is premature to request that the defendants serve an affidavits of documents. As I have stated above, absent a discovery plan and prior to the close of pleadings in an action, the plaintiffs do not have the right to ask for an affidavit of document from defendants to that action, let alone in connection with a motion.

57 If those plaintiffs seek the production of documents on the motion, they may do so under the three methods identified by the court in *Friends of Lansdowne v. Ottawa (City)*, 2011 ONSC 2089 (Ont. S.C.J.), a case that also dealt with a request for the production of documents before cross-examinations on an application. The court in *Friends of Lansdowne* described that in an application, as distinct from an action, the documentary production process normally occurs in three stages. The first involves the documents actually attached to or referred to in the affidavit evidence that must be produced. The second is the documents that the notice of examination may require the affiant to bring to the cross-examination on affidavits. The third is the process of the cross-examination itself that may uncover additional documents. In my view, this three stage process would normally apply to motions as well.

Summary Judgment Issue

58 Counsel for the Nicholson Group argues that the Janza Group, in the application and as the defendants in the two actions, have brought motions in the nature of summary judgment motions for adjudication by this court. The argument goes that if they are granted the relief requested on those motions, it will effectively put an end to this litigation. Mr. Pinsky argues that it would be unfair for these motions to proceed without the Nicholson Group having the benefit of full and continuous disclosure, as required by Rules 30 and 31. He relies upon the decision in *Bank of Montreal v. Negin* (1996), 31 O.R. (3d) 321 (Ont. C.A.) for the principle that it would be unfair if a responding party for a motion for summary judgment were denied the opportunity of reviewing relevant documents in the possession of the moving party before examinations on affidavits to use on a motion for summary judgment, as that party would be deprived of information to which he is entitled under the Rules of Civil Procedure.

59 In *Cole v. Hamilton (City)* (1999), 45 O.R. (3d) 235 (Ont. Gen. Div.), this court held that Rule 30.03 applies where a summary judgment motion is brought because it is essential that a party have produce of relevant documents to prove its

case. A party responding to a motion for summary judgment must be able to forward all relevant evidence in defending the motion. See also, *Laurentian Bank of Canada v. Herzog* [1999 CarswellOnt 2776 (Ont. S.C.J.)], where Justice Pepall wrote that Rule 30.03 was designed to provide full disclosure to a party defending a motion for summary judgment who should not be limited to receiving relevant documentation through cross-examinations on affidavits, and *State Bank of India v. Navaratna*, [2002] O.J. No. 1203 (Ont. S.C.J.).

60 The problem with Mr. Pinsky's argument for the advanced production of documents prior to cross-examinations on the motions before this court is that my Endorsement dated July 10, 2014 specifically limits cross-examinations to the motions that were to be heard on August 11, 2014. Those motions were the disqualification of counsel motions and the terms of adjournment of any motion for injunctive relief. The terms of those adjournments will be dealt with later in these reasons. Therefore, until the issue is determined whether Mr. Battiston and Mr. Rosenberg for the Janza Group, and Mr. Sarai for the clients he represents should be disqualified on those motions, no other motion will be heard for relief that could, in any way, be described as summary judgment. By this I do not wish to be taken as saying that any of the other motions filed to date could be considered a motion for summary judgment without having a full record before me and hearing all submissions of counsel.

61 I therefore conclude that the motions brought by the Nicholson Group to disqualify Mr. Battiston and Mr. Rosenberg for the Janza Group in the application and those members of the Janza Group named as defendants in the two actions, and Mr. Sarai, for the defendants he represents in the two actions is not a motion in the nature of a summary judgment motion, and that the case law he relies upon does not apply.

62 I pause here to observe that the motions of this nature, taking the time and expense the parties are incurring, are motions that the Nicholson Group has brought in this litigation.

Summary of Ruling on the Production Issue

63 In summary, I hold that the Nicholson Group are not entitled to the production of documents they seek from the applicants in the Notice of Application commenced by the Janza Group unless they serve a proper request to inspect documents or otherwise compel production of documents through the examination process relating to the affidavits filed in that proceeding under the Rules because I have found there to be no agreement for the advance production of documents between counsel otherwise.

64 I further hold that the Nicholson Group, as plaintiffs in the two actions, are not entitled to the advance production of documents on the pending motions to disqualify opposing counsel for the various parties in one or more of the three proceedings. This does not take away from their right to request and compel production of documents under the *Rules of Civil Procedure* on those motions, subject to the relevance limited by my orders to date.

65 Once the motions to disqualify counsel have been heard and determined, counsel in all three proceedings representing the parties going forward will be at liberty to speak to the scheduling of the timetable and hearing dates for the status quo motions. It seems logical that any motion to stay or dismiss a proceeding for being a derivative action commenced without leave or for any other reason should be heard at the same time. A new round of examinations and cross-examinations shall be permitted relevant to those motions, including all rights to obtain evidence and the production of documents permitted by the *Rules of Civil Procedure*.

Terms of Adjournment

66 The status quo motions seeking interlocutory injunctive relief or mandatory orders that have been brought by the parties represented by Mr. Pinsky, Mr. Battiston and Mr. Rosenberg, and Mr. Sarai respectively, are hereby adjourned on the following terms:

1. With respect to the motion for injunctive relief on a interlocutory basis made by the Nicholson Group in all three proceedings, those motions are adjourned on the following terms:

a) An interim order enjoining and restraining the defendants in the two actions from manufacturing, selling, offering for sale or advertising BRIM Roofing Products or any other roofing products, including formed metal roofing panels, formed metal roof capping, formed metal flashings, roofing tiles, textiles and textures for roofing, and coatings for roofing products that bear the (all capital letters) BRIM trademark in Canada;

b) An interim injunction enjoining and restraining the defendants in the two actions from manufacturing, selling, offering for sale or advertising any roofing products, including formed metal roofing panels, formed metal roof capping, formed metal roof flashings, roofing tiles, textiles and textures for roofing, and coatings for roofing products bearing a trademark that is similar with the (all capital letters) BRIM trademark in Canada;

c) An interim injunction enjoining and restraining the defendants in the two actions from using or displaying the (all capital letters) BRIM trademark or any trademark similar to the BRIM trademark, domain name or otherwise;

d) An interim order enjoining and restraining the defendants in the two actions from authorizing, inducing or assisting others to do any of the aforesaid acts;

e) An interim order requiring the defendants in the two actions to remove all information, documents or materials available on the internet and all references to information, documents or materials available on the internet, the use, display or reproduction of which would contravene the interim orders made in sub-paragraphs (a) to (d) above;

f) An interim order enjoining and restraining the defendants Paul Janza and Vlado Zupanec from voting as directors and shareholders of the plaintiff BRIM Holding Corp., BRIM IPCO Inc., BRIM Supply Inc. and BRIM Roofing Inc. and;

g) On or before 5:00 p.m. on September 30, 2014, each person and corporation making up the Nicholson Group, being the respondents in the application and the plaintiffs in the two actions shall deliver a written undertaking as required by Rule 40.03 to the court with copies to Mr. Battiston and Mr. Rosenberg on behalf of the parties to the application and the two actions they represent, and to Mr. Sarai, on behalf of the defendants in the two actions he represents, failing which these terms shall be null and void as though they were never granted.

2. With respect to the motion for injunctive relief made by the applicants in the application and by the Janza Group as defendants in the two actions, those motions are adjourned on the following terms;

a) An interim order restraining those parties that make up the Nicholson Group as respondents in the application and the plaintiffs in the two actions from depleting any assets or property of the BRIM Group, including BRIM Holding Corp., BRIM Supply Inc., and BRIM IPCO Inc., and requiring them to preserve all assets and property of any or all of those corporations until further order this court;

b) An interim order restraining the calling or holding of any meeting of shareholders, directors and officers of any of the BRIM Corporations, pending further order of the court;

c) An interim order requiring all parties in each of the three proceedings to preserve all documents and records of any or all of the corporate parties for inspection;

d) An interim order requiring the Nicholson Group to preserve all financial records of BRIM IPCO Inc., including without limiting the generality of the foregoing all banking records, business records, documents and devices of BRIM IPCO Inc., including;

i) Bank deposit books for all accounts;

ii) Cheque books;

iii) Credit cards;

iv) Business access cards for the bank accounts;

v) Administrator access cards for any IP systems;

vi) Supplier accounts;

vii) Sales printouts and summaries of sales reports;

viii) Revenue statements;

ix) Receivables reports;

x) Payables reports;

xi) Reports for Canada Pension Plan and Employment Insurance contributions;

xii) Monthly sales reports to Canada Revenue Agency including HST reports; and

xiii) The Minute Book

e) An interim order that the Nicholson Group preserve all financial records of BRIM Holding Corp., and without limiting the generality of the foregoing to include all banking records, business records, documents and devices of BRIM Holding Corp., including;

i) Bank deposit books for all accounts;

ii) Cheque books;

iii) Credit cards;

iv) Business access cards for the bank accounts;

v) Administrator access cards for any IP systems;

vi) Supplier accounts;

vii) Sales printouts and summaries of sales reports;

viii) Revenue statements;

ix) Receivables reports;

x) Payables reports;

xi) Reports for Canada Pension Plan and Employment Insurance contributions;

xii) Monthly sales reports to Canada Revenue Agency including HST reports; and

xiii) The Minute Book

f) An interim order that the Nicholson Group preserve all financial records of BRIM Supply Inc., and without limiting the generality of the foregoing to include all banking records, business records, documents and devices of BRIM Supply Inc., including;

i) Bank deposit books for all accounts;

ii) Cheque books;

iii) Credit cards;

iv) Business access cards for the bank accounts;

v) Administrator access cards for any IP systems;

vi) Supplier accounts;

vii) Sales printouts and summaries of sales reports;

viii) Revenue statements;

ix) Receivables reports;

x) Payables reports;

xi) Reports for Canada Pension Plan and Employment Insurance contributions;

xii) Monthly sales reports to Canada Revenue Agency including HST reports; and

xiii) The Minute Book.

g) An interim order that the Nicholson Group preserve all financial records of BRIM Roofing Inc., and without limiting the generality of the foregoing to include all banking records, business records, documents and devices of BRIM Roofing Inc., including;

i) Bank deposit books for all accounts;

ii) Cheque books;

iii) Credit cards;

iv) Business access cards for the bank accounts;

v) Administrator access cards for any IP systems;

vi) Supplier accounts;

vii) Sales printouts and summaries of sales reports;

viii) Revenue statements;

ix) Receivables reports;

x) Payables reports;

xi) Reports for Canada Pension Plan and Employment Insurance contributions;

xii) Monthly sales reports to Canada Revenue Agency including HST reports; and

xiii) The Minute Book.

3. With respect to the motion for a mandatory order made by the parties represented by Mr. Sarai that motion is adjourned on the following terms;

a) An interim order enjoining and restraining the Nicholson Group, including Joseph Nicholson, BRIM Holding Corp., BRIM IPCO Inc., BRIM Supply Inc., and BRIM Roofing Inc., and each of them from referring to Stephen Horbatiuk, Richard Myers, Corinne Myers (a.k.a. Cori Pratt), Facilitator Xtreme Corp., Jason Lagadin, Roch Beaulieu, Bobbie Jo Beaulieu and R. Beaulieu Roofing Ltd., in a "Scam Alert" or in any other defamatory manner on any webpage, publication, Facebook or any other avenue of information, electronic, digital or analog device available until further order of this court; and

b) A mandatory order on an interim basis that all reference to those parties be removed accordingly.

4. Further submissions on these terms may be made on October 14, 2014 if there is a materially significant reason supported by cogent evidence.

67 The motions to disqualify opposing counsel from representing adverse parties in any of the three proceedings is now scheduled for hearing on November 25, 2014 starting at 10:00 a.m. in Brampton.

Production refused.

TAB 2

See para. 49

2011 ONSC 2625
Ontario Superior Court of Justice

Sears Canada Inc. v. Pi Media Ltd.

2011 CarswellOnt 4453, 2011 ONSC 2625, 202 A.C.W.S. (3d) 688

Sears Canada Inc., Plaintiff v. Pi Media Ltd. and St. Joseph Printing Limited, Defendants

Master D.E. Short

Heard: April 12, 2011
Judgment: May 16, 2011
Docket: CV-10-400507

Counsel: Enzo Di Iorio, for Moving Defendants
Jaan E. Lilles, for Plaintiff

***Master D.E. Short*:**

I. Overview

1 On April 6, 2010, the Plaintiff issued a Statement of Claim alleging a breach of contract to provide contract services to Sears Canada Inc. ("Sears") by Pi Media Ltd. and its subsidiary company St. Joseph Printing Limited. The Plaintiff seeks damages of $14,000,000.00 for that breach together with a further claim of $2,000,000, relating to an alleged loss of goodwill.

2 By way of a Notice of Motion dated March 25, 2011, the Defendants now move for particulars of the allegations contained in the Statement of Claim.

II. Nature of Claims

3 Pursuant to an agreement dated January 1, 2003, (the "Agreement") Pi Media was to provide various services to Sears including:

> (a) pre-media and related services in respect of Sears' national print advertising programme (the "Retail Programme") and Sears' national catalogue advertising programme (the "Catalogue Programme");
>
> (b) content creation and management of Sears' Catalogue Programme and e- commerce websites ("E-Commerce Programme); and
>
> (c) content creation, management and production of Sears' instore signage (the "Signage Programme")

4 The parties carried on business together, both before and after, the entering of the over 100 page Agreement upon which this action is based. Perhaps surprisingly, notwithstanding the nature of the claims asserted in this action, they apparently are still continuing to do business under the Agreement.

III. Prelude to Motion

5 The Plaintiff served the Statement of Claim on May 25, 2010, 50 days after it was issued.

6 On June 3, 2010, counsel for the Defendants, delivered a Notice of Intent to Defend.

7 On June 25, 2010, at the time the Statement of Defence was due to have been delivered, counsel instead delivered a Demand for Particulars comprising 10 items.

8 After a 4 month delay, on October 12, 2010, counsel for the plaintiff filed a three page Response to Demand for Particulars.

9 On November 29, 2010, approximately 6 weeks later, defendants' counsel advised that he had not had an opportunity to review the Response to Demand for Particulars with this client but that he had received an indication from them that the Response was inadequate. Counsel further advised that he would be in a position to advise of his clients' "specific concerns" within 7 to 10 days.

10 On February 2, 2011, approximately 2 months later, having heard nothing from the Defendants with respect to any specific deficiencies in the Response to the Demand for Particulars, plaintiff's counsel wrote requesting delivery of a Statement of Defence.

11 In response to that letter the counsel for the defendants insisted, without providing any further specificity, that the Response to the Demand for Particulars was inadequate and only then indicated that the Defendants would bring this motion.

12 The only evidence initially filed in support of the defendants' motion was an affidavit from a law clerk employed in the office of counsel for the defendants. That affidavit did not assert that it relied upon, nor that any of its contents were based upon, "information and belief".

13 In the factum filed on behalf of the defendants it is asserted that despite "the inordinate delay on the part of the Plaintiff in responding to the Particulars requested, the response does nothing to correct the pleading deficiencies and keeps the litigation as vague and unfocused as it was when the Defendants initially requested the particulars."

14 Notwithstanding the size of the damages claimed, the pleading of the plaintiff is relatively succinct. I think it is useful to set out the relevant portions of the pleading in some detail which I examined in weighing the relative strengths of the positions of the parties on this motion.

IV. Statement of Claim

15 The initial two paragraphs of the statement of claim, with respect to which particulars are sought, read:

> 8. Throughout the term of the Agreement, Pi Media and St. Joseph have failed to fulfil their obligations under the Agreement.
>
> 9. These breaches have caused losses to Sears, including damage to its goodwill.

16 Standing on their own these two paragraphs clearly lack what I would regard as the necessary degree of particularity. However the pleading needs to be read as a whole.

17 In the immediately following paragraphs, under the heading "Breaches Of The Agreement By The Defendants" the statement of claim (in part) makes these assertions:

> 10. In particular, Pi Media has made numerous advertising errors which have directly contributed to business losses, including in-store allowances and discounts. These errors have caused customer confusion and dissatisfaction and reputational damage to Sears.

11. In addition, under the terms of the Agreement, Pi Media is obliged to provide all services at "Market Rate" pricing.

12. Section 3.3 of the Agreement states, in part:

> .... services to be provided by it hereunder in relation to such Programme shall be at such rates that are competitive with then prevailing market rates...,

13. Pi Media's pricing for 2009 exceeded the market rates by approximately 35% resulting in an overpayment by Sears of approximately $4,000,000.00.

14. Similarly, overcharging occurred in 2007 and 2008 resulting in an additional overpayment by Sears of approximately $8,000,000.00.

15. Pursuant to Section 5.1(e) of the Agreement, Pi Media is obliged to provide leading edge technology. Pi Media has failed to do so. The technology designed by Pi Media for the purposes of fulfilling Pi Media's obligations to Sears has been improperly designed, supported and implemented.

16. Section 5.1 of the Agreement states:

> 5.1 Principles Relating to Performance Goals Each of Pi Media and SIDS confirms its commitment to the following principles and performance goals in relation to its provision of services hereunder:
>
> (a) to continue to maintain its competitiveness overall in its provision of services relative to industry standards in the areas of quality, productivity, production efficiency (including turnaround time) and pricing, but having due regard to the volume and the nature of, and specifications for, the services provided by it hereunder;
>
> (b) to maintain and enhance the strength of the Sears brand;
>
> (c) to continually seek methods to effect improvement in workflow efficiencies;
>
> (d) to establish "best in class" creative content;
>
> (e) to continue to invest in leading-edge technological solutions, as appropriate, to improve efficiencies and performance;

17. In particular, the software designed for translation of copy text has resulted in significant redundant translation costs of approximately $150,000.00 for each of 2007, 2008 and 2009.

18. Also as a result of the failure to provide leading edge technology, Sears has been unable to efficiently reuse artwork and images and has thereby incurred unnecessary costs and expenses.

. . .

20. In addition, it was a term of the Agreement that the Defendants would assist Sears in building and enhancing the Sears brand. As a result of the breaches of the Agreement set out above, the Defendants have breached this term of the Agreement, causing damage to the Sears brand and its goodwill.

21. Sears has brought the breaches of Pi Media to its attention repeatedly for 2007 until the present. Pi Media has taken no steps to remedy the defaults and comply with the terms of the Agreement.

V. Demand for Particulars

18 The demand made on behalf of the defendants contained ten items. Several had been answered to the degree that, at the oral hearing, the defendant did not press for further details. For the purpose of my consideration I focused on these requests:

> 1. Full particulars of the allegation in paragraph 8 that the Defendants, Pi Media and St. Joseph have failed to fulfil their obligations under the agreement.
>
> 2. Full particulars of the losses including damage to goodwill that Sears Canada Inc. ("Sears") sustained as alleged in paragraph 9 of the Statement of Claim.
>
> 3. Full particulars of the names of customers that have been confused and dissatisfied with Sears as alleged in paragraph 10 of the Statement of Claim and the manner in which their reputation has been damaged.
>
> 4. To identify what particular Pi Media pricing exceeded market rates as alleged in paragraph 13 of the Statement of Claim.
>
> 5. Full particulars of the dates of the overpayments by Sears of approximately $8,000,000.00 in 2007 and 2008 as alleged in paragraph 14 of the Statement of Claim.
>
> 6. To provide full particulars of the allegations made in paragraph 15 of the Statement of Claim that the technology designed by Pi Media was improperly designed, supported and implemented.
>
> 7. To identify what the work and images are that Sears has been unable to efficiently reuse as alleged in paragraph 18 of the Statement of Claim.
>
> . . .
>
> 10. To provide full particulars of the times that the Plaintiff allegedly brought the breaches of Pi Media to its attention repeatedly for 2007 as alleged in paragraph 21 of the Statement of Claim. In particular, the name of the individual who brought the breaches to the attention of Pi Media, the dates that the breaches were brought to the attention of Pi Media and the mode of communication of said breaches.

VI. Response to Demand for Particulars

19 The Plaintiff provided the following particulars in response to your Demand for

20 Particulars:

21

> 1. The particulars of the allegations in respect of the failure of Pi Media Ltd. ("Pi Media") and S1. Joseph Printing Limited ("S1. Joseph") to fulfill their obligations under the agreement are set out in paragraphs 10 to 20 of the Statement or Claim.
>
> 2. The losses to goodwill include errors which diminish customer trust in the credibility of Sears Canada Inc. ("Sears") and poor advertising damages the Sears brand and thereby diminishes customer goodwill. Quantification of this loss will be provided prior to trial.
>
> 3. It is not possible to provide particulars of the names of customers who have been confused and dissatisfied. As set out above, whenever there is all error in any form of advertising or media, customers are confused and dissatisfied.
>
> 4. Pi Media's pricing in the following areas exceeded market rates:

(a) retail pricing;

(b) catalogue pricing; and

(c) online pricing; and

(d) Pi Media has failed to comply with its obligation

in the Agreement to provide Sears with a $1 million annual rebate.

5. The overpayments relate to the pricing in excess of market rates as stipulated in the Agreement.

6. The technology designed by Pi Media was improperly designed, supported and implemented as follows:

(a) the rollout of Lago to allow for Sears online approval as an access to content has been significantly delayed;

(b) Pi Media repeatedly failed to build a software download process to meet Sears' protocols and did not identify bandwidth problems with the current network;

(c) items in group shots are not distinctly referenced which limits searchability;

(d) third parties are not allowed access to the content to streamline publishing;

(e) upgrades are executed without appropriate testing;

(f) Pi Media did not follow the recommended architecture that would have allowed for efficient application of Lago as a broader content management platform; and

(g) Pi Media has not presented a viable alternative to replace its antiquated style of software application after seven years of managing the program.

7. See answer to number 6 above.

. . .

10. Sears has brought the breaches by Pi Media to its attention repeatedly since 2007, including in various meetings and telephone calls with representatives from Sears such as Tim Flemming, Rob Evans (Divisional Vice-President, Corporate Procurement) and Ashley Whicher (Sears former Vice-President, Marketing) and representatives from Pi Media such as Tony Gagliano and Doug Templeton.

VII. Applicable Rules and Consideration of Proportionality

22 Rule 25.10 deals with the provision of particulars regarding pleadings:

25.10 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time.

23 Since the court "may" order particulars, the rule provides for the exercising of a discretion as to when particulars are ordered.

24 This would seem to be a case where the affidavits of documents will eventually clarify a number of the issues raised before me. However, since the statement of defence has yet to be delivered, those affidavits are not required to be generated until later in the proceeding.

25 The pre - 2010 rule provided in this regard:

> **30.03**(1) A party to an action shall, within ten days after the close of pleadings, serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

26 On January 1, 2010, subrule (1) was revoked and the following substituted:

> (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

27 In *Sharma v. Timminco Ltd.*, 2010 ONSC 790 (Ont. S.C.J.), Perell J. noted that Rule 30.03(1) no longer specifies the time for the delivery of an affidavit of documents. Previously, the deadline was 10 days after the close of pleadings.

28 Thus the timing of delivery is now governed by the new rule 29.1 dealing with Discovery Plans. The rule reads in part:

> 29.1.03
>
> (2) The discovery plan shall be agreed to before the earlier of,
>
> (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and
>
> (b) attempting to obtain the evidence.
>
> (3) The discovery plan shall be in writing, and shall include,
>
> (a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
>
> (b) dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;
>
> . . .
>
> (e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

29 Another rule amendment introduces a seven hour limitation on the length of examinations for discovery:

> **31.05.1**(1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court.
>
> **Considerations for Leave**
>
> (2) In determining whether leave should be granted under subrule (1), the court shall consider,
>
> . . .
>
> (e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or

the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;

(f) a party's denial or refusal to admit anything that should have been admitted; and

(g) any other reason that should be considered in the interest of justice.

30 I have considered whether this provision has any bearing of the proper approach to particulars motions, since the traditional argument in response was "wait for discovery".

31 It seems to me that it may become relevant to a motion to extend the time for discovery if insurmountable problems arise from limited particulars available prior to the discovery. However, at this stage a reasonable established discovery plan together with complete affidavits of documents ought to alleviate the perceived need for broader particulars in most cases.

32 I believe that in considering a motion of this nature, I must also have to consider the impact of the specified requirement set out in Rule 1.04, for "*proportionality*":

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

33 In *Access to Justice* in 1995 Lord Woolf noted in a chapter entitled "The role of the courts and the parties in the conduct of civil litigation":

1. The overall aim of my Inquiry is to improve access to justice by reducing the inequalities, cost, delay and complexity of civil litigation and to introduce greater certainty as to timescales and costs. My specific objectives are:

(a) to provide appropriate and proportionate means of resolving disputes;

(b) to establish "equality of arms" between the parties involved in civil cases;

(c) to assist the parties to resolve their disputes by agreement at the earliest possible date; and

(d) to ensure that the limited resources available to the courts can be deployed in the most effective manner for the benefit of everyone involved in civil litigation.

34 How do I best establish the appropriate and proportionate means of resolving this specific dispute, to endeavour to provide appropriate and proportionate means of resolving disputes while at the same time seeking to establish an "equality of arms" between the parties involved in this civil case?

35 It is my view that motions for particulars in cases such as this, often engage the limited resources of the court in an unproductive exercise, and result in unnecessary involvement in motions by counsel on both sides.

36 I thus turn to the case law I have particularly considered in reaching my specific conclusions in this case.

VIII. Cases Considered

37 The first thing the Court normally expects to see on a motion for particulars is an affidavit of a directly involved, representative of the party setting out in some detail the information required, the fact that it is not within their knowledge, and how it is required to enable the party to plead.

38 As noted above the initial affidavit evidence filed in support of the defendants' motion contained simply the evidence of a law clerk employed by the defendants' counsel.

39 The factum of the plaintiff which was served and filed with the court, prior to the filing of the factum of the moving parties, raised the appropriateness of relying upon such evidence:

> The only evidence before this Court is the unsupported statement of Mr. Di Iorio's law clerk that "the Defendants require the specific details as requested in the demand for particulars to enable the Defendants to fully respond to the allegations contained in the statement of claim.

40 The morning of the motion I was provided with a supplementary affidavit sworn by the same clerk which in the salient paragraph reads:

> 3. The evidence I provided in my affidavit of March 25, 2011 and in this affidavit is based on information and statements provided to me by Tony Gagliano, the Chairman and Chief Executive Officer of the Defendants and Doug Templeton who is the President of Pi Media. Both have confirmed to me and I verily believe that the allegations made by the Plaintiff are not within their knowledge. They have also confirmed to me that they are unable to provide Mr. Di Iorio with information to be able to properly plead to the allegations therein.

41 Is this good enough? Almost one year has passed since the pleading was served and no witness who might be usefully cross-examined has delivered an affidavit. Even this affiant in her second affidavit, did not to depose to her belief in the truth of the assertions made.

42 As summarized by Master Birnbaum in the case of *Guttmann v. Halpern*, [2008] O.J. No. 1931 (Ont. Master), referring to an earlier decision concerning particulars made by Master Linton, in the same matter:

> At that time the motion was dismissed, not on a technicality as Mr. Tighe submits, but because the master in his discretion found that the pleadings were not so bald that the defendant could not prepare a statement of defence and that there was no affidavit from any of the defendants stating that they needed the information to properly defend. An affidavit with this statement is the first document that a master expects to see on a motion for particulars. This is not a "technicality" - it is substance.
>
> [my emphasis]

43 Similarly, as set out by Master Egan in the case of *Diamond & Diamond in Trust v. Maniatakos*, [2003] O.J. No. 309 (Ont. Master):

> Given the nature and number of particulars requested, the onus on the defendants to prove that the particulars are not within their knowledge is not met by a broad, incredible statement that the defendants know nothing. The affidavit should have stated the nature of the relationship between the parties and specified the particulars that were unknown. It should have specified which documents the defendants allegedly received, signed or agreed to that were not received, signed or agreed to. The affidavit filed in support of the motion pays mere lip service to the requirements on a motion for particulars

44 The Decision of Master Egan was upheld on appeal by Justice Greer at [2003] O.J. No. 2336 (Ont. S.C.J.), where she stated:

> With respect to the particulars requested, the Master correctly found that the onus is on the Defendants to prove that the particulars are not within their knowledge and they did not meet that onus. Further she said the Defendants' affidavit in support of the motion pays mere "lip service to the requirements on a motion for particulars." There is nothing wrong with the Master's decision in this regard.

45 I agree with the view of Master Egan in *Diamond & Diamond*, that it is also appropriate for a Master to consider whether the Demand for Particulars is nothing more than a tactic to delay the proceedings:

> **10** The defendant ... swore in an affidavit ... in support of this motion that "I and the defendants do not have knowledge of the particulars sought."
>
> **11** Unless the defendants had absolutely no financial dealings with the plaintiff it is, quite frankly, not credible that the defendants have no knowledge of the more than 4 pages of particulars sought. Such an affidavit emphasizes that the main reason for the motion was to delay the action.

46 It seems to me that the material in support in the case before me is similarly deficient. If the assessment is incorrect, I need to consider the second half of the two part test set out by Epstein J. (as she then was) in *Obonsawin v. Canada*, [2001] O.J. No. 369 (Ont. S.C.J.), where she reviewed the relevant authorities regarding motions for particulars and noted that particulars should be ordered when:

> (a) they are not within the knowledge of the party demanding them, *and*
>
> (b) they are necessary to enable the other party to plead.

47 I have considered in detail the decision of my colleague Master Muir in *Cutajar v. Frasca*, [2009] O.J. No. 5126 (Ont. Master), where considered the application of these principles. There he concluded:

> 55. I have carefully reviewed the allegations being made against Cipressi in the Proposed Claim. I am satisfied that they meet the minimum requirements of the rules of pleadings. Moreover, I am not satisfied that's Cipressi's responding affidavit sworn October 4, 2009 meets the test set out in *Obonsawin*. His responding evidence does not indicate which of the allegations in the proposed claim fail to comply with the rules of pleading or should be particularized. In addition he does not state that the information is not within his knowledge or that it is required in order to plead.

48 In my view when a claim is asserted for breach of contract, a statement of claim must address the following factors:

> (a) the parties to the contract;
>
> (b) when the contract was entered into;
>
> (c) the material terms of the contract relied upon; and
>
> (d) how those terms are claimed to have been breached.

I am satisfied that all of these components have been provided in the Statement of Claim in this case, particularly when the pleading is read in conjunction with the Response to Demand for Particulars.

49 Pleadings should not be confused with discovery, and the sufficiency of a pleading must be read in light of the discovery process in an action proceeding under the Rules. In my view, even with time limited discoveries, a Demand for Particulars should not be used as a "prepleading" discovery.

50 One of the defendants' demands was for particulars of the losses including damage to goodwill that Sears sustained as alleged in paragraph 19 of the Statement of Claim. In the Response to Demand for Particulars, Sears indicated that quantification of the loss will be provided prior to trial but that the damage to goodwill includes errors which diminish customer trust and the credibility of Sears. It also indicated that poor advertising damaged the Sears brand thereby also diminishing goodwill.

51 Is this sufficient at this stage? *Telus Communications Co. v. Kennedy*, [2010] O.J. No. 3004, 2010 ONSC 2135 (Ont. Master), is authority for the proposition that "the moving defendants do not need to know the exact dollar extent of the detriment in order to plead to the statement of claim."

IX. Disposition

52 The onus to satisfy the Court that particulars are necessary, and are not actually within the knowledge of the parties requesting them, rests with the parties requesting the particulars. The amendments to the Rules have not displaced that onus.

53 I am satisfied that, when considered together with the particulars already provided by the plaintiff, the statement of claim meets, or exceeds, the minimum requirements of the rules for pleadings. Moreover, I am not satisfied that the affidavits filed meet the test set out in *Obonsawin*.

54 As a consequence the motion of the defendants is dismissed.

55 The defendants shall deliver their pleading within 15 days of the date of these reasons or the plaintiff may not them in default. The normal 180 day period under Rule 48.15(1) is extended to June 30, 2011, to avoid an unintended procedural dismissal of the plaintiff's action, flowing from the delays to date.

X. Costs

56 Following the hearing of the argument of this motion counsel agreed that the quantum of costs to be awarded to the winner of the motion would be established at $2500, and I now so order. Those costs to be payable by the Defendants within 30 days.

Motion dismissed.

TAB 3

See paras. 37-38, 50

2012 ONSC 6584
Ontario Superior Court of Justice

Brigaitis v. IQT, Ltd.

2012 CarswellOnt 14710, 2012 ONSC 6584, [2012] O.J. No. 5458, 223 A.C.W.S. (3d) 62

Bob Brigaitis and Cindy Rupert, Plaintiffs and IQT, Ltd., c.o.b. as IQT Solutions, IQT Solutions, IQT Canada, Ltd., JDA Partners LLC, IQT, Inc., Alex Mortman, David Mortman, John Fellows, Renae Marshall, and Brad Richards, Defendants

Perell J.

Heard: November 16, 2012
Judgment: November 21, 2012
Docket: 11-CV-432919CP

Counsel: Theodore P. Charney, Andrew J. Eckart, for Plaintiffs
J. Gardner Hodder, for Defendants, IQT Canada Ltd, JDA Partners LLC, IQT, Inc., Alex Mortman, David Mortman
Eric M. Roher, for Defendant, Bradley Richards

***Perell J.*:**

A. Introduction

1 On this motion, the Plaintiffs Bob Brigaitis and Cindy Rupert seek to have the defendants Alex Mortman, David Mortman, IQT, Inc., IQT Canada Inc., and JDA Partners LLC (the "IQT Defendants") deliver particulars of allegations in their Statement of Defence and Crossclaim.

2 For their motion, the Plaintiffs had also sought orders that: (a) the IQT Defendants produce for inspection documents referred to in the Statement of Defence and Crossclaim; (b) the IQT Defendants produce for inspection documents relevant to this proposed class action; and (c) the IQT Defendants provide authorizations to access information in computers at Canada Revenue Agency. These requests were withdrawn during the course of the argument of the Plaintiffs' motion in light of their understanding that the IQT Defendants would be delivering an affidavit of documents in the normal course and that the motion for certification would proceed in the normal course with the exchange of materials and attendant cross-examinations.

3 For the reasons that follow, I dismiss the Plaintiffs' motion for particulars.

B. Factual Background

4 IQT, Ltd., an Ontario corporation (formerly known as Durham Contact Centre Limited), carried on business as "IQT Solutions." IQT, Ltd operated a customer call centre in Oshawa, Ontario.

5 IQT, Ltd.'s primary client was Bell Canada, for whom it had a service agreement, under which IQT, Ltd. would operate a call centre for Bell. A central allegation in this law suit is that the Defendants stripped IQT, Ltd. of its assets when it appeared that its Bell connection was going to be lost.

6 The Plaintiffs, Bob Brigaitis (of Oshawa, Ontario) and Cindy Rupert (of Oshawa, Ontario) were employees of IQT, Ltd.

7 IQT, Ltd. was owned by: (a) JDA Partners, LLC; (b) IQT, Inc.; (c) John Fellows (of Flower Mound, Texas); (d) David Mortman (of New York City); and (e) Alex Mortman (of New York City). IQT Ltd.'s officers and directors were Fellows, the Mortmans, Renae Marshall (of Nanoose Bay, B.C.) and Brad Richards (of Littleton, Colorado).

8 JDA Partners, IQT, Inc., Fellows, the Mortmans also owned IQT Canada, Ltd., another Ontario corporation carrying on business in Oshawa, Ontario.

9 JDA Partners is a New York corporation that is an investment bank. It is alleged that JDA Partners controlled the business activities of IQT, Ltd and IQT Canada, Ltd. JDA Partners is owned by Fellows and the Mortmans.

10 Alternatively, it is alleged that the defendant IQT, Inc., a Delaware corporation, controlled the business activities of both IQT, Ltd and IQT Canada, Ltd. IQT, Inc. is owned by JDA Partners, Fellows, and the Mortmans.

11 The Plaintiffs allege that the various IQT companies carried on business jointly and operated as one economic unit or enterprise. The Plaintiffs allege that IQT, Ltd. had no independent decision making power and all decisions were made by the individually named defendants.

12 The event that precipitated the action now before the court occurred on July 15, 2011. On that date, without prior notice, the Plaintiffs and all the other employees of IQT, Ltd. were told that their employment was terminated and that they would not be receiving their paycheques, severance pay, and vacation pay, and that their benefits were discontinued.

13 On August 16, 2011, the Plaintiffs issued a Notice of Action and, on September 15, 2011, they filed a Statement of Claim in a proposed class action under the *Class Proceedings Act, 1992*.

14 The Plaintiffs bring their action on behalf of:

> All persons who were employees of IQT, Ltd. whose employment in Oshawa, Ontario, was terminated on July 15, 2011, exclusive of its directors and officers."

15 The Plaintiffs sue the Defendants for: (a) wrongful dismissal; (b) conspiracy; (c) inducing breach of contract; (d) an oppression remedy under s. 245 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16; and (e) negligence.

16 The Plaintiffs claim on their own behalf, and on behalf of the members of the class, for, among other things:

> (a) declaration that the Defendants wrongfully dismissed all employees of IQT, Ltd. and that the class members are entitled to reasonable notice or pay in lieu of notice, including payment for all outstanding pay, vacation pay, bonuses, benefits and severance pursuant to sections 54, 57, 58, 60, 61, 62, 63, 64 and 66 of the *Employment Standards Act, 2000*, S.O. 2000, c.41;
>
> (b) a declaration that all employees of IQT, Ltd. who filed claims under s. 96 of the *Employment Standards Act, 2000*,to the Ministry of Labour be granted leave to participate as members of the class despite s. 97 of the Act;
>
> (c) a declaration that the Defendants conspired together to wrongfully dismiss the employees of IQT, Ltd. and to strip IQT Ltd. of its assets;
>
> (d) a declaration that the directors, officers, and shareholders of IQT, Ltd. intentionally interfered with the contractual relationships between IQT, Ltd. and its employees in Ontario;
>
> (e) a declaration that the directors, officers, and/or shareholders of IQT, Ltd. were negligent; and,
>
> (f) an oppression remedy under s. 245 of the Ontario *Business Corporations Act*.

17 The Plaintiffs claim damages in the amount of $20 million, aggravated damages in the amount of $5 million dollars, and punitive damages in the amount of $5 million dollars.

18 On December 20, 2011, IQT, Ltd. was assigned into bankruptcy. The Defendant Marshall is also bankrupt. The Defendant John Fellows has been noted in default.

19 On May 16, 2012, IQT Canada Ltd, JDA Partners, IQT, Inc., and the Mortmans (the "IQT Defendants") delivered a Statement of Defence and Counterclaim.

20 The Defendant Brad Richards has not yet delivered a Statement of Defence in light of discussions about settling or discontinuing the claim against him.

21 By way of defence, JDA Partners pleads that it nothing to do with any of the IQT companies or the call centre. The IQT Defendants state that IQT, Ltd., now in bankruptcy, was the sole employer of the Plaintiffs and of the proposed class members.

22 In their defence, the IQT Defendants deny the application of the doctrine of common employment, and they plead that there is no basis to pierce the corporate veil.

23 The IQT Defendants allege that IQT, Ltd. experienced financial difficulties operating the Bell call centre and that Wells Fargo Business Credit Canada ULC, which was providing financial assistance, required David Mortman and IQT Inc. to provide guarantees, which were provided, or it would withdraw its financial support for IQT, Ltd's business. The IQT Defendants plead, however, that in early 2011, Wells Fargo began to take steps to terminate financing IQT, Ltd.'s business.

24 The IQT Defendants plead the during the final months of the operation of IQT, Ltd., its operation had effectively been taken over by Wells Fargo. The IQT Defendants plead that they were unsuccessful in their efforts to avert this crisis, and in the result, Wells Fargo refused to fund IQT, Ltd.'s payroll on July 14, 2011. The IQT Defendants say they had no choice but to close the business and end the employment of the Plaintiffs and the other employees.

25 The Defendants deny that they engaged in any conspiracy of any kind. In particular, they deny that they stripped IQT, Ltd. of its assets. They deny that they have breached any contract with either of the plaintiffs or any member of the proposed class. However, as will be revealed further below, they accuse their co-defendant Fellows of defalcations, and of impoverishing and bringing down IQT, Ltd.'s business. (I foreshadow to say that the Plaintiffs' Demand for Particulars mainly concerns Fellows' activities.)

26 The IQT Defendants plead that: (a) they exercised all due diligence to the extent reasonably expected or required; (b) they infused capital into IQT, Ltd. and sought financing and took many measures to maintain and extend the financing necessary for the operation of IQT, Ltd.; (c) at no time did they prefer their own interests to those of the employees of IQT, Ltd.; (d) they conducted themselves with all reasonable prudence in the circumstances; and (e) they removed Fellows as president of IQT, Ltd. after it became apparent that he had engaged in defalcation.

27 The IQT defendants plead that the ultimate failure of IQT, Ltd.'s financing was not reasonably foreseeable by them. The plead that they could not reasonably have foreseen IQT, Ltd.'s financial difficulties or that Fellows, its president and principal shareholder, would have misappropriated from it and weakened it to the point of extinguishing its financing.

28 In any event, the IQT Defendants plead that the proposed class members either filed complaints under the *Employment Standards Act, 2000* or were deemed to have filed complaints about IQT, Ltd.'s failure to pay wages, termination pay, and severance pay, and, therefore, under s. 97 of the *Employment Standards Act, 2000*, the class members may not commence a civil proceeding

29 The IQT Defendants deny that the proposed representative plaintiffs have standing as complainants under section 245 of the *Ontario Business Corporations Act*.

30 The IQT Defendants crossclaim against Fellows for: (a) a declaration that he was in breach of his fiduciary duty as a director of IQT, Ltd. and IQT, Inc.; (b) a declaration that he was in breach of his duty of care as a director of IQT, Ltd. and IQT, Inc.; (c) indemnification to the IQT defendants; (d) indemnification for any amounts ultimately owing by David and IQT Inc. as guarantors; and (e) repayment of any improper expenses which may have been paid by the IQT defendants.

31 The crossclaim against Fellows is set out in paragraphs 40 to 59 of the Statement of Claim and Crossclaim as follows:

> 40. The IQT Defendants plead that it became apparent to Alex and David that Fellows and his operating team, as selected by him, were responsible for the company's struggles. Accordingly, a management change was made removing Richards as CFO for all the Canadian companies and Alex replaced him effective September, 2010.
>
> 41. Upon becoming CFO of IQT, Ltd., Alex discovered a number of accounting irregularities. For example, there were several significant payables that were neither recorded in IQT, Ltd.'s books nor reflected in the operating statements that the Board received.
>
> 42. Alex also noticed substantial travel and entertainment expenses for the entire management team, from Fellows on down. Alex repeatedly requested, both verbally and by email, that Fellows document these expenses. Alex also stopped payment to management employees for all undocumented requests for such expenses. Despite Alex's frequent requests, Fellows never provided any documentation or otherwise explained these unsubstantiated expenses.
>
> 43. The IQT defendants also discovered material unauthorized cash withdrawals from IQT, Ltd.'s account that could only have been made by Fellows.
>
> 44. Fellows' unauthorized, and undisclosed, travel and entertainment expenses and his unauthorized cash withdrawals, were one of the reasons IQT, Ltd. was unable to maintain its financing. Richards was complicit in Fellows' activities and helped conceal those activities from the other defendants and their auditors.
>
> **Breach of Fiduciary Duty**
>
> 45. Fellows is the majority shareholder and former president and director of IQT, Inc.
>
> 46. As the CEO and director of IQT, Inc., and a director of IQT, Ltd., Fellows owed a fiduciary duty to both IQT, Inc. and IQT, Ltd., which required him to act at all times in the best interests of IQT, Inc. and IQT, Ltd. and their investors, to avoid self-dealing, and to act in good faith.
>
> 47. Fellows intentionally and willfully violated his corporate fiduciary duty of loyalty by misappropriating travel and entertainment expenses either for himself and for others with his approval.
>
> 48. Fellows' breaches of his fiduciary duty with IQT, Inc. and IQT, Ltd. led to IQT Ltd.'s inability to maintain its financing, as a result of which it was necessary for the guarantors to execute the aforementioned guarantees. Fellows' breaches of his fiduciary duty led directly to the execution of the guarantees and the exposure of the guarantors thereunder.
>
> 49. Fellows intentionally and willfully violated his corporate fiduciary duty of loyalty by taking material unauthorized cash withdrawals from IQT, Inc.'s account that could only have been made by him.

