

CANADA / JUDGMENT

1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP

2020 BCSC 1435

COURT

Supreme Court of British Columbia

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2020 BCSC 1435 1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP,

2020 BCSC 1435

Date: 20200925

Docket: S208554

Registry: Vancouver

Between:

1119727 B.C. Ltd., 1119733 B.C. Ltd., and Greatus Group Asset Management Ltd.

Plaintiffs

And

Bold and Cypress (Grange) GP Inc. and 1125298 B.C. Ltd.

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:

N. Chang

Counsel for the Defendants:

W.V. Barta

W. Kam

Place and Date of Hearing:

Vancouver, B.C.

September 22, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 25, 2020

- [1] The plaintiffs 1119727 B.C. Ltd. ("1119727"), 1119729 B.C. Ltd. ("1119729"), 1119733 B.C. Ltd. ("1119733"), and Greatus Group Asset Management Inc. ("Greatus") are all companies duly registered under the laws of British Columbia. They are the only Class B limited partners of a Limited Partnership (the "LP") formed on or about July 7, 2017 to acquire, renovate, and sell, or alternatively lease 15 strata units in a building located at 4625 Grange Street, Burnaby B.C. ("the Project Properties").
- [2] The defendant Bold and Cypress (Grange) GP Inc. (the "GP") is the general partner of Bold and Cypress (Grange) Limited Partnership.
- [3] The defendant 1125298 B.C. Ltd. ("Property Co") is a nominee company that shares the same directors of the GP. It is the sole titleholder of the lands that were to be developed under the LP ("the Project Properties").
- [4] 1121611 B.C. Ltd. ("1611") and 1123614 B.C. Ltd. ("3614") are both duly incorporated companies under the laws of British Columbia and are the only Class A limited partners of the LP.
- [5] Each of the plaintiffs invested \$500,000 in capital in the LP representing 80% of the total equity in the LP with the Class A partners contributing 20%.
- [6] Each of 1611 and 3614 invested \$250,000 in capital in the LP. The Class A limited partners are the only limited partners with voting rights in the LP.
- [7] All of the Class A and B limited partners and the GP entered into a limited partnership agreement ("the LP Agreement") dated July 7, 2017. Property Co is the registered owner of the Project Properties. On or about the same date, at the request of the LP, Property Co executed a declaration of trust confirming that it holds the Project Properties as nominee and agent in trust for the LP, and that the beneficial owner of the Project Properties is the LP.
- [8] The LP Agreement includes the following terms:

- s. 3.7 The GP "will exercise its powers and discharge its duties under this Agreement honestly, in good faith and in the best interests of the Limited Partners and in connection therewith will exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances";
 - s. 10.1 The GP will keep and maintain full, complete and accurate books of account and records of the business of the LP;
 - s. 10.2 The limited partners will have the right to inspect the books of account and records, and on written demand to the GP, be given "true and full information of all things affecting the [LP]".
 - s. 10.3 Within 90 days after the end of each fiscal period, the General Partner will provide to each limited partner the following:
 - (i) Unaudited financial statements, including a balance sheet, statement of income or loss, statement of changes in financial position, and a statement of changes in capital;
 - (ii) A report on allocations and distributions to Partners (as defined in the LP Agreement), including credits and charges to capital account and current accounts;
 - (iii) Such other information as, in the opinion of the General Partner, is material to the business of the Partnership; and
 - (iv) Information necessary for a partner to file tax returns.
- [9] The plaintiffs allege that the GP failed to comply with these provisions of the LP Agreement.
- [10] Although the project was estimated to complete by summer 2018 it did not complete until in or around spring 2020. The plaintiffs contend that by allowing the project costs to balloon, the GP allowed management fees to balloon to the detriment of their investment in the LP, in the result unfairly preferring the Class A limited partners' interests to those of the plaintiffs.
- [11] Property Co financed the project by way of a mortgage of some \$6 million that was due to be repaid on September 1, 2020. At present it is estimated that the costs of completion for the project will be \$10,699,431.16 against projected sales revenues of only \$8,920,200.00, leaving an expected shortfall of approximately \$1.78 million.
- [12] The plaintiffs filed their notice of civil claim on August 26, 2020. In it they seek declarations that the GP owed them a fiduciary duty, and breached that duty; that the GP breached its duty to the plaintiffs under s. 22 of the Partnership Act, R.S.B.C. 1996, c. 348, and s. 3.7 of the LP Agreement, by failing to act honestly, in good faith, and in their best interests; and that the defendant Property Co holds the Project Properties in trust for Bold and Cypress (Grange) Limited Partnership and its partners, namely, the plaintiffs, 1611, 3614, and the GP.