50. Therefore, Fellows is liable for not only the unauthorized misappropriation and defalcation of the corporate IQT defendants' funds, but also the amounts owed, including any fees, costs, and expenses on the underlying guarantees, and for punitive damages.

Breach of Duty of Care

51. As the CEO and director of IQT, Inc. and a director of IQT, Ltd., Fellows owed a duty of care to IQT, Inc. and IQT, Ltd., which required him to act at all times in a way that complied with the applicable standard of care.

52. Fellows intentionally and willfully violated his duty of care by misappropriating travel and entertainment expenses either for himself or for others with his approval.

53. Fellows intentionally and willfully violated his duty of care by making material unauthorized cash withdrawals from IQT, Inc.'s account that could only have been made by him.

54. Fellows' breaches of his duty of care led to Wells Fargo's declaration of default. But for that declaration of default, the guarantors would never have executed the guarantees underlying Wells Fargo's current action and faced the potential liability they now face under those guarantees.

55. Therefore, Fellows is liable for not only the unauthorized misappropriation and defalcation of the IQT defendants' funds, but also the amounts owed, including any fees, costs, and expenses on the underlying guarantees, and for punitive damages.

Indemnification

56. Because Fellows' unlawful, wrongful, and bad faith misappropriations and defalcations led to IQT, Ltd.'s initial default with Wells Fargo, if any, and because that default led to IQT, Inc. and David signing guarantees, which Wells Fargo is now attempting to enforce, the IQT defendants have a claim against Fellows that he is obligated to indemnify them all amounts owed, in the event that the Court concludes any amounts are owed at all.

57. Therefore, Fellows is liable for the unauthorized misappropriation and defalcation of the IQT defendants' funds and the amounts owed, including any fees, costs, and expenses on the underlying guarantees.

58. The IQT defendants also claim indemnification for any and all amounts they may be found liable to pay to the plaintiffs or the proposed plaintiff class in the within action.

Conversion

59. During his tenure as IQT, Inc.'s CEO and president, and during his tenure as a director, Fellows intentionally and willfully misappropriated and embezzled money and other company assets and property from that company. This money and these assets and property belonged to IQT, Inc.

32 By letter dated June 29, 2012 to the IQT Defendants' lawyer, the Plaintiffs demanded particulars of the allegations made in the Statement of Defence and Counterclaim as follows:

(1) Paragraph 14: What do the IQT Defendants mean when they claim that IQT, Ltd. was experiencing "financial difficulties"? What type of "financial difficulties" did they suffer? How did these "financial difficulties" relate to John Fellows? What were the "then unknown actions" of Fellows? How and when did the IQT Defendants find out about those actions of Fellows?

(2) Paragraph 17: What "further and substantial efforts to avert" the termination of the financing of IQT, Ltd. did the IQT Defendants make? When did they make those efforts?

(3) Paragraph 26(b): What capital was "infused" into IQT, Ltd and when was this done? What "financing" was sought? From whom was it sought? What were the "many measures to maintain and extend the financing for the operation of IQT, Ltd"? When did they take those measures?

(4) Paragraph 40: Who was part of Fellows' "operating team"? How were they "responsible for the company's struggles"? When did it first become "apparent" to David and Alex that "Fellows and his team, as selected by him, were responsible for the company's struggles"?

(5) Paragraph 41: What were all of the "accounting irregularities" that Alex "discovered"? In what amount were they? Who were the payments to? How were the payments made? Which bank accounts were used? When and how did Alex discover these "irregularities"?

(6) Paragraph 42: What "substantial travel and entertainment expenses" were discovered? Who was part of the "management team"? What was the amount of these expenses? When and how did Alex discover these expenses?

(7) Paragraph 43: What "material unauthorized cash withdrawals" did Fellows make? In what amount? When did he make them? Did anyone assist him in making these withdrawals and if so, who? When and how did Alex discover these withdrawals?

(8) Paragraph 44: How was Bradley Richards "complicit in Fellows' activities" and how did he "help conceal those activities"? What actions did Richards take? When did he do so? What was the dollar amount of the total transactions Richards was complicit in? How many and what transactions was Richards complicit in? When and how did the IQT Defendants find out that Richards was complicit in these activities and that he helped conceal them?

(9) Paragraph 59: When and how did Fellows "misappropriate and embezzle money and other company assets and property"? What is the total dollar amount of this conversion? Who else was complicit in these activities? When and how did the IQT Defendants find out about these activities?

33 By their lawyer's letter dated August 28, 2012, the IQT Defendants refused to provide the requested particulars.

34 Certification materials are due from the Plaintiffs by February 15, 2013. The Plaintiffs submit that to adequately prepare for certification and to assess whether the action is worth pursuing it requires answers to the Demand for Particulars. They state that the Defendants' pleading does not adequately inform them of the Defendants' position.

C. Discussion

35 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time: Rule 25.10; *Fairbairn v. Sage* (1925), 56 O.L.R. 462 (Ont. C.A.); *Physicians Services Inc. v. Cass*, [1971] 2 O.R. 626 (Ont. C.A.); *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (Ont. H.C.).

36 In P.M. Perell and J.W. Morden, *The Law of Civil Procedure in Ontario* (1st ed.) (LexisNexis: Markham, 2010), p. 347, I describe the nature of particulars as follows (citations omitted):

> In between material facts and evidence, is the concept of "particulars". Particulars are additional details that enhance the material facts, and particulars have a role to play different from just being evidence. Particulars are ordered primarily to clarify a pleading sufficiently to enable the adverse party to frame his or her answer, and their secondary purpose is to prevent surprise at trial. Particulars have the effect of providing information that narrows the generality of pleadings. Particulars define the issues, enable preparation for trial, prevent surprise at trial and facilitate the hearing. A function of particulars to a statement of claim is to define the claim sufficiently to allow a defendant to respond intelligently to it.

37 An order for particulars is a discretionary order, and the court must be satisfied that the order is just in the circumstances of each case: *Fairbairn v. Sage*, *supra* at p. 471; *Obonsawin v. Canada*, [2001] O.J. No. 369 (Ont. S.C.J.) at para. 42; *Reichmann v. Koplowitz*, 2012 ONSC 5063 (Ont. Master) at para. 11. Particulars for pleadings are normally ordered only if: (a) they are not within the knowledge of the party demanding them; and (b) they are necessary to enable the other party to plead his or her response: *Fairbairn v. Sage*, *supra*; *Physicians Services Inc. v. Cass*, *supra*.

38 The ability to plead is the focus of the need for particulars, and particulars will be refused if the demand for particulars is being used instead as a way to discover evidence before the examinations for discovery: *Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (Ont. S.C.J.) at para. 23. As evidence is not to be pleaded; it is not to be ordered by way of particulars: *Caputo v. Imperial Tobacco Ltd.*, [1996] O.J. No. 1396 (Ont. Master) at para. 8.

39 In *Sears Canada Inc. v. Pi Media Ltd.*, 2011 ONSC 2625 (Ont. Master), Master Short dismissed a motion for particulars, and he observed that pleadings and the discovery process should not be confused. He stated at para. 49:

> Pleadings should not be confused with discovery, and the sufficiency of a pleading must be read in light of the discovery process in an action proceeding under the Rules. In my view, even with time limited discoveries, a Demand for Particulars should not be used as a "prepleading" discovery.

40 The onus is on the party requesting particulars to satisfy the court that such particulars are necessary: *Obonsawin v. Canada*, *supra* at para. 36. The standard for particulars is the same for both ordinary actions and also proposed class actions: *Caputo v. Imperial Tobacco Ltd.*, *supra*.

41 Typically, a defendant will demand particulars in order to plead his or her statement of defence or a plaintiff will demand particulars in order to plead his or her defence to a counterclaim. The case at bar is novel because there is no counterclaim against the Plaintiffs and their demand for particulars is largely concerned with the Crossclaim included in the Statement of Defence against a co-defendant.

42 Untypically, in the case at bar, the Plaintiffs demand is made: (1) in order to deliver a reply; or (2) because the Plaintiffs submit that they need particulars to prepare for the certification motion and in order to understand the IQT Defendant's defence to the action and their resistance to the certification motion.

43 Addressing the Plaintiffs' alleged need for particulars in order to plead a reply, it needs first to be noted that it is at least doubtful that they are entitled to deliver this pleading, because the right to deliver a reply is a qualified right. The Rules concerning replies are restrictive. Rule 25.08 s t at e s:

> 25.08 (1) A party who intends to prove a version of the facts different from that pleaded in the opposite party's defence shall deliver a reply setting out the different version, unless it has already been pleaded in the claim.
>
> (2) A party who intends to reply in response to a defence on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading shall deliver a reply setting out that matter, subject to subrule 25.06 (5) (inconsistent claims or new claims).
>
> (3) A party shall not deliver a reply except where required to do so by subrule (1) or (2).
>
> (4) A party who does not deliver a reply within the prescribed time shall be deemed to deny the allegations of fact made in the defence of the opposite party.

44 Since the Plaintiffs have already pleaded that the IQT Defendants stripped IQT, Ltd. of assets, and since the IQT Defendants plead a cutthroat defence putting the blame on their co-defendant Fellows, and since the IQT Defendants more or less admit that assets were being stripped from IQT, Ltd., it is not apparent why the Plaintiffs would want to plead a version of the facts different from the IQT Defendants' pleading.

45 It is also not apparent that the Plaintiffs have information that might take the IQT Defendants by surprise. In other words, there is no apparent need for a reply, and, therefore, no manifested need for particulars for pleading a reply.

46 Assuming, however, that a reply will be forthcoming, in my opinion, the Plaintiffs have not met the onus of showing that they need particulars to deliver their reply. It rather appears that the genuine reason that they want particulars is to satisfy their curiosity about the details of the IQT Defendants' resistance to the certification motion and about the details of the IQT Defendants' Crossclaim against Fellows, which, as already noted, rather supports the Plaintiffs' allegations that the assets of IQT, Ltd. were wrongfully depleted.

47 Once again, particulars are not needed. The Plaintiffs' curiosity about the IQT Defendants' case and about the Defendants' position on the certification motion will be satisfied in the normal course by the procedural run-up to the certification motion.

48 Particulars will not be ordered if they are essentially a means to circumvent the normal procedure for an action where the discovery process follows the close of pleadings. In this regard, I agree with the comments of Justice Cullity in *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (Ont. S.C.J.) at paras. 12-13, where he dismissed a motion for particulars and stated:

> 12. In the first place, a number of the particulars address factual questions relating to the class members and their vehicles. Such facts do not have to be pleaded. The statement of claim properly contains the facts alleged as between the plaintiffs and the defendants. Details with respect to the class may be obtained from the affidavits filed by the plaintiffs on the motion to certify the proceeding — and from cross-examinations on them — to the extent that they are relevant to the requirements for certification or, after certification, through examinations for discovery and the evidence given at trial — or when individual claims are considered subsequently.
>
> 13. More fundamentally, particulars are required in order to enable a party to plead. The defendants have elected to defer the filing of their statement of defence until after certification. Particulars are not provided unless the necessary material facts have been pleaded: *Copland v. Commodore Business Machines Ltd.*, 52 O.R. (2d) 586 (Ont. Master) If this is not done, causes of action will not be disclosed by the pleading and certification will denied with respect to them. If the material facts have been pleaded in respect of the claims of the plaintiffs, the absence of particulars should not ordinarily bear on issues relating to certification. The factual basis for those relating to commonality, or the preferable procedure, should be dealt with in supporting affidavits and can be explored in cross-examination. Particulars will, therefore, not usually be required prior to certification and I see nothing in the circumstances of this case that would require it to be treated as exceptional.

49 In *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257 (Ont. S.C.J.), I ordered a plaintiff to provide particulars prior to a certification motion because the moving defendants in that case required them for an imminent certification motion. I stated that particulars were a matter of procedural fairness in order for the defendants to know the case they must meet at the certification motion. However, I also ordered the Defendants to deliver their Statement of Defence as a condition of my ordering particulars, and I applied the normal tests about when particulars should be delivered, including the test that the particulars must be needed in order to plead. I dismissed many of the Defendants' demands for particulars as improper based on the developed caselaw about when particulars will be ordered.

50 Practically speaking, in *Pennyfeather*, I was directing both the plaintiff and the defendant in a proposed class proceeding to complete the normal process of closing pleadings and only then proceeding to the disclosure stages of the action. In that context, particulars would play their normal role.

51 In the case at bar, the Plaintiffs will have an ample opportunity to know the case they must meet for the certification motion through the normal procedures, and they will have an opportunity to question the IQT Defendants about the matters described in the Demand for Particulars. In the case at bar, the Plaintiffs do not meet the onus of showing a need for particulars.

D. Conclusion

52 For the above reasons, I dismiss the Plaintiffs' motion.

53 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the IQT Defendants submissions within 20 days, followed by the Plaintiffs' submissions within a further 20 days.

Motion dismissed.

TAB 4

See para. 32

2018 ONSC 3990
Ontario Superior Court of Justice

Martin v. The City of Mississauga

2018 CarswellOnt 10248, 2018 ONSC 3990, 294 A.C.W.S. (3d) 49

AMANDA MARTIN (Plaintiff) and THE CITY OF MISSISSAUGA, KIMBERLEY LESLIE, ROBERT LEVESQUE and GEOFF WRIGHT (Defendants)

Master M.P. McGraw

Heard: June 19, 2018
Judgment: June 25, 2018
Docket: 17-60754

Counsel: T. Gorsky, for Defendant, City of Mississauga
P. Marshall, C. Kirewskie, for Plaintiff

***Master M.P. McGraw*:**

I. Overview

1 In this wrongful dismissal action, the Defendant The City of Mississauga (the "City") brings a motion seeking leave to amend its Statement of Defence (the "Original Defence"). The proposed amendments relate to the City's withdrawal of its allegation that the Plaintiff was terminated for just cause.

2 The Plaintiff submits that the proposed amendments constitute a withdrawal of admissions and opposes the City's motion. The Plaintiff also brings a cross-motion to: i.) compel the City to produce a third party investigation report (the "Report') together with the name and contact information of the investigator; ii.) permit the Plaintiff to discover on the cause allegation and the investigation as set out in the Original Defence; and iii.) require the City to deliver its Affidavit of Documents within 30 days (the "Plaintiff's Motion").

3 As with many pleadings motions, the issues underlying the Plaintiff's opposition to the proposed amendments relate to discovery. The Plaintiff submits that the proposed amendments are a tactical ploy by the City to deprive her of discovery rights. This is reflected in the Plaintiff's Motion where the Plaintiff seeks both the production of the Report and the right to discover on the investigation prior to the City delivering its Affidavit of Documents and examinations for discovery. Further, the City's counsel has not yet reviewed the Report and advises that the Report may not be relevant to this action as it may be related only to the City's investigation of other employees with no mention of the Plaintiff.

4 Consistent with Rule 1.04 and proportionality, significant case management was provided on both attendances with a view to resolving the real issues on these motions in order to allow the parties to proceed efficiently to discoveries. However, as set out below, minimal compromise was achieved and the motions proceeded.

II. The Parties and the Action

The Parties and the Action

5 The Plaintiff was employed as the Administrative Coordinator in the City's Works, Operation and Maintenance Division from on or about April 15, 2014 until her termination on March 7, 2016. The individual Defendants are City employees.

6 In her Fresh As Amended Statement of Claim issued on June 13, 2017 (original issued on March 1, 2017), the Plaintiff claims damages of $500,000 as against the City and the Defendant Geoff Wright for breach of contract, improper termination and wrongful and bad faith dismissal; $100,000 each for breach of her section 8 rights pursuant to the *Canadian Charter of Rights and Freedoms* (the "Charter") and intrusion upon seclusion; and $500,000 in punitive damages. The Plaintiff claims $500,000 as against the Defendant Kimberley Leslie for harassment, defamation and intentional interference with contractual relations, and $100,000 in punitive damages, and $500,000 as against the Defendant Robert Levesque for sexual harassment and $500,000 in punitive damages.

7 In the Original Defence, the City alleged, among other things, that the Plaintiff was dismissed for just cause as a result of, among other things, the improper disclosure of confidential information related to an investigation of other City employees in the Works, Operation and Maintenance Division.

8 By letter dated January 23, 2018, the City's counsel advised Plaintiff's counsel that the City intended to withdraw its allegation of just cause termination and would be providing an amended Statement of Defence. On February 9, 2018, the City's counsel wrote to Plaintiff's counsel confirming the City's withdrawal of its allegation that the Plaintiff was terminated for just cause, enclosing payment of the required amounts under the *Employment Standards Act, 2000* (Ontario) and the Plaintiff's employment contract and a draft Fresh As Amended Statement of Defence (the "Amended Defence"). The Plaintiff refused to consent to the Amended Defence.

9 The parties first appeared before me on May 23, 2018. As Plaintiff's counsel understood the attendance to be for the purpose of scheduling, and the City needed to file additional materials to respond to the Plaintiff's Motion, I granted an adjournment. As it was immediately apparent that the underlying issues related to discovery, case management was provided and counsel had discussions outside of Court in an attempt to resolve the disputed issues. These efforts were unsuccessful.

III. The Law and Analysis

10 Rule 26.01 states:

> "On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."

11 Amendments should be presumptively approved unless they would result in prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the court's process; or they disclose no reasonable cause of action (*Andersen Consulting v. Canada (Attorney General)*, 2001 CarswellOnt 3139 (Ont. C.A.) at para. 37).

12 Master MacLeod (as he then was) summarized the test for leave to amend pleadings under Rule 26.01 at paragraphs 19-22 of *Plante v. Industrial Alliance Life Insurance Co.*, 2003 CarswellOnt 2961 (Ont. S.C.J.):

> . . .
>
> "(a) The amendments must not result in irremediable prejudice. The onus of proving prejudice is on the party alleging it unless a limitation period has expired. In the latter case, the onus shifts and the party seeking the amendment must lead evidence to explain the delay and to displace the presumption of prejudice: [citations omitted]
>
> (b) The amended pleading must be legally tenable. It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success. For this purpose amendments are to be read generously with allowance for deficiencies in drafting: [citations omitted].

(c) The proposed amendments must otherwise comply with the rules of pleading. For example, the proposed amendments must contain a "concise statement of material facts" relied on "but not the evidence by which those facts are to be proved" (rule 25.06(1)), the proposed amendments are not "scandalous, frivolous or vexatious" (rule 25.11(b)), the proposed amendThements are not "an abuse of the process of the court" (rule 25.11(c)), the proposed amendments contain sufficient particulars -- for example, of fraud and misrepresentation (rule 25.06(8))."

13 The Court of Appeal has provided the following guidance with respect to non-compensable prejudice:

i.) there must be a causal connection between the non-compensable prejudice and the amendment such that the prejudice must flow from the amendments and not somewhere else;

ii.) the non-compensable prejudice must be actual prejudice, ie. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment and specific details must be provided;

iii.) non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial (*1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 CarswellOnt 369 (Ont. C.A.) at para. 25; *Andersen* at paras. 34 and 37).

14 The prejudice referred to under Rule 26.01 is prejudice to a party's rights in prosecuting the action (*Godoy v. 475920 Ontario Ltd.* (2007), 52 C.P.C. (6th) 149 (Ont. S.C.J.)).

15 The Plaintiff submits that since the proposed amendments constitute a withdrawal of admissions, Rule 51.05 supersedes Rule 26.01 (*Antipas v. Coroneos*, [1988] O.J. No. 137 (Ont. H.C.)). Rule 51.05 states:

"An admission made in response to a request to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court."

16 I recently considered and summarized the law with respect to the withdrawal of admissions in *Baca v. Tatarinov*, 2018 ONSC 1307 (Ont. S.C.J.). The Divisional Court has defined an admission as "an unambiguous deliberate concession to the opposing party" (*Griffiths v. Canaccord Capital Corp.*, 2005 CarswellOnt 6610 (Ont. Div. Ct.) at para. 19).

17 In *Yang (Litigation Guardian of) v. Simcoe (County)*, 2011 ONSC 6405 (Ont. S.C.J.), G.P. DiTomaso J. stated the following at paragraph 46:

"Generally, admissions in a pleading are made boldly and baldly and they are, in general, specific and identifiable as admissions. An admission contemplated by rule 51 is one that is an unambiguous deliberate concession to a position taken by the defendant. An admission contemplated by rule 51 occurs when the plaintiff admits that a set of facts were posed by the defendant is correct. An admission must be an intentional concession to the other side and not simply the result of the words chosen in the claim. A factual pleading made in error cannot fairly be characterized as a deliberate admission."

18 In *Nguyen v. Rare Elm Home Corp.*, 2006 CarswellOnt 7982 (Ont. S.C.J.), Master Glustein (as he then was) held at paragraphs 21-23 and 25-26:

"21 However, the fact that the initial claim assumed (or even pleaded) that the assignment agreement was valid is not an "admission" in law. In *Hughes v. Toronto-Dominion Bank*, [2002] O.J. No. 2145 (Mast.), the plaintiff pleaded that there was a personal guarantee in place, but later sought to amend the pleading to allege that he did not intend the documents at issue to be a personal guarantee. Master MacLeod held that the initial pleading was not an admission and, after a review of the leading cases, adopted the following definition (at para. 10):

• I adopt the definition of an admission as being *an unambiguous deliberate concession to the opposing party*. [emphasis added]

22 Carnwarth J. of the Divisional Court adopted the same definition in *Griffiths v. Canaccord Capital Corp.*, [2005] O.J. No. 4897. In that case, the plaintiff initially sought damages for wrongful dismissal and for a higher purchase price for his Canaccord shares than that paid by Canaccord. The plaintiff sought to amend the claim to plead that he was entitled to retain ownership of the Canaccord shares. Carnwarth J. reversed the decision of the Master who held that the amendment had the effect of withdrawing the plaintiff's "admission" that he was obligated to sell his shares. Carnwarth J. held that "the existing pleadings relating to the Canaccord shares do not constitute unambiguous deliberate concessions in response to Canaccord's pleadings" (at paras. 18-20).

23 In the present case, the allegations as to the validity of the assignment agreement in the initial claim are not unambiguous deliberate concessions to positions taken by the defendants.

. . .

25 In the proposed claim, the plaintiffs' pleading that the assignment was not valid does not "withdraw" any pleading from the initial claim. In both claims, the fact pleaded is that the plaintiff signed the assignment agreement. Upon review by new counsel, the plaintiffs now plead that such an assignment required consent, as has already been pleaded by Rare Elm. There is no "concession" to a position taken by the defendants.

26 Subsequent counsel must be free to modify the legal theory of a case, depending on the facts they discover, whether through pleadings, at discovery, or at trial. If a party seeks to withdraw statements that are concessions, the test in *Antipas* must be met. However, as in this case, if new counsel seeks to recast the claim based on an existing document that both parties (the plaintiffs and Pham) agreed was signed, this cannot constitute a withdrawal of an admission."

19 A party requesting leave to withdraw an admission must establish that: i.) the proposed amendment raises a triable issue; ii.) the admission was inadvertent or resulted from wrong instructions; and iii.) the withdrawal will not result in any prejudice that cannot be compensated for in costs (*Metro Ontario Real Estate Ltd. v. Hillmond Investments Ltd.*, 2017 ONSC 3518 (Ont. S.C.J.)at para. 4). If there is a triable issue, a party should be able to withdraw an admission upon furnishing a reasonable explanation for the change of position (*Metro* at para. 4).

20 At paragraphs 4(e) and 22 of the Original Defence, the City alleges that it terminated the Plaintiff's employment for cause. At paragraph 16 of the Amended Defence the City states:

"Although the City initially terminated the Plaintiff's employment for cause, it has since withdrawn the allegation and has notified the Plaintiff that her termination of employment is on the basis of without just cause".

21 Having reviewed the Amended Defence and considered the relevant factors and circumstances, I conclude that the City's proposed amendments do not constitute a withdrawal of admissions. In my view, the City's allegation in the Original Defence that the Plaintiff was terminated with just cause is not an unambiguous deliberate concession to any position taken by the Plaintiff. In asserting that the Plaintiff was terminated with just cause, the City was not making a "concession" or admitting that a set of facts posed by the Plaintiff was correct. To the contrary, the City was disputing the Plaintiff's allegation that she was wrongfully terminated by alleging in response that she was terminated for just cause. As such, the City's allegation is not an admission and the proposed amendment, though a withdrawal, is not a withdrawal of an admission.

22 The Plaintiff has not referred me to any case law which supports the proposition that an allegation of the kind made by the City constitutes an admission and/or that its withdrawal engages Rule 51.05. Having concluded that the proposed amendments do not constitute a withdrawal of admissions, I further conclude it is unnecessary for me to consider the relevant case law under Rule 51.05 and I decline to do so.

23 Turning to Rule 26.01, I conclude that there are no issues with respect to the legal tenability of the proposed amendments or compliance with the Rules of pleadings and the Plaintiff made no submissions in this regard. Therefore, the only factor I must consider is whether the Plaintiff would suffer any actual prejudice as a result of the proposed amendments.

24 The Plaintiff submits that if leave is granted, it will be open to the City to refuse to answer questions on examinations for discovery related to the investigation, the Report and the reasons for her dismissal including bad faith termination. The Plaintiff asserts that this will likely lead to a refusals motion thereby substantially increasing the costs of this action while delaying the trial. The Plaintiff also argues that the proposed amendments would deprive the Plaintiff of her right to know why she was terminated.

25 I reject the Plaintiff's submissions for numerous reasons. The City concedes that that if the amendments are permitted, the reasons for the Plaintiff's dismissal including bad faith termination will remain relevant to this action. The City states it will not refuse to answer questions related to cause to the extent to which they are relevant to bad faith termination, subject to proportionality, privilege or any other proper basis for refusal.

26 Further, as set out above, the Report and the corresponding investigation may relate to City employees other than the Plaintiff. In this regard, the City has agreed to review the Report, and advise within 7 days if the City takes the position that it is relevant and producible or if it otherwise asserts privilege over the Report. In addition, the Plaintiff's arguments that granting leave will delay the trial, lengthen the proceedings, increase costs and/or possibly result in a refusals motion does not constitute actual, non-compensable prejudice as defined by the Court of Appeal. The Plaintiff will have the opportunity to deliver a Reply and conduct examinations for discovery on the Amended Defence in the normal course with the benefit of the City's Affidavit of Documents and productions. This includes discovery on bad faith termination, the primary area of concern expressed by the Plaintiff. Therefore, in my view, the Plaintiff would not lose any opportunities in the conduct of this action if leave is granted.

27 The Plaintiff also relies on *Pagliuca v. Paolini Supermarket Ltd.*, [2013] O.J. No. 653 (Ont. C.A.) which the Plaintiff submits stands for the proposition that actual prejudice can arise if the effect of a pleading amendment is to allow damages to be determined on a different basis than that on which the liability issue was founded. In my view, *Pagliuca*, which was decided under Rule 51.05, is distinguishable from the present case. In that case, the applicants sought to withdraw an admission that an undisputed right of way existed across their property. The court held that withdrawing the admission would cause actual prejudice given that it had been before the court for over 12 years in 2 related actions, 1 of which was decided and confirmed on appeal on the basis of the admission of the undisputed right of way. That is not the case here, where I have concluded that the proposed amendments do not constitute admissions, there has been no adjudication of any issues and the Plaintiff is advancing numerous grounds of liability including bad faith termination, harassment, breach of contract and the Charter, intrusion upon seclusion and intentional interference with contractual relations which will remain after the amendments.

28 The Plaintiff also relies on *Phillips v. Disney*, [2018] O.J. No. 833 (Ont. S.C.J.), another decision under Rule 51.05. In *Phillips*, Boswell J. states that the Court must determine whether the amendments are meritorious or "whether they are nothing more than a tactical move that will tend to hinder, delay or frustrate the course of justice" (*Phillips* at para. 25). Again, this case is distinguishable given that it was decided under Rule 51.05, and, in any event, I am not satisfied that the proposed amendments are exclusively a tactical move being made for the purpose of hindering, delaying or frustrating the Plaintiff's action.

29 Accordingly, I conclude that the Plaintiff has not established that she would suffer non-compensable prejudice if leave is granted. Based on my consideration of the factors and circumstances above, I conclude that it is appropriate in the circumstances that the City be granted leave to amend its Original Defence in the form of Amended Defence filed.

30 With respect to the Plaintiff's Motion, as set out above, the City's counsel has agreed to review the Report and advise the Plaintiff regarding its position on production within 7 days. The Report will then be listed on Schedule "A" to the City's Affidavit of Documents and produced; listed on Schedule "B" as a document over which the City asserts privilege; or the City may take the position that it is not producible because it is not relevant to the Plaintiff's action.

31 Notwithstanding the City's agreement to provide its position on the Report within 7 days and prior to the delivery of its Affidavit of Documents, the Plaintiff insists that she is entitled to an order now compelling its production together with the name and contact information for the investigator. The Plaintiff's arguments in support of this request again relate to her right to know why she was terminated and to receive information with respect to the termination of her employment. While she is entitled to this information because it is relevant to her action, the issue is one of timing, specifically, whether she is entitled to documentation and information now, before the City has delivered its Affidavit of Documents and before examinations for discovery.

32 In my view, the order sought by the Plaintiff is premature and disproportionate given that the City has not yet taken a position and may ultimately agree to produce the Report within 7 days, rendering such an order moot. Even if the City ultimately takes the position that the Report is not producible due to relevance, privilege or some other grounds, the Plaintiff is not entitled to an order in advance compelling its production. Production at this time would be contrary to the long-held principle that production and inspection will only be ordered at this stage where the documents are essential for the purposes of pleading (*Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (Ont. H.C.). While the Plaintiff submits that production of the Report "may" assist with any Reply she delivers, this is not sufficient to justify production at this stage.

33 The Plaintiff also cites her numerous attempts to obtain the Report and information regarding the investigation through correspondence between counsel and the delivery of a Demand For Particulars and Request to Inspect in which the information was refused on the basis that it constituted evidence not required for pleading. Again, this does not give rise to an entitlement to production at this stage of these proceedings. Any questions related to the Report, the investigation or the City's positions can be addressed on examinations for discovery after the City provides its position, Affidavit of Documents and productions.

34 Accordingly, having considered the relevant factors, I decline to order the City to deliver the Report and the information regarding the investigator.

35 For similar reasons, I also decline to grant an order permitting the Plaintiff to discover on the cause allegation and investigation as requested. In my view, any such relief is premature. Again, the City will provide its position regarding the Report which will in turn determine its position on the investigation, the City will deliver its Amended Defence and produce its Affidavit of Documents, the Plaintiff may file a Reply and the parties will proceed to examinations for discovery. The parties should complete their discussions on a discovery plan which may assist in defining the scope of discoveries. Questions can be posed on examinations for discovery and answers and positions taken accordingly. As set out above, the City has already agreed that bad faith termination, the primary area of concern expressed by the Plaintiff, remains relevant in this action.

36 Finally, although the City advises that it is in the process of reviewing documents and preparing its Affidavit of Documents, I am satisfied that that it is reasonable in the circumstances to set a deadline for its delivery. In my view, the City should do so within 45 days.

IV. Disposition

37 Order to go as follows:

i.) the City is granted leave to amend its Original Defence in the form of the Amended Defence;

ii.) the City shall advise the Plaintiff regarding its position with respect to the production of the Report within 7 days;

iii.) the City shall serve its Affidavit of Documents on the Plaintiff within 45 days.

38 If the parties cannot agree on the costs of this motion, they may file written costs submissions not to exceed 3 pages (excluding costs outlines) with me through the Hamilton Trial Coordinator on or before August 15, 2018.

Motion granted; cross-motion granted in part.

TAB 5

1985 CarswellOnt 508
Ontario Supreme Court

Durish v. Bent

1985 CarswellOnt 508, [1985] W.D.F.L. 2084, 33 A.C.W.S. (2d) 141, 4 C.P.C. (2d) 37

DURISH et al. v. BENT

Master Donkin

Judgment: October 7, 1985
Docket: Toronto No. 03662/85

Counsel: *P. McInnes*, for defendant.
M. Canning, for plaintiff.

***Master Donkin*:**

1 This is a motion for an order for production of documents in the possession, control and power of the plaintiffs, more particularly listed in Sched. "A" to the motion.

2 The action itself was commenced in June 1985. It is alleged in the statement of claim that the individual plaintiff and the corporate plaintiff were sued by the wife of the individual plaintiff in 1978 and that in that action, the entitlement to certain real property was at issue. The wife obtained an order restraining the present plaintiffs from selling, mortgaging or changing in any way the real property which was in issue. At a later stage, the defendant was retained by the plaintiffs in the action brought by the wife and shortly after his retainer, he obtained an order releasing one of the properties from the earlier restraining order. The plaintiffs allege that in November 1980, the plaintiffs settled with the wife and that minutes of settlement were executed which included a term that three items of real property and a yacht were to become the property of the plaintiffs. The plaintiffs allege that the solicitor, when taking out the judgment pursuant to those minutes of settlement was negligent in that he did not include in the judgment an order having the effect of vacating the whole of the restraining order although the plaintiff states that that had been specifically agreed. They further allege that pursuant to the settlement, the defendant did provide certain documents to the solicitors for the wife and permitted them to take certain steps in furtherance of the settlement without insisting upon the obtaining of an order vacating the balance of that restraining order. Finally, the order was obtained in May 1981. The plaintiff alleges that because of this delay from November 1980 to May 1981, the plaintiffs were unable to provide certain security required by their banks and that as a result, they suffered damages in the loss of their credit worthiness and substantial opportunities to earn profits and their ability to borrow from certain sources.

3 The documents which the defendants asked to have produced are 34 in number. The affidavit in support states that the whole of the defendant's file was handed over to the clients who are now the plaintiffs at the conclusion of his retainer. The documents requested include such things as the litigation briefs in the action brought by the wife, the briefs in another action by a bank against the present plaintiffs, credit applications of the plaintiffs for the last six years, memoranda between the plaintiffs and defendant, pleadings in other actions, correspondence between the plaintiffs and other solicitors, correspondence between the plaintiffs and their banks, documents and correspondence which are mentioned in documents already in the possession of the defendants, documents dated as late as 1984 between the plaintiffs and certain banks and commercial companies, minutes of settlement of certain actions brought by banks, and a credit application to a trust company. The affidavit in support ends by saying:

It is contended on behalf of the defendant that the production of all material requested in the memorandum ... is necessary in order for the defendant properly to plead to the claims set out in the statement of claim and deliver a statement of defence.

4 The motion is brought pursuant to r. 30.04(5) which states:

The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

5 Counsel for the defendant cites Morgan v. Fekete (1979), 25 O.R. (2d) 237, a decision by Master Davidson. An appeal from that order was dismissed. In that case, the plaintiff requested an order under R. 348 which is the predecessor of the present rule. He requested records in the possession of the defendant. The claim was a medical malpractice claim against a physician for his treatment of the plaintiff's foot, the treatment being given in the private medical offices of the defendant. There were no public or hospital records. Master Davidson based his decision on McLean v. Barber & Ellis Co. (1890), 13 P.R. 500 and stated [at p. 238]:

With that case in mind, and given the added circumstances here of a patient-doctor relationship, I see no reason why the order ought not to go and I accordingly make the order in favour of the plaintiff in respect to Rule 348.

6 In the McLean case, an order was made in favour of a plaintiff before he delivered his statement of claim for the production of a letter written by the plaintiff to the defendant. The letter was essential in framing the plaintiff's case and the plaintiff had not kept a copy.

7 In Arthur & Co. v. Runians (1898), 18 P.R. 205, Chancellor Boyd, on an application by a plaintiff for an order for production of certain books and papers stated:

[T]he practice followed is that production should not, as a rule, be ordered to a plaintiff before he pleads, unless the Judge is satisfied that the documents called for are essential to the statement of the plaintiff's claim. Applying this test, the order of the Chief Justice should be set aside and the original order of the acting Master restored. It is not essential for the plaintiffs to have the documents in order to frame the statement of their cause of action. They claimed damages for 'false misrepresentations' in the indorsement on the writ; but they must know by what false statements they were misled although they may not be able to prove their falsity without reference to the documents in question.

8 There are similar quotations to the same effect in that case.

9 Applying that line of reasoning to this case, it is noteworthy that the affidavit does not state that the deponent is informed and verily believes that the defendant cannot plead but it does state "it is contended" that all the material is necessary for the defendant to properly plead. No mention is made of the knowledge by the defendant of the truth or falsity of the allegations made in the statement of claim. I find it difficult to believe that the defendant does not know the status of the parties, the course of the matrimonial action, the history of the settlement and the obtaining of the orders, and the nature of the instructions given to him by his client, the plaintiffs. He may well not know the relationship between his client and the banks and the others whom the client claims were pressing for payment. He can so state under today's rules of pleading. Those are the main facts set out in the statement of claim and since the affidavit does not say that the defendant does not know the facts in order to frame his defence, it is my view that an extraordinary order such as this should not be made. Further, the affidavit in support states that the defendant terminated his involvement as counsel for the plaintiff by letter dated May 22, 1981. Many of the documents requested are dated long after that time and while it may be that when it comes time to draw affidavit of documents, those documents may be relevant to prove or disprove the plaintiffs' case, particularly as to damages, I fail to see how the lack of those documents at the present time prevents the defendant from pleading. The motion is therefore dismissed. In my view, this motion was misconceived and costs should be to the plaintiff in any event.

Motion dismissed.

TAB 6

See para. 9

2001 CarswellOnt 2813
Ontario Superior Court of Justice

HSBC Securities v. Davies

2001 CarswellOnt 2813, [2001] O.J. No. 3375, 107 A.C.W.S. (3d) 582

HSBC Securities vs. Davies

Hawkins Master

Heard: June 7, 2001
Judgment: June 12, 2001
Docket: Toronto 00-CV-189099CM

Counsel: *Darryl A. Cruz*, for Plaintiff
George Glezos, for Defendant

***Hawkins Master*:**

1 In this legal malpractice action, the defendant solicitors seek, in part on the basis of rule 25.10 and for the purpose of pleading, particulars of certain allegations in paragraphs 15, 16 and 19 of the statement of claim. They also seek, on the basis of sub-rule 30.04(2), production by the plaintiff of certain documents.

2 These paragraphs allege the following:

> 15. Thereafter, Davies assisted Gordon Capital in undertaking a review of the client accounts managed by Rachar. Gordon Capital, with the advice and assistance of Davies determined that the transactions under review were improper and that they had caused a shortfall in the regulatory capital that Gordon Capital was required to maintain in order to carry on its business activities as an investment dealer.
>
> 16. Davies conducted an extensive review of Rachar's trading activities, including interviewing Rachar and others with whom he conducted business an discovered that Rachar had engaged in an ongoing scheme of deception and cover-up and that he had knowingly misrepresented the beneficiary and the nature of trading activity in his client's accounts. As a result of Rachar's conduct, Gordon Capital was entitled to recover under the Bonds for its losses.
>
> 19. Davies was aware that the fraudulent an dishonest conduct of Rachar was premeditated and carried out with the intent of placing Gordon Capital, unknowingly, at substantial economic risk with the knowledge of the significant financial losses which would be sustained by Gordon Capital if that risk crystalized.

3 In *Physicians Services Inc. v. Cass*, [1971] 2 O.R. 626 (Ont. C.A.), the Court of Appeal held that particulars for the purpose of pleading will be ordered only if (i) they are not within the knowledge of the party demanding them, and (ii) they are necessary to enable the other party to plead. As Lerner J. said in *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (Ont. H.C.), at 129, ordinarily an affidavit should be delivered with the notice of motion for particulars to enable the moving party to meet this test. The requirement for an affidavit meeting this test is especially germane where, as here, the statement of claim alleges that the defendant solicitors were intimately involved in investigating and advising Gordon Capital Corporation (now the plaintiff) on the employee misconduct, the loss calculations, and the insurance and regulatory requirements and issues particulars of which are now sought.

4 The defendant has not filed any affidavit in support of its motion. That being so the defendant has not met the test in *Physicians' Services*. The motion for particulars is dismissed.

5 The second part of the defendant's motion seeks production of certain documents under subrule 30.04(2). This subrule entitles a party to obtain production for inspection of a document referred to in another party's "pleading". The term "pleading" is not defined in the rules of civil procedure either generally or in subrule 30.04(2).

6 Clauses 1(b), (c) and (d) of the defendant's notice of motion make reference to paragraph 15 of the statement of claim and seek production for inspection of certain documents. None of the documents the defendant seeks to inspect are referred to in paragraph 15 of the statement of claim. Indeed, the defendant's original request to inspect documents does not even refer to paragraph 15 at all. On January 26, 2001 the plaintiff served a response to demand for particulars of the defendant. This prompted a second demand for particulars and a request to inspect documents in the form of a letter dated February 22, 2001. The documents production of which is sought in this letter are referred to in the response to demand for particulars, not in the statement of claim.

7 While the term "pleading" is not defined, I note that subrule 48.03(1), prescribing the contents of a trial record, expressly requires that a response to a demand for particulars be included as well as the pleadings. If the term "pleadings" had a meaning that included a response to demand for particulars, this express reference would not be necessary.

8 In conclusion, since the documents production for inspection of which is sought are not referred to in the statement of claim (the only "pleading" served in this action to date) subrule 30.04(2) does not assist the defendant. The balance of the defendant's motion is therefor dismissed.

9 Insofar as this is a motion for an order for production for inspection of documents under subrule 30.04(5), such an order should be made only where the court is satisfied that the documents are essential to enable the moving party to plead: *Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (Ont. H.C.), at 219*a-b*. Here, since the defendant has not filed any supporting affidavit, I am not persuaded that the documents are essential to enable the defendant to plead.

10 The time for service of the statement of defence is extended to July 3, 2001.

11 If the parties cannot agree on costs, counsel for the defendant is to make written submissions as to the costs of this motion within seven days. Counsel for the plaintiffs is to respond within a further seven days, and counsel for the defendant is to reply within a five days thereafter.

Motion dismissed.

TAB 7

2010 ONSC 5040
Ontario Superior Court of Justice

1731431 Ontario Ltd. v. Crestwood Apartments (Thunder Bay) Ltd.

2010 CarswellOnt 7416, 2010 ONSC 5040, 193 A.C.W.S. (3d) 414

1731431 ONTARIO LIMITED (Plaintiff) and CRESTWOOD APARTMENTS (THUNDER BAY) LTD., VICTORIA WIEJAK, MARK WEIJAK, KATHY WIEJAK, MICHAEL CAVANAGH, JOHN COVELLO, THE ESTATE OF JAMES R. JOHNSON by its ESTATE TRUSTEE, JUDY JOHNSON, CHEADLES LAWYERS AND TRADE AGENTS, FIRST AMERICAN TITLE INSURANCE COMPANY (Defendants)

D.C. Shaw J.

Heard: September 9, 2010
Judgment: September 16, 2010
Docket: Thunder Bay CV-09-0331

Counsel: Barry Appleton, Kyle Dickson-Smith for Plaintiff
Brian A. Babcock for Defendants, Crestwood Apartments (Thunder Bay) Ltd., Victoria Wiejak, Mark Wiejak, Kathy Wiejak
Aaron Postelnik for Defendant, Michael Cavanagh
John Covello for himself
Laird S.S. Scrimshaw for Defendants, Cheadles Lawyers and Trade Mark Agents, Estate of James R. Johnson by its Estate Trustee, Judy Johnson
Bruce S. Batist for Defendant, First American Title Insurance Company

***D.C. Shaw J.*:**

Decision On Motion

1 This is a motion by the Plaintiff for an order that the Defendant, Michael Cavanagh, provide particulars of the following allegations in his Statement of Defence:

> 7. Further or in the alternative, Cavanagh states that the Plaintiff is barred from pursuing this action by reason of the expiry of the applicable limitation period.
>
> 8. Cavanagh pleads and relies upon the provisions of the *Limitations Act*, 2002, c. 24.

2 The Plaintiff delivered a Demand for Particulars requesting "... full particulars of the nature of the limitation defence pleaded and the details of all facts and matters relied (sic) in support of the allegation."

3 The solicitor for Cavanagh responded by letter, denying that further particulars were required in order to permit the Plaintiff to deliver a Reply and stated: "Our client alleges that your client was, or ought to have been, aware of the contents of its complaint more than two years before it commenced its initial action."