[13] In their notice of civil claim, the plaintiffs sought an order for an accounting of the LP from July 7, 2017 to date, and an order that the GP pay damages for breach of fiduciary duty, breach of the Partnership Act, and, or alternatively, breach of LP Agreement.

[14] In addition the plaintiffs sought an order that a Certificate of Pending Litigation ("CPL") be registered against each of the Project Properties.

[15] In their notice of civil claim, the plaintiffs pleaded that:

Part 1, para. 11. Property Co is the registered owner of the Properties. On or about July 7, 2017, pursuant to the request of the LP, Property Co executed a declaration of trust confirming that it holds the Properties as nominee and agent in trust for the LP, and that the beneficial owner of the Properties is the LP.

Part 3, para. 17. In relation to the partnership assets, a general partner or its nominee acts as a trustee and holds property for the benefit of all other partners.

Part 3, para. 20. As a result of the wrongful actions of the GP described herein, the Plaintiffs have suffered loss and damage for which the GP is responsible, including but not limited to, loss of investment value, related expenses, costs, and other damages, particulars of which will be provided.

[16] The defendants contend that the plaintiffs' action is contrary to both the contract between the parties and the provisions of the Partnership Act.

The Defendant's Application

[17] The defendants seek an order that the CPL registered under no. CA8386719 against the Project Properties situated in Burnaby, British Columbia and being more particularly known and described as:

P1D: 001-326-163 Strata Lot 2 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-171 Strata Lot 3 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-180 Strata Lot 4 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-198 Strata Lot 5 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-201 Strata Lot 6 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-210 Strata Lot 7 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-228 Strata Lot 8 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-244 Strata Lot 10 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-252 Strata Lot 11 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-279 Strata Lot 13 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-287 Strata Lot 14 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-236-309 Strata Lot 16 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-236-317 Strata Lot 17 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-333 Strata Lot 19 DL 33 Group 1 NWD Strata Plan NW416

PID: 001-326-368 Strata Lot 22 DL33 Group 1 NWD Strata Plan NW416

be cancelled pursuant to s. 256 (1) of the Land Title Act, RSBC 1996, c. 250.

[18] The plaintiffs are prepared to agree to an order cancelling their CPL against these Project Properties on terms that:

- a) The CPL registered against the Project Properties will be temporarily discharged for the purposes of allowing the refinancing of the G&F mortgage to proceed, following which the CPL will be reregistered on title to those properties;
- b) Notwithstanding the first term, the CPL will be cancelled for units 103, 107, and 205;
- c) The defendants will pay the sales proceeds for units 103, 107, and 205 less:
 - i) Any payments required by the G&F mortgage, and
 - ii) Any payments owing to trade contractors who are not affiliated, related, or associated with:
 - The GP;
 - Jimmy Hon Chung Law;
 - Cypress Land Services Ltd.;
 - Bold Construction Ltd.;
 - Justin Kyowu;

(collectively, the "Expenses"), into the plaintiffs' solicitor's trust account immediately on receipt;

- d) The defendants will not distribute to any other person or make any other use of the sale proceeds other than by written agreement of the parties or court order;
- e) The GP will provide particulars of the Expenses to the plaintiffs within seven days of the completion of the relevant unit sale, and such particulars shall include the list of the payees, the amount paid to each payee, and the invoice or payment statement confirming the amount to be paid is duly owing; and
- f) The CPL registered on title to the remaining twelve Project Properties (for units 102, 104, 105, 106, 108, 202, 203, 206, 208, 301, 303, 306) will be cancelled by written agreement of the parties. For greater certainty, the plaintiffs will agree to cancel said registrations if the defendants agree to terms identical to paragraphs c, d, and e above.

- [19] The defendants declined that proposal.
- [20] The defendants also seek orders that the plaintiffs be restrained from filing any further certificates of pending litigation against the Project Properties, or in the alternative that the CPL registered against title to the Project Properties be cancelled on the defendants providing security in such amount and in such a manner as this Honourable Court deems appropriate and just.
- [21] The defendants seek a further order pursuant to s. 258 of the Land Title Act that the Registrar of Land Titles, at the New Westminster Land Title Office, upon application, for an order of cancellation of registration of the CPL in respect of the Project Properties, and upon production of the order or a certified copy, shall cancel the registration of the CPL as to the land affected by the order. In the alternative, the defendants seek an order pursuant to s. 257(1)(b)(i) of the Land Title Act, that the plaintiffs enter into an undertaking to abide by any order that the Court may make as to damages properly payable to the defendants, the GP and Property Co as a result of the registration of the CPL.