4 Rule 25.10 provides:

> 25.10 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to provide them within seven days, the court may order particulars to be delivered within a specified time.

5 Rule 25.10 has been interpreted to require particulars of a pleading only when the particulars sought are not within the knowledge of the party seeking them and when they are necessary to enable that party to plead.

6 In *Obonsawin v. Canada*, [2001] O.J. No. 369 (Ont. S.C.J.), at para. 33, Epstein J., (as she then was) held that the test for when particulars should be ordered has been set out by the Court of Appeal in *Physicians Services Inc. v. Cass*, [1971] 2 O.R. 626 (Ont. C.A.). Epstein J. held:

> In that case the court applied the principles laid down in cases such as *Fairbairn v. Sage*, 56 O.L.R. 462, [1925] 2 D.L.R. 536, in which it was held that particulars for pleading will only be ordered when (1) they are not within the knowledge of the party demanding them, and (2) they are necessary to enable the other party to plead. While other cases such as *Champagne v. Kapuskasing Plumbing & Heating Ltd.* (1996), 48 C.P.C. (3d) 111 (Ont. Div. Ct.), help explain why particulars are ordered such as to define the issues, to prevent surprise at trial, to enable adequate preparation for trial, and to facilitate the hearing, I am of the view that the *Physicians Services Inc.* case remains the authority as to when the court should order particulars.

7 In support of this motion, the solicitor for the Plaintiff filed an affidavit from an assistant in his office, setting out the chronology of events leading up to this motion. The affidavit does not depose that the particulars are not within the knowledge of the Plaintiff or that they are necessary to plead. (Even if that information had been contained in the affidavit, the deponent of the supporting affidavit on a motion for particulars should be the moving party, otherwise little weight will be given to the affidavit. See *Hanna v. Hanna* (1986), 53 O.R. (2d) 251 (Ont. Master) and *Dudziak v. Boots Drug Stores (Canada) Ltd.* (1983), 40 C.P.C. 140 (Ont. Master)).

8 However, an affidavit is not necessary where the allegations are so general that particulars are manifestly necessary. See *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (Ont. H.C.), at p. 129.

9 The issue on this motion is therefore whether Mr. Cavanagh's pleading that the action is barred "... by reason of the expiry of the applicable limitation period" under the *Limitations Act* is so general or so bald that particulars should be required without a supporting affidavit that meets the test set out in *Obonsawin* and *Physicians' Services*.

10 The Plaintiff's claims arise out of its purchase of 29 townhouse buildings in Thunder Bay. The Plaintiff brings this action against the vendor, the principals of the vendor, the agents of the Plaintiff, the Plaintiff's solicitors and a title insurance corporation. The claims include fraudulent misrepresentation, gross misrepresentation, negligent misrepresentation, fraudulent civil conspiracy, breach of fiduciary duty, gross negligence, negligence and indemnification.

11 The Statement of Claim alleges that the Plaintiff and the vendor entered into an agreement of purchase and sale for the townhouses on January 17, 2007 and that the transaction was completed on July 9, 2007. The Statement of Claim was issued on July 9, 2009.

12 Sections 4 and 5 of the *Limitations Act* provide:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

(3) For the purposes of subclause (1) (a) Ii), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is as failure to perform the obligation, once a demand for performance is made.

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004.

13 The effect of the legislation is that the Plaintiff must commence its action within two years of the day on which the claims were discovered. The Plaintiff's claims are presumed to have been discovered on the day that the acts complained of took place, unless the Plaintiff proves the contrary. This is the defence which the Plaintiff faces by reason of the pleading of the *Limitations Act*.

14 I am not persuaded that this allegation is so bald that the Plaintiff is unable to plead to it. Particulars of the Plaintiff's claims and when the Plaintiff discovered the claims would be within the knowledge of the Plaintiff. The Plaintiff has, in fact, pleaded in reply to similar limitations defences alleged by the other Defendants. In each Reply, delivered in response to the Statements of Defence and Crossclaims of the other Defendants, the Plaintiff alleges:

> The plaintiff denies that its claim against these defendants is statue-barred pursuant to the *Limitations Act*, 2002, S.O. 2002, c-24, Schedule B. ("the Act") as the plaintiff issued its Statement of Claim on 9 July 2009, within two years of the date when the plaintiff knew the facts on which the claim is based. The plaintiff further states that these defendants have failed to provide adequate particulars of such a claim.

15 I see no reason why the Plaintiff cannot plead to the limitations defence made in Cavanagh's Statement of Defence and Crossclaim. Cavanagh should not be obliged at this stage to attempt to ascertain the particulars of each claim made by the Plaintiff relative to the limitations defence and particulars of when those claims were discovered. The issue of the *Limitations Act* is squarely before the Plaintiff. The Plaintiff will not be surprised at discoveries or at trial that this issue is being raised. It has been raised by all Defendants. The Plaintiff knows the case it has to meet. The Plaintiff will have the opportunity to flesh out from all Defendants the facts upon which the Defendants rely in support of their limitations defence.

16 Because the pleading in question is not so bald that particulars are manifestly required, and because the Plaintiff has failed to file an affidavit establishing that the particulars sought are not within its knowledge and are necessary to plead, I dismiss the motion.

17 The Defendant, Cavanagh, is entitled to his costs of the motion. If the parties are unable to agree upon costs of this motion, which took approximately one-half hour to argue, Cavanagh shall serve and file written submissions, not exceeding three pages, exclusive of his Bill of Costs, within 20 days. The Plaintiff shall respond with written submissions,

again not exceeding three pages, exclusive of its Bill of Costs (if it wishes to present one for purposes of comparison), within 10 days of service of Cavanagh's submissions.

Motion dismissed.

TAB 8

See paras. 4-5

1983 CarswellOnt 547
Ontario Supreme Court

Dudziak v. Boots Drug Stores (Canada) Ltd.

1983 CarswellOnt 547, [1983] O.J. No. 2164, 23 A.C.W.S. (2d) 169, 3 C.C.E.L. 130, 40 C.P.C. 140

Dudziak v. Boots Drug Stores (Canada) Ltd.

Master Peppiatt

Judgment: December 6, 1983
Docket: No. 7397/83

Counsel: *C. Slater*, for defendant-applicant.
M. Czuma, for plaintiff-respondent.

Annotation

This case includes a number of minor but interesting practice points relevant to pleadings in wrongful dismissal claims in addition to those set out above. The law with respect to claims for mental distress and loss of reputation is clearly in a developmental phase, this case representing the latest in a series of cases dealing with these areas. Useful reference could be made to the annotations following the Johnston v. Muskoka Lakes Golf & Country Club Ltd. case at 33 C.P.C. 239, and Wojcichowski v. Lakeshore Lions Club at 29 C.P.C. 269.

Of note is the Master's summary of the law regarding the use of affidavits in support of motions for particulars and the comments made by the Master regarding the lack of weight accorded solicitor's affidavits. For cases discussing the strictures on the use of solicitor's affidavits, see Holmested & Gale, R. 292 ¶ 4.

***Master Peppiatt*:**

1 This is an application to strike out certain paragraphs of a statement of claim or, in the alternative, for particulars of them. Before dealing with the merits of the motion it is necessary to make reference to an affidavit which was filed in support of the application for particulars. The issue of when an affidavit is necessary on such an application, whose affidavit is required, and what its contents should be seems to have given rise to a great deal of confusion arising from misunderstanding of the law as laid down in previous cases.

2 The principle is succinctly summed up by Lerner J. in Steiner v. Lindzon (1976), 14 O.R. (2d) 122, 1 C.P.C. 237 (H.C.) at p. 129 of the Ontario Reports where he says:

> A motion for particulars should only be granted where particulars are necessary for the applicant to plead, and they are not within his knowledge. Ordinarily, an affidavit should be delivered with the notice of motion. There was none here. However, an affidavit is not necessary when the allegations are so general that particulars are manifestly necessary, or so bald so as to be recognized as a pleading of which particulars should be given without a supporting affidavit: Welch v. Jackson et al., [1948] O.W.N. 708; Patterson v. Proprietary Mines Ltd. et al., [1945] O.W.N. 237; Madden v. Madden, [1947] O.W.N. 746, [affirmed [1947] O.R. 866].

3 It should be pointed out that, contrary to the arguments made by some respondents, sometimes as a preliminary objection, such an affidavit is not a condition precedent to a motion for particulars nor does its lack prevent the Court from dealing with the motion. However if there is no supporting affidavit the applicant must convince the Court that the allegations are so general or so bald that particulars are manifestly necessary.

4 On many occasions an affidavit is filed by a solicitor, or a student or, on one occasion that I recall, by a secretary in the solicitor's office, to the effect that the solicitor does not have enough knowledge of the facts to plead. Such an affidavit is worthless. I would not expect the solicitor to have enough knowledge to plead since, presumably, he was not involved in whatever occurence gave rise to the litigation and must rely upon what his client tells him. It is the knowledge of the latter that is material.

5 On other occasions an affidavit is filed by the solicitor or someone in his office to the effect that his client advises him and he verify [sic] believes that the client does not possess sufficient knowledge to plead without particulars. Presumably this method is adopted to avoid putting the client to the trouble of attending at the solicitor's office to swear an affidavit on his own behalf or to prevent a meaningful cross-examination. Such an affidavit is, in my opinion, admissible pursuant to Ont. R. 292, although it is said in Wiley, Lowe & Co. v. Gould, [1958] O.W.N. 316 (H.C.) that there is a discretion to refuse to admit such an affidavit and to insist upon the best evidence rule. With respect, I prefer the statement of Stark J. in Bongard v. Parry Sound, [1968] 2 O.R. 137 (H.C.), that the Court may refuse to act upon an affidavit based upon information and belief where it appears that direct evidence could have been tendered and there is no acceptable reason given for not doing so. It is, therefore, my view that affidavits by solicitors in such matters deposing as to their clients' lack of knowledge of the allegations in a pleading, although admissible, will seldom be given much weight.

6 In the motion before me we seem to have reached a reductio ad absurdum. An affidavit was filed by one C. Foster Brown who identifies himself as the manager, employee relations for the defendant and then goes on in the following ten paragraphs, which are in substance identical, to swear that he is "advised by counsel for the defendant and do verily believe that the defendant is unable to plead" to the various paragraphs. Nowhere does Mr. Brown say that he is unable to instruct counsel because neither he nor any other employees of the defendant have the requisite knowledge. It would appear that he is taking the word of the defendant's counsel as to what the defendant knows and I consider his affidavit to be of no value whatsoever.

7 It should be seen, therefore, that the filing of an affidavit in support of a motion for particulars is not a mere formality but is required, when necessary within the rules laid down by Lerner J., to place before the Court a sworn statement of some person who might be expected to know such things that he does not have sufficient knowledge of the allegations to plead to them without further particulars. I should add that such an affidavit will not invariably be accepted at face value, although it is, of course, entitled to great respect in most cases. However when the deponent reveals, for example, that he attended a certain meeting referred to in the pleading but that he does not have sufficient knowledge of what went on there without further particulars a certain amount of scepticism will be warranted.

8 Turning now to the specific motion, a brief account of the plaintiff's allegations as gleaned from the statement of claim will be helpful.

9 The plaintiff is a pharmacist who entered the employ of the defendant in 1976. Some time in April 1983 representatives of the defendant questioned the plaintiff concerning certain unspecified allegations against her and the plaintiff complains of this questioning. On or about April 20, 1983, the defendant dismissed the plaintiff without notice or payment in lieu thereof and has refused to provide her with a letter of reference. A further interrogation was carried out on April 21. It is alleged that these actions caused mental distress to the plaintiff and she characterizes the interrogations as constituting false imprisonment. She is therefore asserting two causes of action.

10 The defendant's first attack is based upon the submission that the claim for false imprisonment, which of course sounds in tort, cannot be joined with the claim for wrongful dismissal which is a breach of contract, and reliance is placed upon the judgment of Boland J. in Kelly v. Amer. Airlines Inc. (1981), 32 O.R. (2d) 626 (H.C.) and the authorities cited therein. I do not think that Her Ladyship's judgment goes that far. What was held in that case was that a claim for slander should not be joined with a claim for wrongful dismissal although, as I read the reasons, Boland J. did not say that this could never be done. However I do not think that there is any rule to the effect that a tort action and one for wrongful dismissal cannot be joined. This is always a matter for the discretion of the Court acting under R. 67 of the

Rules of Practice. In Tellier v. Bank of Montreal (1982), 32 C.P.C. 17 (Ont. M.C.), I permitted the joinder of an action for wrongful dismissal with an action for inducing breach of contract where the facts were intertwined. In the present action while it seems to me that the facts can be separated, they are very closely related. It appears that the plaintiff alleges that she was wrongfully dismissed during the period of her false imprisonment and I infer, perhaps prematurely, that if the defendant pleads that the dismissal was for cause that cause will be the same matter that lead to the plaintiff's interrogation and alleged false imprisonment. There is therefore very likely to be at least one important common question of fact. I do not think that the defendant will be prejudiced by having the matters tried in the same action. If different principles are to be applied in assessing damages for the two causes of action the trial Judge will be able to keep these separate. It is of course possible that the actual development of the litigation will make it desirable to sever the causes of action either before or at trial but I do not think that it is necessary or desirable to do so now.

11 I should add, perhaps unnecessarily, that what I have said above is based upon the assumption that this will not be a jury trial. Because, as will become apparent from what I have to say about the individual paragraphs attacked, there are elements which are relevant to the tort action but not to the action for breach of contract, a jury might have considerable difficulty in making the necessary distinctions. However this too is a matter for the discretion of the trial Judge.

12 It remains then to deal with the individual paragraphs of the statement of claim which are under attack.

13 In some instances these can be dealt with in groups.

14 In para. 7 of the statement of claim the plaintiff pleads that prior to her dismissal she was "subject to arrogant and officious interrogations and investigations by the Defendant's servants and employees". She goes on in paras. 8 and 9 to plead specific interrogations on the 20th and 21st days of April of 1983 and to allege that these constituted false imprisonment and caused severe emotional distress. I think that paras. 8 and 9 cannot be successfully attacked. However, there is some considerable doubt as to whether para. 7 is a general allegation of which paras. 8 and 9 are the particulars or whether it refers to other instances at other times. If the latter be the explanation it is lacking in particularity and fails, so far as I can see, to set out a cause of action. For that reason para. 7 will be struck out with leave to amend.

15 Paragraph 10 pleads that the defendant has refused to provide a letter recommending the plaintiff to future employers which has prejudiced her in her search for employment, and para. 14 alleges that she has been unable to find employment as a pharmacist because of the conduct of the defendant and specifically pleads that she has suffered a loss of reputation. With great respect to those of contrary opinion I believe that it is settled by binding authority that a claim for loss of reputation cannot be asserted in a wrongful dismissal case. Such authority is the unanimous judgment of the Supreme Court of Canada in Peso Silver Mines Ltd. (N.P.L.) v. Cropper, [1966] S.C.R. 673, 56 W.W.R. 641, 58 D.L.R. (2d) 1, per Cartwright J. at pp. 683-84 S.C.R. I have recently dealt with this matter in Phillips v. Inco, Ont. M.C., Sudbury No. 3912/83, September 12, 1983 (unreported) [summarized 21 A.C.W.S. (2d) 458], in which I held that I was precluded by that judgment from following the decision of Montgomery J. in Cleary v. Cabletronics Inc. (1982), 39 O.R. (2d) 456, 140 D.L.R. (3d) 110 (H.C.), and distinguished the judgment of Henry J. in Johnston v. Muskoka Lakes Golf & Country Club Ltd. (1983), 40 O.R. (2d) 762, 33 C.P.C. 239 (H.C.). It is unnecessary to add anything to what I said there except to add that this principle and the Peso Silver Mines case were reaffirmed by Weatherston J.A. delivering the judgment of the Court of Appeal in Brown v. Waterloo Reg. Bd. of Commrs. of Police, released September 14, 1983 [now reported (1983), 43 O.R. (2d) 113, 2 C.C.E.L. 7, 150 D.L.R. (3d) 729]. Paragraphs 10 and 14 must, therefore, be struck out.

16 Paragraph 11 pleads that the defendant's conduct towards the plaintiff during the final months of her employment was such as to amount to constructive wrongful dismissal. There is no doubt that there is such a thing as constructive wrongful dismissal; e.g., where an employer unilaterally reduces the employee's salary or makes substantial changes in her conditions of employment and that such constructive dismissal will found a cause of action. However, it is an essential part of such a cause of action that the employee refused to accept the employer's actions and therefore treated them as amounting to dismissal by leaving the employment. I am not prepared to say that conduct undermining authority and damaging the employee's capacity to carry out her responsibilities could not amount to constructive dismissal. However, in order to found the cause of action it must be treated by the employee as being dismissal. In this case it is clear that

Miss Dudziak did not leave the defendant's employ because of its conduct prior to April 20, 1983. Her cause of action for wrongful dismissal is based upon the act of the defendant in dismissing her on that date and it is implicit in her pleading that prior to that she was and considered herself to be employed by the defendant. It is, therefore, my opinion that para. 11 pleads irrelevant facts and must be struck out.

17 In para. 12 the plaintiff pleads that the defendant "has behaved with arrogance, high handedness, and a callous disregard for the Plaintiff and her rights" and in para. 13 pleads "the Defendant knew or should have known that its conduct in severing its contract with her would be the cause of severe emotional distress." In my opinion these paragraphs, although they bear some similarity must be dealt with separately.

18 Paragraph 12 does not say whether the defendant's behaviour of which the plaintiff complains is that in relation to the false imprisonment or to the wrongful dismissal or to both. It should be pointed out that in para. 15 (c) she claims exemplary or punitive damages without saying whether this is in respect to the tort claim or the wrongful dismissal claim. In my view para. 12 should be interpreted as applying only to the tort claim as should para. 15 (c) and as such they are proper.

19 Claims for mental distress in breach of contract actions including those for wrongful dismissal have been a part of our law at least since the judgment of R.E. Holland J. in Delmotte v. John Labatt Ltd. (1978), 22 O.R. (2d) 90, 92 D.L.R. (3d) 259 (H.C.). This principle was applied recently by Saunders J. in Bohemier v. Storwal Int. Inc. (1982), 40 O.R. (2d) 264, 142 D.L.R. (3d) 8 (H.C.) where His Lordship, beginning at p. 271 [O.R.], reviewed the principles and pointed out the difficulties of applying them in a case such as this.

20 This question was the main issue dealt with by the Court of Appeal in Brown v. Waterloo, supra, and it is to that authority that I must turn for guidance in dealing with the motion before me. I think such guidance is to be found at p. 10 of the reasons of Weatherston J.A. where, after reviewing the authorities both in the United Kingdom and Canada he says [p. 120 O.R.]:

> It is trite law that an employer is entitled to terminate his employee's contract of employment either on reasonable notice or by giving compensation in lieu of notice. If he fails to give reasonable notice, the wrong he does is not the termination of the contract, but the failure to give reasonable notice so, for damages to flow from this wrong, it must have been in the contemplation of both parties, at the time of hiring, that mental distress would be the probable result of a failure to give proper notice, and the mental distress suffered by the discharged employee must flow from the want of reasonable notice, and not from the fact of dismissal. (my emphasis)

21 At p. 11 [p. 120 O.R.] His Lordship states that the correct rule is set out in Corbin on Contracts (1963), Vol. 5, p. 429 citing the Restatement of the Law of Contracts, para. 341, as follows:

> There is sufficient authority to justify the statement that damages will be awarded for mental suffering caused by the wanton or reckless breach of a contract to render a performance of such a character that the promissor had reason to know when the contract was made that breach would cause such suffering, for reasons other than pecuniary loss.

22 It appears to me that this judgment severely limits the circumstances under which damages for mental distress can be obtained in an action for breach of contract. It requires that the mental distress be caused by the lack of notice rather than by the dismissal and that the result of such a breach of contract be in the contemplation of the parties at the time it was entered into. No such allegations are made in para. 13 of the statement of claim before me and it cannot stand in its present form. Such damages are recoverable under the circumstances set out by Weatherston J.A. and, therefore, the proper order to make is to strike out para. 13 with leave to amend.

23 In view of the considerable success that the defendant has had on this motion the costs will be to the defendant in the cause.

24 I must also deal with the costs of an earlier day. As I understand it, and counsel did not disagree upon the facts, this matter was on a Master's list on October 20. Following the regular Masters' meeting at 11:15 it was transferred to another Master in order to balance the lists. The respondent did not appear at that time and therefore the motion was adjourned with the costs of that day reserved to the Master who heard it. Counsel for the respondent offered no acceptable explanation and it is to his credit to say that he did not attempt to justify his actions but made his submissions essentially by way of apology. I have no doubt that he had no intention to be discourteous and I have every reason to believe that he will not offend again. There is, therefore, no need to make any award of costs by way of punishment or to mark the Court's disapproval of his conduct. However, the other party must be compensated for the wasted time and therefore the costs of that day will be to the defendant in any event of the cause.

Application allowed in part.

TAB 9

See para. 52

1994 CarswellOnt 491
Ontario Court of Justice (General Division)

Hedley v. Air Canada

1994 CarswellOnt 491, [1994] O.J. No. 287, 23 C.P.C. (3d) 352, 45 A.C.W.S. (3d) 1056, 5 W.D.C.P. (2d) 113

MICHAEL HEDLEY and ROY HINKIN v. AIR CANADA, ROYAL CANADIAN MOUNTED POLICE, FASKEN, CAMPBELL GODFREY (formerly the partnership of FASKEN & CALVIN), ARTHUR ANDERSEN & COMPANY, PEAT MARWICK THORNE (formerly the partnership of THORNE ERNST & WHINNEY), BRYKER DATA SYSTEMS LTD., PIERRE JEANNIOT, DENIS GROOM, LEO DESROCHERS, CLAUDE TAYLOR, MICHAEL ZOZULA, RAY LINDSAY, PAUL GARRETT, AL KEOUGH, JOHN BROOME, PAUL LETOURNEAU, CAMERON DESBOIS, TED LORENZ, DENNIS McCULLOUGH, CAMERON McCAW, RICHARD WHITE, RUSSELL ROBERTSON, JOHN LONG, DAVID BRASH, BRYAN KERDMAN, PATRICK RYAN, CLYDE YORK, PIERRE ROBITAILLE, DON TAYLOR, JOHN PALMER, KARIM BHIMJI, RONALD ROLLS, RONALD WALKER, MELISSA KENNEDY, DOUG SCOTT, PAUL CASSIDY, DAVID VINCENT, COMMISSIONER INKSTER, F.L. BROWNLEE, P.B. CAMERON, W. KALICHUK, GLEN SAMSON, ALLEN SHEPPARD, DAWSON TILLEY, RAINER BELTZNER

R.A. Blair J.

Judgment: February 17, 1994 *
Docket: Doc. 92-CQ-28867

Counsel: *Joseph W. Irving*, for Michael Hedley and Roy Hinkin.
G.A. Hainey and *K.L. Mahoney*, for Air Canada et al.
D. Aleck Dadson, for Peat Marwick Thorne et al.
Brian E. McNeely, for Attorney General of Ontario.

***R.A. Blair J.*:**

Overview

1 Two civil actions and an abortive criminal prosecution have sprung from the acquisition of Gelco Express Limited by Air Canada in 1987.

2 The first civil action (the "Air Canada action") involves a claim in fraud by Air Canada against Michael Hedley and Roy Hinkin — former officers of Gelco Express — and others. The criminal prosecution, in which Mr. Hedley and Mr. Hinkin, along with another officer, were the accused, arose out of the same allegations of fraud, but was ultimately stayed because of a failure on the part of the Crown to comply with its obligation to make full disclosure to the accused in accordance with the requirements enunciated by the Supreme Court of Canada in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1. Following the demise of the criminal proceedings, Messrs. Hedley and Hinkin have sued Air Canada, the RCMP, and various advisors and individuals for malicious prosecution and abuse of process and other similar relief in connection with those failed proceedings (the "Hedley action").

The Motions

3 There are two motions before me:

1) Air Canada and its related defendants in the Hedley action move for a stay of that action pending the final disposition of the Air Canada action; and,

2) Messrs. Hedley and Hinkin seek an order granting them leave, in their action, to use the documents and evidence produced to them in the criminal proceedings — which by order of Morrison J. at the conclusion of those proceedings, were returned to the Crown — for the purpose of preparation of pleadings; and, for an order requiring the Crown to release to Mr. Irving, their solicitor, the documents, papers and computer tapes returned to the Crown in accordance with that order.

4 These motions raise interesting and important questions about what can happen in the civil proceedings to the documentation produced in the criminal proceedings in accordance with the Crown's "Stinchcombe" obligation to make full disclosure. To what extent, if at all, are the protections of privilege and the principles embedded in the implied undertaking that documents produced for one purpose will not be utilized for collateral purposes, threatened or undercut by the sweep of the "Stinchcombe" requirements for full disclosure to the defence in criminal proceedings? Given the conclusions I have reached with respect to the appropriate disposition of the motions, however, it is only necessary to deal with these issues in a marginal fashion, notwithstanding the full and able arguments with which I was presented on all sides respecting them.

5 I turn first to a somewhat fuller outline of the pertinent facts.

Facts

The Air Canada Action

6 On November 6, 1989, Air Canada and Gelco Express Limited ("Gelco Express") commenced an action against Mr. Hedley and Mr. Hinkin, and others, claiming damages for fraud, fraudulent misrepresentation, conspiracy to defraud, negligence, negligent misrepresentation and breach of fiduciary. The claims arose out of discoveries which Air Canada asserts were made after its acquisition of the Gelco Express shares, regarding the true state of Gelco Express' financial condition prior to the acquisition. It is alleged that accounts receivable were overstated by approximately $10,000,000, and in the action, the plaintiffs seek damages in that amount.

The Criminal Proceedings

7 Criminal proceedings also arose out of the same impugned conduct of Messrs. Hedley and Hinkin, and another former officer of Gelco Express, one Robert Chestnutt ("the criminal proceedings"). The indictment in those proceedings alleged that the accused defrauded Air Canada and Gelco Corporation (the parent of Gelco Express) by altering computer tapes and financial statements and thereby overstating the accounts receivable of Gelco Express as described above.

8 At the outset of the criminal trial, before The Honourable Mr. Justice W. Morrison, counsel for the accused moved for a stay of the proceedings on the grounds of abuse of process and on the basis that their right to make full answer and defence, as protected by s. 7 of the *Canadian Charter of Rights and Freedoms* and by the *Criminal Code*, had been infringed by non-disclosure of relevant information and documents. They relied upon the sweeping endorsement of full disclosure by the Crown to the defense enunciated by the Supreme Court of Canada in *Stinchcombe*, supra.

9 The voir dire on the application for a stay of the criminal proceedings encompassed 22 days. At its conclusion, the criminal proceedings were stayed.

10 During the course of the voir dire, Morrison J. heard a great deal of evidence and, at his direction, the Crown sought and obtained access to much documentation which was in the possession and control of Air Canada — the complainant

in the case — and of Air Canada's solicitors, Fasken Campbell Godfrey ("Faskens"), relating to Air Canada's civil action against Messrs. Hedley, Hinkin et al. In addition, the Crown was provided with a copy of a report prepared for Air Canada by Arthur Andersen & Company — Air Canada's forensic experts — in connection with the Air Canada action, which Air Canada had given to the RCMP in the early stages of the criminal investigation, but which had only been revealed to the Crown during the voir dire. All of this information, and more — including accounting and "working papers" prepared by Peat Marwick Thorne (formerly Thorne Ernst & Whinney) in connection with the review and audit of Gelco Express — after review by Crown counsel, was disclosed to the accused in the criminal proceedings.

11 The documentation was disclosed to the accused subject to Orders of Morrison J. "that they will be used *solely for* the criminal proceedings" and (at the conclusion of the voir dire) that they be returned to the Crown, their release to abide any further order of a judge. The documents have been returned to the Crown, and with the Crown, in spite of a number of court skirmishes, they presently remain.

The Hedley Action

12 Somewhat predictably, the stay of the criminal proceedings spawned the third proceeding. Mr. Hedley — subsequently joined by Mr. Hinkin — sued Air Canada, Faskens, Peat Marwick Thorne, the RCMP and a large number of individuals from those entities who were directly and indirectly involved in the criminal proceedings. In this action, the plaintiffs claim damages for malicious prosecution, negligent prosecution, negligence, abuse of public office, abuse of process, conspiracy, and breach of rights under the *Canadian Charter of Rights and Freedoms*. Damages are sought in the amount of $10,000,000.

Motion to Stay

13 I have come to the conclusion that the Motion to stay the Hedley action should succeed.

14 The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

> s. 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (1992), 16 C.P.C. (3d) 352 (Ont. Gen. Div.) at p. 359.

16 The Court is also empowered under r. 6.01(1) to order a stay in order to avoid multiplicity of proceedings. The rule states:

> 6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (*a*) they have a question of law or fact in common;
>
> (*b*) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
>
> (*c*) for any other reason an order ought to be made under this rule,
>
> the court may order that,
>
> . . . . .

(*e*) any of the proceedings be,

(i) stayed until after the determination of any other of them ...

17 Two civil proceedings are pending in this Court. The Air Canada action is founded upon allegations of fraud and fraudulent misrepresentation against Messrs. Hedley and Hinkin (and others). The criminal proceedings, which were themselves stayed, were grounded upon the same allegations and factual background. The main thrust of the Hedley action is to be found in the allegations of malicious prosecution and abuse of process.

18 It is clear that the allegations of fraud permeate both civil actions. In its own suit, Air Canada must prove those allegations. In the Hedley action, the fundamental contested issues will be whether Air Canada had reasonable and probable cause for its conduct in laying the criminal complaint and whether Air Canada — and its advisors — acted for an improper purpose and without an honest belief in the guilt of the accused: see *Meyer v. General Exchange Insurance Corp.*, [1962] S.C.R. 193, at pp. 199-200.

19 Notwithstanding the stay of the criminal proceedings, the question of whether the accused had committed a fraud is still an issue to be determined in the Hedley action. If the trier of fact in that action determines that fraud has been committed, there can be no finding that the prosecution was without reasonable and probable cause. "No action lies for the institution of legal proceedings, *however malicious*, unless they have been instituted without reasonable and probable cause." See *Meyer v. General Exchange Insurance Corp.*, supra, at p. 200; *Meier v. Elder*, [1930] 3 W.W.R. 551, at pp. 552-553 (Sask. C.A.).

20 The second major substantive thread of the Hedley action is its abuse of process claim. "Abuse of process" is a separate and distinct tort from that of malicious prosecution, and does not depend upon there having been a reasonable basis for the impugned proceeding. The gist of the tort is improper motive and ulterior purpose in bringing that proceeding: *Tsiopoulos v. Commercial Union Assurance Co.* (1986), 57 O.R. (2d) 117, 13 C.P.C. (2d) 279, 32 D.L.R. (4th) 614 (H.C.); *Poulos v. Matovic* (1989), 47 C.C.L.T. 207 (Ont. H.C.).

21 While there are other causes of action raised, and other parties involved, the fraud/malicious prosecution/ abuse of process issues are central to the two civil actions. Fraud underlies them both. Whether or not it is found to have existed is essential to the Air Canada action and key to the malicious prosecution aspect of the Hedley action. A finding of fraud, or lack of such a finding, will also be of great significance in the measuring of the allegations of "malice" and "improper purpose", concepts which are themselves intertwined and common to both the malicious prosecution and abuse of process allegations: see *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609 (S.C.C.), per Lamer J., at p. 639.

22 Thus, there are common questions of law and fact in the two actions and belief arises out of the same series of transactions or occurrences.

23 There is an additional basis upon which I am satisfied that the Hedley action should be stayed, however. It would be unfair to Air Canada, in my opinion, and prejudicial to its position in the first action based on fraud, if the Hedley action were permitted to proceed at the same time as the Air Canada action, having regard to nature of the documentation which may become relevant and producible in the Hedley action and the circumstances in which that documentation came into the possession of the Crown.

24 The second Motion which is before the Court at this time is a Motion for leave to refer to certain documents which came into the possession of the Crown during the course of the exercise of the Crown's disclosure obligations in the criminal proceedings. Those documents were shown to the accused as a part of that process. Messrs. Hedley and Hinkin accordingly know what is in them. Now they seek production of them from the Crown and the right to use the information contained in them for purposes of the Hedley action.

25 The documents in question fall loosely into the following categories:

The Crown Disclosure Documents

26

a) Documents that were disclosed to the accused as part of the Crown's initial disclosure prior to the commencement of the trial; and,

b) Documents subsequently disclosed in the course of the stay application and consisting of portions of the investigating officer's notebooks relevant to the investigation and the occurrence log maintained by him and other officers of the RCMP.

The Air Canada Documents

27

a) Documents listed in Schedule "A" to the Affidavits of Documents delivered by Air Canada in the Air Canada action;

b) Documents forming part of the "litigation work product" of Faskens in the Air Canada action, prepared after the discovery of the alleged fraud and in contemplation of and preparation for the civil litigation commenced by Air Canada, and including internal firm memoranda, witness interviews and the forensic accounting report prepared by Arthur Andersen & Company; and

c) Documents consisting of internal Faskens memoranda and correspondence and other documentation passing back and forth between the law firm and its client, Air Canada, in connection with the Air Canada action.

The "TEW Working Papers"

28

Documents that comprised the audit working papers of Peat Marwick Thorne (formerly Thorne Ernst & Whinney) in connection with a review and audits performed by it with respect to Gelco Express. Thorne Ernst & Whinney were Air Canada's auditors, and had performed this work at Air Canada's request.

The "Bryker Materials"

29

Documents and computer tapes originating from Bryker Data Systems Limited regarding the financial records of Gelco Express.

30 The documentation is in the hands of the Crown because it was all ordered returned to the Crown by Mr. Justice Morrison at the conclusion of the criminal proceedings. Some of the documentation has already been produced in the Air Canada action (the Schedule "A" Air Canada documents referred to above). Some of the documentation and information, however, is highly sensitive, confidential and privileged, and not ordinarily producible in the Air Canada action. The "litigation brief" of Air Canada's solicitors — including the firm's work product and the report of its forensic expert — and the privileged communications between Faskens and Air Canada respecting the Air Canada litigation are not fields in which Mr. Hedley and Mr. Hinkin, and their solicitors are entitled to forage, in connection with that action.

31 On the other hand, some at least of this latter documentation may very well be relevant and producible in the Hedley action, because of the nature of the claim and the allegations made therein. To make that documentation available to the plaintiffs in the Hedley action, for their indubitable advantage as defendants in the Air Canada action, would be, to my mind, unfairly and unnecessarily prejudicial to Air Canada.

32 The general principles which have historically governed the Court's exercise of its power to stay proceedings were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.*, supra, at pp. 65-66. The balance of convenience must weight significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would work an injustice on the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues, the onus of satisfying the Court in on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Int. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.), at p. 779.

33 Here, the Air Canada Documents, the TEW Working Papers and the Bryker Materials were all delivered up to the Crown in pursuance of its *Stinchcombe* obligations of disclosure. Privilege was at all times claimed and never waived. Mr. Justice Morrison, himself, made it plain, in his Orders, that the documentation was being produced — and disclosed to the accused — soley for the purposes of the criminal proceedings. In addition, the documentation I have just mentioned, at least, was produced to the Crown and disclosed to the accused (now the Plaintiffs in the Hedley action) in circumstances where, in my view, it is impressed with an express or implied undertaking that it would not be used by Messrs. Hedley and Hinkin for any purposes collateral or extraneous to the criminal proceedings.

The Implied Undertaking

34 It is a well established principle of civil litigation that a party to whom documents are produced in the course of a proceeding is subject to an implied undertaking not to use the documents for any purpose extraneous or collateral to the litigation in question, except with leave of the court or the consent of the producing party: *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (H.C.), at pp. 263-264, leave to appeal granted (1985), 2 C.P.C. (2d) 76 (Ont. H.C.) but not proceeded with; *Home Office v. Harman*, [1983] 1 A.C. 280 (H.L.) at pp. 299-300 and 308-309; *Reichmann v. Toronto Life Publishing Co.* (1988), 28 C.P.C. (2d) 11 (Ont. H.C.), at pp. 21-23, leave to appeal to Ont. Div. Ct. refused (1988), 29 C.P.C. (2d) 66 (Ont. H.C.); *National Gypsum Co. v. Dorrell* (1989), 68 O.R. (2d) 689 (H.C.), at p. 697.

35 The implied undertaking applies not only to the use of the actual documents themselves but to oral evidence and to information derived from the documents, whether in the form of copies or of information stored in the mind of the party who had access to the documents. Nor does the fact that the contents of the documents may have been read into evidence and thus have become part of the public record — something which occurred during the voir dire in the criminal proceedings — operate to destroy the undertaking. See *Reichmann v. Toronto Life Publishing Co.*, supra, at pp. 21-23; and *Sybron Corp. v. Barclays Bank Plc.*, [1985] Ch. 299, at p. 318.

36 The implied undertaking is a concept developed on the civil side of the justice system, in the context of the compulsory discovery process of civil litigation. Whether this concept is one which spans the boundary between the civil and criminal sides of the system and applies when documentation comes into the hands of a party to a civil proceeding not in that capacity but in the capacity of an accused in a criminal proceeding as a result of the Crown's *Stinchcombe* obligations of disclosure, is something that has not been considered in many cases.

37 In my view, the obligation imposed by the implied undertaking not to use documents for an extraneous or ulterior purpose does extend to documents disclosed in criminal proceedings and sought to be used by the accused recipients in the fashion at issue here.

38 I see no policy reason why a party to a civil proceeding should be placed in a favoured position simply because that party happens to have been an accused in a related criminal prosecution — even where that prosecution has been unsuccessful. The principle remains the same: society balances the value of compelling disclosure in criminal and civil

matters with a countervailing limit engrafted upon that production; the recipient of the documents is not to utilize them, or the information contained in them, for purposes other than the proceeding in which they have been produced.

39 Whether the implied undertaking extended to documents received in the course of criminal proceedings was considered in *Consolidated NBS Inc. v. Price Waterhouse* (1992), 10 C.P.C. (3d) 155 (Ont. Gen. Div.). There, Mr. Justice Herold [at pp. 159-160] found that the implied undertaking was not applicable because the case was "not one where the party who received disclosure then [*sought*] *to use* the documents for a collateral or ulterior purpose but rather [was] one in which the party [was] being *asked to produce* the documents which he has or they [had] received as part of the complete disclosure required of Crown counsel" (emphasis in original). His decision was affirmed by the Divisional Court in a decision released February 9, 1994, as yet unreported [now reported at 69 O.A.C. 236], which underscored the same distinction as the basis for the inapplicability of an implied undertaking.

40 Here, of course, seeking to utilize the documents for a collateral or ulterior purpose — the foundation for their own civil action — is precisely what Mr. Hedley and Mr. Hinkin are attempting to do.

41 There is a discretion in the Court to grant leave to utilize the documents in spite of the undertaking. For reasons that I shall refer to later, however, it would be premature at this stage of the Hedley action for the Court to embark upon a consideration of that question.

42 Whether the documents in question in this case are subject to an undertaking as to non-disclosure is complicated by an *express* undertaking that was executed by Mr. Hedley's then counsel on his behalf before the documents emanating from Faskens — or, at least, some of them — were disclosed by the Crown. On behalf of Mr. Hinkin, Mr. Irving originally agreed that his client would sign such an undertaking, but subsequently advised Morrison J. that he had reconsidered his client's position and concluded that Mr. Hinkin was not required to sign such an undertaking. In the meantime, however, the initial documents had been handed over by Faskens to the Crown on the strength of counsels' assurances that the express undertaking would be signed by the accused, and the Crown had delivered the documents to the accused notwithstanding the purported withdrawal of the undertaking.

43 These matters are all matters which in my judgment it is appropriate for the Court to consider in assessing where the balance of convenience lies with respect to the granting or refusing of a stay, and whether or not the granting or refusing of such an order would work an injustice upon or be oppressive to one or another of the parties. In the case at bar, I am satisfied that the factors to be weighed in this regard, as set out by Montgomery J. in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.*, supra, favour Air Canada.

44 The imposition of a stay on the Hedley action does not deny the plaintiffs in that action their right to pursue their claim; it merely postpones it pending disposition of the Air Canada fraud action. Indeed, the disposition of the latter action may result in the pursuit of the Hedley action becoming somewhat academic, thus saving the parties — and the state — the costs which accompany the pursuit of such an action.

45 The Motion to Stay is accordingly granted.

The Motion for Release and Use of the Documents in the Possession of the Crown

46 In view of the foregoing conclusion, the Motion by Messrs. Hedley and Hinkin for release of the documentation in the hands of the Crown and for leave to utilize the information contained therein takes on less immediate relevance. Had I not imposed a stay of the Hedley action, however, I would not have been inclined to grant the relief sought on this second Motion, in any event, for the reasons set out above with respect to the implied or express undertaking and also because, in my judgment, the Motion is premature.

47 The Hedley action is still in the pleading stage. A Notice of Action has been issued and a Statement of Claim delivered. No defences are yet filed. At this stage, however, Messrs. Hedley and Hinkin seek to have the documents in the possession of the Crown by virtue of Morrison J.'s Order released to them, or at least to be granted leave to use the

information they have learned from their review of the documentation, for the purposes of pleading in the Hedley action. They wish to deliver an amended statement of claim "particularizing the allegations [of wrongdoing] and the conclusions of law set out in the statement of claim".

48 The factual thrust of those allegations and conclusions is set out in paragraph 68 of the Statement of Claim, where the following is pleaded (in the singular, because Mr. Hinkin had not yet been added as a plaintiff):

> 68. The plaintiff states that:
>
> (a) the criminal charges were instituted by Air Canada and its agents and professional advisors, and caused the R.C.M.P. to investigate the plaintiff. In furtherance of the conspiracy that had as its object the illegal and improper purpose of securing criminal convictions against the plaintiff and others for the purpose of facilitating a settlement with Gelco Corporation and covering up the wrongful and/or negligent acts of Air Canada and its agents which were committed during the acquisition of Gelco Express and up to the time of the purported discovery of a criminal fraud, Air Canada and its agents provided the R.C.M.P. with selective information which Air Canada knew would result in charges being laid and withheld information that they knew would exculpate the plaintiff;
>
> (b) the criminal prosecution was terminated in the plaintiff's favour;
>
> (c) Air Canada acted without reasonable and probable cause in proffering the allegation of criminal wrongdoing which resulted in the charges being laid;
>
> (d) Air Canada acted maliciously in bringing the proceedings as it:
>
> (i) caused charges to be laid for the improper purpose of facilitating a settlement in its negotiations with Gelco Corporation with respect to the issues raised in this action and to cover up the wrongful and/or negligent acts of Air Canada and its agents which were committed during the acquisition of Gelco Express and up to the time of the purported discovery of a criminal fraud; and
>
> (ii) caused charges to be laid against the plaintiff and others for the improper and collateral purpose of blaming the management of Gelco Express for the purchase so as to ensure that the then pending privatization of Air Canada was not affected.
>
> The plaintiff therefore states that Air Canada and its agents prosecuted him maliciously and/or, abused the process of the Courts in Ontario, and/or conspired against the plaintiff. The plaintiff further states that the RCMP acted maliciously and/or were negligent in the course of their investigation and subsequent prosecution of the plaintiff.

49 No attack has been made on this pleading by the defendants. More particularly, however, there is no evidence — either in the affidavits filed or in the cross-examinations thereon or in the materials — which establishes that Messrs. Hedley and Hinkin require the documents or the information from them *in order to plead*.

50 Ordinarily, production and disclosure do not take place in a civil action until after the pleadings have been completed. As between the parties to the civil proceeding themselves, subrule 30.03(1) of the *Rule of Civil Procedure* requires the delivery of an affidavit of production from the parties "within 10 days *after the close of pleadings*". While subrule 30.04(5) gives the Court a discretion "at any time" to order production for inspection of documents that are not privileged and that are in the possession, control or power of a party, this discretion is usually exercised at the pleading stage only where the documents are essential to enable the party to plead: see *Hong Kong (Official Receiver of) v. Wing* (1986), 57 O.R. (2d) 216 (H.C.), at pp. 218-219.

51 Here, the matter is complicated further by the fact that the documents which it is sought to have released are in the hands of a third party, the Crown. The Court may order production from non-parties, under r. 30.10, where the documents are not privileged, and where the Court is satisfied that,

(*a*) the document is relevant to a material issue in the action; and

(*b*) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

52 Although r. 30.10 does not impose any time parameters for such a motion, its language clearly indicates that its provisions are directed towards the "production and discovery" part of the civil litigation process — it speaks of unfairness in requiring a party "to proceed to trial" without "discovery" — and not to the production of documents for the purpose of pleading. It may be that the Court, in the exercise of its discretion, could import by analogy the same principle that it has implied into the application of subrule 30.04(5), namely, that production may be ordered prior to pleading if it is shown to be essential for that purpose. In this case, however, it has not been shown that documents which Mr. Irving seeks to have released by the Crown to the plaintiffs, or the use of the information obtained from their examination, are necessary for the purposes of pleading.

53 What documentation falls within the proper scope of discovery in the Hedley action — should it ultimately proceed — can best be assessed after statements of defence have been delivered, pleadings completed, and the issues suitably defined. Only in that context can the questions raised by the Crown's *Stinchcombe* disclosure in the criminal proceedings, regarding privilege and regarding whether Messrs. Hedley and Hinkin should be relieved from the implied undertaking of non-disclosure, be properly addressed.

54 Indeed, it may be that such a need will never arise. The original documentation is all in the hands of Air Canada, Fasken Campbell Godfrey, the RCMP, Arthur Andersen & Company, Peat Marwick Thorne, or one of the other parties to the Hedley action. To the extent that they become producible in that action, they may well be forthcoming from one or another of the parties to the action. It is not the policy of the courts to order production from non-parties where the parties themselves can be the source of production. As r. 30.10(1) states, the court's discretion is to be exercised where the document sought to be produced is (a) not privileged, (b) relevant, and (c) where "it would be unfair to require the moving party to proceed to trial without having discovery of the document".

55 Whether this latter test, in particular, can be met, can only be determined after the discovery process as between the parties in this case has been completed.

56 For the foregoing reasons, the Motion on behalf of the plaintiffs in the Hedley action for release of the documents currently being held by the Crown pursuant to the Order of Morrison J., or for leave to make use of the information contained in that documentation and obtained by the plaintiffs, qua accused, is dismissed as well.

Disposition

57 In the result, then, the Motion to stay the Hedley action pending disposition of the Air Canada action is granted, and the Motion by Messrs. Hedley and Hinkin respecting the documents in the possession by the Crown is dismissed.

58 The parties may make written submissions with respect to costs, if so advised, with 14 days of the release of these Reasons.

Motion for stay granted; motion for production of documents dismissed.

Footnotes

* On March 9, 1994, the court issued a corrigendum to correct typographical errors in counsels' names. The corrections have been incorporated herein.

TAB 10

See paras. 8-10

2012 ONCA 681
Ontario Court of Appeal

SA Capital Growth Corp. v. Mander Estate

2012 CarswellOnt 12445, 2012 ONCA 681, 117 O.R. (3d) 16,
220 A.C.W.S. (3d) 504, 298 O.A.C. 85, 354 D.L.R. (4th) 748

SA Capital Growth Corp. Applicant and Christine Brooks as Executor of the Estate of Robert Mander, deceased and E.M.B. Asset Group Inc. Respondents and Peter Sbaraglia Moving Party (Appellant, Respondent by way of cross-appeal) and RSM Richter Inc. and Ontario Securities Commission Responding Parties (Respondent, Appellant by way of cross-appeal)

Robert J. Sharpe, E.E. Gillese, David Watt JJ.A.

Heard: October 2, 2012
Judgment: October 10, 2012 *
Docket: CA C55588

Proceedings: reversing in part *SA Capital Growth Corp. v. Mander Estate* (2012), 110 O.R. (3d) 765, 2012 CarswellOnt 6330, 2012 ONSC 2800, 90 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]); & additional reasons at *SA Capital Growth Corp. v. Mander Estate* (2012), 2012 ONCA 768, 2012 CarswellOnt 13972 (Ont. C.A.)

Counsel: Kevin D. Toyne for Appellant, Peter Sbaraglia
Matthew Gottlieb, Shannon Beddoe for Respondent, RSM Richter Inc. (now Duff & Phelps Canada Restructuring Inc.)
Evan Cobb for Applicant, SA Capital Growth Corp.
Jennifer Lynch for Respondent, Ontario Securities Commission
Frank Lamie for Tonin & Co. LLP, Peter Tonin

***Per curiam*:**

1 The appellant faces allegations before the Ontario Securities Commission ("OSC") related to an alleged Ponzi scheme. In an unrelated proceeding and at the suit of the respondent SA Capital Corp., a court-appointed receiver conducted an investigation of the appellant, his wife, and companies they controlled in relation to the alleged Ponzi scheme. The appellant sought and obtained from the Superior Court a third-party production order requiring the respondent, RSM Richter Inc. ("the receiver"), to produce materials the appellant claims he needs in order to make full answer and defence in the OSC proceedings.

2 The appellant appeals that order, arguing that the Superior Court judge erred by failing to order further production. The receiver cross-appeals arguing that no production should have been ordered.

3 For the following reasons, we conclude that the appeal should be dismissed, the cross-appeal allowed, and the order requiring the receiver to produce materials set aside.

Analysis

4 The appellant submits that the third-party production order was justified on two grounds:

1. the appellant is an "interested person" in the receivership and is thereby entitled to production; and

2. the Superior Court has the authority to order third-party production to protect the appellant's right to make full answer and defence before the OSC.

5 We are unable to accept either of these propositions.

1. "Interested person"

6 In our view the application judge correctly found that a court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate in the receivership to be used in a separate proceeding.

7 The application judge recognized that in some circumstances, a party involved in a receivership can insist upon the production of documents and materials that have been obtained by the receiver. Reference was made to *Bennett on Receiverships*, 3rd ed. (Toronto: Thomson Reuters, 2011) at p. 232:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons including prospective purchasers. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. The receiver must produce all documents in its possession which are relevant to the issues in the receivership.

8 The reach of the phrase "interested person" was discussed and applied by Greer J. in *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]), where "interested person" was held to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek production of documents that do not "relate to a specific purpose" concerning the receivership itself. This approach is in line with the case law that states that receivers are not subject to cross-examination on their reports except in exceptional or unusual circumstances: see *Bell Canada International Inc., Re* (2003), 126 A.C.W.S. (3d) 790 (Ont. S.C.J. [Commercial List]) [2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List])]; *Impact Tool & Mould Inc., Re* (2007), 41 C.B.R. (5th) 112 (Ont. S.C.J.), affirmed (2008), 41 C.B.R. (5th) 1 (Ont. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 220 (S.C.C.); and *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]). It is also consistent with bankruptcy case law that establishes that a court officer (trustee in bankruptcy) will not be compelled to produce documents created and obtained as part of its duties in one proceeding for a collateral purpose: see, for example, *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 79 O.R. (3d) 241 (Ont. C.A.); *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2002), 37 C.B.R. (4th) 267 (Ont. S.C.J. [Commercial List]).

9 The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.

10 We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

2. Full answer and defence

11 The application judge made the third-party production order on the basis that the appellant was entitled to the material he ordered produced to make full answer and defence to the allegations he faces before the OSC. The application judge applied, by way of analogy, the procedure contemplated by *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) in criminal proceedings.

12 In our view, the application judge erred. However, in fairness, we observe that the basis upon which we reach that conclusion does not appear to have been clearly articulated before the application judge.

13 It was inappropriate for the Superior Court to make what amounted to an interlocutory procedural order in relation to a proceeding pending before the OSC.

14 Matters such as disclosure, third-party production, and other pre-hearing orders required to ensure fair process are quintessentially matters to be dealt with by the tribunal that will decide the case. Requests for third-party production give rise to issues of relevance, cost, delay and fairness, and it has long been recognized that the judge or tribunal charged with final decision-making authority is best placed to resolve such issues. In this case, it is for the OSC to determine what procedural rights should be accorded to the appellant and it is for the OSC to ensure that the appellant is accorded a level of procedural fairness commensurate with the allegations he faces. If, at the end of the day, the appellant is not accorded appropriate fairness in the OSC proceeding, the law provides him with appropriate remedies.

15 Further, resort to the courts on an interlocutory basis disrupts orderly decision-making by the tribunal. There is a long-established principle that ordinarily, neither appeals nor judicial review should be entertained until after the tribunal proceedings have come to a final conclusion. Although this application did not take the form of an appeal or application for judicial review, it was inconsistent with that basic principle.

16 In view of the conclusion we have reached, we make no comment on the merits of the appellant's assertion that he has a procedural right in the OSC proceeding to a third-party production order or on whether the documents he seeks are relevant.

17 We are aware of the fact that before the appellant brought his application before the Superior Court, a time when he was acting in person, he brought a motion before the OSC requesting third-party production from the receiver. The receiver was not served with that motion. The motion was heard by a single commissioner who ruled that the OSC "does not have the authority to order productions from the Receiver, who is an independent officer of the Court" and observed that, as Staff counsel had submitted, the respondent was not left without a remedy. The commissioner did not specify what remedy he had in mind, but we were informed during oral argument that the OSC Staff had pointed out that the appellant could seek a summons including an order for production of the material he seeks in the OSC proceeding or he could go to the Superior Court and ask for an order for third-party production pursuant to rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

18 The appellant did not challenge that ruling but instead commenced this Superior Court application for third-party production.

19 We agree with the receiver that rule 30.10 could have no application to the appellant's request. That rule provides orders for third-party production "on motion by a party" for a document that is "relevant to a material issue in the action". The rule plainly does not confer jurisdiction on the Superior Court to make freestanding production orders for production of documents sought in relation to proceedings before agencies or tribunals such as the OSC.

20 We make no comment on whether the commissioner was right or wrong in his ruling. We observe, however, that the dismissal of the appellant's motion for third party production does not preclude the appellant from seeking an alternative remedy before the OSC. In any event, the refusal to order production within the OSC proceedings cannot confer authority on the Superior Court to make such an order if, as we find, there is no basis in law for the Superior Court to exercise that authority.

Conclusion

21 For these reasons, the appeal is dismissed, the cross-appeal is allowed, and the order of the Superior Court is set aside. We have received the receiver's bill of costs for the application before the Superior Court and for this appeal. We

will entertain brief written submissions in support of that request, to be submitted within 7 days from the release of these reasons and responding submissions from the appellant within 7 days thereafter.

Appeal dismissed; cross-appeal allowed.

Footnotes

* Additional reasons at *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2013), 2013 ONSC 917, 2013 CarswellOnt 1264 (Ont. S.C.J.).

TAB 11

See para. 16

2010 ONCA 673
Ontario Court of Appeal

Salah v. Timothy's Coffees of the World Inc.

2010 CarswellOnt 7643, 2010 ONCA 673, [2010] O.J. No. 4336,
193 A.C.W.S. (3d) 1151, 268 O.A.C. 279, 74 B.L.R. (4th) 161

Abdulhamid Salah and 1470256 Ontario Inc. (Plaintiffs / Respondents) and Timothy's Coffees of the World Inc. (Defendant / Appellant)

Winkler C.J.O., M. Rosenberg J.A., Pitt J. (ad hoc)

Heard: September 16, 2010
Judgment: October 14, 2010
Docket: CA C51317

Proceedings: affirming *Salah v. Timothy's Coffees of the World Inc.* (2009), 65 B.L.R. (4th) 235, 2009 CarswellOnt 6470 (Ont. S.C.J.)

Counsel: Alan J. Lenczner, Q.C., Jaan E. Lilles for Appellant
Stephen S. Appotive for Respondents

***Winkler C.J.O.*:**

1 Timothy's Coffees of the World Inc. ("Timothy's") appeals a decision of the Superior Court of Justice finding that it breached a franchise agreement with the respondents. The trial judge found that the franchise agreement provided the respondents with a conditional right of renewal and that the appellant denied them this right. She awarded damages for breach of contract, breach of the duty of good faith and mental distress. I agree with the trial judge's reasons and find no error in her decision. I would dismiss the appeal. My reasons follow.

Background

2 In the fall of 2001, the respondent Abdulhamid Salah ("Mr. Salah") entered into a franchise agreement with Timothy's to operate a franchise store in the Bayshore Shopping Centre in Ottawa. Timothy's was a lessee under a head lease for a location on the third floor in the shopping centre. When Mr. Salah entered into the franchise agreement, he became a sublessee under the head lease. There were only four years remaining on the head lease, which was set to expire on September 30, 2005. The term of the franchise agreement was tied to the length of the head lease.

3 Mr. Salah was concerned about the short term of the lease and the franchise agreement, given the amount of his investment in purchasing the franchise and setting up operations. In response to Mr. Salah's concerns about the term, Timothy's proposed the inclusion of Schedule "A" in the franchise agreement. Schedule "A" provided that in the event that Timothy's entered into a new head lease with the Bayshore Shopping Centre, Mr. Salah's franchise agreement would be renewed with a new sublease. In the event that the new head lease was to be for a period of less than five years, there would be no additional franchise fee payable by Mr. Salah. If the new head lease was for a period of more than five years, Mr. Salah would be required to pay an amount equal to 50% of the then current franchise fee.

4 Concurrent with the execution of the franchise agreement, Mr. Salah assigned the agreement, the sublease, and the general security agreement to his newly incorporated company 1470256 Ontario Inc. ("147") by way of an Assignment and Guarantee. This was permitted by Timothy's, but with the condition expressed in the Assignment and Guarantee that Mr. Salah remained personally liable for all franchisee obligations under the franchise agreement.

5 Prior to September 30, 2005, the expiry date of the head lease on the third floor, Timothy's entered into a new lease on the second floor and signed an agreement with a new franchisee for that location. The appellant then advised Mr. Salah that his franchise agreement would come to an end on September 30, 2005. Mr. Salah and 147 commenced proceedings against Timothy's alleging breach of the franchise agreement and seeking damages arising both from the breach and from the appellant's conduct.

6 At trial, Timothy's argued that the respondents had no right of renewal and that the parties had intended the franchise agreement to end with the expiry of the head lease on September 30, 2005. It submitted that any right of renewal provided by Schedule "A" only concerned the original location on the third floor of the shopping centre. Since the appellant could not renew its head lease on the third floor, the provisions of Schedule "A" were inoperative. Timothy's also argued that because Mr. Salah had assigned his franchisee rights to 147, only that corporation could bring a claim against the franchisor.

Decision of the Trial Judge

7 The trial judge, in a clear and carefully reasoned decision, held as follows:

> 1. that both Mr. Salah and 147 were franchisees of Timothy's and could be treated as one entity for the purpose of enforcing rights or seeking remedies;
>
> 2. the proper interpretation of Schedule "A" is that it related to the Bayshore Shopping Centre in general and was not limited to the existing third floor location;
>
> 3. Timothy's breached the franchise agreement by failing to observe the terms of Schedule "A" with respect to the new head lease on the second floor of the Bayshore Shopping Centre;
>
> 4. Timothy's breached a duty of good faith, contrary to s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("*Wishart Act*"); and
>
> 5. the breach of the duty of good faith was an independent actionable wrong.

8 The trial judge awarded Mr. Salah damages in the amount of $230,358 for future loss of income flowing from the appellant's breach of contract, and an additional $50,000 for breach of the duty of good faith and mental distress.

Issues on Appeal

9 Timothy's submits that the trial judge erred in:

> i. failing to distinguish between Mr. Salah and 147;
>
> ii. interpreting Schedule "A" as providing an option to amend the franchise agreement;
>
> iii. finding that Timothy's owed a duty of good faith and that Timothy's breached it;
>
> iv. assessing damages for breach of contract at $230,358 and awarding $50,000 for breach of the duty of good faith and mental distress;
>
> v. awarding damages to Mr. Salah for breach of contract when these damages were pleaded only by 147.

Analysis

i. Treating Mr. Salah and 147 as one entity

10 The appellant argues that the trial judge erred in failing to distinguish Mr. Salah from his corporation, 147. Since a corporation is a distinct entity from its owner, and since Mr. Salah assigned the franchise agreement to 147, the appellant submits that only the corporate franchisee could assert contractual rights against the franchisor.

11 I cannot accede to that submission. There was ample evidence to support the trial judge's finding that the appellant "maintained a relationship with both the individual franchisee and its assignee corporation. It never intended to accept the corporation in the place of Mr. Salah for all purposes." While the franchisor allowed Mr. Salah to assign the franchise agreement to 147, one of the main purposes of the Assignment and Guarantee was to ensure that all obligations under the franchise agreement continued to be those of Mr. Salah personally. In addition, as noted by the trial judge, the concluding words of s. 4 of the Assignment and Guarantee state as follows:

> Furthermore and without restricting the generality of the foregoing, the assignor shall continue to be personally bound by any and all provisions of the franchise agreement related to confidentiality and non-competition.

12 Indeed, the business model of Timothy's, as reflected in its franchise agreement, was to treat a corporate franchisee and its personal owner as one and the same. To this effect, clause 19.19 of the agreement provides:

> In the event that there is more than one Franchisee, or if the Franchisee should consist of more than one legal entity, the Franchisee's liability hereunder shall be both joint and several. A breach hereof by one such entity or Franchisee shall be deemed to be a breach by both or all.

13 Moreover, it is revealing and significant that Timothy's June 8, 2005 letter — in which Timothy's informed the franchisee that the franchise agreement would not be renewed — was addressed to Mr. Salah personally, and not to the corporate respondent. The *de facto* relationship under the franchise agreement was between Timothy's and Mr. Salah.

14 The trial judge concluded that Mr. Salah and his corporation were one entity for the purposes of the franchise agreement. Accordingly, she held that to deny Mr. Salah a remedy on the basis of separateness would yield a result "too flagrantly opposed to justice": see *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 (S.C.C.), at p. 10. I agree with her conclusion. In the context of this dispute between franchisor and franchisee, it would be incongruous, not to mention unfair to Mr. Salah, if he and his corporation were treated as one entity for the purposes of franchise liabilities, but were treated as separate entities when the question of enforcing franchisee rights under the franchise agreement is at issue.

ii. Interpretation of the franchise agreement

15 Timothy's submission that the trial judge improperly construed Schedule "A" as providing an "option to amend" the franchise agreement is an attempt to ground an appeal on a statement taken out of context in the reasons for the decision. Read as a whole, it is clear that the trial judge was engaged in an analysis of the contract between the parties, and the rights and obligations conferred by its terms. The argument fails on this basis alone. Moreover, there was no error in the approach adopted by the trial judge in construing the agreement before her.

16 The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. Where a transaction involves the execution of several documents that form parts of a larger composite whole — like a complex commercial transaction — and each agreement is entered into on the faith of the

others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements. See *3869130 Canada Inc. v. I.C.B. Distribution Inc.* (2008), 66 C.C.E.L. (3d) 89 (Ont. C.A.), at paras. 30-34; *Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.), at paras. 47-56; *SimEx Inc. v. IMAX Corp.* (2005), 11 B.L.R. (4th) 214 (Ont. C.A.), at paras. 19-23; *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.), at paras. 24-27; and Professor John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005), at pp. 705-722.

17 I see no error in the manner in which the trial judge applied the principles of construction of commercial agreements. The trial judge considered all of the relevant documents and found that the seminal document, the franchise agreement, was not ambiguous. All of the documents executed by the parties referred to the premises under the franchise agreement as "Bayshore Shopping Centre, 100 Bayshore Drive, Nepean, Ontario", and not to a specific store on the third floor.

18 Indeed, the only agreement that specifically referred to the third floor was the head lease between the Bayshore Shopping Centre and Timothy's. The appellant contends that the trial judge failed to take the head lease into account in her analysis. I do not agree. A review of her reasons demonstrates otherwise. Moreoever, to the extent that any discrepancy exists between the head lease and the franchise agreement, I agree with the trial judge that the franchise agreement should be interpreted *contra proferentem*. The head lease had been negotiated by Timothy's with the landlord, and its terms were obviously known to Timothy's at the time it drafted Schedule "A". Timothy's had the opportunity to limit the scope of Schedule "A" to the third floor premises and either chose not to do so or was aware that Mr. Salah would not have accepted such a limitation. In either event, there is no basis to find that the trial judge committed a reviewable error. Her conclusions that the franchise agreement and Schedule "A" applied to the whole shopping centre and that Timothy's conduct — which effectively amounted to a refusal to allow Mr. Salah the option of renewing the franchise agreement — constituted a breach of contract are unassailable.

iii. Breach of duty of good faith

19 Section 3 of the *Wishart Act* provides:

> **Fair dealing**
>
> 3.(1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> **Right of action**
>
> (2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.
>
> **Interpretation**
>
> (3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

20 Timothy's argues that its conduct leading up to the expiration of the franchise agreement could not constitute a breach of the duty of good faith because s. 3(1) of the *Wishart Act* only imposes the duty of good faith and fair dealing in the "performance or enforcement" of the existing franchise agreement. In other words, the appellant would have it that a terminated agreement is not caught by the section. In my view, it is unnecessary in this case to consider the full scope of the words "performance or enforcement" as used in the *Wishart Act*. The premise underlying the appellant's submission has been negated by the trial judge's interpretation of the agreement between the parties and the effect of Schedule "A". On the facts as found by the trial judge, there can be no doubt that the conduct at issue arises squarely within the "performance or enforcement" of the franchise agreement.

21 Since I find no error in the trial judge's conclusion that Schedule "A" applies to the whole shopping centre and that the right of renewal was triggered, the appellant's submission on the effect of s. 3(2) of the *Wishart Act* cannot succeed.

22 I turn then to the conduct of the appellant. When Timothy's could no longer renew the head lease of the third floor location and was negotiating a new lease on the second floor, the evidence showed that the franchisor deliberately kept Mr. Salah in the dark about its intentions. The trial judge found that "Mr. Black [the senior vice-president of development at Timothy's] e-mailed Bayshore Shopping Centre representatives asking them to refrain from passing on any information about the second floor location to Mr. Salah". The trial judge made further factual findings that Timothy's "actively sought to keep the franchisee from finding out what was going on with the lease" and that Timothy's deliberately withheld "critical information and did not return calls". These findings of fact more than support the conclusion that there was a breach of the duty of good faith that franchisors owe franchisees under s. 3(1) of the *Wishart Act*.

iv. Damages

23 The trial judge awarded damages under two heads: (1) damages flowing from the breach of contract, and (2) damages for the breach of the duty of good faith and for mental distress.

24 For past and future losses flowing from the breach of contract, the trial judge had before her both the opinion of the appellant's expert, who calculated the loss of profits only to 147, and the opinion of the respondents' expert, who assessed the losses to Mr. Salah and 147 collectively. As the trial judge decided to treat Mr. Salah and his corporation as one and the same, it was open to her to prefer the evidence of the respondents' expert, which took into account the loss of income to Mr. Salah as a result of the breach. I would not interfere with this decision.

25 The appellant submits that it is not open to the trial judge to award damages under the *Wishart Act* for anything other than compensatory damages relating to pecuniary losses. In other words, it is not open to a trial judge to award damages under the head of compensatory damages relating to non-pecuniary losses, or under exemplary or punitive damages. It argues that any damages flowing from the breach of the duty of good faith is limited to lost profits, and in particular the lost profits, if any, of 147. The latter point is addressed above. The trial judge treated Mr. Salah and 147 as a single entity for the purpose of determining losses flowing from the breach of contract and, on the evidence, she was entitled to do so.

26 In like fashion, the argument advanced by the appellant with respect to the limitations applicable to damage awards under s. 3(2) of the *Wishart Act* is misconceived. The *Wishart Act* is *sui generis* remedial legislation. It deserves a broad and generous interpretation. The purpose of the statute is clear: it is intended to redress the imbalance of power as between franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance. An interpretation of the statute which restricts damages to compensatory damages related solely to proven pecuniary losses would fly in the face of this policy initiative.

27 The right of action provided under s. 3(2) of the *Wishart Act* against a party that has breached the duty of good faith and fair dealing is meant to ensure that franchisors observe their obligations in dealing with franchisees. In that regard, the conduct that the trial judge found egregious in the present case is precisely the mischief that this legislation was enacted to remedy.

28 Our courts have given limited recognition to the duty of good faith between contracting parties in general. However, by enacting legislation that addresses the particular relationship between franchisors and franchisees, the legislature has clearly indicated that such relationships give rise to special considerations, both in terms of the duties owed and the remedies that flow from a breach of those duties. This is evident in the wording of s. 3(2), which focuses on the conduct of the breaching party and not injury to the other side. The trial judge's award of damages was informed by these considerations.

29 In summary, I am in agreement with the trial judge that s. 3(2) of the *Wishart Act* permits an award of damages for the breach of the duty of good faith, separate and in addition to any award in compensation of pecuniary losses. I would go further to say that any such award must be commensurate with the degree of the breach or offending conduct in the particular circumstances. Taking the conduct of the appellant as found by the trial judge into account, I see no error in her decision to award damages on a merged basis for the breach of duty of good faith and mental distress, either in principle or in respect of quantum. In my view, her findings as to the breach of duty of good faith alone would support the amount of the award.

30 Accordingly, I would not interfere with her decision as to damages.

v. The Pleadings Argument

31 I will deal summarily with the pleadings argument advanced by the appellant. The trial judge found that Mr. Salah and 147 should be treated as one entity with regard to the franchise agreement. As noted above, there was ample evidence to support this finding. Having done so, she was entitled thereafter to treat the pleadings of one as the pleadings of the other. This is a complete answer to the appellant's argument. Accordingly, I would not give effect to this ground of appeal.

Conclusion

32 I would dismiss the appeal.

33 The respondents shall have their costs in the amount of $32,500, all inclusive.

***M. Rosenberg J.A.*:**

I agree.

***Pitt J. (ad hoc)*:**

I agree.

Appeal dismissed.

TAB 12

2001 CarswellOnt 306
Ontario Superior Court of Justice

Obonsawin v. Canada

2001 CarswellOnt 306, [2001] 2 C.T.C. 96, [2001] G.S.T.C. 26,
[2001] O.J. No. 369, [2001] O.T.C. 78, 102 A.C.W.S. (3d) 1026

Obonsawin, Carrying on Business as Native Leasing Services and Joe Hester, Plaintiffs and Her Majesty the Queen in Right of Canada, Minister of National Revenue, Minister of Indian Affairs, Commissioner of Customs and Revenue, Bill McCloskey, Robert Frapier, Michael Cox, Winford Smith, Denis Lefebvre, K.M. Burpee, Ken Fox, John Fennelly, Jeanne Flemming, Luisa Guyan, Ruby Howard, Ken McCuaig, Aileen Conway and Brian Dawe, Defendants

Epstein J.

Heard: January 15, 2001
Judgment: February 6, 2001
Docket: 00-CV-192586CP

Counsel: *Clayton Ruby* and *Brian G. Shiller*, for Plaintiffs
John Birch, for Defendants

***Epstein J.*:**

1 The Rules of Civil Procedure provide that every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence. The rules also give the court jurisdiction to order particulars of an allegation. This motion raises certain issues concerning when particulars should be ordered.

2 The plaintiffs have sued Her Majesty the Queen in Right of Canada, the Minister of National Revenue, the Minister of Indian Affairs, and the Commissioner of Customs & Revenue (collectively, the "Crown") and 15 individuals who at relevant times were employed by the Crown. The action is based on alleged abuse of power in the defendants' treatment of the plaintiffs during a dispute that arose between Obonsawin and the Crown over changes in the way the Crown administered tax exemptions to native peoples. The plaintiffs contend that in the course of resolving this dispute, the defendants developed such animosity towards Obonsawin's position on the rights of native people in Canada that they acted maliciously and conspired to damage Obonsawin, his business and his employees.

3 In addition to seeking a declaration concerning the defendants' violation of certain of the plaintiffs' constitutional rights and damages for breach of such rights, the plaintiffs allege and claim damages for breach of fiduciary obligations, abuse of power in the exercise of statutory powers and duties, and conspiracy to injure Obonsawin.

4 The statement of claim was issued on June 21, 2000, as a prospective class action under the *Class Proceedings Act, 1992*, S.O. 1992, c.C.6. Rather than filing a statement of defence, the defendants served a demand for particulars on September 14, 2000 that requested, amongst other things, particulars of the conspiracy, breach of fiduciary duty, and other aspects of the claim. The defendants requested a total of 67 particulars. On October 12, 2000, the plaintiffs provided some additional information in a response to the demand for particulars. However, the plaintiffs, for the most part, took the position that the information requested was in the defendants' knowledge or was unnecessary for the purposes of pleading. The defendants did not pursue the matter further on an informal basis; instead they launched this motion.

5 At the outset of the motion the claim for particulars with respect to paragraphs numbered 8, 9, 11 and 49 of the statement of claim was abandoned. That left, for purposes of determination, the particulars relating to paragraphs numbered 12, 16, 28, 31, 32, 33, 39, 42, 43, 44, 47(a), 47(c), 51, 52, 53, 54, 55, 56, 57 and 58.

The Claim

6 The following is a summary of the factual underpinning of the action set out in the statement of claim.

7 Obonsawin is a status Indian who operates Native Leasing Services ("NLS") as a sole proprietorship. The plaintiff Joe Hester is also a status Indian and is an employee of NLS. He brings this action on behalf of all employees of NLS.

8 NLS contracts with native organizations to provide a broad range of human resource assistance to the employee plaintiffs to create a pool of aboriginal personnel equipped with skills required by native communities and organizations. The employees' support services, administration, salaries and benefits are administered through NLS's offices located on the reserve of the Six Nations of Grand River, near Brantford, Ontario.

9 Obonsawin encourages native people to exercise their tax exemption rights in order to increase their ability to be self-sufficient. In keeping with this mixed political and economic agenda, Obonsawin has taken a public stand that the Crown cannot lawfully reduce these tax exemption rights except with the consent of native peoples expressed through treaty or self-government agreements. Accordingly, Obonsawin commenced this action when the Crown unilaterally developed guidelines for the administration of the tax exemption provided for in section 87 of the *Indian Act*, R.S.C., 1985, c. I-5, which, amongst other things, provides that the property of an Indian located on a reserve is exempt from taxation.

10 As mentioned above, one of the claims advanced is breach of fiduciary duty. It is alleged that the fiduciary duties the Crown owes to native people extend to the protection of native property situated on an Indian reserve, and that such property includes employment income from taxation. The plaintiffs say that the administration of section 87 of the *Indian Act* has been assigned to the defendant Revenue Canada, and that Revenue Canada has a fiduciary duty to ensure that in its exercise of discretion, while interpreting and applying section 87, tax exemption rights are reasonably protected.

11 Paragraph 21 of the statement of claim contains details of obligations that the plaintiffs say flow from the Crown's fiduciary duties. In paragraphs 23 through 48 of the claim the plaintiffs set out, again in considerable detail, the historical treatment of natives respecting tax exemption rights. The chronology ends with allegations of an agreement to proceed with test cases to determine whether NLS's employees were exempt from taxation and therefore whether the Crown was lawfully administering its obligations. It is alleged that a term of the agreement was that the Crown would not pursue the collection of taxes from employees of NLS until a settlement or ultimate determination of the issues before the courts in the test cases.

12 Paragraphs 46 to 48 describe a test case involving Rachel Shilling, an employee of NLS, in which the Federal Court ruled in favour of Shilling (subject to a pending appeal brought by Revenue Canada). It is alleged that the Crown has breached the test case agreement in the various ways detailed in paragraph 47.

13 The claim also raises an issue with respect to GST. The Crown administers the GST exemption in the same manner as it does the income tax exemption: only an employer who fits within one of certain specified categories relating to certain types of employment relationships is protected from taxation. NLS takes the position that it is not required at law to collect GST from the placement organizations with which it contracts.

14 Obonsawin alleges that some or all of the individual defendants acted with malice by undertaking three actions with regard to GST collection including a GST prosecution against Obonsawin under the *Criminal Code*. At the end of 1998, the Crown instructed the prosecution to apply for a stay of proceedings in this prosecution. The plaintiffs contend that the stay was sought to prevent evidence of wrongdoing by the defendants from being revealed through the disclosure of documents in the criminal proceedings. This, in addition to other acts of intimidation that are specified in

paragraphs 53 and 54 of the claim, have caused damage to the plaintiffs, such as loss of tax exemption rights, loss of business opportunities and injury to Obonsawin's reputation.

15 These allegations provide the backdrop to the conspiracy claim. The plaintiffs allege that beginning in 1994, the individual defendants agreed to take steps to harm the plaintiffs by pursuing the course of conduct set out in the statement of claim. The specific purposes of the conspiracy alleged in paragraph 56 of the claim include using Obonsawin as an example in order to suppress native opposition to government policies concerning taxation, injuring Obonsawin's commercial interests by discouraging the placement organizations from contracting with NLS and harming Obonsawin's ability to mount an effective political campaign to require the government to fulfil its obligations under s. 87 of the *Indian Act*.

The Argument

16 The defendants criticize the statement of claim as providing no details of improper conduct by any of the individual defendants in respect of any of the causes of action pleaded. Specifically, the claim fails to contain details of which defendants participated in the conspiracy or to what extent these defendants conspired or took steps to carry out the conspiracy, to what extent the defendants individually or collectively owed a fiduciary duty to the plaintiffs, and how the individual defendants breached their fiduciary duty, including what specific acts by specific defendants constituted such breach and what unlawful conduct and harassment each of the individual defendants allegedly engaged in. These are, in summary, the areas addressed by the 67 particulars requested by the defendants.

17 Mr. Birch, counsel for the defendants, argues that the purpose of particulars is to define the issues, to prevent surprise at trial, to enable adequate preparation for trial and to facilitate the hearing. The defendants go further and argue that it is even more important to provide full particulars when very serious allegations, such as conspiracy and other intentional torts have been made, particularly against public officials. The submission is that the combination of the current state of the pleading, which now must be read together with the particulars that have been provided, is insufficiently particularized so as to fulfil that purpose.

18 Concerning the alleged breach of fiduciary duty, the defendants submit that the duties of the Crown to native people are found in s. 35 of the *Constitution Act, 1982*. This section is seen as the "source" of fiduciary duties that may be owed to aboriginal people. However, the statement of claim does not allege that the fiduciary duties upon which the action is based arise out of any right protected by s. 35. The defendants suggest that the most that can be assumed is that the plaintiffs are alleging some fiduciary duty arising out of s. 87 of the *Indian Act* but, in addition to being problematic in the sense of how a fiduciary duty can arise out of the statutory construction of this provision, the breach of any such duty has not been pleaded in adequate detail to allow the defendants to respond.

19 The plaintiffs have also alleged that the defendants or certain of them have conspired to harm to the plaintiffs. The defendants, relying on the well-known case of *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), submit that the tort of conspiracy requires specific circumstances to be pleaded and proven. There must be an agreement to act together, overt acts consequent upon the agreement, and damage to the plaintiffs that was caused by the acts of the defendants in furtherance of the conspiracy.

20 The defendants say that the claimed conspiracy portion of the pleading is deficient as the agreement to conspire is very generally pleaded with no information concerning who the agreement was between, no detail of what each alleged conspirators did in furtherance of the conspiracy and what injury or damage was occasioned to the plaintiffs.

21 In relation to the issue of damages, the defendants point out that no particulars of the damage claim have been provided whatsoever. In fact, there is no monetary amount at all set out in the prayer for relief in the statement of claim.

22 Finally, in respect of the additional torts including intimidation and harassment of the prospective class members, the defendants contend that the statement of claim alleges serious wrongdoing by government employees at the highest level but does not provide necessary details for these individuals to respond.

23 In general, the defendants submit that the statement of claim is so general and wide-ranging and contains so many allegations of wrongdoing that it is more properly characterized as a political document.

24 In response, the plaintiffs accuse the defendants of delay tactics. If the statement of claim is as deficient as alleged by the defence, then the defendants ought to have brought a motion to strike under Rule 25.06(1).

25 In specific response to the relief sought, the plaintiffs', relying on *Physicians Services Inc. v. Cass*, [1971] 2 O.R. 626 (Ont. C.A.), say that particulars should only be ordered when they are not within the knowledge of the moving party and are required for the purposes of pleading. The primary argument of the plaintiffs is that given the defendants have not adduced any evidence that they are unable to plead to the claim, the motion should be dismissed.

26 If I am prepared to examine the specifics of the defendants' complaints notwithstanding the lack of a supporting affidavit, the plaintiffs take the position that each of the causes set out in the statement of claim have been adequately pleaded.

27 Concerning the claim for breach of fiduciary duty, the plaintiffs submit that the fundamental law concerning the fiduciary duty the Crown owes to aboriginal peoples has to be considered differently, given the unique nature of their relationship. The "source" of the fiduciary obligation is based on the Indians' historic occupation prior to white settlement. Mr. Ruby, counsel for the plantiffs, contends that the nature of the duty flows from history, not the pleading. It is just there.

28 In relation to the conspiracy claim, the plaintiffs say that the requirements of *Canada Cement LeFarge* have been met to the extent the plaintiffs are able to detail the elements of the tort of conspiracy. In relation to the other torts pleaded, the plaintiffs strongly resist any suggestion that public officials are entitled to any greater degree of particularity even when serious allegations are made against them.

Analysis

29 The court's duty is to examine the impugned pleading from the point of view of intelligibility and compliance with the rules. When a pleading is deficient for want of particulars, the practice is to move to strike out the pleading or a part of it pursuant to Rule 25.06(1), or for particulars pursuant to rule 25.10.

30 Rule 25.06(1) and the cases decided under it establish that material facts, but not evidence, must be pleaded. Somewhere in the spectrum between "material facts" and "evidence" is the concept of "particulars". In *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (Ont. Master), Master Sandler referred to particulars as "additional bits of information, or data, or detail, that flesh out the material facts, but they are not so detailed as to amount to "evidence". These additional bits of information, known as "particulars", can be obtained by a party under new Rule 25.10, if the party swears an affidavit showing that the particulars are necessary to enable him to plead to the attacked pleading, and that the "particulars" are not within the knowledge of the party asking for them."

31 There is also a more specific rule, Rule 25.06(8) that provides that when causes such as fraud, misrepresentation, breach of trust and malice are alleged, the pleading shall contain full particulars.

32 The relevant authorities, like the rules, provide assistance not only with respect to the general principles surrounding the ordering of particulars but also concerning certain specific types of claims being advanced.

33 In terms of the general principles, the test for when particulars should be ordered is that set out in the decision in *Physicians' Services*. In that case the court applied the principles laid down in cases such as *Fairbairn v. Sage* (1925), 56 O.L.R. 462, [1925] 2 D.L.R. 536 (Ont. C.A.), in which it was held that particulars for pleading will only be ordered when (1) they are not within the knowledge of the party demanding them, and (2) they are necessary to enable the other party to plead. While other cases such as *Champagne v. Kapuskasing Plumbing & Heating Ltd.* (1996), 48 C.P.C. (3d) 111 (Ont. Div. Ct.), help explain why particulars are ordered such as to define the issues, to prevent surprise at trial, to

enable adequate preparation for trial, and to facilitate the hearing, I am of the view that the *Physicians' Services* case remains the authority as to when the court should order particulars.

34 It is well settled that when the tort of conspiracy is alleged, pleadings must contain details as to what agreements and what parties were involved in the conspiracies, the particulars of any such agreements and the particulars of damages allegedly resulting. The requirements of a pleading alleging conspiracy are succinctly outlined in *Bullen, Leake and Jacob's, Precedents of Pleadings*, 12 ed. (1975), p. 341, as follows:

> Pleading. The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the object of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

See also: *Industrial Ecology Inc. v. Kayar Energy Systems Inc.* (January 22, 1997), Doc. 96-CU-115197, B1/97 (Ont. Gen. Div. [Commercial List]) and *Key Property Management (1986) Inc. v. Middlesex Condominium Corp. No. 134* (1991), 50 C.P.C. (2d) 255 (Ont. Gen. Div.).

35 I first turn to a fundamental position advanced by the plaintiffs that there is no evidence before the court to support a finding that the defendants require the particulars requested for the purpose of pleading. By way of example, only the plaintiffs claim that since December 31, 1994, the Crown has maintained that the employees of NLS are subject to taxation and are not entitled to the benefits of s. 87 of the *Indian Act*. They have further pleaded that the Crown has directed its officials to exercise their discretion specifically to exclude NLS's employees from being able to benefit from the tax exemption rights. The defendants have requested information concerning which representatives directed what officials to so exercise their discretion in this manner. The response to that request is that the information is within the knowledge of the defendants.

36 The onus is on the party requesting the particulars to satisfy the court that particulars are necessary. The defendants therefore have the onus of demonstrating that they do not know which representatives of the Crown have directed which of its officials to exclude NLS's employees from the tax exemption rights and that, without this information, the Crown is unable to plead. Since the defendants did not support their motion with any evidence there is no evidence before me upon which to base such a finding.

37 I have examined the other specific requests and responses and come to the same conclusion with respect to each one. The failure of the defendants to provide evidence on the very issue before the court is fatal to the relief sought in this motion. While it has been recognized in cases such as *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (Ont. H.C.), that there may be instances where a supporting affidavit may not be necessary, I cannot say, using the words of Justice Lerner in *Steiner* at p. 129, that the pleading is so" general that particulars are manifestly necessary, or so bald as to be recognized as a pleading of which particulars should be given without a supporting affidavit".

38 While the breach of fiduciary duty aspect of the claim does not contain the types of material facts requested by the defendants, in my view it is perfectly adequate given the foundation of the fiduciary relationship. I agree with Mr. Ruby's submission that in the circumstances of this case the basis of the fiduciary relationship relied upon is unique. The aboriginal rights that are at the heart of the action as pleaded are *sui generis*. They do not arise out of any band or treaty right. Section 35 of the *Constitution Act, 1982*, is not the "source" of these duties.

39 In *R. v. Sparrow* (1990), 46 B.C.L.R. (2d) 1 (S.C.C.), the Supreme Court of Canada found that the Crown owed a fiduciary obligation to the Indians with respect to the lands and said, in paragraph 59 of that decision, that" the *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation.... the Government has the responsibility to act in a fiduciary capacity with respect to

aboriginal peoples. The relationship between the Government and aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

40 The plaintiffs claim that Obonsawin has encouraged native people to exercise their tax exemption rights and to insist that the Crown properly exercise its fiduciary obligations with respect to these rights. The defendants have asked what specific facts give rise to the alleged fiduciary obligations, what specific duties the Crown owes to native people and what facts support the Crown's alleged duty to act in utmost good faith. The response is essentially to refer the defendants to paragraph 16 of the statement of claim that identifies the source of the fiduciary duty as being the original relationship between the Crown and aboriginal peoples as now protected by s. 35 of the *Constitution Act*. In my view, this response is sufficient in the circumstances of this case.

41 In terms of the details of the conspiracy alleged, the claim contains the basic elements of the tort of conspiracy. While the details of those elements might not be set out with "clarity and precision", the pleading is not so general and bald so as to lead me to conclude, without a supporting affidavit, that particulars are necessary.

42 While I have determined that the lack of a supporting affidavit is fatal to the defendants' motion, and that the motion must, with one minor exception, otherwise fail, I will add one other observation. The resolution of the dispute over particulars must always be tied to the Court's overall obligation to ensure that justice is done between the parties in the context of the circumstances of each case. In exercising the discretion to order particulars and in ensuring that justice is done, the court is entitled to consider the nature of the relationship between the parties. See: *Dixon v. Trusts & Guarantee Co.* (1914), 5 O.W.N. 645 (Ont. H.C.).

43 It is the relationship between the parties and not the characteristics of the parties themselves that is relevant to the exercise of the court's discretion in terms of when to order particulars. I do not accept the argument that a party, just because he or she is a public official, is entitled to greater particularity of a pleading against him or her. In the circumstances of this case I find the relationship between the parties to be relevant. This is an action in which there is an imbalance between the parties' access to information surrounding the issues raised in the claim. The information and documentation concerning the actions of the Crown in its administration of Canada's tax laws are not only primarily within the knowledge and control of the defendants, but also, for the most part, outside of the knowledge and control of the plaintiffs. It would be unfair to impose an obligation on the plaintiffs that would be difficult, if not impossible, to meet when the defendants have so much power over the information sought relative to that of the plaintiffs.

44 In all of these circumstances, I am of the view that with one exception it is neither appropriate nor just to order the plaintiffs to provide the particulars requested.

45 The exception has to do with the failure of the plaintiffs to specify any amount of damages in the prayer for relief. Although one has to wonder about how meaningful such numbers may be to either side at this stage of the proceeding, Rule 25.06(9) makes it clear that damages must be quantified. The plaintiffs were unable to bring to my attention any authority nor have they advanced any compelling argument to support the proposition that this rule does not apply to actions brought under the *Class Proceedings Act* that have not yet been certified.

46 Finally, I adopt the observation made by Gale C.J.O. in *Physicians' Services* that holding that certain particulars are not warranted prior to discovery does not mean that they will not have to be given for the purpose of trial.

47 The plaintiffs will provide particulars of the damages claimed in paragraphs 1(b), (d), (e), (f) and (i) of the statement of claim. The motion is otherwise dismissed.

48 The plaintiffs have been virtually entirely successful and are entitled to their costs. If counsel are unable to resolve the amount, they may make arrangements with my secretary for a conference call in which to make submissions.

Motion granted in part.

TAB 13

2017 ONSC 3582
Ontario Superior Court of Justice

Arend v. Boehm

2017 CarswellOnt 17756, 2017 ONSC 3582, 285 A.C.W.S. (3d) 311, 78 B.L.R. (5th) 146

KARSTEN AREND, HANSJOERG WAGNER AND BITRUSH CORP. (Applicants) and WERNER BOEHM, ALFRED DOBIAS AND MEZZACAP INVESTMENTS LTD. AND ELFRIEDE SIXT (Respondents)

L.A. Pattillo J.

Heard: May 31; June 5, 2017
Judgment: November 14, 2017
Docket: CV-16-11653-00CL

Counsel: Alistair Crawley, Clarke Tedesco, April Engelberg, for Applicants
No one, for Respondents

***L.A. Pattillo J.*:**

Introduction

1 The Applicants, Karsten Arend ("Arend"), Hansjoerg Wagner ("Wagner") and BitRush Corp. ("BitRush") (collectively the "Applicants"), seek various relief in this Application pursuant to s. 248 of the *Business Corporations Act*, R.S.O. 1990 c. B.16 (the "OBCA") including:

> 1) A declaration that the respondent Werner Boehm ("Boehm"), in his capacity as CEO of BitRush has acted oppressively, in breach of his fiduciary duty to BitRush;
>
> 2) Orders transferring shares of BitRush from the respondent MezzaCap Investments Ltd. ("MezzaCap Investments") to Dr. Joachim Dr. Kalcher ("Dr. Dr. Kalcher") and HSRC Investments Pte. Ltd. ("HSRC") to whom the shares are owed; and
>
> 3) An order that MezzaCap Investments' remaining shares in BitRush be cancelled.

2 At the outset of the hearing of the Application, the Respondents Boehm, Alfred Dobias ("Dobias") and Elfriede Sixt ("Sixt") (collectively the "Individual Respondents") each brought motions to stay or dismiss the Application on the ground that an Ontario court has no jurisdiction to hear the matter or, in the alternative, is not the most appropriate forum. They also sought to set aside service of the *Amended* Notice of Application and stay the proceedings on the basis that it was not authorized by the *Rules of Civil Procedure* and the Application was frivolous or vexatious or otherwise abusive (the "Jurisdiction Motions").

3 Although the Individual Respondents were not represented by counsel, they each filed material in respect of their respective Jurisdiction Motions and participated in the hearing before me by conference telephone call. Following submissions, I reserved my decision on the Jurisdiction Motions and directed that the argument proceed on the Application. In that regard, neither the Individual Respondents nor MezzaCap Investments filed material in the Application. Further, the Individual Respondents advised during the Jurisdiction Motions that they intended to make no submissions on the Application. They did, however, listen to the completion of the argument by conference telephone.

4 By written reasons released June 12, 2017 and reported at 2017 ONSC 3424 (Ont. S.C.J.), I dismissed the Jurisdiction Motions. For the reasons that follow, I allow the Application in part.

The Facts

5 The Applicants have filed affidavits from Arend, Wagner, Dr. Dr. Kalcher and Peter Lukesch, the former CEO of BitRush and the CEO of Streetwear Corporation ("Streetwear"). As noted, none of the Respondents filed any responding material in the Application. The following is a factual overview from the material filed by the Applicants, which I accept as true.

1) The Parties

6 BitRush is an Ontario corporation with its head office in Toronto. BitRush is engaged in the development and implementation of various cryptographic technologies and blockchain based solutions. While its principal focus is on implementing a cryptographic payment system for the internet, it is also involved in developing online advertising services and gaming technologies for the internet. BitRush was publically traded on the Canadian Securities Exchange and the Frankfurt Exchange. On December 2, 2016, the Ontario Securities Commission issued a cease trade order against its shares.

7 Arend is a Canadian who resides in Ontario and is engaged in the business of consulting and investing in mining and technology companies. He is a shareholder of BitRush and has been a member of its board of directors (the "Board") and its president since April, 2016.

8 Wagner is a Permanent Resident of Singapore and is an experienced former senior executive and investor in the hi-tech industry. He is a shareholder of BitRush and has been a director of the company since June 2016. Wagner is also a director and part owner of HSRC, a Singapore corporation, which also owns shares in BitRush. HSRC is reported in BitRush's public filings as owning 21% of its shares.

9 MezzaCap Investments is a United Kingdom corporation which is owned and controlled by some combination of Boehm and/or Dobias. Boehm is the sole director of MezzaCap Investments. The evidence establishes and I find that Boehm is the directing mind of MezzaCap Investments. MezzaCap Investments owns approximately 51% of BitRush's shares as at September 30, 2016.

10 Boehm is an Austrian citizen but resides in the United Kingdom. He is a former marketing manager of IBM and has been involved in internet technology companies since at least 1998. Boehm was the directing mind behind the formation of BitRush in July 2015. He was Chief Executive Officer of BitRush from December 24, 2015 until his termination on December 7, 2016. As noted, Boehm is also the sole director of MezzaCap Investments.

11 Dobias is a resident of Austria and was a member of BitRush's Board until he resigned in on February 22, 2017.

12 Sixt is also a resident of Austria. She is an accountant and has acted as BitRush's accountant from 2015 until she was terminated on December 13, 2016.

2) BitRush

13 BitRush was formed in July 2015 through a reverse takeover ("RTO") initiated and implemented by Boehm through MezzaCap Investments. Streetwear, an Ontario public corporation, acquired 100% of the shares of MezzaCap GmbH, from MezzaCap Investments, in exchange for approximately 2/3 of the shares of Streetwear (83,287,265 shares). Streetwear subsequently changed its name to BitRush on or about September 2, 2015.

14 The main driver behind the RTO was the representation by Boehm to representatives of Streetwear that MezzaCap GmbH owned a universal payment service based on cryptocurrency payment system called ANOON (the "ANNON

Technology") and it had cryptocurrency websites which generated advertising revenues through various bitcoin related strategies which were valued in excess of $2 million.

15 BitRush is publically traded on the Canadian Securities Exchange and the Frankfurt Exchange. It has 127 million shares outstanding and approximately 2,000 shareholders.

16 BitRush has three main businesses that are or will be built around the ANOON Technology: the ANNON payment processing service; gaming technologies and online advertising services operated by its subsidiary AdBit Efficient Marketing Limited ("AdBit").

3) Dr. Kalcher

17 Dr. Kalcher is an Austrian citizen. ANOON and its predecessors, BitCore, P2Nex, BlockNexus and ANON were developed by Dr. Kalcher. Dr. Kalcher became the Acting Chief Technology Officer of BitRush.

18 In 2013, Dr. Kelcher who had been developing a platform to be used for crowdfunding and crowd investing on the internet called CrowdLauncher, entered into an agreement with Boehm to set up a company for the development, marketing and sale of CrowdLauncher. The company, which became MezzaCap GmbH, was to be owned 20% by Dr. Kalcher through his company kb-spirit, 20% by Dobias and 60% by MezzaCap Investments. As part of the agreement, Dr. Kalcher agreed to license the CrowdLauncher technology to MezzaCap GmbH. The agreement was never reduced to writing. Subsequently and despite repeated assurances to him from Boehm, no share transfers ever took place to Dr. Kalcher and MezzaCap GmbH never obtained a license from Dr. Kalcher for the technology.

19 At the time that BitRush was formed, Boehm advised Dr. Kalcher that he would be provided with 5,000,000 shares of BitRush which was approximately 4% of the company's shares. Dr. Kalcher's understanding was that it was to secure his support for the BitRush initiative. He was told by Boehm that the shares had been placed in escrow with BitRush's transfer agent in Toronto but only 500,000 were immediately tradable and the balance would be released to him at the rate of 15% every six months. Dr. Kalcher subsequently received only 500,000 shares and learned that no shares were ever deposited into escrow in his name and that the shares he did receive came from MezzaCap Investments. Once again the agreement was never reduced to writing.

4) Wagner and HRSC's Investment in BitRush

20 In August 2015, Wagner purchased and received 2 million shares of BitRush. Those shares are not in issue. In February 2016, Boehm approached Wagner for a further investment in BitRush or MezzaCap Investments. It was subsequently agreed between HSRC, MezzaCap Investments and BitRush that HSRC would invest in BitRush on the following terms:

a) MezzaCap Investments would sell to HSRC 18 million shares of BitRush for consideration of $1 CAD and HRSC's commitment to support the development of BitRush through the provision of technical and infrastructure support;

b) BitRush would sell to HSRC a private placement of 7 million BitRush shares for $700,000 CAD; and

c) Wagner would be appointed to the BitRush Board.

21 In late February 2016, HSRC signed a subscription agreement with BitRush for 7 million BitRush shares for $700,000.00 CDN (approximately $500,000 US).

22 On March 8, 2016, HSRC wired $500,000 USD to BitRush. On March 17, 2016, BitRush transferred 6,650,000 BitRush shares to HSRC. The reduced number of shares resulted from BitRush only receiving $665,000 CDN based on the then current exchange rate. Wagner testified that Boehm assured him that MezzaCap Investments would provide HSRC with the outstanding 350,000 shares but it never did.

23 Further, although HSRC also provided the promised technical and infrastructure support to BitRush, MezzaCap Investments only transferred 12,493,090 of the agreed 18 million BitRush shares leaving a shortfall of 5,506,910 shares from what was agreed to.

24 Further, it was not until June 20, 2016 and substantial effort on his part that Wagner was appointed to BitRush's Board.

25 In an email dated November 29, 2016, Boehm purported to unilaterally terminate BitRush's and MezzaCap Investments obligations to provide HSRC with the outstanding BitRush shares "for several reasons we have already discussed."

5) The Events of the Fall of 2016

a) Dr. Kalcher

26 On October 28, 2016, Arend had a conversation with Dr. Kalcher to better understand the ANOON technology. During the conversation, Dr. Kalcher asked about the 4,500,000 shares of BitRush that he'd been promised by Boehm and asked when they would be transferred to him, and if Arend had been instructed to transfer them. Arend responded that he had no knowledge about the shares or the transfer. Dr. Kalcher also became extremely upset when he learned that Sixt was closely involved with BitRush as he had had a very negative business experience with her in the past and Boehm had promised him at the outset that she would not be involved in the MezzaCap GmbH venture.

27 Shortly thereafter, Dr. Kalcher confronted Boehm about his outstanding 4,500,000 shares in BitRush and his concealment of Sixt's involvement. On November 2, 2016, Dr. Kalcher wrote to Boehm and advised him that he was resigning from BitRush and proposed that BitRush make him a proposal if it wanted to continue using the ANOON technology. Boehm did not advise the Board of this development. On November 4, 2016, Dr. Kalcher sent an email to the Board advising them of his resignation.

28 On November 25, 2016, Dr. Kalcher sent a further email to BitRush's Board providing it with two options: BitRush could purchase the ANOON technology for 875,000 or he would shut the ANOON technology down on December 23, 2016.

29 On November 28, 2016, Boehm sent an email to the Board alleging that Dr. Kalcher had never previously made claims to be compensated for the ANOON technology and that his sudden fallout with Dr. Kalcher was because Boehm was unwilling to work with various individuals who he felt were involved in money laundering (a potential investment opportunity that Boehm had originated). In fact the Board had already decided not to work with the individuals in question.

30 By email dated November 24, 2016, Sixt advised the Board that BitRush's third quarter financial statements as of September 30, 2016 were due on November 29, 2016 and that if the financials were not filed on or before that date, BitRush's shares would be cease traded by the OSC.

31 On November 29, 2016, Sixt emailed draft third quarter financial statements she had prepared to the Board. The statements were to be filed, as certified by the CEO and CFO, that day. Note 1 to the financial statements, entitled "Nature of Operations and Going Concern" briefly set out the company's business, its intended focus and the fact that as at December 31, 2015, it had not yet achieved profitable operations and continued to be dependent on external financing to meet its financial obligations. The note then stated:

> These conditions indicate the existence of material uncertainty that may cost [*sic*] significant doubt upon the ability of the company as a going concern. This doubts [*sic*] are substantially increased by a failed private placement effort announced as of 6th September 2016 and due to the fact the Corporation has been experiencing a blackmailing

effort since end of October 2016 by its former CTO Joachim Dr. Kalcher. There are severe indications that HSRC Investments Inc. — a minor shareholder of the Corporation — are in close contact with Joachim Dr. Kalcher and that the purpose of this blackmailing effort is to use ANOON for money laundering activities. These incidents have induced BitRush's major shareholder, MezzaCap Investments Ltd, to terminate its shareholder agreement with HSRC Investment Inc. and to take the necessary legal actions against them. Appropriate legal steps have already been taken.

32 Arend was extremely concerned about the impact of the proposed disclosure concerning Dr. Kalcher and HSRC on BitRush. He viewed Dr. Kalcher's position concerning the use of the ANNON Technology as a legitimate business issue and not blackmail. Further, BitRush had terminated any discussions with the individuals Boehm was alleging were involved in money laundering. Accordingly, he edited Note 1 of the draft financial statements to remove the allegations against both Dr. Kalcher and HSRC and indicated that there was a dispute over the ownership of the technology. He then sent the revised draft financial statements by email later on November 29, 2016 to the Board and Boehm and Sixt requesting, despite his concerns about her performance, that the Board appoint Sixt CFO for the purposes of certifying the financial statements and that Boehm and Sixt certify them. Wagner agreed to Sixt's appointment but there was no response from Dobias.

33 Despite frequent email correspondence between Arend, Boehm and Sixt on November 29, 2016, neither Boehm nor Sixt responded to Arend's request for them to sign the revised financial statements. Arend filed the revised third quarter financial statements, uncertified, at 9:44 p.m. on November 29, 2016. As a result of BitRush's failure to file certified financial statements, the OSC issued a Cease Trade Order against BitRush on December 2, 2016.

34 On December 6, 2016, MezzaCap Investments filed a criminal complaint against Dr. Kalcher with the prosecutor's office in Austria alleging the same improper conduct against him as Boehm and Sixt had raised in the notes to the financial statements. The complaint was dismissed on January 19, 2017, following a preliminary investigation.

b) AdBit

35 In the fall of 2016, BitRush was contemplating a venture between its subsidiary AdBit and a third party software supplier to raise capital for the development of the business. Unbeknownst to the Board, Boehm was acting behind the scenes to appropriate AdBit for the benefit of MezzaCap Investments. On November 18, 2016, without the authorization or knowledge of the Board, Boehm amended AdBit's company register in the UK to transfer the shares of AdBit from BitRush to MezzaCap Investments.

36 Also on November 18, 2016, Bohem advised the principals of the third party that he, Sixt and some new investors were running AdBit and that they were ready to proceed.

37 On November 20, 2016, without advising the Board of any of his actions concerning AdBit, Boehm proposed to the Board that BitRush sell AdBit to MezzaCap Investments for $100,000 CAD in order to resolve its short term cash situation until the issues with Dr. Kalcher were "cleared". The Board rejected Boehm's proposal as being completely inappropriate and not a realistic proposal.

c) The Special Committee

38 On December 7, 2016, BitRush's Board formed a Special Committee comprised of Arend and Wagner to investigate the circumstances leading to the Cease Trade Order and the ownership of the ANOON technology. The Board also terminated Boehm as CEO for acting in a manner that was contrary to the interests of BitRush. On December 13, 2016, the Board terminated Sixt.

39 As a result of its investigation, in addition to Boehm's actions concerning his dispute with Dr. Kalcher leading to the Cease Trade Order, the Special Committee also learned:

i. Boehm had failed to fulfil agreements to provide MezzaCap GmbH and subsequently BitRush shares to Dr. Kalcher in exchange for a license to use the ANOON Technology and to compensate him for the development of the ANOON Technology resulting in BitRush having no rights to the ANOON Technology and putting the very core of BitRush's business at risk;

ii. That between August 2015 and September 2016, there were a number of largely unsupported transfers of funds from BitRush to MezzaCap GmbH (an Austrian company controlled by Boehm and subsequently renamed BitRush GmbH in June of 2016), totaling $561,373 CAD;

iii. In October/November 2016, Boehm had taken steps to misappropriate AdBit for MezzaCap Investments, as detailed above;

iv. Subsequent to his termination from BitRush, Boehm maintained an active presence on the former BitRush website and associated blogs and chat boards. He also has taken steps to form a new company in the UK called BitRush Limited and appears to be operating the website *www.bitrush.org* which is described as a "new online trading platform".

The Relief Requested

40 The Applicants' Amended Notice of Application seeks multiple relief against the Respondents pursuant to the oppression remedy in s. 248 of the OBCA. Besides orders requiring Boehm and Sixt to return certain BitRush property, cease dealing with BitRush's assets and cease operating certain websites, the principal relief requested is as follows:

a) Orders pursuant to s. 248(3)(d) of the OBCA requiring MezzaCap Investments to transfer a total of 21,157,453 shares in BitRush to Dr. Kalcher and 5,865,910 shares in BitRush to HRSC as was agreed between the respective party, BitRush and MezzaCap Investments (Boehm).

b) An Order for the issuance of 350,000 shares from BitRush's treasury to HRSC, also as agreed between HRSC, MezzaCap Investments and BitRush (Boehm).

c) An Order, based on the "material misrepresentations" of Boehm and MezzaCap Investments at the time of the formation of BitRush, cancelling MezzaCap Investments' remaining shares in BitRush;

d) In lieu of an order requiring the respondents to return $561,373 CAD to BitRush which was improperly transferred to MezzaCap GmbH (now BitRush GmbH), cancellation of 6,237,478 shares of BitRush owned by the respondents constituting $561,373 worth of BitRush shares at today's market price.

41 The Applicants have obtained interim orders from this court dated March 20 and April 12, 2017 requiring the respondents to deliver to BitRush the corporate assets and property that continues to be in their possession and control and to cease dealing with BitRush's assets, communicating with BitRush's customers or holding themselves out as an officer or director of BitRush and its subsidiaries. None of the respondents have complied with the orders.

The Oppression Remedy

42 The oppression remedy is set out in s. 248 of the OBCA. In particular, s 248(2) provides:

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

43 An oppression claim is to be brought by "complainant" (s. 248(1)) which is defined in s. 245 of the OBCA as follows:

"complainant" means,

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

44 Section 248(3) of the OBCA gives the court broad remedial powers to remedy oppressive conduct. It sets out in a non-exhaustive list, a number of remedies available to the court if oppression is found.

45 In *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), the Supreme Court of Canada set out what is required to establish the oppression remedy in s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44, the wording of which is identical to s. 248 of the OBCA. At para. 56, the court stated that in considering whether an oppression claim has been made out, it is necessary to determine whether the reasonable expectations of the claimant have been breached and, if so, whether the breach is oppressive, unfairly prejudicial or unfairly disregarded the interests of the claimant.

46 The reasonable expectations of the claimant are to be determined both objectively and contextually: *BCE*, para. 62. Not all breaches of a claimant's reasonable expectations will give rise to the oppression remedy. The court must be satisfied that the conduct resulting in the breach falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of a claimant's interest: *BCE*, para. 89; s. 5(2) of Schedule 3 of the Act.

47 In *BCE*, at paras. 90 to 94, the court discusses the concepts of oppression, unfair prejudice and unfairly disregarding relevant interests. The concepts are on a scale of wrongful conduct extending from abusive behavior at one end to unfair conduct at the other. Oppression is a "wrong of the most serious sort." It involves wrongful or improper conduct in respect of the corporation's affairs which smacks of bad faith: para. 92. Unfair prejudice is less serious than oppression and involves conduct that results in unfair consequences: para. 93. Unfair disregard is less serious again and involves, for example, ignoring shareholder interests as being of no importance: para. 94.

i. Complainant

48 The first issue to determine is whether the Applicants meet the criteria of "complainant" as defined in s. 245 of the OBCA. The acts complained of in the Application by Boehm and MezzaCap Investments concern the business and affairs of BitRush. Arend is a director and officer of BitRush and Wagner is a director and shareholder. They qualify as "complainants" under subsections (a) and (b) of the definition. As will become apparent, however, when I come to discuss reasonable expectations, the reasonable expectations of both Arend and Wagner are no different than those of all shareholders.

49 Can BitRush qualify as a complainant? Subsection (3) of the definition provides that the court has a discretion to permit that status to any other person who is a "proper person" to make an application.

50 In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 180 O.A.C. 158, [2003] O.J. No. 5242 (Ont. C.A.) at para. 45, Goudge J.A. on behalf of the Court stated:

> 45 It may be that the finding in that case is simply that in the circumstances there the trustee in bankruptcy would not be given a remedy under s. 248 and therefore ought not to be accorded standing as a complainant. If, however, that case sets out the absolute prohibition contended for by the appellants, as I tend to think it does, then despite the great respect due its author I would disagree. The simple reason is that s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

51 Two Alberta decisions, considering a similar definition of "complainant" have held that a corporation may be a complainant in an oppression action: *Gainers Inc. v. Pocklington* [1992 CarswellAlta 277 (Alta. Q.B.)], September 10, 1992, Alta. Q.B. Action No. 9103 14818; *Calmont Leasing Ltd. v. Kredl*, [1993] 7 W.W.R. 428 (Alta. Q.B.) at paras. 127-128.

52 In *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 3899 (Ont. S.C.J.), the court rejected the respondent's submission that a corporation should not be considered a "complainant" because "the interests of the Corporation are not mentioned" in s. 248. Finally, in *Patheon Inc. v. Frank*, 2009 CarswellOnt 9046 (Ont. S.C.J.), Wilton-Siegel J. dealt with a Rule 21 motion to strike an oppression claim for no cause action on the ground that the corporate plaintiff had no status as a complainant. After reviewing *Olympia & York*, *Calmont* and *Gainers*, the learned judge concluded at para. 125 that the common rationale for permitting a corporation to bring an oppression action was because it was in substance a representative action on behalf of all shareholders (except the defendants) or creditors in the case of a bankruptcy. He then continued at para. 128:

> 128 However, while I strongly incline to the view that the cases reflect a requirement that a corporate plaintiff prosecuting an oppression remedy must have actual authority to represent all of the shareholders (or creditors in the case of a trustee in bankruptcy) other than the defendants, I cannot say that, on the current state of the law, it is plain and obvious that a corporate plaintiff must satisfy this requirement in order to qualify as a "proper person". The fact that an alternative remedy is available under securities legislation is not, as a matter of law, sufficient to exclude the corporation as a possible complainant. Accordingly, the motion for relief striking the oppression claim against the JLL Nominees in its entirety is dismissed. It is not plain and obvious that, as a matter of law, Patheon cannot be a "proper person" for the purposes of the definition of "complainant" in section 238 of the CBCA. This question is one that is properly left to be determined on a full factual record at trial or on a summary judgment motion.

53 Given the circumstances of this case and the relief being sought, I am satisfied that BitRush is a "proper person" to bring an oppression claim under s. 248 of the OBCA. The Application seeks to remedy certain acts directly caused by Bohem (and MezzaCap Investments) for the benefit of all shareholders. Further, and while "actual authority" from all shareholders as mentioned by Wilton-Siegel J. may be required in some cases, in my view it will depend on the circumstances. In this case where the shares are widely held, MezzaCap Investments, which is controlled by Boehm, owns the majority of BitRush's shares and where Arend and Wagner, the remaining members of the Board, are also Applicants, I do not consider actual authority to be required.

ii. Oppression

54 The Applicants submit that the business and affairs of BitRush have been carried on by Bohem, in a manner that was oppressive, unfairly prejudicial to and disregarded the interests of the shareholders of BitRush and in breach of his fiduciary duty to BitRush.

55 There is no question that Boehm, who is the directing mind of MezzaCap Investments, was the driving force behind the RTO and the creation of BitRush in July 2015. Although he never became a director of BitRush and only became CEO in December 2015, the evidence establishes that at all material times he was the directing mind of BitRush, operating the company with impunity by intimidating and threatening BitRush's former directors who eventually resigned due to his conduct. The delay in Boehm becoming CEO was only because of criminal proceedings against him in Austria which were dismissed in December 2015.

56 I am satisfied from the facts that I have found that the business and affairs of BitRush as directed by Boehm both before and after he became CEO, were carried on in a manner which was oppressive, unfairly prejudicial and/or disregarded the best interests of BitRush and its shareholders. Further Boehm's actions were a breach of his fiduciary duty to BitRush.

57 Boehm's conduct in failing to provide BitRush with the ANOON technology, attempting to transfer the shares of AdBit to MezzaCap Investments in November 2016 and transferring monies from BitRush to companies controlled by him in Austria was conduct of the most serious sort. It was clearly oppressive within the meaning of that term. Further, Boehm's conduct clearly breached the reasonable expectations of BitRush and its shareholders which were that as the person in charge of running BitRush, he would direct the business and affairs of BitRush and conduct himself in a proper and legal manner.

58 The ANNOON technology is fundamental to BitRush's existence. As Wagner deposed, "The ANOON Technology is, effectively, the entire business of BitRush". Not only did Bohem fail to ensure that BitRush was entitled to use the ANOON technology from the very inception of BitRush, he never took any steps to ensure that was done (by completing his agreements with Dr. Kalcher) nor did he ever advise the Board that was the case. Further, when the Board learned of the problem from Dr. Kalcher, Boehm attempted to shift the blame to Dr. Kalcher.

59 Similarly, AdBit was an important part of BitRush's business. Boehm's actions in fraudulently amending the company's register to transfer the shares of AdBit to MezzaCap Investments, carrying on negotiations with third parties on the basis that he was running AdBit and then, without advising the Board of any his actions, making a low ball offer to purchase AdBit allegedly to provide BitRush with cash until the Dr. Kalcher matter was resolved were improper and wrong. He attempted to fraudulently misappropriate BitRush's property.

60 Finally, Boehm's actions in transferring a total of CDN $561,373 from BitRush to companies controlled by him and subsequently refusing to account for the transfers or return the money when requested constitutes further misappropriation of BitRush's property.

61 I am also satisfied that Boehm's conduct in refusing to complete share transactions that he agreed to on behalf of BitRush and/or MezzaCap Investments with both Dr. Kalcher and HRSC and his refusal to certify the 2016 3rd quarter financial statements were unfairly prejudicial to and unfairly disregarded the interests of BitRush and its shareholders.

62 Bohem entered into a number of share transactions both on behalf of BitRush and MezzaCap Investments providing for the provision of BitRush shares in exchange for monies and/or services or technology to for BitRush in order for it to obtain capital and assist it in its development. Boehm subsequently failed to complete and/or reneged on those agreements for no apparent reason. BitRush and its shareholders have a reasonable expectation that BitRush will fulfill its agreements, particularly when it has received the consideration agreed to. The ability to raise capital is crucial to BitRush's ongoing existence. Boehm's conduct in failing to fulfill the agreements in issue unfairly disregards the interests of BitRush and its shareholders by threatening its existence.

63 Finally, Boehm's actions (and those of Sixt) in refusing to certify the 3rd quarter 2016 financial statements on the basis of their characterization of BitRush's dispute with Dr. Kalcher as blackmail on Dr. Kalcher's part and also because Boehm was allegedly unwilling to work with certain individuals who he said were involved in money laundering had no basis in fact at the time and were improper. Bohem was clearly aware at the time that Dr. Kalcher's dispute with BitRush was a legitimate business dispute caused solely by Boehm's failure to honour his prior agreements with Dr. Kalcher. Further, the individuals who Boehm accused of money laundering were part of a business opportunity that had been introduced to BitRush by Boehm and he knew the Board had previously decided not to deal with the individuals.

64 As is clear from the emails that circulated prior to November 29, 2016, Boehm knew that in refusing to certify the 3rd quarter financial statements, BitRush's shares would be cease traded by the OSC. His actions in refusing to certify the financials for no legitimate reason and in influencing Sixt in that regard were clearly contrary to the interests of BitRush and its shareholders because BitRush's shares ended up being cease traded and they remain that way.

iii. Remedy

65 The real issue in this case concerns the remedy that should follow from my finding that Boehm's conduct as set out herein was oppressive, unfairly prejudicial and unfairly disregarded the interests of BitRush's shareholders. As noted, the Amended Notice of Application seeks a number of remedies. Before me, the remedies sought were primarily to eliminate MezzaCap Investments' shareholdings in BitRush in order that Boehm would no longer have any involvement in BitRush, permitting it to regularize its affairs and proceed with its business without any interference from Boehm.

66 The Applicants seek to regularize the share transactions in respect of BitRush concerning Dr. Kalcher and HSRC. Further, they seek to eliminate MezzaCap Investments remaining shares in BitRush based on its failure to provide any of the promised assets at the time of the RTO. Finally, they seek to recoup the misappropriated money by cancelling the dollar equivalent of MezzaCap Investments shares in BitRush.

Dr. Kalcher

67 The Applicants seek an order pursuant to s. 248(3)(d) of the OBCA (directing an issue or exchange of securities) requiring MezzaCap Investments to transfer a total of 21,157,453 shares in BitRush to Dr. Kalcher made up of 4,500,000 shares being the balance of the shares promised by Bohem at the time BitRush was formed and 16,657,453 shares arising from Dr. Kalcher's original agreement with Bohem in 2013.

68 As noted, Boehm promised Dr. Kalcher 5,000,000 shares in BitRush at the time it was formed to secure his support in the venture. Dr. Kalcher only received 500,000 shares and those shares came from MezzaCap Investments. There is no evidence as to why Bohem failed to complete the agreement with Dr. Kalcher. Dr. Kalcher's technology is important to BitRush. In my view, Dr. Kalcher should receive the balance of the shares owing which were promised by Bohem. Further, it is in BitRush's best interests to complete the agreement. Dr. Kalcher's technology is important to BitRush and BitRush has an interest in seeing that the agreement with Dr. Kalcher be completed to assist in securing the ANOON technology.

69 Given that Boehm initially provided Dr. Kalcher with shares from MezzaCap Investments, it follows that the remainder of the promised shares should come from MezzaCap Investments, which at all material times Boehm controlled. Therefore, in order to complete the agreement, I order that BitRush issue 4,500,000 shares to Dr. Kalcher and at the same time cancel 4,500,000 of its shares held by MezzaCap Investments and amend its share registry accordingly. That completes the agreement between Dr. Kalcher and Boehm on behalf of BitRush and MezzaCap Investments without affecting the overall issued shares in BitRush.

70 The Applicants also seek an order that Dr. Kalcher be awarded 16,657,453 shares of BitRush based on his original agreement with Bohem at the time of the formation of MezzaCap GmbH in 2013 that in exchange for providing the

CrowdLauncher technology, Dr. Kalcher's company, kb-spirit would receive 20% of MezzaCap GmbH. MezzaCap GmbH subsequently became part of the RTO, resulting in MezzaCap Investments receiving 83,287,265 shares in Streetwear which became BitRush. The Applicants seek 20% of MezzaCap Investments initial shareholding in BitRush or 16,657,453 shares for Dr. Kalcher.

71 I am not prepared to make the order requested. In my view, the agreement in question is not connected to the oppressive conduct found. It predates BitRush and has nothing to do with the conduct of the business and affairs of BitRush. Nor does the relief requested arise from a breach of the shareholders reasonable expectations which in this case are to ensure that BitRush lives up to its obligations. While it coincides with Dr. Kalcher's expectations, he is not a party to the Application. Nor is it clear on the evidence that the agreement was with Dr. Kalcher as opposed to his company. Dr. Kalcher's claim is against MezzaCap Investments.

HSRC

72 The Applicants also seek orders for the issuance/transfer of a total of 6,215,910 shares of BitRush to HSRC pursuant to agreements entered into by HSRC and Bohem on behalf of BitRush and MezzaCap Investments made up of 350,000 shares from BitRush's treasury and the balance of 5,865,910 from MezzaCap Investments.

73 The Applicants submit the 350,000 shares make up the balance which remains owing to HSRC in respect of a subscription agreement for 7 million shares entered into between BitRush and HSRC in February 2016 for a subscription price of CDN $700,000 (the agreement noted in brackets that it was approximately US $500,000). HSRC provided US $500,000 which at the then current exchange rate was CDN $665,000. As a result, HSRC received 6,650,000 shares. Although Bohem assured HSRC that MezzaCap Investments would provide the additional 350,000 shares, it never did.

74 Through the fluctuation of the exchange rate, HRSC ended up paying less than was agreed for the shares. However, it received the number of shares it paid for based on the subscription price. While Bohem unilaterally amended the subscription agreement to reflect the lesser amount, in my view, the initial agreement governs and HSRC is entitled to receive the remaining 350,000 shares upon payment of the balance owing of CDN $35,000.

75 In light of the agreement Boehm made on behalf of both BitRush and MezzaCap Investments, the remaining 350,000 shares of BitRush due to HRSC upon its payment of CDN $35,000 to BitRush should come from MezzaCap Investments. Therefore, upon HRSC's payment of CDN $35,000 to BitRush, BitRush shall issue 350,000 shares to HRSC and cancel the same number of its shares owned by MezzaCap Investments and amend its share registry accordingly.

76 Turning next to the 5,865,910 shares remaining due to HRSC, the agreement, which was between HRSC, BitRush and MezzaCap Investments provided, among other things, that HSRC would obtain 18 million shares of BitRush from MezzaCap Investments in exchange for CDN $1 and HSRC's provision of technical and infrastructure support. HSRC paid the $1 and provided the technical and infrastructure support. It received 12,493,090 BitRush shares from MezzaCap Investments but not the remaining 5,506,910 shares.

77 I do not consider that Boehm's purported termination of the agreement on November 29, 2016 to be of any effect. HSRC had already provided the consideration required. In my view, Boehm's purported termination of the HRSC agreement is further evidence of his unreasonable conduct in respect of the business and affairs of BitRush. In that regard, BitRush and its shareholders have a reasonable expectation that BitRush will honour its agreements.

78 MezzaCap Investments was a party to the agreement in question and Boehm acted on behalf of both BitRush and MezzaCap Investments in respect of the agreement. Given that the obligation to provide the BitRush shares was MezzaCap Investments, in order to complete the agreement, I order that BitRush issue 5,506,910 shares to HSRC and at the same time cancel the same number of BitRush shares held by MezzaCap Investments and amend the share registry such that the impact on BitRush's overall issued shares is nil.

BitRush

79 The Applicants submit that as a result of misrepresentations by Boehm on behalf of MezzaCap Investments prior to the RTO concerning the extent and value of the assets owned by MezzaCap GmbH, MezzaCap Investments provided no value in return for the shares it received in BitRush at the time of the RTO. They seek the cancellation of all of MezzaCap Investments remaining shares in BitRush.

80 I am not prepared to make the order requested. In my view, Boehm's oppressive conduct concerning the business and affairs of BitRush has nothing to do with misrepresentations that occurred prior to the RTO. Further, the representations were made on behalf of MezzaCap Investments, in respect of its subsidiary MezzaCap GmbH. The order requested does not arise from Boehm's oppressive conduct that I have found.

$561,373

81 The Applicants seek an order that 6,237,478 shares of BitRush (the share equivalent of $561,373 at current market price) held by MezzaCap Investments be cancelled in lieu of an order requiring the respondents to return the CAD $561,373 which Boehm and Sixt misappropriated.

82 The money has been clearly misappropriated by Boehm. Further, although requested, neither he nor Sixt have accounted for it or returned any of the funds to BitRush. Nor would a judgment for the money have any chance of being realized on. The respondents have already demonstrated that they will not respond to court orders.

83 In my view, BitRush is entitled to the order requested. Boehm's misappropriation of the money without any explanation is part of the affairs of BitRush. Further, the loss of that money is extremely prejudicial to BitRush. BitRush was not in good financial shape at the time the monies were transferred. The 3rd quarter financial statements for 2016 (which were never certified) show a net loss for the nine month period of $1,193,658.

Conclusion

84 For the above reasons, therefore, the following orders shall issue:

a) A declaration pursuant to s. 248 of the OBCA that Boehm caused the affairs of BitRush to be conducted in a manner that was oppressive, unfairly prejudicial and unfairly disregarded BitRush and its shareholders and in breach of his fiduciary duties to BitRush;

b) An order that BitRush shall issue 4,500,000 shares from treasury to Dr. Kalcher and at the same time cancel 4,500,000 of MezzaCap Investments shares in BitRush and amend its share registry accordingly;

c) An order that BitRush shall issue 5,856,910 shares from treasury to HSRC and at the same time cancel 5,856,910 of MezzaCap Investments shares in BitRush and amend its share registry accordingly;

d) An order that BitRush shall cancel 6,237,478 of MezzaCap Investments shares in BitRush and amend its share registry accordingly.

e) The balance of the relief requested is dismissed without prejudice to BitRush raising it at some future time if it considers it appropriate.

85 While the Applicants did not obtain all the relief they sought on this Application, they were successful in establishing oppression. They are entitled to their costs. In that regard, they have submitted a bill of costs claiming partial indemnity costs (including disbursements) totaling $225,956.87 and substantial indemnity costs totaling $338,935.46.

86 The Application involved a significant amount of work. The record comprises four large volumes. The issues were complex and even though the respondents did not appear it required the better part of two days to hear. In addition to the main Application, the Applicants had to respond to the respondents' jurisdiction challenge.

87 In my view, notwithstanding my findings in respect of Boehm's conduct, I think the appropriate scale is partial indemnity. Having reviewed the bill of costs, I am satisfied that the both the time spent and the rates charged are reasonable. Given the issues and the result, I consider that the amount claimed of $225,956.87 is fair and reasonable.

88 The Application was really directed at Boehm and MezzaCap Investments. No claims were asserted against Dobias and no relief was sought against him apart from return of property. Sixt was added as a respondent later with respect to return of property. No substantive claim was asserted against either of them and no relief sought against either of them on the motion before me. Accordingly, I would not award costs against Dobias or Sixt.

89 Costs to the Applicants, fixed at CDN $225,956, payable by Boehm and MezzaCap Investments.

Application granted in part.

TAB 14

See paras. 29-32

2001 CarswellOnt 2954
Ontario Superior Court of Justice [Commercial List]

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.

2001 CarswellOnt 2954, [2001] O.J. No. 3394, 107 A.C.W.S. (3d) 734, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294

PricewaterhouseCoopers Inc., in its Capacity as Trustee of Olympia & York Developments Limited, a Bankrupt, Plaintiff and Olympia & York Realty Corp. and Olympia & York SF Holdings Corporation, Defendants

Farley J.

Heard: September 11-14 and 18, 2000, April 3-5, 9 and 10, 2001
Judgment: August 9, 2001
Docket: 93-CQ-38609, 98-CL-1034

Counsel: *F.J.C. Newbould, Q.C.*, *Aaron A. Blumenfeld*, for Plaintiff
Peter F.C. Howard, *Ashley John Taylor*, for Defendants

Editor's Note

At the opening of business on March 16, 1992:

(i) Olympia & York Developments Limited (OYDL) owned 100% of the common shares of Olympia & York Realty Corp. (OYRC) and OYRC owned 100% of the shares of Olympia & York SF Holdings Corporation (OYSF).

(ii) OYSF owed OYDL approximately $391 million under a promissory note from OYSF to OYDL (the OYSF Note).

(iii) OYSF had provided non-recourse guarantees to a number of financial institutions which had made advances to OYDL and had pledged marketable securities to support its guarantees.

(iv) OYSF had entered into a Custodial and Pledge Agreement with the European Investment Bank (EIB) under which OYSF had deposited with EIB marketable securities to support a guarantee of a loan facility made by EIB to an OYDL entity. The Agreement provided that the securities deposited by OYSF were not to constitute a security interest in favour of EIB until an attachment event or an event of default occurred, including an insolvency of OYDL.

(v) OYRC owed Citibank approximately U.S. $250 million.

On March 16, 1992 OYSF provided a solvency certificate to HongKong Bank of Canada in support of its guarantee of a $25 million loan facility from HongKong Bank to OYDL.

On March 16, 1992, and prior to giving the solvency certificate to HongKong Bank, a complicated transaction (the Transaction) was entered into amongst OYDL, OYRC and OYSF under which new common shares of OYSF were issued to OYRC, new common shares of OYRC were issued to OYDL and the OYSF Note of $391 million to OYDL was retired by OYSF from the subscription price for the new common shares issued that day (a swap of equity for debt).

On May 14, 1992 OYDL, OYRC, OYSF and other companies filed for protection under the CCAA, and OYDL was eventually adjudged bankrupt. After the insolvency of OYDL, marketable securities worth approximately $612 million

owned by OYSF and pledged to the financial institutions to support OYSF's guarantees of OYDL loan facilities were sold and the proceeds paid to the financial institutions.

The Trustee of OYDL claimed in this action that the Transaction under which the OYSF Note was retired should be reviewed or reversed and that the remaining cash assets of OYSF should be paid to it as Trustee of OYDL. The Trustee claimed (i) under s. 100 of the *Bankruptcy and Insolvency Act* (BIA) that the value of the OYSF Note was conspicuously greater than the value of the common shares of OYRC received by it in the Transaction (ii) that the Transaction was oppressive under s. 248 of the Ontario *Business Corporations Act* (OBCA) as disregarding the interests of the creditors of OYDL and (iii) that the Transaction was a fraudulent conveyance in favour of Citibank contrary to s. 95 of the BIA. The fraudulent conveyance claim was not advanced at the trial.

The defendant creditor interests of OYRC contended that the Transaction enhanced the equity interests of OYDL in OYRC, that OYRC, which held OYDL's U.S. real estate interests, had value at the time of the Transaction and that OYDL received these enhanced equity interests in the Transaction. They also contended that even if OYSF owed $391 million to OYDL under the OYSF Note, there should be set off against that amount the amount of $612 million representing the value of the marketable securities owned by OYSF and sold to pay off OYDL loans guaranteed by OYSF and that therefore the OYSF Note had no value at the time it was retired in the Transaction. They further contended that any sale of the OYSF Note would have resulted in the bankruptcy of OYDL and that OYDL would therefore have never sold the OYSF Note.

While Citibank and Citibank Canada were not direct participants in this litigation, it was noted that Citibank ended up with a 25% interest in OYRC in the ultimate restructuring of OYDL's U.S. real estate interests. Citibank was a significant creditor of OYRC at the relevant time, the size and percentage of such interest being sufficient to support the claim that Citibank was a privy of OYRC/OYDL.

OYDL need not have entered the Transaction in order to obtain the balance of the $25-million credit from the HongKong Bank of Canada since that process was ostensibly entered into (solely) for the purpose of providing the Bank with a solvency certificate of OYSH that was unnecessary, because the money could have been obtained on the basis of the wholly owned subsidiary exception to s. 20 of the OBCA.

In addition, OYRC was a wholly owned "private" subsidiary of OYDL. Before the Transaction, OYDL owned 100% of OYRC and after the Transaction, it owned the same 100%. There was no value created which OYDL could have utilized. If OYDL had wished to sell (or pledge) the 30% of OYRC shares, then it could have done so by utilizing the same percentage out of its existing 100% ownership it had of OYRC prior to the transactions.

After reviewing the evidence, the trial judge held that there was a conspicuous difference in fair market value between what OYDL received for the OYSF Note and what the OYSF Note was worth (on a fair market value analysis) — namely, OYDL received more shares of OYRC, but it already had 100% of this wholly owned subsidiary, thus no further value was put into OYRC. The 30% of OYRC shares that it received in addition carried with them no value in the sense that the original 100% of the shares were worth exactly the same as the 100% original shares plus the 30%, but in return for this "nothing", OYDL gave up a OYSF Note which, on the evidence, had a fair market value of some tens of millions of dollars and likely in the neighbourhood of some $30-$50 million.

In accordance with the requirements set out in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.*, the trial judge then reviewed the equities of the case and noted that the onus of raising equitable considerations and proving that they apply to the particular case must be borne by the party asserting them. The defendants, in this case, offered no reasonable explanation why the wholly owned subsidiary exemption for the solvency certificate was not put to HongKong Bank as a complete and absolute answer. The defendants also argued that OYDL was at best owed $39 million by OYSF, but that OYDL and its creditors took $611 million of OYSF's assets as security for OYDL's indebtedness, both direct and and through its guarantees. However, this was a historical or in place situtaton and did not impact on the equities which must take what is in place as a given factor, before applying equity.

The trial judge was not persuaded that the defendants had done anything more than raise the issue of applying the equities as envisioned by Weiler J.A. in the Standard Trustco case. They did not put forward anything specific subject to some general comments concerning set-off which, in the view of the trial judge, were sufficiently dealt with in the Mitchell, Houghton Limited case. The escrow pot arose only after the bankruptcy. Vis-à-vis the question of equitable set-off affecting fair market value of the OYSF Note and hypothetical or notional market, at the time of the assumed sale, OYSF would have no claim against OYDL.

The trial judge also held that a trustee in bankruptcy can be a "proper person" to bring an oppression claim pursuant to ss. 245-248 OBCA. While the bankrupt's trustee takes the property of the bankrupt as he finds it and that the trustee stands in the shoes of the bankrupt, the trustee has, as its primary obligation, the protection of the creditors of the estate of the bankrupt. Where there is superadded to the equation allegations/facts to support one of the three claims of (a) "oppression", (b) "unfairly prejudicial" or (c) "unfairly disregards", then creditors have been permitted to be complainants pursuant to s. 245(c) as a "proper person". If a creditor could bring such an oppression action, then the characterization of the trustee in bankruptcy as the creditors representative should be recognized as allowing the trustee in bankruptcy to bring a "representative" oppression action on behalf of the creditors in a proper case.

While OYRC/OYSF did not as affiliates of OYRC oppress the creditors of OYDL, it was reasonable to conclude that they as affiliates participated in at least unfairly disregarding the interest of those creditors. OYRC/OYSF participated in the Transaction with — and at the behest of — OYDL. A better way of looking at the oppression side of this case would be to visualize the creditors of OYDL suing not only OYRC and OYSF, but also OYDL. As a result of the Transaction, OYDL creditors were inappropriately deprived of the value of some U.S. $22 million to which they would have otherwise been entitled, and to which the creditors of OYRC/OYSF would not have been entitled.

It was held that under either the s. 100 BIA claim or the oppression claim, the plaintiff trustee was entitled to the funds held in escrow of some U.S. $22 million, plus interest.

Note:

> The Editors were provided with a copy of the agreed statement of facts introduced in evidence which was used in preparation of the annotation.
>
> The case is under appeal.

***Farley J.*:**

1 This action is, I understand, the last piece of litigation arising out of the 1992 demise of the Olympia & York empire. As is usual in this saga, the contestants have put forward their positions with skill, vigour and dexterity. Each side has presented a convincing case. At dispute is some $22 million U.S. plus interest. The plaintiff trustee in bankruptcy ("Trustee") did not pursue its fraudulent preference claim, but rather relied on its (a) s. 100 *Bankruptcy and Insolvency Act* ("BIA") claim and (b) an oppression claim pursuant to s. 248 (Ontario) *Business Corporations Act* ("OBCA"). It was noted that since this litigation commenced, the various relevant participants have changed their corporate citizenship from Ontario to New Brunswick; however I do not see that change as affecting the jurisdiction of the oppression claim since that cause of action arose whilst they were still Ontario corporations. See also Agreed Statement of Facts.

2 On September 15, 2000, I ruled that Patricia Caldwell who had been tendered as an expert witness by the plaintiff was not so qualified to give an opinion concerning fair market value ("fmv") for the purposes of s. 100 BIA (see *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2000), 20 C.B.R. (4th) 277 (Ont. S.C.J. [Commercial List]). At the resumption of this trial in April, 2001, I was asked by counsel jointly not to rule as to the acceptability of their respective expert witnesses (Susan Glass and Judy Mencher for the plaintiff and Stephen Cole for the defendants) until after closing argument. Aside from these witnesses, Gary Wilson (a Vice-President of the HongKong Bank of Canada), John Bottomley (now an executive of Citibank, a U.S. bank, but who then was at

Citibank Canada, a subsidiary of Citibank, and who was involved in real estate investments), James Wright (who was the Managing Director, Real Estate of Citibank Canada) and Robert Lowe (the senior officer of the Trustee and called by the defendants) testified.

3 Lowe confirmed that, in the Trustee's 1994 report to creditors of OYDL, it was indicated that the equity of OYDL in the U.S. operations was an extremely important asset. However in my view this evidence is of rather negligible importance given that it is evidence of "value" some two years after the time in question — namely March 16, 1992 — and given at a time when Lowe was actively attempting to parlay that asset into something of value, salvageable for the benefit of the OYDL creditors and thus one would reasonably assume that the upside would be emphasized to readers (who would include the outside world).

4 While Citibank and Citibank Canada were not direct participants in this litigation, it should be noted that Citibank ended up with a 25% interest in OYRC in the ultimate restructuring of OYDL's U.S. real estate interests. (It should be noted that Citibank was a significant creditor of OYRC at the relevant time, the size and percentage of such debt capital being sufficient to support the claim that Citibank was a privy of OYRC/OYDL: see *Halsbury Laws of England* 4th edition (Butterworths, 1976) at Vol. 17, pp. 53-4; Sopinka, Lederman & Bryant, the *Law of Evidence in Canada* 2nd ed. (Butterworths) p. 302.) While either side could have called Citibank executives as witnesses, only the plaintiff, the Trustee of OYDL, chose to. Neither Bottomley nor Wright were evasive; rather they gave their evidence in a straightforward neutral way. The Citibank interests had loaned OYRC $250 million U.S. This was classified as a substandard loan in March 31, 1991 with the first Classified Loan Management Report ("CLMR"), with the New York office (real estate department) to do a review of OYRC's U.S. real estate holdings. This real estate department had considerable interests and experience in U.S. real estate through its loan portfolios and otherwise; the New York office department was very familiar with the New York market where OYDL's (OYRC's) U.S. holdings were concentrated. In August 1991, it had reached the view that with the downturn, the New York office market was very soft. Citibank was concerned that if the OYRC real estate had to be sold (to attempt to realize upon the loan), the properties would not fetch their appraised (by Landauer) values. Bottomley recognized that the New York department was more familiar (in the sense of having expertise) with the New York market than anyone at Citibank Canada. Further CLMRs on a monthly basis indicated a recognition that Citibank's exposure was becoming more and more serious. The November 30, 1991 CLMR indicated that the New York department had completed a detailed analysis of the U.S. real estate portfolio. It was indicated in that report (of Citibank Canada) that there was no value over the debt load of the properties (Bottomley indicated that it was in his handwritten notation on this conclusion that it was "as determined by CRENY", that is, the New York office) and that there was estimated to be a negative net worth of $90 million.

5 Bottomley indicated that the New York department had started with the Landauer appraisals and adjusted such with Citibank's views as to capitalization rates (looking at a range of such rates), the space expected to be available for lease over the next several years, the cost of inducements to lease out OYRC space and appropriate discount rates. While it is true that no one from Citibank testified as an expert as to the value of the U.S. real estate holdings at the relevant time, it seems to me that it would be inappropriate to dismiss Citibank's recorded view, given Citibank's in depth interest in and experience in the U.S. (including New York) real estate market in conjunction with its privy relationship as above. It also seems to me that, given Citibank's views intervening between the Landauer appraisals and the March 16, 1992 date, then the Landauer view of values must be reconsidered and negatively adjusted to take into account the deterioration thus evidenced.

6 Wright, aside from observing that Paul Reichmann did not keep his word as to securing the $250 million U.S. loan, acknowledged that if the OYRC properties were sold, then the realizations would be less than the Landauer appraisals.

7 It seems to me reasonable to conclude that as of March 16, 1992, the OYRC real estate interests (and thereby OYRC itself) had a negative value (that is, it is probable that the debt load would exceed realizations) by a large dollar absolute amount and a considerable percentage.

8 Wilson indicated that he had requested a s. 20 OBCA solvency certificate in February 1992 to support the further grant of credit involved in the $25 million facility. This request was ignored until March 13, 1992. Ken Leung the Chief Financial Officer of OYDL in his letter of March 13 th did not raise the question of the necessity of a solvency certificate when he was requesting that Wilson authorize the advance of a few million dollars to bring the credit up to the $25 million limit. Neither did OYDL's lawyers (Davies, Ward & Beck) question the necessity of such a solvency certificate when they forwarded the documentation on March 16, 1992 including the solvency certificate. Wilson testified that he requested the solvency certificate in following a standard checklist used when getting a guarantee from a third party. He noted that s. 20 OBCA provided for certain exceptions as to the necessity of a solvency certificate (specifically one which would apply here, namely that wholly owned subsidiary exception) and that the bank would be told (generally by borrower's counsel in his experience) as to whether a solvency certificate were required. No explanation was advanced in these proceedings as to why Wilson was not advised that a solvency certificate was not required because the wholly owned subsidiary exception applied (with the proffering of such a wholly owned subsidiary certificate or equivalent documentation); rather it appears that for some (unexplained) reason, the more convoluted "reorganization" path was followed. Neither side shed any light on this by calling witnesses in this regard.

9 The Transactions (see para. 69 of Agreed Statement of Facts and defendants' Memorandum of Argument para. 9) in question as to the s. 100 BIA and s. 248 OBCA issues are described in Ex. 25 Cole report on the Valuation of Consideration Given and Received in the Transactions dated March 16, 1992 (and specifically at Appendices 4 and 5 of that report). S. 100 BIA provides:

> s. 100(1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons, for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.
>
> (3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property or services concerned in the transaction and what in his opinion was the value of the actual consideration given or received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section shall be the values so stated by the trustee unless other values are proven.

10 Cole in his March 27, 2001 report opines that the fmv of the consideration given by OYDL was in the range of $0 to $10 million whereas the fmv attributable to the OYRC shares received was in the range of $0 to $100 million. Cole had difficulty in distinguishing between the notional seller in the classical definition (who is not burdened with the difficulties which a real seller may face) and OYDL which did have some of these "real" difficulties. Cole's classical definition at p. 3 of his report was:

> Fair market value is defined as the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in terms of money or money's worth.

11 It appears that Cole and defendants' counsel discussed the scope of Cole's work sometime prior to Cole delivering his report since the formal letter of instructions is dated March 27, 2001 as well. The concluding paragraph of that

instruction letter instructed Cole to "bear[ing] in mind the fundamental caveat that it is not a transaction that OYDL as vendor in its circumstances would have entered into." Cole indicated that he had ignored this (in my view valid) fundamental caveat and justified that decision by stating that he was merely observing his independence. I did not find that explanation very convincing.

12 Cole placed great value (as opposed to fmv) on the economic benefit of not having a fairly immediate bankruptcy of OYDL. However that seems to ignore that OYDL was reorganized by the market place leading into the spring of 1992 as being in perilous financial shape — teetering on the brink. Even if the Transactions could be said to have bought OYDL time until it actually did seek insolvency protection pursuant to its May 1992 CCAA filing, this time at a maximum was only a scant two months, at the maximum if one assumes that this was the only factor of this relief. There was no evidence presented which would lead one to believe that either (a) the time bought by virtue of the Transactions did (or was reasonably expected) to provide OYDL breathing space for either a rescue or an orderly insolvency proceeding which would reduce costs and preserve value for the sake of the OYDL estate and its creditors or (b) there was a reasonable expectation that the values underlying the OYRC shares would rebound. As indicated above, it seems a reasonable conclusion that OYRC had a significant negative net worth. Further not only did the Transactions not affect that net worth, but the defendants give no recognition to the fact that two fundamental and independent facts are ignored. Firstly OYDL need not have entered the Transactions in order to obtain the balance of the $25 million credit from the HongKong Bank of Canada since that process was ostensibly entered into (solely) for the purpose of providing the bank an (unnecessary) solvency certificate; rather the money could have been obtained on the basis of the wholly owned subsidiary exception. Secondly, OYRC was a wholly owned "private" subsidiary of OYDL. Before the Transactions, OYDL owned 100% of OYRC and after the Transactions, it owned the same 100%. There was no value created which OYDL could have utilized; if OYDL had wished to sell (or pledge) the 30% of OYRC shares (which is recovered by virtue of the Transactions), then it could have done so by utilizing that same percentage out of its existing 100% ownership it had of OYRC prior to the Transactions. This is a fmv in a notional market question — but in this notional market, the hypothetical seller already has 100% of the shares of the company — and it is being paid for the Note with more shares of its wholly owned subsidiary. Even in a hypothetical or notional market the fmv of these extra shares would be zero or "nothing".

13 While Cole correctly stated the definition of fmv, he was reluctant to use it as required by s. 100 BIA. Rather he wandered away from the notional market to deal with the aspect of "economic value" when considering fmv. In this he came close to the line which Patricia Caldwell had strayed over in *PricewaterhouseCoopers*, *supra*. It would seem to me that this aspect of consideration should be left to the court once the calculations have been made to determine if there were a conspicuous difference; then to factor that into its discretion.

14 All of Cole, Mencher and Glass had no particular expertise in real estate valuation, and specifically U.S. offices buildings, particularly in New York City. Thus we should not place any weight of significance to their views of these values. However I think it noteworthy to observe that Cole (who indicates that he has some U.S. real estate experience but is no expert as to values) assumed a possibility of a 20% increase in values in the N.Y. market — at a time when a respected professional survey (Korpaz) was indicating that that market would remain particularly soft for the foreseeable future. When pressed on that, he fenced rather than acknowledging his difficulty (eg. where he said several times that he agreed with what his cross-examiner was reading — but in the sense that the cross-examiner was accurately reading what was printed and when he inaccurately defended his position by speculating that the survey referred to old construction and not to new construction).

15 Cole then indicated that in real terms the Transactions saved OYDL (or the OYDL estate and its creditors) approximately $660 million (3% of $22 billion) in staving off the insolvency to allow for a more planned and stable reorganization. He then speculated that these savings could be increased by a factor of two, plus or minus. In this regard he was relying on a general observation in a valuation book which dealt with essentially manufacturing and service industries — as opposed to the rather stand alone real estate buildings involved in OYDL. Further he did not take into consideration that it does not appear that the intervening two months before OYDL filed were productively spent.

16 Cole had no expertise in the distress value trading market in either Canada or the U.S. Mencher had some experience in the U.S. market and appeared to me to have a reasonable handle and appreciation for it. As a side note I would observe that it was rather common knowledge, even to the court, that U.S. vulture funds were eager for opportunities to put chunks of their cash mountains (or at least cash hills) into at this time. Frequently it appears that the demand for product was such (and the experienced rewards great enough) that minimal due diligence was not uncommon (eg. Cadillac Fairview). It would seem to me that an OYDL entree would be of interest to the debt-trading vulture funds.

17 It was difficult to understand Cole's insistence on the point of a note purchaser being concerned about being accused of "sharp practice" or its equivalence as to the bankruptcy of OYRC changing the relationship with the EIB. In my view this would have been regarded as "smart practice" by the industry.

18 In contrast Glass and Mencher were fairly understated. I was more impressed with their neutrality (to the degree that we see expert witnesses these days) and objectivity. To the degree to which they relied on the Fasken Campbell Godfrey opinion of December 7, 1998 (Ronald N. Robertson, Q.C.), their reliance appears reasonable in the circumstances. I agree with Mr. Robertson's analysis of the change in legislation not affecting the law as expressed in *Hillstead Ltd., Re* (1979), 26 O.R. (2d) 289 (Ont. Bktcy.) particularly from a *Pepper (Inspector of Taxes) v. Hart* (1992), [1993] 1 All E.R. 42 (U.K. H.L.) analysis. See also *Plante, Re* (1996), 38 C.B.R. (3d) 165 (Ont. C.A.) per Houlden J.A. at pp. 170-2. Certainly there do not appear to have been any formal Notices of Default (either through an Attachment Event or Event of Default) registered with OYDL and thus Robertson's assumption on that point appears reasonable as well. Thus I would think that the vulture market would appreciate the potential that the EIB pledge was not perfected vis-à-vis a trustee in bankruptcy and that any purchaser would have done the level of due diligence with which it would have been satisfied to confirm that potential as a business opportunity. Mencher mentioned a purchaser possibly requesting a certificate of non-default and of net worth after making enquiries of OYDL. Mencher testified that she as a representative of the market would pay $40 million for the Note, with the potential of getting within a fairly short period of time an aggregate of $100 million. She described this as a fabulous return. A return of such relative magnitude (actual dollars and percentage) would be an attractive proposition for a large proportion of the vulture fund market — so attractive in my view that some leeway for slippage in time or dollars would not be a great distraction. The vulture fund managers are number crunchers based on their best estimates of what is likely to come about. I think it a fair observation based on experience that these managers are aggressive; they are not conservative banker types. While they will rely on advice of legal counsel and others in coming to their estimates, they tend not to let legal caution kill a business deal. To survive (and attract new capital), the vulture fund managers must get their money out and working. I agreed with Mencher's observation, when taken in that context, that in her view lawyers do not make good "investors". In her view if there was a higher risk observed by the manager, then it would not be a questions of not doing the deal (purchase), but rather that the purchase would be transacted at a lower price.

19 It appeared to me that Glass in looking at the underlying Santa Fe Pacific, Santa Fe Energy and Catellus shares proceeded appropriately to consider whether there were any material downside (she also looked at upside potential) over the foreseeable future. Mencher's reliance on Glass in this respect is appropriate, given that Mencher takes the more conservative non-enhanced value figures.

20 In the overall balance of matters, to the extent necessary to rely on any of the proffered experts, I was more comfortable with the basis of analysis and conclusions of Glass/Mencher than I was with Cole. While I have no doubt that they were all sincere in their effort to assist the court I would note that Cole was stretching to achieve his conclusions while Glass/Mencher were fairly understated and readily acknowledged some elements of criticism, but which I found in the overall result were not of material significance.

21 In the end result with respect to the initial determination pursuant to s. 100 BIA, it seems to me that there was a conspicuous difference in fmv between what OYDL got for the Note and what the Note was worth (on a fmv analysis) — namely OYDL got more shares of OYRC but it already had 100% of this wholly owned subsidiary, no further value was put into OYRC and the 30% of OYRC shares that it received in addition carried with them no value in the sense that the

original 100% of the shares were worth exactly the same as the 100% original shares plus the 30%, but in return for this "nothing", OYDL gave up a Note which had a fmv of some tens of millions of dollars and likely in the neighbourhood of some $30 - $50 million. This range takes into account the slippages and contingencies raised. To my mind in this particular case, the value of what OYDL got in the form of the extra shares of OYRC was exactly the same, whether it be "fair value" which takes into consideration the factors then prevailing or "fmv" which is a notional market concept; that same was namely "nothing". Compounding this was the factor that, it appears, OYDL did not have to engage in the Transactions to allow it to obtain the balance of the $25 million credit from HongKong Bank of Canada since it could have relied on the wholly owned subsidiary exception, as opposed to engaging in the Transactions to support a solvency certificate compliance with s. 20 OBCA.

22 Weiler J.A. for the majority in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.) stated at p. 24:

> ... The willing purchaser in a fair market value situation is not concerned with the expectation of the parties but only with the value of the assets. If the regulatory context is to be considered, and in my opinion, a reasonable and just outcome requires that it be considered, it should be at the stage when the court is deciding whether to grant judgment to the trustee. At that stage the court will know that there is a conspicuous difference in the fair market value of the property given and received by the bankrupt. In deciding whether to exercise its discretion to grant judgment to the trustee it would then be appropriate for the court to consider the good faith of the parties, their intention, and whether fair value has been given for the property.
>
> The wording of s. 100 strongly suggests that ordinarily fair market value is to be used to determine whether judgment should be granted to the trustee. That is as it should be. I am, however, of the view that the court is left with a residual discretion to decide whether or not to grant judgment based on equitable principles such as the ones I have mentioned. Clearly the onus of raising those equitable considerations and proving that they apply to the particular case must be borne by the party asserting them. In my opinion Farley J. erred in his interpretation of s. 100(2) of the Act by not recognizing that s. 100(2) confers a discretion on the courts which is to be exercised on the basis of equitable considerations.

23 Allow me to now turn to the equities. HongKong Bank of Canada made a technical request — *a month before* the Transactions. At that stage there was no response from OYDL of any kind, but specifically none which indicated the simple solution to the solvency certificate request — namely it was not required as OYDL could rely on the wholly owned subsidiary exception contained in s. 20 OBCA. I should note that once we are out of the conspicuous difference analysis, we are out of the notional market — and there is no need to assume the sale of the Note to a third party purchaser. The sale of the Note (which event, I have no doubt "would have brought the house of cards down") was truly never in actual question. As Weiler J.A. observed at p. 24 *supra*: "Clearly the onus of raising those equitable considerations and proving that they apply to the particular case must be borne by the party asserting them". The defendants here, to my view, have offered no reasonable explanation why the wholly owned subsidiary exemption was not put to HongKong Bank as a complete and absolute answer — nor why nothing was done for a month.

24 The defendants do assert that OYDL was at best owed $390 million by OYSF but that OYDL and its creditors took $611 million of OYSF's assets as security for OYDL's indebtedness, both direct and through its guarantees. However this was a historical or in place situation and to my view it does not impact on the equities which must take what is in place as a given factor, before applying equity.

25 In the result I am not persuaded that the defendants have done anything more than raise the issue of applying the equities envisaged by s. 100(2) BIA as discussed (without specific limitation) by Weiler J.A. in the *Standard Trustco* case, *supra*. They have not put forward anything specific subject to some general comments concerning setoff which may also be directed here, nor have they, in my view, provided any proof of facts to support any equitable relief. The court needs more than vague allegations in this regard.

26 The defendants also briefly raised the issue of whether equitable setoff was sufficiently, if at all, addressed. In their Memorandum of Argument at p. 54 before citing *Telford v. Holt* (1987), 21 C.P.C. (2d) 1 (S.C.C.) they assert:

> (d) However, by reason of the enforcement of the security over the shares owned by OYSF, OYSF is entitled to assert a right of subrogation and indemnity. According to paragraph 96 of the Agreed Statement of Facts, the amount paid by OYSF on account of obligations of OYDL, whether incurred as a principal debtor or a guarantor, is approximately $612,000,000. According to paragraph 97 no payment was made in respect of this amount by OYDL to OYSF. While this entitlement likely does not give rise to a right of legal set-off in that it was not liquidated at the relevant time and also due to want of mutuality, equitable set-off is not subject to either of these limitations.

Wilson J. at p. 13 of *Holt* stated: "And second, an individual may set-off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events."

27 However it seems to me that the question of setoff is sufficiently dealt with in the *Mitchell, Houghton Ltd. v. Mitchell, Houghton (Que.) Ltd.* (1970), 14 C.B.R. (N.S.) 301 (Ont. S.C.), at pp. 305-6, cited with approval by Kelly Palmer, *The Law of Set-Off in Canada* (1994, Canada Law Book) at p. 187 and in Holden & Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. loose-leaf, Carswell) at p. 4-93. In our case, OYDL was owed $391 million by OYSF but OYDL did not owe OYSF anything. The escrow pot only arose after the bankruptcy.

28 See also *Northland Bank, Re* (1994), 25 C.B.R. (3d) 166 (Man. Q.B.), at pp. 176-7 for the question of equitable setoff under the *Holt* doctrine and the question of timing. Vis-à-vis the question of equitable setoff affecting fmv of the Note in a hypothetical or notional market, at the time of the assumed sale, OYSF would have no claim against OYDL. Further it is a third party purchaser for value (here fmv) who would acquire the Note. It would seem to me that if a claim were ever made, it would have to be against OYDL, not the purchaser of the Note. The claim against OYDL would not exist at the time of the bankruptcy of OYDL since it was only after that event that the financial institutions sold the underlying shares. I do not see that the defendants have made out a valid case in setoff, nor would it seem that it would be considered a particularly thorny issue in a fmv sale so as to materially affect the saleability of the Note.

29 The plaintiff Trustee asserts that it is the proper person to bring an oppression claim pursuant to ss. 245-248 OBCA. It relies on the court-sanctioned unopposed *Companies' Creditors Arrangement Act* ("CCAA") Plan of Arrangement pursuant to the CCAA proceedings as to which these parties were all applicants and further that all the rights of the Administrator under the CCAA Plan were transferred to the Trustee upon the December 1994 bankruptcy. In any event it assets that it is a proper person as per the s. 245 definition of "complainant" at clause (c). However the Trustee must get around the views of Houlden J.A. sitting as a General Division judge in *Canada (Attorney General) v. Standard Trust Co.* (1991), 5 O.R. (3d) 660 (Ont. Gen. Div.) at p. 666 where he stated:

> If the trustee in bankruptcy were permitted to bring the application under s. 247, it would be attacking as oppressive a transaction which was unanimously approved by the board of directors of the bankrupt corporation. In argument, Mr. Robertson, counsel for CDIC, posed this question: if Trustco were not insolvent, could it have attacked the transaction as oppressive? Clearly, in my opinion, it could not. The remedy given by s. 247 of the *Business Corporations Act, 1982* is a personal remedy; it belongs to the person who has been oppressed by the actions of the corporation or its affiliates: *Skorchid v. Edgewater Marine Ltd.*, an unreported decision of Carter L.J.S.C. released March 31, 1988 [summarized at 9 A.C.W.S. (3d) 247]. The trustee in bankruptcy, as I have said, has no higher rights than the bankrupt corporation, and consequently, it cannot bring the application under s. 247.

Counsel for the Trustee submits that Houlden J.A. was wrong in his conclusion and that it is contrary to a previous Court of Appeal decision, *Margaritis, Re* (1977), 23 C.B.R. (N.S.) 150 (Ont. C.A.). Houlden J.A. gave the lead judgment (concurred in by MacKinnon J.A.) in *Margaritis* and he stated at pp. 156-7:

> Even if the appellant is right and s. 1(b) of *The Bills of Sale and Chattel Mortgages Act* is not broad enough to include a trustee in bankruptcy appointed after the repeal of the Act, I think that the respondent by virtue of his appointment as trustee in bankruptcy has the necessary status to bring these proceedings in order that the chattel mortgage may be set aside, the mortgaged assets disposed of, and the proceeds distributed rateably among the creditors of the bankrupt estate. A somewhat similar point arose in *Re Rinn*, 3 C.B.R. 828, [1923] 1 W.W.R. 1190, 33 Man. R. 153, [1923] 3 D.L.R. 986. In that case a trustee in bankruptcy brought an application to set aside a chattel mortgage because of its failure to comply with the Manitoba *Bills of Sale and Chattel Mortgage Act*, R.S.M. 1913, c. 17. The Manitoba Act, which had been passed prior to the enactment of the *Bankruptcy Act*, 1919 (Can.), c. 36, did not define "creditors" to include a trustee in bankruptcy. The Manitoba Court of Appeal held that, although the *Bankruptcy Act* did not confer the power on a trustee in bankruptcy to impeach transactions that are not impeachable by the bankrupt (and the bankrupt could not have impeached the chattel mortgage), the trustee in bankruptcy, as representative of the creditors, had the necessary status to bring proceedings to set aside the chattel mortgage. I would refer also to the comments of Tweedie J. in *Re Cohen and Mahlin*; *Can. Credit Men's Trust Assn. v. Spivak*, 7 C.B.R. 655 at 673, [1926] 3 W.W.R. 34, [1926] 3 D.L.R. 942, reversed on other grounds 8 C.B.R. 23, [1927] 1 W.W.R. 162, 22 Alta. L.R. 487, [1927] 1 D.L.R. 577, as to the authority of a trustee in bankruptcy to take the necessary proceedings to gather in all the property which is or may be made available to satisfy the claims of creditors. Similarly, in this case, if it were necessary, I would hold that the respondent, by virtue of his appointment as trustee in bankruptcy, represents creditors and has the necessary status to maintain these proceedings to have the appellant's chattel mortgage declared null and void.

30 It seems to me that while the bankrupt's trustee takes the property of the bankrupt as he finds it and that the trustee stands in the shoes of the bankrupt, the trustee has, as his primary obligation, the protection of the creditors of the estate of the bankrupt. While oppression cases should not be used by creditors to facilitate ordinary debt collections, where there is superadded to the equation allegations/facts to support one of the three claims of either (a) "oppression", (b) "unfairly prejudicial" or (c) "unfairly disregards", then creditors have been permitted to be complainants pursuant to s. 245(c) as a "proper person". It should be noted that s. 248(2) talks of act or omission "that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, *Creditor*, director or officer of the corporation or any of its affiliates ..." (emphasis added). Since it would seem that a creditor could bring such an oppression action, then it would seem to me that the *Margaritis* characterization of the trustee in bankruptcy as the creditors representative should be recognized as allowing the trustee in bankruptcy to bring a "representative" oppression action on behalf of the creditors in a proper case. Certainly the bankruptcy legislation generally encourages such a collective action on the part of the trustee as being the effective and efficient way of proceeding. The resort to s. 38 BIA with a creditor getting leave to institute a collective (by invitation) action is usually only resorted to where the trustee in bankruptcy does not have sufficient funds to initiate such an action. Therefore with respect and trepidation I decline to follow Houlden J.A.'s reasoning in *Standard Trust*. I note that McDonald J. in *Gainers Inc. v. Pocklington* (1992), 7 B.L.R. (2d) 87 (Alta. Q.B.), at pp. 89-90 stated:

> It does not necessarily follow that the corporation cannot itself be a "proper person" to make an application for a remedy under s. 234. When the acts complained of are those of a director, a corporation will seldom consider seeking a s. 234 remedy because the director will be the controlling director or one of a group of controlling directors. But in the present case the creditor (the Crown) has, by exercising its contractual rights, taken ownership and control of the corporation. That is an exceptional situation, not expressly contemplated by the definition of "complainant" in s. 231(b), but I cannot say that in those circumstances the corporation cannot be a "proper person" to make application under s. 234. I have read what I said about the scope of the discretion granted by s. 231 (b)(iii), in *First Edmonton Place Ltd. v. 31588 Alberta Ltd.* (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) at p. 150 [Alta. L.R.]. Nothing said there is inconsistent with the possibility that in special circumstances the corporation itself might be a "proper person" to bring a complaint under s. 234.

McDonald J. went on to distinguish *Canada (Attorney General) v. Standard Trust Co.* when he further observed at p. 90: "I do not question the correctness of that decision, which concerned proceedings against another party which had contracted with the corporation. The corporation itself could not complain that another contracting party's conduct had been oppressive." What McDonald J. does not appear to have picked up on is that Standard Trust Co. was a subsidiary affiliate of Standard Trustco Corp. (as represented by its creditor, the Crown). Clearly one can complain of the actions of an affiliate pursuant to s. 248(2) OBCA. Here, that is precisely what the plaintiff Trustee is complaining of — that what the affiliate OYRC paid OYDL in return for the Note was in substance worth nothing on a fair value basis and that in doing so OYRC unfairly disregarded the interests of the creditors of OYDL.

31 I would be of the view that what occurred was that, while OYRC/OYSF did not as affiliates of OYRC oppress the creditors of OYDL, I think it reasonable to conclude that they as affiliates participated in at least unfairly disregarding the interests of those creditors. I would observe that OYRC/OYSF participated in the Transactions with — and at the behest of OYDL. Perhaps a better way of looking at the oppression side of this case (as opposed to the s. 100 BIA side) would be to visualize the creditors of OYDL suing not only OYRC and OYSF, but also OYDL. As a result of the Transactions, the OYDL creditors were inappropriately deprived of the value of some $22 million U.S. to which they would otherwise have been entitled — and which the creditors of OYRC/OYSF would not have been entitled to. It would seem to me that the appropriate remedy in such a case would be to put the participants back in the same position as they would have been but for the wrongful act: see *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.). Thus the escrowed pot of $22 million U.S. plus interest should be given up to the plaintiff Trustee.

32 In the end result under either the s. 100 BIA claim or the oppression (in reality, unfairly disregards the interests) claim, it appears to me that the appropriate result, which is indeed just and equitable, is that the plaintiff be given the funds held in escrow of some $22 million U.S. plus interest.

33 Each side of this contest had valid and sympathetic reasons as to why the losses which each (or rather their respective creditors) have suffered should not be further exacerbated by a loss in this case. As indicated at the beginning of these reasons their counsel worked extremely hard on their behalves. They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in s. 100 BIA, a section which is difficult to administer when fmv in a notional or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notional or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized. Counsel may speak to me if they are not able to agree on costs.

Action allowed.

2003 CarswellOnt 5210
Ontario Court of Appeal

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.

2003 CarswellOnt 5210, [2003] O.J. No. 5242, 127 A.C.W.S. (3d) 830,
180 O.A.C. 158, 42 B.L.R. (3d) 14, 46 C.B.R. (4th) 313, 68 O.R. (3d) 544

PRICEWATERHOUSECOOPERS INC., in its capacity as Trustee of Olympia & York Developments Limited, a bankrupt (Plaintiff/ Respondent) and OLYMPIA & YORK REALTY CORP. and OLYMPIA & YORK SF HOLDINGS CORPORATION (Defendants/Appellants)

Goudge, Simmons, Gillese JJ.A.

Heard: June 16 and 17, 2003
Judgment: December 24, 2003
Docket: CA C36941

Proceedings: affirming *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]); additional reasons at *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), 2001 CarswellOnt 4739, 32 C.B.R. (4th) 83 (Ont. S.C.J. [Commercial List])

Counsel: Peter F.C. Howard, Ashley John Taylor for Appellants
F.J.C. Newbould, Q.C., Aaron A. Blumenfeld, Benjamin T. Glustein for Respondent

***Goudge J.A.*:**

1 This is an appeal from the judgment of Farley J. by the appellants, Olympia & York Realty Corp. (OYRC) and its wholly owned subsidiary Olympia & York SF Holdings Corp. (OYSF). The respondent, who succeeded at trial, is Price Waterhouse Coopers Inc. as the trustee in bankruptcy of Olympia & York Developments Ltd. (OYDL).

2 The judgment concluded a trial which scrutinized a transaction done on March 16, 1992 between OYDL and the appellants. The trial judge concluded that, pursuant to s.100 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA), this was a reviewable transaction in which there was a conspicuous difference between the fair market value of what OYDL received and what it gave up. The trial judge also found that pursuant to s. 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (OBCA), the transaction constituted oppression of the creditors of OYDL. He determined that the appropriate remedy was the same for each claim, namely to give the trustee in bankruptcy of OYDL the appellants' remaining assets to make up for the loss.

3 The appellants argue that the trial judge erred in a number of respects in applying both s. 100 of the BIA and s. 248 of the OBCA. For the reasons that follow, I conclude that he did not err, except in one minor respect which does not affect the outcome. I would therefore dismiss the appeal.

THE FACTS

4 In 1992, OYDL owned 100 percent of the shares of OYRC which, in turn, owned 100 percent of the shares of OYSF. OYRC held a significant number of US real estate investments and, through OYSF, shares in certain US public companies.

5 At the date of the transaction in question in this litigation, March 16, 1992, OYSF owed OYDL approximately $391 million, secured by a promissory note that it had given to OYDL (the OYSF note).

6 In addition, OYSF had pledged a large proportion of its shareholdings to guarantee various financial obligations of OYDL and its other subsidiaries. Of these, a significant number of its marketable securities were pledged to guarantee a major loan made by the European Investment Bank (EIB) under an agreement that constituted these securities a security interest in favour of EIB only on the occurrence of a "triggering event". If no triggering event occurred, these securities were free of any EIB charge and would be available to OYDL to recover under the OYSF note.

7 As of March 16, 1992, Hong Kong Bank Canada (HKBC) had extended a US $25 million credit facility to OYDL secured in part by a guarantee from OYSF. Pursuant to s. 20 of the OBCA, HKBC asked for a certificate by OYSF that it was solvent as defined in that section of the Act. However, no solvency certificate was required by s. 20(2)(c) of the OBCA, since OYSF was indirectly a wholly owned subsidiary of OYDL. HKBC had requested the solvency certificate as part of its standard checklist. When this had happened in the past, HKBC had typically been advised by a borrower or counsel if an exemption applied. Neither OYDL nor its counsel had raised the issue of the exemption with HKBC.

8 The impugned transaction of March 16, 1992 involved several steps. OYDL acquired additional OYRC shares from OYRC for a stated consideration of $397.8 million. OYRC acquired additional OYSF shares from OYSF for a stated consideration in the same amount. OYSF directed that $390.8 million be repaid to OYDL for the OYSF note and that $7 million be advanced to OYDL to be evidenced by a note from OYDL to OYSF. No money actually changed hands. The end result for OYDL was that it acquired additional shares in OYRC and surrendered the OYSF note.

9 On May 22, 1992, petitions for a receiving order under the BIA were issued against OYDL and a number of its subsidiaries including OYRC and OYSF. After the bankruptcy petition with respect to OYDL was heard on December 20, 1994, a receiving order was issued and the respondent was appointed trustee in bankruptcy of OYDL. OYRC and OYSF have not been adjudged bankrupt.

10 After OYDL was adjudged bankrupt, all of OYSF's marketable securities were sold and secured creditors were paid the proceeds from the securities which had been pledged. Thereafter, there was approximately US $30 million left over, representing the remaining proceeds of realization on OYSF's assets. These funds have been held in trust to await the outcome of this litigation.

11 In this action, the respondent trustee in bankruptcy for OYDL claimed that under s. 100 of the BIA, the fair market value of the OYSF note was conspicuously greater than the fair market value of the additional OYRC shares which OYDL received in the transaction. It also claimed under s. 248 of the OBCA that the transaction unfairly disregarded the interests of the creditors of OYDL and thus constituted an act of oppression.

12 The trial judge held that the fair market value of the OYSF note was between US $30 and $50 million. He further held that the fair market value of the additional OYRC shares was nil and that there was therefore a conspicuous difference of US $30 to $50 million for purposes of s. 100 of the BIA. He found that the appellants had not satisfied him that he should exercise his residual discretion under s. 100(2) of the BIA to refuse judgment for that conspicuous difference.

13 Turning to s. 248 of the OBCA the trial judge held that, in the circumstances, the respondent was a proper complainant and that the transaction constituted an oppression of the creditors of OYDL.

14 By way of remedy, the trial judge ordered that the respondent was entitled to the funds held in trust on either basis: pursuant to s. 100 of the BIA or pursuant to s. 248 of the OBCA. He reasoned that even the low end of the range of conspicuous difference which he had found, when coupled with prejudgment interest and then converted to US dollars, was equivalent to the value of the funds held in trust to the credit of this action. Hence this sum was required to compensate the respondent for its loss due to the transaction. Before us, the appellants take no issue with this remedy if the trial judge is found to have properly applied these two sections.

ANALYSIS

15 The appellants raise challenges to a number of the trial judge's conclusions in both his analysis under s. 100 of the BIA and his analysis under s. 248 of the OBCA. So far as these challenges are to findings of fact, the trial judge's conclusions are entitled to significant deference in this court. We can interfere only if the trial judge has made a palpable and overriding error. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) Iacobucci and Major JJ. said this at para. 1:

> A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

16 With this in mind I will first address the appellants' arguments in relation to s. 100 of the BIA and then those in relation to s. 248 of the OBCA.

THE S. 100 ISSUE

17 Section 100(1) and (2) of the BIA read as follows:

> 100(1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

18 In making an inquiry under this section, the court must find that there is a reviewable transaction and that it was made within the required time frame. Then the court must determine the fair market value of what the bankrupt gave up and the fair market value of what it received in the transaction. If the former is conspicuously greater than the latter, the section confers a discretion on the court to give judgment against the party to that transaction for the amount of the difference.

19 While the appellants accept that the time frame requirement is met here, and do not contest the amount of the judgment, they challenge every other step in the trial judge's analysis under s. 100 of the BIA.

20 First, although their oral argument was muted on this point, the appellants contend that there was no "reviewable transaction" here but rather a series of separate transactions involving different parties.

21 This argument can be disposed of quickly. Pursuant to s. 100(1), the court may inquire into whether the bankrupt gave or received fair market value in consideration for the property involved in the transaction. Here the consideration given by OYDL was the OYSF note and the consideration received was the additional shares in OYRC. That is the transaction in issue regardless of the steps taken to achieve this exchange of debt for equity. The purpose of s. 100 cannot be averted simply by using a subsidiary corporation to act as an intermediary. This was a reviewable transaction.

22 Second, the appellants attack the trial judge's finding that the OYSF note which OYDL gave up in the transaction had a fair market value of $30 to $50 million. He held that the note would be worth that much to a vulture fund assessing

the possible reward against the risk that an undiscovered triggering event could have occurred so as to render the assets of OYSF subject to the security charge in favour of EIB and therefore unavailable to satisfy the note.

23 Contrary to the appellant's submission, the trial judge did not assume an imprudent purchaser in reaching this conclusion. Rather, he accepted the respondent's expert evidence that, given the way vulture funds operate, a vulture fund acting prudently would be satisfied with the limited due diligence available to it to assess the possible occurrence of a triggering event and would deal with this uncertainty by discounting its offer price accordingly. This expert evidence proceeded not on the assumption that no triggering event had occurred but, rather, on the basis that there was uncertainty on this score which would cause a vulture fund purchaser to offer a discounted price. It was entirely open to the trial judge to accept this evidence in determining the fair market value of the OYSF note.

24 Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note. The imprudence advanced by the appellants is that OYDL as the vendor of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to preempt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjective to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

25 The appellants further argue that the trial judge erred in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would it have been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notional, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

26 Finally, the trial judge did not err in not discounting the fair market value of the OYSF note for any alleged equitable set off OYSF would have against OYDL or any purchaser of the note. Such a claim could arise only once the OYSF equities pledged to guarantee OYDL debts had been sold by OYDC creditors and at the date of the transaction no such claim existed. OYSF would thus have had no set off claim when the purchaser of the OYSF note put it into bankruptcy immediately upon making the purchase.

27 The appellants' third attack on the trial judge's s. 100 analysis focuses on his finding that the additional OYRC shares received by OYDL in the transaction had no value. The trial judge based this conclusion in part on his finding that at the date of the transaction the US real estate assets underlying OYRC (and therefore OYRC itself) had a negative value because their debt load exceeded their market value. In making this finding the trial judge relied primarily on the opinion to that effect of Citibank, OYRC's principal banker. The Citibank evidence was given by one of its executives who in turn relied on reports by Citibank experts concerning US real estate values. These experts were not themselves called at trial and the appellants objected to admitting their reports for their truth, although the appellants did not challenge the admissibility of Citibank's own opinion as distinct from the reports of its experts.

28 The trial judge found that he could rely on Citibank's own opinion as a foundation for his conclusion that at March 16, 1992 the OYRC real estate interests (and hence OYRC itself) had a negative value and therefore shares in OYRC were worth nothing. The trial judge concluded that he could do so both because Citibank was a significant creditor who could therefore be considered a privy of OYRC and because of Citibank's experience in the US real estate market.

29 In my view, his first reason is erroneous. There was no privity between Citibank and the appellants that would warrant treating the reports of the Citibank experts as admissions of the appellants and therefore admissible for the truth of their contents. Citibank and the appellants shared no privity of title. Nor was it enough that Citibank was a significant creditor of the appellants. Indeed, I think that the divergent interests of creditor and debtor make it unwarranted to take the statements of one about the value of the security underlying the debts as admissions by the other, based on privity.

There was simply not a sufficient identity of interest to permit the admissibility of the reports of the Citibank experts as the admissions of the appellants. See J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. Toronto: (Butterworths), 1999 at p. 302.

30 In the end I do not think this matters, because I see no error in the other reason offered by the trial judge for accepting the opinion of Citibank as a basis for finding that as of March 16, 1992 the OYRC real estate interests had a negative value and therefore so did OYRC. The opinion of Citibank itself as to the value of the OYRC real estate was not that of an expert qualified by the court to give an opinion on the value of US real estate. However, it was the opinion of a major lender whose commercial success depended in part upon its deep interest in and experience in the US real estate market. As such its opinion was no doubt admissible. Indeed the appellants did not dispute that at trial, quarrelling only with the admission of the reports of Citibank's own experts. The weight to be given to the Citibank opinion was a matter for the trial judge and I see no palpable and overriding error in his use of that evidence as one basis to come to his factual conclusion about the worth of OYRC at the date of the transaction.

31 Moreover, the trial judge had before him significant additional expert evidence that the fair market value of OYRC as a whole was negative both before and after the transaction. In particular, there were two appraisers' reports admitted on consent concerning the value of OYRC's US real estate and the respondent's expert evidence concerning OYRC's non-real estate assets. There was thus an ample basis for the trial judge to conclude that at the relevant time the value of OYRC was negative and the fair market value of shares in OYRC including the additional shares received by OYDL in the transaction was nil.

32 The trial judge also rejected the appellants' expert evidence that the potential for a rebound in the value of the assets of OYRC gave the shares in OYRC some value. He did so on the basis that there was no evidence that this turnaround was a reasonable expectation. This was a conclusion he was perfectly entitled to draw, given the record before him.

33 In short there was no palpable error in the trial judge's finding that since the assets underlying OYRC had negative value at the relevant times, OYRC's shares including the additional shares received by OYDC were worthless.

34 Nor did the trial judge err when he confirmed this conclusion by saying that the transaction of March 16, 1992 added no value to OYRC and that the original 100 percent of the shares in OYRC were worth exactly the same as those shares taken together with the additional shares received by OYDL in the transaction, namely nil. The trial judge made clear that this represented both the value of the additional OYRC shares to OYDL and their fair market value given that OYRC then had a negative value.

35 To summarize, save for the one narrow finding I have referred to I can find no reversible error in the trial judge's determination that the fair market value of the OYSF note given up by OYDL was between $30 to $50 million and the fair market value of the additional OYRC shares it received was nil. As I have explained, in neither case did the trial judge depart from a proper fair market value analysis to value the note or the additional shares simply to OYDL. And by any measure the disparity between $30 to $50 million and nil is a conspicuous difference for the purposes of s. 100 of the BIA.

36 The trial judge's final step was to examine the equities in the exercise of the residual discretion given to him under s. 100(2) of the BIA. Here too the appellants say he erred.

37 In my view, this argument must also fail. There is limited scope for appellate intervention in the exercise of this sort of discretion at first instance. There was no error in principle in the exercise undertaken here. The trial judge was clearly alive to the considerations relevant to the exercise of his discretion. He drew on the factors outlined by this court in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.). He made clear the obligation on the appellants to establish the equities which they say disentitle the respondent to relief. He found that it was not enough for the appellants to point to the broad provision of security that OYSF had historically given to OYDL since that was in place prior to and independent of the transaction. Nor was he persuaded by the appellants' assertion that the transaction had to be undertaken to provide HKBC with a solvency certificate of OYSF. The trial judge concluded

that a solvency certificate not required by statute was not an equitable basis to decline to order a s. 100 remedy. He found that the fair value to OYDL of the additional shares in OYRC was nil (as was their fair market value) because OYDL already owned 100 percent of OYRC. Beyond these factors the trial judge found that the appellants had merely made vague allegations but had not proven any facts so as to warrant equitable relief. I cannot say that anything in this analysis constitutes reversible error.

38 I therefore conclude that the appellants' various challenges to the trial judge's s. 100 conclusion must all fail.

THE S. 248 ISSUES

39 The trial judge concluded that the circumstances here made this a proper case to allow the respondent trustee in bankruptcy to be a complainant and seek an oppression remedy pursuant to s. 248 of the OBCA. He went on to find that the transaction was oppressive in that it unfairly disregarded the interests of the creditors of OYDL and concluded that this served as a second basis for the remedy that was appropriate under s. 100 of the BIA.

40 In this court the appellants attack both the finding that the respondent was a proper complainant and the finding that the transaction was oppressive.

41 Section 245 of the OBCA sets out the definition of "complainant" for the purposes of seeking an oppression remedy under s. 248. The trial judge acted here pursuant to s. 245(c) which gives the court a discretion to determine who is a proper person to be a complainant. The definition of "complainant" in s. 245 reads as follows:

> 245. In the Part . . .
>
> "complainant" means,
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

42 Section 248(2) is also a discretionary provision. Indeed it gives the court a double discretion. The court must first satisfy itself that the act in question constitutes oppression and having exercised its discretion to come to that conclusion the court may order a remedy. Section 248(1) and (2) read as follows:

> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

43 Both of the findings which the appellants challenge constitute exercises of discretion and are therefore entitled to deference in this court. Unless the trial judge erred in principle or made a significant error in determining and weighing the considerations relevant to these findings they are beyond the scope of appellate review.

44 In challenging the determination that the respondent can be a complainant the appellants argue that the trial judge erred in principle because that status can never be conferred on a trustee in bankruptcy where the bankrupt was a party to the transaction which is said to be oppressive. The appellants say that the decision of Houlden J.A. sitting as a General Division judge in *Canada (Attorney General) v. Standard Trust Co.* (1991), 5 O.R. (3d) 660 (Ont. Gen. Div.) stands for this proposition.

45 It may be that the finding in that case is simply that in the circumstances there the trustee in bankruptcy would not be given a remedy under s. 248 and therefore ought not to be accorded standing as a complainant. If, however, that case sets out the absolute prohibition contended for by the appellants, as I tend to think it does, then despite the great respect due its author I would disagree. The simple reason is that s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

46 In this case the appellants were affiliates of OYDL, the party with which the allegedly oppressive transaction was concluded. In that transaction, OYDL gave up something of significant value (the OYSF note) in return for something of no value (additional shares in OYRC). It would have been reasonable for the trial judge to conclude that since the appellants unfairly disregarded the interests of the OYDL creditors, those creditors have properly been recognized as complainants. Thus it was equally reasonable in the circumstances for the trial judge to find that this was a proper case in which to conclude that the trustee of OYDL was a proper person to be a complainant in effect on behalf of the creditors of OYDL. This conclusion is consistent with the bankruptcy principle of collective action to pursue the claims of the creditors of the bankrupt and the trustee's role as their representative. See *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). The appellants have put forward no reason why this principle should not be followed in this case. The trial judge therefore exercised his discretion reasonably in finding that the respondent was a proper person to be a complainant here and I would dismiss the appellants' first argument.

47 The appellants' second argument is that the trial judge ought not to have found the transaction to be oppressive. In essence the appellants say that this was an ordinary course transaction reflective of normal business decisions. The trial judge however found that the exchange of a note of substantial value for shares worth nothing inappropriately deprived the OYDL creditors of a very significant value to which they would otherwise have been entitled. He found that by participating in this transaction the appellants had unfairly disregarded the interests of those creditors. He was satisfied that in this way the transaction effected an oppressive result. In my view, it was entirely reasonable for the trial judge to focus on these aspects of the transaction in coming to his conclusion. He properly exercised his discretion and this court should not interfere. Therefore the appellants' second argument also fails.

48 In summary, the appeal must be dismissed. The respondent acknowledges that a costs order against the appellants would be of academic interest only in these circumstances. There is no point in making such an order here. Therefore there will be no costs of the appeal.

***Simmons J.A.*:**

I agree.

***Gillese J.A.*:**

I agree.

Appeal dismissed.

TAB 15

See paras. 51-53

2014 ONSC 4018
Ontario Superior Court of Justice

Indcondo Building Corp. v. Sloan

2014 CarswellOnt 10946, 2014 ONSC 4018, [2014] O.J. No. 3722, 121 O.R. (3d) 160, 16 C.B.R. (6th) 220, 243 A.C.W.S. (3d) 873

Indcondo Building Corporation, Plaintiff and Valerie Frances Sloan, David Robin Sloan and Cave Hill Properties Ltd., Defendants

Penny J.

Heard: May 26-30, 2014; June 2-3, 2014
Judgment: July 31, 2014
Docket: CV-08-7587-00CL

Counsel: Trung Nguyen, P. James Zibarras for Plaintiff
Philip P. Healey for Defendants

***Penny J.*:**

Overview

1 This is an action to set aside certain transfers of property on the basis that they were undertaken with the intent to defeat, hinder, delay or defraud creditors. The litigation began in 1992 with Indcondo's claim for damages for breach of a contract to purchase its shares in a real estate development company. John Di Paola is the sole shareholder of Indcondo. A judgment was obtained by the plaintiff at an undefended trial against the defendant, Robin Sloan, in 2001. A fraudulent preference action was commenced by the plaintiff in 2002 seeking to set aside the 1992 transfer of Sloan's half interest in his matrimonial home to his wife, Valerie Sloan. In the course of that action, the plaintiff became aware of other transfers of property from Sloan dating back to 1987 and 1988.

2 Sloan declared bankruptcy in 2004 and the plaintiff's fraudulent conveyance action was stayed. The plaintiff filed a proof of claim in Sloan's bankruptcy. Sloan received an absolute discharge in 2005. In April 2006, the plaintiff obtained an *ex parte* order under s. 38 of *The Bankruptcy and Insolvency Act* authorizing it to proceed in its own name with an action to set aside the impugned transfers of property. This action was not commenced until June 2008.

3 The action was dismissed by order of Morawetz J. on a limitations issue. The Court of Appeal reversed Morawetz J.'s order. The action was again dismissed as an abuse of process, on grounds of issue estoppel, by Mesbur J. That order too was reversed by the Court of Appeal. The matter was case managed to trial by D. Brown J. Thus, after 23 years of litigation, a seven-day trial was finally conducted in this matter from May 26 to June 3, 2014.

4 There are four transfers of property by Sloan which are challenged:

> (1) transactions involving the 1987 transfer of property referred to as the "Bowes property" to Cave Hill Properties Limited, a company owned by Valerie;
>
> (2) transactions involving the transfer of the "Hill 'N' Dale" farm property to Cave Hill in 1987 and 1988;
>
> (3) transactions involving the transfer of the matrimonial home, 42 Riverside Boulevard to Valerie in 1992; and
>
> (4) a transaction involving the transfer of a Florida condominium to Valerie in 1993.

5 The plaintiff also seeks to pierce the corporate veil in connection with assets owned by Cave Hill. These assets include the properties listed above (apart from 42 Riverside), or proceeds from the sale of these properties, as well as other assets alleged to have originated with Sloan but later been transferred to Cave Hill.

6 Valerie suffered a serious stroke in 1996 and lives in a long-term care facility. Her affairs are managed by Sloan, who holds her power of attorney, and a long-time friend and former colleague of Sloan's, Bruce Pender. Valerie gave brief evidence by affidavit but was not cross-examined at trial.

7 Before turning to the specific transactions in issue, it is necessary to set out, in some detail, the background and circumstances giving rise to these transactions and the litigation.

Background

8 In 1967, Sloan started a business with Frank Stronach called Unimade Industries Limited. In 1974, Unimade was acquired by Magna for Magna shares and Sloan went to work for Magna.

9 From 1974 to 1986, Sloan was a vice president at Magna. During part of this time, he headed up MI Developments, Magna's real estate acquisition arm. While doing so, he came to know Bruce Pender, an accountant who was a fellow Magna employee, and Doug Ford, an in-house lawyer employed by Magna.

10 In 1985, Sloan, Di Paola and several other businessmen formed a private real estate development company called Steeles-Jane Properties Inc. It is common ground that this was a period when the Toronto real estate market was booming. The company was set up as a vehicle to buy property, develop it, and either resell at a profit or lease and refinance, using the proceeds to invest in additional properties.

11 The principals, who were all involved in construction or real estate development in some way, each invested in Steeles-Jane through holding companies. The plaintiff is Di Paola's company. Sloan's company was called Ascania Investments Inc.

12 The shareholders and interests in Steeles-Jane were as follows:

Shareholder	***Principal***	***Number of Shares***	***%***	***Date of Share Issuance***
Indcondo	John Di Paola	100	10%	June 17, 1985
Rocar Construction Limited	Carlo Rotundo	200	20%	June 17, 1985
Lostrock Corporation	Anton Czapka	200	20%	June 17, 1985
CIFU Safe Investments Limited	Carmen Alfano	150	15%	June 17, 1985
Conleo Holdings Limited	Leo Rinomato	150	15%	June 17, 1985
623742 Ontario Inc. / Ascania Investments Inc.	David Robin Sloan	200	20%	June 17, 1985

13 Carlo Rotundo acted as President and was the most active of the principals in the operations and affairs of the company. Unlike the other shareholders, Di Poala/Indcondo did not invest any money in Steeles-Jane. Di Poala "earned" his shares by providing real estate agent services without commission.

14 The parties entered into a shareholders' agreement in 1985. That agreement restricted the sale of shares by the shareholders. As between shareholders, the shareholders agreement contained a buy/sell, or "shotgun," clause which permitted any shareholder to make an offer to acquire another shareholder's shares. The offeree had the option to accept that offer or acquire the offeror's shares at the offered price.

15 Paragraph 4.03 of the shareholders' agreement dealt with purported transfers of shares to persons who were not existing shareholders. In that case, any purported transfer was deemed to be a grant by the shareholder involved of an option to Steeles-Jane to purchase the shares at a value of 80% of the original purchase price.

16 The shareholders agreement was amended in 1987 to provide that paragraph 4.03 would not apply to any transfer by any of the parties to the agreement if the "purported sale occurred within a period of 90 days after the fifth anniversary date of this agreement and/or every fifth anniversary thereafter." Thus, by June 1990, any Steeles-Jane shareholder had a 90 day window during which it would be entitled to sell its shares to a third-party without penalty under paragraph 4.03.

17 The financial statements of Steeles-Jane show that by the year ended May 31, 1988, Steeles-Jane had accumulated total assets of $35 million (based on acquisition and carrying costs). Steeles-Jane also had liabilities of $34 million, largely from mortgages and bank indebtedness. Retained earnings for that year were a little over $700,000.

18 The Steeles-Jane financial statements show that by the year ended, May 31, 1989, the total assets of Steeles-Jane (again based on acquisition and carrying costs) had grown to over $70 million and liabilities, again largely in the form of mortgages and banking indebtedness, had grown to over $66 million, producing retained earnings of some $3.8 million in that year.

19 It is not contested that the principals of the shareholders were required to give the bank and mortgage lenders personal guarantees as security for the financing of Steeles-Jane's acquisitions and operations.

20 Di Paola's evidence was that from 1987 on he raised with the other principals including Sloan concerns about the direction Steeles-Jane was taking. He was concerned, he said, about the highly leveraged nature of the Steeles-Jane balance sheet and that, if the market turned, they would lose everything. Di Paola said that by the fall of 1988, he advised the other principals that he wanted out and would be exercising his right to sell on the first five-year anniversary.

21 There is little objective support for Di Paola's evidence that he was sounding the alarm as early as 1987. First, Di Paola produced no documentary evidence reflecting or demonstrating his concerns. There is no evidence that he had any discussions with any of the other shareholders about using the buy/sell provisions to buy him out. He called no corroborative evidence from other principals or witnesses. There is no evidence that in 1987 the real estate market was entering a downturn. Sloan does not support the contention that Di Paola raised concerns about the viability of Steeles-Jane at this stage.

22 Apart from the fact that the shareholders' agreement was amended to permit the sale (without penalty) of shares on the fifth anniversary of the formation of Steeles-Jane, there is no evidence of financial concerns being expressed about Steeles-Jane in 1987 or 1988, apart from Di Paola's uncorroborated evidence, which I find is tainted by both his self-interest in placing the date that concerns about Steeles-Jane's financial viability were raised as early as possible and the enormous passage of time since the relevant events.

23 I do, however, accept that by September 1989, the five-year anniversary was on the horizon. The minutes of the shareholders' meeting from that month reflect the fact that Rotundo reminded the shareholders that the corporation's fifth year anniversary would be on May 30, 1990, that any of the shareholders had the right to dispose of their shares without penalty at that time and that, if any shareholder intended to exercise this right, he should make his intentions known so as to provide ample time to perform any necessary valuations. I find that, in or around this period, Di Poala voiced his desire to sell Indcondo's Steeles-Jane shares. Sloan agreed on discovery that, in the period leading up to Di Paola's notice of his desire to sell, he and Di Paolo had "many discussions" about it.

24 A reporting package to shareholders of October 25, 1989 shows established equity in Steeles-Jane at that time of almost $48 million. No evidence was presented about the basis or background of the calculations shown in this shareholder package. The significant difference from the May 1989 financial statements appears to derive from the use of market values for the properties owned rather than their acquisition cost.

25 The evidence discloses that by April 23, 1990, Di Paola had negotiate a "put/call" agreement providing for the potential buyout of all of Indcondo's Steeles-Jane shares over time at a price of $50,000 per share (Indcondo held, following a stock split, 100 shares such that the purchase price, if Indcondo chose to exercise all of its put rights, was $5 million). Based on the schedule agreed to, if Di Paola exercised all of Indcondo's puts under the agreement, the last tranche would be acquired by October 1994.

26 The put/call agreement was between Indconco and Steeles-Jane. It provided, however, in paragraph 3.03, that if Steeles-Jane defaulted by failing to purchase any of its shares from Indcondo when required to do so, the principals of the

other shareholders, including Sloan, "shall be jointly and severally obligated to purchase such shares from Indcondo for the [agreed] option price per share" on the closing dates specified in the agreement.

27 At the end of April 1990, Steeles-Jane's rights to purchase the first tranche of Indcondo's Steeles-Jane shares were assigned to CIFU (Alfano) and Conleo (Rimomato). In this way, Alfano and Rinomato would each increase their shareholdings in Steeles-Jane by 5%, such that the remaining five shareholders would each hold 20%.

28 In October 1990, Indcondo gave notice to Steeles-Jane of its intention to exercise its option to sell 10 more shares under the schedule of put options. These shares were also purchased by CIFU and Conleo in November 1990 and January 1991.

29 In March 1991, CIFU (Alfano) and Conleo (Rinomato) provided indemnities to Sloan (and, according to Sloan, the other remaining shareholders), in which they indemnified Sloan against any claims as a result of CIFU and Conleo's agreement to purchase Indcondo's Steeles-Jane shares.

30 In April 1991, Indcondo again gave notice to Steeles-Jane of its intention to exercise its put option to sell 10 more of its shares. CIFU and Conleo failed to purchase Indcondo's shares.

31 According to Di Paola, the reason Steeles-Jane was unable to purchase the shares was that the Toronto property market bubble had burst and that prices had started to drop. The failure of CIFU and Conleo, or Steeles-Jane, to acquire the April, 1991 tranche of Indcondo's shares gave rise to negotiated amendments to the put/call agreement.

32 The First Amendment, dated May 28, 1991, provided that Steeles-Jane or its assignees would acquire one of Indcondo's Steeles-Jane shares per month, commencing May 15, 1991, for the following 10 months. The agreement reiterated that if Steeles-Jane or its assignees failed to close any of the transactions in the First Amendment, that failure would be subject to the joint and several liability of the other principals under paragraph 3.03 of the put/call agreement. The first five shares were purchased from Indcondo by CIFU and Conleo in accordance with the First Amendment. However, on October 15, 1991, Steeles-Jane breached the First Amendment when CIFU and/or Conleo failed to purchase the share designated for purchase on that date.

33 Further, on October 16, 1991, Indcondo gave a third notice to Steeles-Jane of its intention to exercise its put option under the put/call agreement for the sale of the next tranche of its Steeles-Jane shares. Steeles-Jane/CIFU/Conleo failed to purchase Indcondo's 10 shares by the end of October 1991 in breach of the put/call agreement.

34 As result, the parties discussed a second amended agreement. The Second Amendment provided that:

> (a) the five shares that were the subject of the First Amendment would be purchased on certain specified dates;
>
> (b) the 10 shares that were the subject of Indcondo's October 1991 notice would be purchased on March 14, 1992; and
>
> (c) if Steeles-Jane, Conleo or CIFU failed to purchase the shares on the prescribed dates, the principals would be required to do so in accordance with paragraph 3.03 of the put/call agreement.

Although the Second Amendment was never signed, it appears that three of the five shares outstanding were purchased in October, November and December 1991 but that, in January 1992, Conleo and CIFU failed to purchase the common share designated for that date, in breach of the Second Amendment, and failed to purchase any additional shares, in further breach of the put/call agreement and the Second Amendment.

35 Di Paola gave evidence that there were further verbal agreements, tied to pending sales of specific properties, under which Indcondo agreed to forbear from enforcement of its rights in exchange for the promise of payment once the pending property sales closed. These agreements were not fulfilled and so, in March 1992, Indcondo finally gave notice to the principals that it required the principals to purchase Indcondo's shares under paragraph 3.03. At that point, the principals were jointly and severally liable to purchase from Indcondo its remaining 69.5 common shares at a price of $65,847 (the

amounts included accumulated interest) per share for a total amount owing of $4,576,366.50.

36 The principals failed to acquire Indcondo's shares in accordance with paragraph 3.03 of the put/call agreement. Accordingly, on May 21 1992, Indcondo issued a statement of claim against Steeles-Jane and the principals to recover the $4,476,366.50 of indebtedness.

37 From 1992 to 1996, Di Paola says he was unable to afford counsel and the action languished. In August 1996, however, he was able to retain counsel and the action continued. In September 2001, Indcondo obtained a trial date to commence in December 2001. On the eve of trial, Sloan's lawyer advised that he would not be attending as he had not been retained for the trial. The trial proceeded on an undefended basis against Sloan. Molloy J. granted judgment in the amount of $8,010,575.30 plus interest at 15% (apparently based on the interest rate payable on amounts due and owing to Indcondo under the put/call agreement).

38 That judgment has never been set aside or appealed from.

39 In the course of seeking to enforce its judgment, Indcondo discovered that Sloan had transferred his half interest in the matrimonial home, 42 Riverside, to Valerie after he had been served with Indcondo's statement of claim. Indcondo commenced an action in August 2002 to set aside the conveyance of Sloan's 50% interest in 42 Riverside as being contrary to the *Fraudulent Conveyances Act*. Apparently, sometime during the course of that proceeding, Indcondo became aware of other alleged transfers of property by Sloan to a corporation owned and controlled by Valerie.

40 What happened next was comprehensively summarized by Mesbur J. in her Endorsement on a motion to dismiss this action, dated August 30, 2011 [2011 CarswellOnt 10288 (Ont. S.C.J. [Commercial List])]. I cannot do better than simply repeat her words:

> [4] In January 2004, Mr. Sloan declared personal bankruptcy. As a result of the bankruptcy the First Fraudulent Conveyances Action was stayed. Mr. Sloan listed only two creditors: Indcondo in the amount of $8.7 million and the Royal Bank of Canada for about $12 million. Indcondo proved its claim in the bankruptcy. Its principal, Mr. DiPaola, was active in the bankruptcy proceedings, and urged the Trustee to follow up on trying to get the matrimonial home and other properties back into the estate.
>
> [5] Mr. DiPaola requested a meeting of creditors, which was held on March 26, 2004. At the meeting, Mr. DiPaola questioned the bankrupt regarding a number of financial issues, and asked the Trustee what he would be doing about pursuing some of the transactions. Many of the transactions related to events that occurred in the years 1993 to 1996. The Trustee advised that the items raised were "outside the timeframes for challenging transactions pursuant to the *Bankruptcy and Insolvency Act*. More importantly, any action to be pursued by the estate would have to be funded by the creditors as the estate is impecunious."
>
> [6] Mr. DiPaola then advised the meeting he would be requesting an examination of the bankrupt pursuant to Section 161 of the *Bankruptcy and Insolvency Act*. The minutes of the meeting record that Mr. DiPaola was made aware of his rights under section 38 of the *Bankruptcy and Insolvency Act* to pursue any action not taken up by the estate.
>
> [7] Mr. DiPaola's next action was to write to the office of the Superintendent of bankruptcy, seeking the OSB's cooperation in investigating this file. Although Mr. DiPaola knew of Indcondo's rights under section 38 in March of 2004, he did not take any steps at that time to obtain a section 38 order. He waited until 2006 to do so, and then waited another two years before actually commencing the section 38 Fraudulent Conveyances action itself.
>
> [8] Because Mr. Sloan was a first time bankrupt, he came up for discharge in 2005. The Royal Bank of Canada did not oppose the discharge, but Mr. DiPaola did so on Indcondo's behalf. His notice of intended opposition set out alleged offences under Section 173 of the *Bankruptcy and Insolvency Act*, as well as section 195. The notice goes on to say "The creditor wishes to conduct Section 163 examinations of the following after it had received Section 161, Official Receiver's Report on September 24, 2004."
>
> [9] Mr. Sloan's initial discharge hearing was set for April 5, 2005. Indcondo sought an adjournment in order to examine the bankrupt. Although the discharge hearing was adjourned for that purpose, Indcondo's counsel never conducted an

examination. I have no evidence as to why not. The Trustee's report on Mr. Sloan's application for discharge showed nothing improper in the bankrupt's conduct. The Trustee did not oppose the bankrupt's discharge, but noted that a creditor had opposed the discharge. Mr. DiPaola's opposition on Indcondo's behalf was attached to the Trustee's report.

[10] Mr. DiPaola then wrote to the Trustee, and attached to his letter a resolution of the inspector (namely Mr. DiPaola) disapproving the Trustee's report.

[11] The discharge hearing was rescheduled for August 19, 2005. Counsel for the bankrupt sent a letter to Indcondo's counsel by fax and mail a month before the new date. In the letter, she advised Indcondo's counsel of the date and time for the new discharge hearing. Indcondo did not attend, nor did any other opposing creditor. The Registrar granted an absolute discharge. The discharge order recites that no one appeared for the opposing creditor, Indcondo, although properly served. It goes on to recite that "No proof has been made of any facts under Section 173 of the *Bankruptcy and Insolvency Act*."

[12] Mr. Sloan's lawyer then send a copy of the discharge order to Indcondo's lawyer, Mr. Chapman. In the letter, he says:

> As a result of the discharge order, the action [i.e. the First Fraudulent Conveyances Action] should be dismissed. My proposal is that it be dismissed on a without costs basis... If I do not hear from you by the above noted diary date [October 3, 2005] I will presume that you will not consent and proceed to bring a motion... If I am forced to bring such a motion, I will be seeking costs of the action.

[13] Mr. Chapman did not respond. On October 17, 2005 Mr. Sloan's lawyer wrote to him again, and asked for the courtesy of a reply. He suggested Mr. Chapman simply obtain ups instructions to consent.

[14] About 10 days later Mr. Chapman responded, saying "I have asked my client for instructions." He did not, however, ever advise whether he received any instructions, or what those instructions were. As a result, Mr. Sloan's counsel proceeded to schedule a motion to dismiss the First Fraudulent Conveyances Action. Mr. Sloan's lawyer wrote to Mr. Chapman on January 5, 2006 to advise him that since Mr. Chapman had not responded regarding his client's position, a motion to dismiss was scheduled for April 5, 2006. Mr. Chapman was served with the motion materials, but did not appear on the motion, and did not deliver any responding materials to it.

[15] On April 5, 2006 Belobaba J made the requested order. Indcondo did not attend that motion, but the following day counsel for Indcondo attended *ex parte* before the Registrar and obtained an order under Section 38 of the *Bankruptcy and Insolvency Act* to take proceedings to set aside certain reviewable transactions by the bankrupt. Having shown it was a creditor, had requested the Trustee to act in terms of setting aside fraudulent conveyances, and the Trustee having refused to do so, the court made the order. Although Indcondo obtained the s. 38 order in 2006, it did not begin its action pursuant to the order until 2008. These new proceedings became the Section 38 Fraudulent Conveyances Action, namely, this action.

[16] Some nine months after Belobaba J had dismissed the First Fraudulent Conveyances Action, Indcondo suggested its failure to attend the motion before Belobaba J was due to inadvertence. It sought to set aside the dismissal order on that basis. The motion came on before Low J on October 20, 2006. She dismissed the motion with costs against Indcondo of $2,500. She found first, there was no inadvertence; Indcondo simply failed to provide its counsel with instructions. Second, Low J held Indcondo had failed to explain its delay in moving to set the order side.

[17] Once Low J made her order, the First Fraudulent Conveyances Action was definitively dismissed. Indcondo did not appeal Low J's order.

[18] Even though it obtained the Section 38 order, Indcondo waited two years to commence the Section 38 Fraudulent Conveyances Action. In it, it makes identical claims as it had in the First Fraudulent Conveyances Action against the bankrupt, his wife and Cave Hill, the successor to the numbered company which had been the corporate defendant in the First Fraudulent Conveyances Action.

41 As noted above, motions to dismiss this action on limitations grounds, initially granted by Morawetz J., and as an abuse of process, initially granted by Mesbur J., were overturned by the Court of Appeal for Ontario.

42 With that background to set the context, I will now turn to the major issues in dispute.

The Impugned Transactions

1. The Law of Fraudulent Conveyances

43 The *Fraudulent Conveyances Act*, R.S.O. 1990, c. F-29, provides, in s. 2:

> Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such other persons and their assigns.

44 Thus, in order for this section to apply so as to void a transaction, there must be:

(a) a "conveyance" of property;

(b) an "intent" to defeat; and

(c) a "creditor or other" towards whom that intent is directed,

see *Bank of Nova Scotia v. Holland*, [1979] O.J. No. 1190 (Ont. S.C.) at para. 12.

45 The courts have interpreted the words "or others" broadly to include potential beneficiaries under a guarantee (where demand has not been made) and subsequent creditors. Indeed, courts have found that, in some circumstances, it is not necessary for there to be any creditors at all at the time of a transaction in order to conclude that it was done with the intent to defeat creditors.

46 Galligan J. held in *Bank of Nova Scotia*, *supra*, that, although the holder of a guarantee upon which no demand has been made may not be a "creditor," the beneficiary of a guarantee is an "other" within the meaning of s. 2 and entitled to the protection of the *Act*. He cited May's *Laws of Fraudulent and Voluntary Conveyances*, 3rd ed. at p.2:

> The words "creditors and others" are wide enough to include any person who has a legal or equitable right or claim against the grantor or settler by virtue of which he is, or may become, entitled to rank as a creditor of the latter.

47 Is also not necessary for a party, in attempting to impeach a conveyance, to demonstrate that it had an actual debt owing to it at the time of the conveyance. In *Beynon v. Beynon*, [2001] O.J. No. 3653 (Ont. S.C.J.), the court noted that "creditors and others" is broad enough to contemplate a person who, while not a creditor at the time of the conveyance, may become one in the future.

48 If there was an intention to defeat creditors, then it does not matter whether it was to defeat present or future creditors, see *Canadian Imperial Bank of Commerce v. Boukalis*, 1987 CarswellBC 513 (B.C. C.A.). If an intent to defraud existed at the time of the conveyance, it does not matter that the person attacking it was not a creditor at the time, *IAMGOLD Ltd. v. Rosenfeld*, [1998] O.J. No. 4690 (Ont. Gen. Div.).

49 The *Fraudulent Conveyances Act* was enacted to prevent fraud. It is remedial legislation and must be given as broad an interpretation as its language will reasonably bear. The purpose of the *Act* was expressed by Prof. Dunlop in *Creditor-Debtor Law in Canada*, 2nd ed. at p. 598:

> The purpose of the Statute of Elizabeth and of the Canadian Acts based on it, as interpreted by the courts, is to strike

down all conveyances of property made with the intention of delaying, hindering, or defrauding creditors and others except for conveyances made for good consideration and bona fide to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally.

50 Prof. Dunlop also considered the judicial difficulties in establishing fraud by ascertaining the state of mind of the debtor; that is, the dominant motive for effecting the impugned transaction. In the absence of direct evidence of intent, he said, "courts have been ready to rely on the surrounding circumstances as establishing *prima facie* the intent to defraud or delay... the so-called badges of fraud being nothing more than typical and suspicious fact situations which may be enough to enable the court to make a finding."

51 In most cases, a finding concerning the necessary intention to defeat creditors cannot be made except by drawing an inference from the circumstances. If existing creditors are well secured, it may be that one is unlikely to infer that the conveyance was made in order to defeat them. Of course, the time for considering intent is the time of the conveyance, *Canadian Imperial Bank of Commerce v. Boukalis*, *supra*, at p. 4.

52 The badges of fraud derive from *Twyne's Case, Re* (1601), 76 E.R. 809 (Eng. K.B.). As interpreted by modern courts, the badges of fraud include:

(d) the donor continued in possession and continued to use the property as his own;

(e) the transaction was secret;

(f) the transfer was made in the face of threatened legal proceedings;

(g) the transfer documents contained false statements as to consideration;

(h) the consideration is grossly inadequate;

(i) there is unusual haste in making the transfer;

(j) some benefit is retained under the settlement by the settlor;

(k) embarking on a hazardous venture; and

(l) a close relationship exists between parties to the conveyance.

53 The badges of fraud represent evidentiary rules developed over time which, when considered in all the circumstances, may enable the court to make a finding unless the proponents of the transaction can explain away the suspicious circumstances. Is clear that the legal or persuasive burden to prove the case remains on the plaintiff throughout the trial. Nevertheless, the plaintiff may raise an inference of fraud sufficient to shift the *evidentiary* burden to the defendant if the plaintiff can establish that the transaction has characteristics which are typically associated with fraudulent intent. Proof of one or more of the badges of fraud will not compel a finding for the plaintiff but it may raise a *prima facie* evidentiary case which it would be prudent for the defendant to rebut.

54 The leading articulation of this burden was set out in *Koop v. Smith* (1915), 51 S.C.R. 554 (S.C.C.), where Duff J. held:

I think the true rule is that suspicious circumstances coupled with [a close] relationship make a case of *res ipsa loquitor* which the tribunal of fact may and will generally treat as a sufficient *prima facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact.

55 Kruzick J. put the matter succinctly when he said, in *Beynon*, *supra*, at paras. 49 and 52:

> I am mindful of the fact that I must be very careful to avoid using the badges of fraud doctrine mechanically... fraudulent assignment depends not so much on the tally of "badges" but upon the view of all the facts...
>
> Although the primary burden of proving the case remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances, there is an [evidentiary] onus on the defence to adduce evidence showing an absence of fraudulent intent.

56 The transfer of property to a person in a close relationship is, of course, itself a badge of fraud. In such cases the testimony of the parties as to their subjective intent must be scrutinized with care and suspicion; it is very seldom that such evidence can be safely acted upon as in itself sufficient. In cases involving a transfer to near relatives, as matter of prudence the court should most often require corroborative evidence of the bona fides of the transaction.

57 At the end of the day, however, the court must act on such a preponderance of evidence as to show whether the conclusion the plaintiff seeks to establish is substantially the most probable of the possible views of the facts; mere suspicion is not sufficient, *Clark v. R.* (1921), 61 S.C.R. 608 (S.C.C.), at 616.

58 This raises the question of the standard of proof in fraudulent conveyance actions. Different submissions were made on this issue at the close of trial. The plaintiff says the standard of proof in a fraudulent conveyances action is, like any civil action, on a balance of probabilities. The defendants argue that a higher standard must be met in quasi-criminal cases where allegations of serious misconduct, like fraud, are alleged.

59 The Supreme Court of Canada in *C. (R.) v. McDougall*, [2008] 3 S.C.R. 41 (S.C.C.) put this issue to rest. That case involved a civil action for damages for sexual assault. Although some cases involve more serious consequences by the nature of the allegations made in them, the seriousness of the allegations does not alter the standard of proof in civil cases. The majority held that there is only one standard of proof in all civil cases and that standard is 'proof on a balance of probabilities.'

60 Finally, I should comment on the expert evidence. Both parties filed expert reports from accountants on the transactions in issue and the flow of funds associated with those transactions. Both sides objected to the other expert's evidence, essentially on the grounds that their opinions exceeded their area of expertise and extended into purporting to answer the very question for the court in this case — were these transactions done with fraudulent intent?

61 I allowed the testimony of both experts into evidence, indicating that the objections could be revisited in argument and would go to weight. Both were cross-examined on their reports. In the end, little reference was made to the testimony of the experts in argument.

62 I found the factual presentation and organization of both experts helpful but I also found they both were, in effect, trying to answer the very question that must be addressed by the court in this case. As such, in the end, while I found the methodology helpful in parsing the transactions, I gave their conclusions little if any weight.

2. The Formation of Cave Hill Properties Limited

63 The evidence is somewhat vague on this issue but sometime in 1987, Sloan decided to cash in his Magna shares (issued at the time of the acquisition by Magna of Unimade), reacquire Unimade from Magna and leave his employment at Magna to run Unimade.

64 Sloan used the proceeds of the sale of his Magna shares, and other funds he had accumulated to that point, to purchase Unimade and to acquire the Hill 'N' Dale property. The manner in which these transactions were structured is controversial. I will begin by explaining how Cave Hill Properties Limited came to be.

65 Sloan incorporated 723938 Ontario Limited (938) in June, 1987. In December 1987, Sloan transferred his shares in 938 to Valerie Sloan and executed a declaration of trust in respect of those shares. Thus, from December 1987 forward,

Valerie was the sole shareholder of 938.

66 When Unimade was set up in 1966, it acquired property in Vaughan from which Unimade's business (the supply of structural steel) was run. This was known as the Bowes property. In 1974, Unimade, including the Bowes property, was acquired by Magna. In 1987, 938 acquired the Bowes property from Magna for about $1.4 million. A vendor takeback mortgage was granted by Magna to 938 for the full amount. The mortgage payments were made by 938 from the proceeds of rents charge to tenants of the Bowes property.

67 938 leased the Bowes property to Unimade at market rates until Unimade ceased operations following the recession in 1991/1992. After that, 938 leased the Bowes property to a third-party and eventually sold it, in 1999, to another third-party for $2.5 million.

68 In the course of these activities, 938 changed its name to Cave Hill Properties Limited and later, in 1996, amalgamated with other companies owned by Valerie to form the current Cave Hill entity.

69 David Ford was called to the Bar in 1981 and practised corporate commercial, real estate and tax law as an in-house lawyer with Magna throughout the 1980s. While at Magna, he worked closely with Sloan, Bruce Pender and other senior officers of Magna.

70 Ford started providing tax consulting and estate planning advice to Sloan, Valerie and Mr. Pender in the early 1980s. He testified that in about 1987, Sloan told him that, since he accumulated considerable assets, Sloan wanted his family to have their own "nest egg" independent of his assets. Sloan told Ford that the Hill 'N' Dale property, which was acquired in December 1987, could serve the purpose of building that "nest egg." Ford told Sloan that he should enter into a nominee and trustee agreement to confirm that Sloan was holding title to Hill 'N' Dale as a nominee/bare trustee and that the beneficial owner should be a separate legal entity owned by Valerie so that all assets and liabilities would be contained in that entity.

71 Ford testified that in 1988, he became aware of an opportunity to reduce future potential taxable gains on the Hill 'N' Dale property by creating an immediate gain in a tax efficient manner, thereby increasing the cost base and reducing taxable gains from a future potential sale. The transaction required three clean shelf corporations which had been incorporated before Sloan became the registered owner of Hill 'N' Dale. Ford had incorporated three such shelf corporations for Magna on June 4, 1987 which, he knew, were surplus to Magna's needs. As a result, these were sold to Sloan for Magna's cost of incorporation. The companies were 721310 Ontario Inc. (310), 721311 Ontario Inc. (311) and 721312 Ontario Inc. (312). The shares of 311 were transferred to 310 and the shares of 312 were transferred to Valerie, all on the same day Sloan acquired these corporations in July 1988. The transfers were said to "have effect from" December 1987.

72 Ford's evidence was that the shares of both 310 and 312 were transferred to Valerie. Sloan's evidence, however, was that only shares of 312 were transferred to Valerie. In any event, the only documentation relating to the transfer of shares to Valerie that was produced at trial related to 312, which transfer took place on July 8, 1988.

73 Ford also gave evidence that, about the same time, Sloan entered into a nominee and trust agreement with 311 whereby Sloan remained the registered owner of Hill 'N' Dale as a nominee/bare trustee for 311. Sloan, he testified, could not have been the beneficial owner of Hill 'N' Dale, otherwise Valerie would not have been able to complete the tax transaction that ensued. No such nominee agreement, however, was available or produced at trial.

74 In essence, the 1988 tax transaction involved 311 (as beneficial owner) selling Hill 'N' Dale to 312 at its then fair market value in consideration for a note receivable, thereby creating a gain on the sale. The shares of 311 were then sold by 310 to a British Columbia numbered company which had accumulated tax losses. The net effect was that the British Columbia numbered company amalgamated with 311, thereby acquiring 311's taxable gain from the sale of Hill 'N' Dale. The British Columbia numbered company was able to offset that gain against its accumulated tax losses. These transactions were negotiated and completed for valuable consideration with an arms' length third party represented by counsel at Smith Lyons who, Ford testified, conducted thorough due diligence, including confirming that 311 held *bona fide* beneficial ownership of Hill 'N' Dale when it was sold to 312.

75 As a result of these transactions, 312 owed 310 approximately $5 million on the purchase of Hill 'N' Dale (represented by a note receivable) and 312's adjusted cost base of the Hill 'N' Dale property was now based on the 1988 purchase price at

fair market value. In 1996, 310, 312 and Cave Hill amalgamated forming the "new" Cave Hill. This had the effect, among other things, of eliminating the note receivable owing from 312 to 310.

76 Valerie has remained the sole shareholder of 312 and Cave Hill throughout. Mr. Pender is the manager of Cave Hill's assets and is paid a fee for his services in that regard. Sloan is an officer of Cave Hill but, since his bankruptcy in 2004, has not been a director. Cave Hill's assets are of considerable value and principally consist of an investment portfolio and the Hill 'N' Dale property, which has significant capital value and produces rental income. Distributions from Cave Hill, authorized by Valerie as the sole shareholder, essentially finance Valerie's care and Sloan's personal living expenses, as he has no assets of his own or other means of support.

3. The Bowes Property

77 The plaintiff attacks the transfer of the Bowes property on the following basis. Unimade was acquired from Magna with Sloan's assets. Sloan kept Unimade's shares in his name but put the Bowes property in the name of a holding company, 938, of which Sloan was the sole shareholder at the time. It was only a month later that Sloan transferred the shares of 938 to Valerie. Neither 938 nor Valerie paid any material consideration for the acquisition of the Bowes property.

78 After transferring the Bowes property to 938 and the shares of 938 to his wife, Sloan continued to treat the Bowes property as his own by causing Cave Hill to rent it to Unimade for more than $10,000 per month. When Unimade went out of business in 1992, Sloan negotiated the rental of the Bowes property to a third-party commercial tenant. In 1999, Sloan negotiated the sale of the Bowes property by Cave Hill for $2.5 million. The sale proceeds of the Bowes property were used by Cave Hill to purchase securities that form part of Cave Hill's investment portfolio. Sloan continues to derive benefit from these assets through the "largesse" of Valerie.

79 The plaintiff argues that this transfer exhibits several badges of fraud:

(a) it was made to a close relative;

(b) it was made without consideration;

(c) Sloan continue to use, or benefit from, the property post-transfer;

(d) Sloan had actual or potential liabilities on the date of the transfer; and

(e) the conveyance forms part of a pattern of conduct which resulted in essentially all of Sloan's assets being transferred to Valerie by the date of Indcondo's judgment for breach of the put/call agreement.

80 The plaintiff argues that these suspicious circumstances raise a *prima facie* evidentiary basis for an inference that the transaction was done with the intent to defeat creditors which the defendants are bound to rebut. Indcondo says the defendants have failed to do so.

81 As in so many cases involving alleged fraudulent conveyances, in this case a finding concerning the necessary intention to defeat creditors cannot be made except by drawing an inference from all of the surrounding circumstances. There is, for example, no explicit fraudulent act in the sense of evidence that a representation was made concerning the ownership of Sloan's assets to a creditor or potential creditor which was not true. As the cases make clear, I must be careful to avoid using the badges of fraud doctrine mechanically. A finding of fraudulent intent to defeat creditors depends not on a tally of "badges" - these are but part of the factual matrix from which inferences may be drawn - but upon an assessment of all the facts bearing on the question of fraudulent intent.

82 Taken alone, the mere fact that Sloan took title to this property in a company, the shares of which he transferred to his wife for no consideration, or even that Sloan now, with the benefit of hindsight, effectively controls the resulting asset due to his wife's stroke, would not be sufficient to conclude that the transfer was made with fraudulent intent.

83 Sloan was a wealthy businessman in 1987. While at Magna, he was extremely well paid. Although the details of his profit on the sale of his Magna shares in 1987 are vague, it is nevertheless clear that he did very well indeed. As well, Sloan was about to fulfill a longtime dream of running his own business, a successful business with which he was already extremely familiar. He was also an investor in an apparently successful real estate development company along with a number of very wealthy friends and acquaintances. If he wanted to establish a nest egg for his wife and children, he was entitled to do so provided it was not with the intent of defeating creditors.

84 Sloan and Valerie's protestations that, in transferring the property to 938 and 938's shares to Valerie, there was no thought of defeating creditors is, of course, of essentially no evidentiary value. This is a case where the testimony of the parties as to their subjective intent must be scrutinized with care and suspicion. As the authorities say, it is very seldom that such evidence can be safely acted upon as in itself sufficient. As matter of prudence, therefore, I should look for corroborative evidence of the *bona fides* of the transaction.

85 The critical issue, in my view, relates to whether there were "creditors or others" toward which a fraudulent intent to defeat was directed. That there were creditors or others in 1987 is, I think, beyond doubt. The real question in analyzing the inference the plaintiff seeks to draw is whether Sloan had any reason to think that, as a result of this impugned transaction, his potential future liabilities would probably exceed his ability to pay. That requires an analysis of Sloan's assets and liabilities, or potential liabilities, at the end of 1987 in the context of what he would reasonably have believed were his prospects at the time.

86 It is necessary to comment on the fact that a good deal of documentation that one would expect to have been produced in this litigation is not available. The plaintiff asks for adverse inferences to be drawn from Sloan's failure to produce, for example, more detailed evidence of his net worth, assets and liabilities, from the 1980s and early 1990s. Sloan's response to these allegations is simple: the plaintiff's claim was not instituted until four or five years after most of the relevant dates and, given the glacial pace of this litigation since 1992, documents have gone missing or were destroyed in the ordinary course.

87 There is much to be said for the defendants' position. It is easy, with the benefit of hindsight, to say that this or that document ought to have been produced. However, the lethargy which seems to have infected the plaintiff's prosecution of its claims could easily have contributed to a false sense of security. The loss of documents is just as prejudicial to the defendants as it is to the plaintiff. While it has made everyone's job more difficult in the context of this trial, I am not willing, in the circumstances of this case, to draw any adverse inferences from Sloan's inability to produce documents which, it is to be assumed, must have existed at the relevant time.

88 While not dispositive, it is relevant that the plaintiff was not a "creditor or other" in December 1987. The put/call agreement did not even exist until April 1990. Sloan owned a successful business, Unimade. It is unknown precisely what its assets and liabilities were in 1987 (apart from the transfer of the Bowes property) but there is no suggestion that its prospects were anything but excellent. Sloan had just sold his Magna shares for a substantial profit. Sloan's investment in Steeles-Jane was doing well. While its acquisitions were almost fully financed, the real estate market was, I find, still booming in 1987.

89 The plaintiff seeks to paint a picture of looming disaster in the 1987 to 1990 period - of a real estate market, and Steeles-Jane in particular, heading for a cliff. This, in my view, is an argument entirely constructed with the benefit of hindsight. While it is true that markets have cycles, downturns, like car accidents, cannot be foreseen. It seems obvious, after the fact, what happened but at the time, it is business as usual.

90 I find that in December 1987, Sloan's existing creditors were well secured. I do not think that Sloan reasonably believed, or ought reasonably to have believed, that giving title to the Bowes property to his wife's corporation would result in his inability to make good on his existing, or contemplated, financial obligations. I am therefore unable, on this evidence, to infer that the conveyance of the Bowes property was made with the intent to defeat Sloan's "creditors or others."

4. The Hill 'N' Dale Property

91 The Hill 'N' Dale property was acquired in December 1987 for $2.17 million. It was sold in April 1989 for $7.33 million (comprised of $3.6 million cash and a $3.73 million vendor takeback mortgage). The cash and mortgage were received by 312. The purchaser eventually defaulted on the mortgage. Cave Hill took foreclosure proceedings, as a result of

which Cave Hill re-acquired the Hill ‘N’ Dale property in November 1994 and continues to own it today.

92 The plaintiff argues that this transfer exhibits similar badges of fraud:

(a) it was made to a close relative;

(b) it was made without consideration;

(c) Sloan continue to use, or benefit from, the property post-transfer;

(d) Sloan had actual or potential liabilities on the date of the transfer;

(e) the destruction or disappearance of relevant documents concerning the transaction; and

(f) the conveyance formed part of a pattern of conduct.

93 A great deal of time was spent at trial and in argument on the series of transactions which took place between December 1987 and the summer of 1988, all focusing on the question of whether Sloan held the Hill ‘N’ Dale property as bare trustee or not. As of April 1989, however, there is no question that the benefit of Hill ‘N’ Dale property ownership — that is, the proceeds of sale — was transferred to Cave Hill.

94 What turns on all this is whether the gift of indirect beneficial ownership in the Hill ‘N’ Dale property to Valerie took place in December 1987 or April 1989. This seems to be viewed by the parties as important because it either places the transfer to Valerie earlier (and therefore further in time from the eventual falling out of the Steeles-Jane shareholders and the alleged real estate market reversal) or later (and, therefore, closer to those events).

95 If, of course, the transfer of sale proceeds to Cave Hill in 1989 was not done with fraudulent intent, then what happened earlier does not matter. However, since this is a case where inferences must be drawn from the surrounding circumstances, I will address both scenarios.

96 The plaintiff argues that the whole trust argument advanced by the defendants is a sham and an afterthought. The details of the trust agreement were not, it says, even pleaded and no mention of the trust’s details surfaced until shortly before trial, in the pre-filed evidence of Mr. Ford.

97 The plaintiff points to the lack of any nominee and trust agreement and to many of the “badges” described earlier — the fact that Sloan appears to have dealt with the property as if it were his own, etc.

98 The plaintiff also attacks Mr. Ford’s credibility, relying on his long relationship with Sloan, the alleged “back-dating” of documents, the fact that documents surfaced from Mr. Ford’s basement at the last minute and his behavior at trial generally. This is a reference to the fact that, following the completion of his testimony at trial, where the lack of documentation was repeatedly pointed out during his cross-examination, Mr. Ford searched an old precedent file in a box in his basement and located some documents relating to the 1988 tax loss transaction described above. He called Mr. Healey and was told to attend in court the next day with the documents so that Mr. Healey could review them. What transpired was a bizarre incident in which Mr. Zibarras chased Mr. Ford, and the documents, to Mr. Ford’s car parked on University Avenue in front of the court. At the lunch break, I was required to make a ruling on the street when the documents were being transferred from Mr. Ford’s car to the courtroom where they were to be reviewed by both parties.

99 While all of the details of the 1988 tax loss transaction were not pleaded, the essential fact, that Sloan acquired the Hill ‘N’ Dale property in trust for Valerie and that ownership ended up in 312, a company owned by Valeris, is pleaded. Mr. Ford is not a party and was not examined prior to trial. There is no doubt that documents one would expect to see, such as a nominee and trust agreement executed by Sloan, have not been produced. Mr. Ford testified that there would have been such a document and that it was essential to the transaction that neither Sloan nor Valerie personally held beneficial title to the Hill ‘N’ Dale property. While it is true that, for tax purposes, who beneficially owned the shares of 310 and 312 was not critical, Ford’s evidence was that the fundamental intent in 1987/1988 was that Valerie, through 312/Cave Hill, would have beneficial

title to Hill ‘N’ Dale; it was a secondary purpose to reduce future tax liabilities on a sale of Hill ‘N’ Dale through the tax loss transaction, the result of which was to boost the adjusted cost base of the Hill ‘N’ Dale property in Cave Hill’s hands.

100 While it is true that the two issues, whether Sloan held title in trust and the tax loss transaction, are not *necessarily* related I find, as a fact, that they *were* related in this case. In other words, the intent of the tax loss transaction was not only to achieve a desirable tax outcome regardless of who held the ultimate beneficial interest in Hill ‘N’ Dale but a tax benefit for 312, the shares of which were held by Valerie from the date of its acquisition.

101 The plaintiff attacks the 1988 tax transaction on essentially two levels. First, it argues that the tax transaction did not, in fact, confer title on 312. Secondly, the plaintiff argues that even if the tax transaction settled beneficial title in Hill ‘N’ Dale on 312, it was a sham; that is, a transparent attempt to defeat creditors.

102 I do not think the first argument can be sustained. The plaintiff’s main argument on this issue rests on the fact that no nominee/bare trustee agreement has been produced and that 310 shares were not owned by Valerie at the time of the transaction. The agreement of purchase and sale and the bill of sale describe Sloan as the purchaser of Hill ‘N’ Dale “in trust.” Registered title was taken in Sloan’s name. The deed and land transfer tax affidavit do not mention any trust. However, within months of the acquisition, Sloan and Ford initiated the tax transaction, the ultimate result of which was to put beneficial ownership of Hill ‘N’ Dale into 312. Ford testified that there would have been a nominee and trust agreement. He said it was necessary for the deal that title be transferred to 312, not Sloan.

103 The plaintiff argues that Mr. Ford is not credible. While I agree with the plaintiff’s general observation that Mr. Ford is not independent and that he shaded his evidence in an effort to help his old friend, on this point I find Mr. Ford’s evidence credible. I say this for several reasons.

104 First, this was the type of deal Mr. Ford was used to doing at Magna. He had experience and expertise in this area. A nominee trust agreement was, he said, a typical and necessary feature of these types of deals. Second, and more importantly, the tax transaction involved a third-party, materially adverse in interest to Sloan and the 300-series companies. The B.C. tax loss corporation was independently represented by Smith Lyons, a law firm also experienced in these types of deals. In order for everyone to get what they bargain for, Sloan could not have been the beneficial owner of Hill ‘N’ Dale. Is clear, therefore, that if legal title remained with Sloan, it was because beneficial ownership clearly and unambiguously rested first with 310/311 and, post-transaction, with 312.

105 I do not think Mr. Ford intentionally sought to conceal relevant documents. Issues raised during his cross-examination prompted him to search an old precedent file in his basement. He found exhibits 11 and 12. He brought these to court to show Mr. Healey. During that process, plaintiff’s counsel got wind of these new documents and aggressively sought access to them. I fault no one for this but Mr. Ford was “spooked” by plaintiff’s counsel and took the documents back to his car. His stated purpose in doing so was to enable Mr. Healey to review them in private (and because he had to put more money in his parking meter). My ruling during the trial required the documents to be retrieved and brought into court, where they were reviewed by Mr. Healey and, ultimately, all provided to plaintiff’s counsel. They were marked as exhibits in the trial and subject to subsequent cross-examination. The documents show the continuation of what we had seen earlier; Sloan signed documents on behalf of the companies, etc. The new documents, however, are not dispositive of any specific issue in dispute

106 It is true that all of the documents were not perfectly organized or entirely consistent through the process of acquiring Hill ‘N’ Dale in 1987, transferring it to 312 in 1988 and selling it in 1989. However, as Hunt J. said in *Royal Bank v. Thiessen*, [1981] M.J. No. 45 (Man. Q.B.) at para. 12, “Financial arrangements between husband and wife are often not documented as thoroughly as they are between people acting at arms’ length. This does not mean they are not real or that they should not be accepted as factual, or bona fides.”

107 In all of the circumstances, I find that Sloan held legal title to Hill ‘N’ Dale in trust for Valerie. He was not holding title in trust for himself and there was a known, intended beneficiary in his wife, Valerie. While the exact form of that trust was not determined until several months later, the intention was, I find, that Valerie was to hold the ultimate beneficial interest. The delay in implementing that intent was to enable Mr. Ford to structure the transaction in a way that would reduce exposure to tax on any future sale.

108 The plaintiff's second argument rests on the proposition that, in the course of acquiring the Hill 'N' Dale property, Sloan converted his own asset, i.e. money, into an asset beneficially owned by Valerie, i.e., the Hill 'N' Dale property. This transaction was to a closely related party for no consideration. Sloan's subsequent dealings with the property, including to the present, is said to show that he continued to derive benefit from and, to some extent, control this property. These are suspicious circumstances which warrant careful scrutiny.

109 In my view, as with the Bowes property, the issue of whether there was fraudulent intent to defeat creditors in December 1987 essentially turns on the question of whether Sloan ought reasonably to have understood that conveying Hill 'N' Dale beneficially to Valerie was likely to result in his inability to meet his obligations to others as they fell due.

110 The analysis of this issue is similar to the analysis of the Bowes transaction. I am unable to conclude, on the evidence, that in buying the Hill 'N' Dale property for Valerie, Sloan intended, or reasonably ought to have been concerned, that in doing so he would defeat creditors.

111 Indcondo was not a creditor in December 1987. The put/call agreement would not exist for several years into the future. The banks were clearly creditors of Steeles-Jane and Sloan was bound by personal guarantees to cover Steeles-Jane's indebtedness. However, in 1987 and 1988, there is no evidence that Steeles-Jane was in, or heading for, trouble. There is no evidence that the market was turning or that Sloan was embarking on a new, uniquely risky, venture. There is no evidence that any creditor relied on Hill 'N' Dale specifically as security for Sloan's current or possible future obligations.

112 The plaintiff argues that when you take away the investment portfolio and the Hill'N'Dale property, there are no assets remaining to satisfy Sloan's creditors. On this basis, the plaintiff argues that Sloan must have intended that these transfers would leave his creditors with nothing. The flaw in this argument, however, is that it is based entirely on hindsight. In fact, in 1987/88 I find, these assets represented a relatively small proportion of what Sloan would reasonably have believed to be his net worth. To all intents and purposes, Sloan was flying high in 1987/88. He cashed in his Magna investment, acquired Unimade for his own and appeared to be heading for substantial profits arising out of Steeles-Jane's real estate development activities. The plaintiff's argument requires assuming that the failure of Steeles-Jane and Unimade were reasonably foreseeable by Sloan in 1987, 1988 and 1989. I do not think the evidence supports that assumption. The acquisition of the Hill 'N' Dale property beneficially for Valerie was, therefore, not done with intent to defeat Sloan's creditors.

113 If I am wrong in the conclusion that Valerie beneficially owned Hill 'N' Dale and, in fact, Sloan remained the beneficial owner of Hill 'N' Dale until it was sold on April 6, 1989, there remains the question whether, when Hill 'N' Dale was sold, the transfer of the proceeds of that sale to 312 (both cash and vendor takeback mortgage) itself represents a fraudulent conveyance.

114 There are three main factors said to have changed between December 1987 when the Hill 'N' Dale property was acquired and April 1989 when it was sold. First, by year-end May 1989, Steeles-Jane's balance sheet had changed. As of May 31, 1989, Steeles-Jane had assets of about $70 million, including over $40 million of property held for resale or future development. Steeles-Jane had liabilities of almost $67 million with retained earnings of some $3.8 million. The value of Sloan's stake in Steeles-Jane had grown but so had his potential liabilities. April 1989 is only about a year before the put/call agreement was reached, in the period of time Di Poala claims to have been giving dire warnings to the other shareholders of their possible exposure to a downturn and expressing his desire to be cashed out of Steeles-Jane. Finally, 1989 is when Di Poala says the market started to turn.

115 In essence, the plaintiff argues that by April 1989, there were more warning signs and that the potential exposure under Sloan's personal guarantees to the CIBC and the percentage of raw land held by Steeles-Jane (and therefore the more risky part of its real estate portfolio) had grown significantly. Thus, the plaintiff takes the position that by April 1989 Sloan could no longer reasonably have believed that giving his assets to Valerie would not adversely affect his ability to see that his creditors would be paid.

116 As mentioned earlier, the parties take diametrically opposed views of when the market started to turn and when the collapse of the market was reasonably foreseen or foreseeable. The anecdotal evidence of the parties I find entirely unhelpful. Both sides have their self-interested reasons for placing the downturn earlier or later than the other. Neither party called any expert evidence on this issue. In my view, the best evidence of the buoyancy of the Toronto real estate market has to be taken

from the objective evidence of third-party transactions involved in this case.

117 The reporting package to shareholders of Steeles-Jane dated October 25, 1989 shows, as indicated earlier, established equity of almost $48 million, leaving aside budgeted gains on unserviced land. This approach appears to be consistent with the manner in which Indcondo's shares were valued for the purposes of the put/call agreement.

118 In April 1990, a year after the sale of Hill 'N' Dale and the transfer of the proceeds to 312, Indcondo's 10% was agreed to be worth about $5 million, suggesting an underlying assumed net equity value of Steeles-Jane of $50 million. Indcondo is the only shareholder ever to receive a net equity return on its shares in Steeles-Jane. Had the business been in trouble, or on the known brink of trouble, as Di Poala alleges, it is inconceivable to me that all the other shareholders of Steeles-Jane would have agreed in April 1990 to a buy out for Di Poala at a price representing a *net equity value* of Steeles-Jane of $50 million.

119 Further, this value suggests an assumed net equity value of Sloan's 20% interest in Steeles-Jane of $20 million. Thus, in April 1990, Sloan would reasonably have believed based on the market values of the underlying assets, that, after all Steeles-Jane's lenders had been paid, his interest in Steeles-Jane would still have had very substantial value indeed.

120 In addition, in 1988, post-purchase of Hill 'N' Dale, Sloan and Ford thought it worth paying a substantial fee of some $133,000 to structure a transaction the entire purpose of which was to realize current gains against a future sale. This suggests an anticipation that the value would continue to grow. And, in fact, it did grow - the April 1989 sale of the Hill 'N' Dale property to HTB (an arms' length transaction) resulted in a gain of over $5 million over the 1987 purchase price.

121 The put/call agreement was not signed until April 1990. The initial scheduled transaction posed no problem for Alfano and Rinomato, the intended purchasers of Indcondo's Steeles-Jane shares. Indcondo's October 1990 put also resulted in the scheduled purchases by Alfano and Rinomato, albeit some portion of payment for which was later than originally contemplated.

122 It was not until November 1990 that Alfano and Rinomato gave indemnities to Sloan and not until April 1991 that Alfano and Rinomato defaulted on their scheduled purchases of Indcondo's Steeles-Jane shares. It was not until March 1992 that Indcondo served notice of its intention to require Sloan to purchase all of Indcondo's Steeles-Jane shares and only in April 1992 that Indcondo commenced an action to enforce this obligation (an action in respect of which it did essentially nothing for four years).

123 Another factor worthy of consideration in the analysis of this issue is the timing of Di Poala's release from his own personal guarantees of Steeles-Jane's indebtedness to its lenders. As noted in the put/call agreement, Indcondo and Di Poala had provided guarantees to various mortgagees in the amount of $22.8 million and to CIBC for $5.5 million (10% of $55 million). As of April 6, 1990, there was approximately $37.2 million of indebtedness owed to the CIBC (10% of which was $3.72 million).

124 Under the put/call agreement, Steeles-Jane agreed to use its best efforts to obtain releases for Indcondo and Di Poala from their guarantees to the lenders and indemnified Indcondo and Di Poala in respect of all guarantees given by them.

125 The evidence was that sometime after April 6, 1990, Di Paola and Indcondo were, in fact, released by the lenders from the obligations under their guarantees. There was no evidence provided about the specific timing or circumstances of obtaining these releases. However, it seems to me inconceivable that, if there had been any hint of Steeles-Jane's financial difficulty or possible inability to discharge its debts to the financial institutions, the release of Indcondo and Di Poala's guarantees could have been obtained in any circumstances.

126 Accordingly, the only possible inference from the lender's conduct in agreeing to release Indcondo and Di Poala from their guarantees is that by, at least April 6, 1990, and most likely for some time after that, Steeles-Jane's creditors were satisfied with Steeles-Jane's balance sheet and unconcerned about the sufficiency of their security for Steeles-Jane's obligations.

127 In my view, on the evidence, the earliest sign of market difficulty can be placed no earlier than November 1990, a year and a half after 312 received the benefit of the proceeds of sale of the Hill 'N' Dale property. At the time of that transfer

in April 1989, therefore, Sloan had every reason to believe, reasonably, that the transfer of the benefit of the sale of Hill 'N' Dale to 312/Cave Hill would not impair his ability to make good on his other financial obligations.

128 For these reasons and those previously stated, I do not think Sloan could be said to have had the required intent to defraud creditors in April 1989. I therefore find that, even if Sloan remained the owner of the Hill 'N' Dale property until it was sold in April 1989, the transfer of the proceeds of that sale to 312 was not done with the intent to defraud creditors.

5. The Riverside Property

129 Sloan and Valerie purchased 42 Riverside as joint tenants in August 1989. Their prior home was also owned in joint tenancy. On July 8, 1992, Sloan conveyed his 50% interest in 42 Riverside to Valerie.

130 The context for this transaction is materially different from those discussed above. By at least early 1991, Alfano and Rinomato defaulted on their obligation to purchase Indcondo's shares in Steeles-Jane. Indcondo served notice of its call on Sloan to acquire its shares in March 1992. When the shares were not purchased, Indcondo issued a statement of claim in May 1992. The details are vague but it is known as well that somewhere between 1990 and 1992, CIBC, the Royal Bank of Canada and the Bank of Nova Scotia began "putting pressure" on Sloan in respect of his personal guarantees. The Royal Bank sued Sloan and apparently obtained judgment for $12 million in 1993. I find that this "pressure" likely became manifest in late 1991.

131 Sloan had initially transferred his interest in 42 Riverside to Valerie in 1990 for no consideration. He received advice later, however, that the transfer of this interest without consideration was liable to be set aside and so the transfer was reversed. By July 1992, the Bank of Nova Scotia was pressing Sloan for repayment of a $500,000 line of credit. Mr. Ford's evidence was that he discussed the matter with Sloan and Valerie. Valerie, he said, wanted to help Sloan was unwilling to mortgage 42 Riverside. Mr. Ford recommended pursuing a tax efficient transaction in which Valerie would acquire Sloan's interest in 42 Riverside in exchange for causing Cave Hill to pay off Sloan's Scotiabank indebtedness. Sloan and Valerie followed this advice.

132 Sloan and Valerie obtained an appraisal of 42 Riverside, valuing the property at $1,050,000. Cave Hill raised $500,000 by agreeing with HTB, the purchaser of the Hill 'N' Dale property, in exchange for a reduction of its vendor takeback mortgage to HTB of $900,000, to a prepayment on the mortgage of $500,000. This money was used to pay off Sloan's obligation to Scotiabank. The remaining $25,000 was paid to Sloan in cash. Title to Sloan's interest in 42 Riverside, therefore, passed to Valerie in exchange for consideration of half the appraised value, $525,000.

133 The plaintiff attacks the transfer of Sloan's interest in the matrimonial home on the basis that:

(a) the transfer was made to a non-arms' length person;

(b) consideration was inadequate or nonexistent;

(c) the debtor continued in possession of the property after the conveyance;

(d) there were actual and potential liabilities facing the transferor at the time of the transfer; and

(e) the transfer forms part of a pattern of conduct.

134 The defendants seek to justify this transaction on the basis that the defendants had a continuing intention to transfer Sloan's interest to Valerie since 1990 (that is, from before the market collapse) and on the basis that the transaction was done for valuable consideration.

135 I do not think the fact that an earlier attempt, perhaps in more favourable circumstances, to transfer Sloan's interest in 42 Riverside to Valerie can save the transaction from attack. The law is clear that the time for evaluating fraudulent intent is at the time of the impugned transaction. Thus, hindsight does enter into the analysis.

136 Sloan knew by July 1992 that he was in significant financial jeopardy, not only to the Bank of Nova Scotia but to Steeles-Jane's lenders, Unimade's lenders and, potentially, to Indcondo as well. He also knew that at least some of his others assets had been given to Valerie. In the circumstances, I can come to no other conclusion but that Sloan knew, or ought to have known, that the transfer of his interest in 42 Riverside to Valerie in 1992 would be likely to have a material adverse impact on his ability to pay his creditors. Indeed, in the circumstances, I find that this was the very reason the transaction was done.

137 This leaves the issue of consideration. The defendants say that Valerie, through her company, 312, paid valuable consideration to Sloan in the form of satisfaction of Sloan's obligation to the Bank of Nova Scotia. They argue that consideration cures all, rendering valid what would otherwise be an attack-able transaction. The plaintiff argues that there was no consideration at all or that, if there was any consideration, it was grossly inadequate. The plaintiff first argues that the assets of 312 were, in fact, Sloan's assets, such that Sloan simply paid himself funds for the reduction of the Scotiabank indebtedness. In the alternative, the plaintiff argues that, since 312 was itself on the hook to Scotiabank as guarantor of Sloan's indebtedness, the payment of $500,000 to the Bank of Nova Scotia was not consideration paid to Sloan for his half interest in 42 Riverside but, rather, a payment to reduce indebtedness of its own which 312 already had. The remaining consideration paid, $25,000 in cash, was grossly inadequate given the evidence of a valuation of the property at $1,050,000. Finally, the plaintiff argues that even with consideration, the 1992 transfer of Sloan's interest in 42 Riverside to Valerie constitutes, in the circumstances, a fraud on his creditors.

138 I am not persuaded by the plaintiff's first argument. For the reasons outlined earlier, I find that Valerie was the sole owner of 312 and, therefore, had the ultimate financial benefit of 312's assets. If Valerie wanted to spend 312's money bailing out Sloan from his personal financial difficulties, that was her prerogative. I accept that, absent the issue of fraudulent intent to defeat creditors, the deal as proposed by Mr. Ford was a valid one.

139 I agree, however, with the plaintiff's second and third arguments. On February 27, 1990, 312 executed an unlimited guarantee of Sloan's obligations to the Bank of Nova Scotia. The evidence is that Sloan was being pressed by the Bank of Nova Scotia in 1992 for payment of Sloan's obligations to the bank. While Valerie seeks to characterize 312's payment of $500,000 to the bank as consideration for Sloan's interest in the matrimonial home, in reality the payment was necessary to avoid 312's own liability under its guarantee. That payment, therefore, in the circumstances cannot be considered valid consideration for Sloan's half interest in 42 Riverside. The remaining aspect of the payment, $25,000, was grossly inadequate.

140 Even if 312's payment in respect of Sloan's obligation to Scotiabank could have been considered valid consideration for the transfer of Sloan's interest in the matrimonial home, in the circumstances that existed by mid-1992, I would have found the transaction invalid in any event.

141 This is because even where the court determines that there is good and valuable consideration, it may still find that the conveyance was fraudulent if:

(a) it was not done in good faith; and

(b) it was made to a person with knowledge of the debtor's intent to defraud.

142 Section 3 of the *Fraudulent Conveyances Act* provides that good consideration is a defence to a fraudulent conveyance action *provided that* the conveyance was done "in good faith to persons not having at the time of the conveyance to the person notice or knowledge of" the fraudulent intent. Given the close relationship Sloan enjoyed with Valerie, emphasized repeatedly throughout his evidence, and the extent of the business dealings in which Valerie was already engaged with the family unit's assets, it is inconceivable that Valerie was not aware of Sloan's financial problems by July 1992. I find that Valerie must have known that the chief purpose of the transfer of Sloan's interest in 42 Riverside was to protect their home against execution by Sloan's creditors.

143 For these reasons, I find that the transfer of Sloan's interest in 42 Riverside to Valerie in July 1992 was done with the

intent to defeat Sloan's creditors and must, on this basis, be set aside.

6. The Florida Condominium

144 Sloan purchased a Florida condominium in 1981 in his own name and using his own money. In 1993, Sloan conveyed 50% of his interest in this property to Valerie for no consideration. In April 1994, the condominium was sold for $275,000. The proceeds of sale went to Valerie personally or to Cave Hill. The explanation for this transfer at trial was simply that Valerie asked Sloan to do it this way.

145 In my view, the same analysis applying to 42 Riverside applies to the Florida condominium. The condominium was clearly Sloan's asset. The transfer of a half interest to Valerie in 1993 and the transfer of the entire proceeds of sale to Cave Hill (or Valerie) in 1994 were done at time when Sloan had been sued, not only by the plaintiff but by the Royal Bank of Canada as well. The badges of fraud in this case overwhelming point to fraudulent intent. The defendants have not overcome their evidentiary, or tactical, burden of providing a plausible explanation justifying the validity of this transfer.

146 For these reasons, the transfer of the proceeds of sale, in the amount of $275,000, to Cave Hill must be set aside. There being no evidence of the amount of any encumberance on this property, the full amount of the proceeds must be considered available for Sloan's creditors.

The Evidence of Tony Di Poala

147 The plaintiff's only other witness besides John Di Poala was his brother, Tony Di Poala. Tony gave evidence about a conversation he had with Sloan in September 1991, in which the subject of the plaintiff's pending action came up. During the conversation, Sloan is alleged to have said that he was taking steps to make himself judgment-proof, as were the other shareholders, and that this was what businessmen do when faced with threatened litigation.

148 I do not find this evidence to be especially probative or compelling. First, as John Di Poala's brother, Tony has an obvious "stake" in these proceedings; he is not an entirely independent witness. Second, this evidence involves events that happened 23 years ago. For this reason, I do not find either the specific content or the specific timing of the conversation particularly reliable. Most importantly, however, even if I were to accept Tony's evidence, it does little more than tend to corroborate conclusions I have already reached based on other, more objective evidence. The conversation, on Tony's own evidence, took place in the fall of 1991. The Bowes and Hill 'N' Dale property transactions had already taken place. At best, therefore, Tony's evidence is relevant to the transfers of 42 Riverside and the Florida condominium, which I have already found, on the basis of other evidence, were invalid as having been undertaken with the intent to defeat Sloan's creditors. For these reasons, I have placed little weight on Tony's evidence.

Piercing the Corporate Veil

149 The plaintiff also argues that, in addition to the specific transactions attacked under s. 3 of the *Fraudulent Conveyances Act*, it is entitled to trace all of Sloan's assets to Cave Hill in order to satisfy its judgment. The plaintiff claims, in the circumstances of this case, that it is entitled to pierce the corporate veil.

150 In essence, the plaintiff argues that Cave Hill has, since 1988, operated as little more that Sloan's personal bank account. Put simply, the plaintiff says that Sloan's name is all over Cave Hill's transactions since its formulation as 938 and 312. It was Sloan who, in reality, was the directing mind of Cave Hill's activities. All of Cave Hill's assets came from Sloan for no consideration. Yet now that Sloan is insolvent, these assets have been removed from the reach of Sloan's creditors. Even Sloan's consulting income in the 1990s was deposited into Cave Hill's account for no consideration. The assets of Cave Hill continue to provide the cash for money transfers to Sloan and Valerie's joint bank account, which funds all of not only Valerie's but Sloan's ongoing living expenses. Sloan does not even need, the plaintiff says, to go through the charade of having Valerie (as sole Cave Hill shareholder) authorize these transfers because, at least since Valerie's stroke, Sloan has held her power of attorney for property and Sloan's old friend, Mr. Pender, is the business manager of Cave Hill. Cave Hill is, argues the plaintiff, a flagrant abuse of the corporate form.

151 I take the definitive, and most current, formulation of the principles underlying when the corporate veil may be pierced from the decision of Sharpe J. (as he then was) in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1996 CarswellOnt 1699 (Ont. Gen. Div.) at paras. 22 and 23:

> ...the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently...
>
> The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights?"

152 Sharpe J. relied on the prior decision of the Ontario Court of Appeal in *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (Ont. C.A.), a decision of Laskin J.A., at p. 536:

> Generally, a subsidiary, even a wholly-owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

153 An appeal from the decision of Sharpe J. was dismissed by the Court of Appeal in a brief endorsement at 1997 CarswellOnt 3496 (Ont. C.A.). See also *642947 Ontario Ltd. v. Fleischer*, [2001] O.J. No. 4771 (Ont. C.A.) at para. 68.

154 In my view, the corporate veil argument adds nothing to the analysis of the situation here. The corporate veil argument cannot succeed separate and apart from the issue of fraudulent conveyances.

155 I say this because, while I would be prepared to accept that Sloan sufficiently dominated the affairs of Cave Hill to meet the first part of the test, the basis for the alleged fraudulent conduct which has deprived the claimant of its rights under the second part of the test is the same conduct on which the plaintiff relies to set aside the impugned transfers as fraudulent conveyances of property dealt with earlier in these Reasons. Thus, the corporate veil argument adds nothing and has no effect apart from the specific transactions which are under attack and which have been dealt with on their own merits.

156 For this reason, I dismiss the plaintiff's claims relating to piercing the corporate veil.

The Defence of Laches

157 Laches is an equitable doctrine, akin to estoppel, founded on the principle that one is obliged to assert legal rights in a timely way or risk losing them. Laches is a form of equitable limitation period. Two factors dominate the consideration of this doctrine:

> (1) delay and its circumstances; and
>
> (2) prejudice resulting from that delay.

158 In *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 (Ontario P.C.), at 239 -240 the principle was stated as follows:

> ...[it] is not an arbitrary or technical doctrine... Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

159 The Supreme Court of Canada discussed these critical factors in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at pp. 77-78:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches... Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

160 In this case, the defendants argue that the plaintiff's action should be dismissed on the basis of laches. The defendants argue that there has been inordinate delay (now 23 years) and prejudice resulting from that delay. The prejudice, it is said, is the presumed prejudice of fading memories over time and the loss or destruction of relevant documents.

161 In respect of the delay, the defendants rely, among other things, on the conclusions of Mesbur J. in her ruling of August 30, 2011 in this case when she said:

> When I look at all the facts of this case and its tortured history, I can come to no other conclusion than that it is an abuse of the court's process. I cannot see how Indcondo can purport to pursue the identical claims yet again, particularly in light of its inordinate delay.

162 I note, however, that central to Mesbur J.'s conclusion in this ruling was the finding that the plaintiff's action was an abuse process — a conclusion founded on the further conclusion that the plaintiff's claim was precluded by the principle of issue estoppel. That central finding on issue estoppel was, however, reversed by the Court of Appeal, which found that, because in *this* case the plaintiff stood in the shoes of the Trustee, it was not seeking to re-litigate earlier, dismissed claims which had been advanced by the plaintiff in its own capacity.

163 Nevertheless, I would be prepared to conclude that the plaintiff has been guilty of inordinate delay in the prosecution of its claims, whether or not those claims are asserted on its own behalf or standing in the shoes of the Trustee. This finding alone, however, as noted above, is insufficient to support a claim of laches. The defendants must also prove circumstances, such as irredeemable prejudice, which show that the continued prosecution of this action is unreasonable. The defendants have failed to do so in this case.

164 In my view, the prejudice relied on — fading memories and loss of documents — lacks sufficient specificity. While the plaintiff is unquestionably guilty of delay, all parties must take some responsibility for aspects of the more than 23 years which has elapsed since the relevant events. More importantly, while Sloan makes the generic claim that documents were lost or destroyed in the usual and ordinary course of business, there is no evidence of specific documents being destroyed at specific stages of the proceeding as a result of the plaintiff's delay. The relevant property transfers took place between 1987 and 1989. Sloan was first notified of claims in early 1992. Sloan has failed to give any content to the generic complaint that documents that would have been helpful to him were lost or destroyed before that point in time. Since then, while there have been long periods of inactivity on the plaintiff's part, only a fool would have jettisoned important documents with litigation hanging over his head. The fact that Mr. Ford (while not a party nevertheless a friend of Sloan's) produced documents at the eleventh hour also casts some doubt on the rigor with which Sloan fulfilled his document production obligations. While I am sympathetic to the defendants' plea that adverse inferences ought not to be drawn from the loss or destruction of relevant document in the circumstances of this case, the evidence does not rise to the level of proof of acquiescence or actual, material prejudice sufficient to support a claim of laches. For these reasons, the defendants' argument for the dismissal of this action on the basis of laches is dismissed.

CPL Motion

165 The defendants had a pending motion before this court to set aside an *ex parte* order for a certificate of pending litigation based on alleged incomplete disclosure by the plaintiff. This motion, it seems, was overtaken by other events including the two motions to dismiss the action, and the two trips to the Court of Appeal, and the case management order of

D. Brown J., which suspended all motions and reserved this issue to trial.

166 The *ex parte* motion was for an interlocutory order, the sole purpose of which was to prevent the dissipation of assets in dispute pending the trial of this action. There has now been, of course, a full hearing on the merits of the plaintiff's claims and, subject to rights of appeal, a final determination of those claims. In my view, therefore, the issue of the sufficiency of the evidence on the plaintiff's *ex parte* motion for a CPL is now moot. I therefore find it unnecessary to rule on the defendants' motion to set aside the CPLs. Any CPL affecting Hill 'N' Dale must and shall be discharged. Any CPL affecting 42 Riverside has been superceded by my judgment.

167 Should there be an appeal, any further motions to preserve assets pending appeal will have to be brought on fresh evidence which would include the evidence adduced at trial.

Costs

168 Any party seeking its costs shall do so by filing a written submission, not to exceed five typed, double-spaced pages, together with a Bill of Costs and supporting documents, within 21 days of the release of these Reasons. Anyone wishing to respond to such a request shall do so by filing a written response, subject to the same page limit, within a further 14 days.

Action allowed in part.

2015 ONCA 752
Ontario Court of Appeal

Indcondo Building Corp. v. Sloan

2015 CarswellOnt 16689, 2015 ONCA 752, 259 A.C.W.S. (3d) 691, 31 C.B.R. (6th) 110

Indcondo Building Corporation, Plaintiff/Appellant/Respondent in Cross-Appeal and Valerie Francis Sloan, David Robin Sloan and Cave Hill Properties Ltd., Defendants/Respondents/Appellant in Cross-Appeal

G.R. Strathy C.J.O., E.E. Gillese, R.A. Blair JJ.A.

Heard: October 19, 2015
Judgment: November 5, 2015
Docket: CA C59303

Proceedings: affirming *Indcondo Building Corp. v. Sloan* (2014), 2014 ONSC 4018, 121 O.R. (3d) 160, 16 C.B.R. (6th) 220, 2014 CarswellOnt 10946, Penny J. (Ont. S.C.J.)

Counsel: Trung Nguyen, for Appellant
Philip Healey, for Respondents

***Per curiam*:**

1 Following oral argument, we dismissed the appeal and cross-appeal with reasons to follow. These are those reasons.

2 The appellant sought to set aside four transfers of property pursuant to the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F-29, in order to satisfy a judgment it obtained against the respondents in 2001. The action was twice dismissed prior to trial, first on a limitations issue and second as an abuse of process. Both orders were reversed by this court and the matter went to trial.

3 Success was divided. The trial judge found that the respondent Sloan's conveyances in 1987 and 1988 to his wife and her company were not made with intent to defraud his creditors. He found, however, that transfers of the matrimonial home and a Florida property between 1992 and 1994 were made for that purpose, and set them aside.

4 The trial judge's analysis hinged primarily on his determination of when Sloan knew he was in financial trouble. He found the conveyances in 1987 and 1988 occurred at a time when Sloan could not reasonably have known that they would impair his ability to discharge his financial obligations. By 1992, however, his circumstances had changed. He knew that he was in significant financial jeopardy. The circumstances surrounding those transactions pointed to a fraudulent intent.

5 The trial judge also dismissed the appellant's claim to pierce the corporate veil of the wife's company and dismissed the respondents' defence that the action should be dismissed on the basis of the doctrine of laches.

6 The appeal and cross-appeal impugn the trial judge's findings of fact. This was a case in which the documentary and testimonial evidence suffered from some infirmities due to the passage of time. The trial judge was in the best position to consider and weigh all that evidence, recognizing the challenges faced by both parties. His findings were based on inferences he drew from the evidence, and from the lack of evidence, and on his assessment of the credibility of the witnesses. They are supported by that evidence. We are not persuaded that the trial judge made a palpable and overriding error in any of his

factual findings.

7 In attacking the 1987 and 1988 conveyances, the appellant says the trial judge should have found the trust arrangements were a "sham", relying on *Duca Financial Services Credit Union Ltd. v. Bozzo*, 2011 ONCA 455, 68 E.T.R. (3d) 1 (Ont. C.A.). It says that on the trial judge's findings, Sloan maintained control of his wife's company, and this is inconsistent with having parted with the beneficial interest in the properties.

8 We do not accept this submission. Although the *Duca* case was not brought to the attention of the trial judge, he addressed the argument that the transactions were shams and found otherwise. Indeed, in both cases, based on Sloan's evidence and that of his lawyer, the trial judge found that the appellant had failed to establish that the conveyances were made with fraudulent intent. The trial judge recognized that the documentation was not as complete as it might have been, but observed this did not mean the transaction was lacking in good faith.

9 Applying the principles from *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), at pp. 433-34, affirmed by [1997] O.J. No. 3754 (Ont. C.A.), the trial judge concluded that the corporate veil argument could not succeed separate and apart from the issue of the fraudulent conveyances. He was willing to accept that Sloan dominated the affairs of his wife's company to bring it under his complete control. He noted, however, that the second part of the test — "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights" — had not been met. The conduct upon which the appellant relied was the same conduct it relied upon to set aside the transactions as fraudulent conveyances. Thus, the corporate veil argument did not add anything to its attacks of the specific transactions, which he had already dismissed on their merits.

10 Turning to the cross-appeal, the trial judge found that Sloan's circumstances were markedly different by 1992. The appellant had started an action against Sloan and three banks were putting pressure on him. It was in these circumstances that Sloan transferred his interest in the matrimonial home to his wife in 1992 and his half interest in their Florida condo to her in 1993. On the matrimonial home, the trial judge found that Sloan knew the transfer would materially impact his ability to pay his creditors. That was the very reason he made the transfer, and his wife knew that was the reason it was done.

11 As for the Florida condo, the trial judge found that the badges of fraud pointed overwhelmingly to a fraudulent intent and the respondents had not overcome their evidentiary burden of establishing the validity of the transfer.

12 The trial judge was then entitled to determine that the entire proceeds of sale were available to Sloan's creditors, as the respondents produced no evidence to show the property was encumbered.

13 On the cross-appeal, the respondents also say the trial judge erred in not giving effect to the defence of laches.

14 We see no merit to this submission. As the trial judge noted, laches is an equitable doctrine. The party relying on the defence must establish both delay and prejudice resulting from the delay. The trial judge indicated that he would be prepared to find the appellant had been guilty of inordinate delay in the prosecution of the claims. He found, however, that the defendants had not established actual prejudice as a result of the delay.

15 Having presided at the trial, the trial judge was in the best position to determine whether the respondents' defence was prejudiced by the 23-year delay in bringing the matter to trial. The respondents essentially ask us to re-assess the circumstances and to make our own findings as to prejudice. We are not prepared to do so. Nor are we prepared to interfere with the trial judge's exercise of his discretion.

16 The respondents also submit on the cross-appeal that the trial judge erred in failing to give effect to s. 5(1) of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, which, the respondents claim, "exempts any payment of money to a creditor provided it was made in satisfaction of a pre-existing debt, whether the payment was intended to prefer the creditor or not." This submission does not reflect the actual words of the section, which contains no reference to a "pre-existing debt." Nor does it take into account the concluding words of the sub-section:

> ... that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the

consideration therefor.

17 The wording of the provision suggests that it does *not* refer to payments for *pre-existing* debts but rather to *present* payments, advances, sales or deliveries.

18 We do not, however, find it necessary to resolve the issue. This provision was not pleaded and the submission was not made to the trial judge. We are not satisfied that we have all the facts necessary to address the issue and that it can be addressed without causing unfairness to the appellant: *767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350 (Ont. C.A.), at para. 3; *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130 (Ont. C.A.), at para. 18.

19 Both parties sought to introduce fresh evidence on the appeal. In a case of this vintage, a party's claim to have discovered new evidence is viewed with some scepticism. We are not satisfied that the evidence could not have been obtained by due diligence before trial. Whether we apply the *Palmer* test (*R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.)), or the *Sengmueller* test (*Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.)), the fresh evidence is not admissible. See *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3 (Ont. C.A.) at paras. 72-78.

20 For these reasons, the motions to admit fresh evidence are dismissed. The appeal and cross-appeal are dismissed. As success is divided, there will be no order as to costs.

Appeal dismissed; cross-appeal dismissed.

FTI CONSULTING CANADA INC. Plaintiff	-and-	ESL INVESTMENTS INC. et al Defendants Court File No. CV-18-00611219-00CL
SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants Court File No. CV-18-00611214-00CL

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SUPERIOR COURT OF JUSTICE
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(Returnable March 20, 2019)

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