Discussion

- [22] The defendants contend that, contrary to the authority granted to the GP as well as the terms restricting the plaintiffs from registering a charge against the Project Properties pursuant to the LP Agreement, the plaintiffs registered the CPL against the Project Properties on or about August 26, 2020.
- [23] In support of their assertion that they are entitled to the registration of a CPL against the Project Properties, the plaintiffs assert that in relation to partnership assets, a general partner or its nominee acts as a trustee and holds property for the benefit of all other partners.
- [24] The plaintiffs argue that as the GP's nominee, Property Co executed a declaration of trust confirming that it holds the Project Properties in trust for the LP. Therefore, the plaintiffs argue, the Project Properties are held in trust for them.
- [25] Section 215 of the Land Title Act provides that:
- (1) A person who has commenced or is a party to a proceeding, and who is
 - (a) claiming an estate or interest in land, or
 - (b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.

[26] Sections 256(1) and s. 257 of the Land Title Act provide that:

256(1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

...

257(1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
- (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered

[27] Sections 23(1), 25 and 55 of the Partnership Act, respectively, state:

23(1) Subject to subsection (2), all partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

25 If land or any heritable interest in it has become partnership property, it must, unless the contrary intention appears, be treated as between the partners, including the representative of a deceased partner, and also as between the heirs of a deceased partner and his or her executors or administrators, as personal or movable and not real or heritable estate.

55(1) A limited partner may contribute money and other property to the limited partnership, but not services.

- (2) A limited partner's interest in the limited partnership is personal property.

[28] The parties agree that the first step in the analysis required on the application before me is to determine if the plaintiffs have an interest in land that would entitle them to register a CPL against the Project Properties.

[29] In *Nouhi v. Pourtaghi*, 2019 BCSC 794 [Nouhi], Madam Justice Matthews dealt with an application for an order cancelling CPLs on the basis that the amended notice of civil claim did not properly plead an interest in land.

[30] At paras. 9 - 12, Matthews J. set out the approaches by which a court could cancel a CPL:

9 To register and maintain a certificate of pending litigation against land, a party must claim an interest in that land: Land Title Act, s. 215(1). To be validly registered, a certificate of pending litigation must be supported by pleadings that assert an interest in the lands subject to the certificate of pending litigation. Valid registration is a threshold criterion for its sustained registration under s. 215(1): Bilin v. Sidhu, 2017 BCCA 429 at para. 55.

10 In Bilin, at paras. 52-56, the Court of Appeal outlined two distinct approaches to cancelling a certificate of pending litigation.

11 The first approach is where the party's pleadings are incapable of supporting a claim to an interest in land. In such a case, the certificate of pending litigation will fail to meet the interest in land threshold criterion under s. 215(1) and the court has the jurisdiction to cancel the certificate of pending litigation immediately for that reason: Bilin at paras. 54-55 citing RCG Forex Services Corp. v. Lin, 1999 BCCA 644. As stated by Madam Justice Holmes in Bajwa v. Singh, 2016 BCSC 916 at para. 20, referred to with approval in Bilin at para. 51, "[i]f the claim could not give rise to an interest in land, the certificate of pending litigation will be ordered to be cancelled because, essentially, it was improperly registered from the start."

12 The second approach is where the party's claim cannot meet the test of disclosing a bona fide triable issue with regard to an interest in land. The proper course of action in this scenario is for the opposing party to bring an application to dismiss the action: Berthin v. Berthin, 2018 BCCA 57 at para. 44. If this application is successful, the certificate of pending litigation will be cancelled once all appeals have been exhausted regarding the underlying action in accordance with s. 254 of the Land Title Act: Bilin at para. 53. A party is not able to immediately cancel a certificate of pending litigation under this approach nor does the court have the inherent jurisdiction to do so: Berthin at para. 44.

[31] The defendants in the case before me have not advocated for the second approach, but in Nouhi Matthews J. recognized at para. 13 that:

13 The distinction drawn between the two approaches is that in the first, the question is whether the pleadings disclose a claim for an interest in land without regard to the merits of the claim; it is purely a question of adequate pleadings. It is only in the first case that the s. 215(1) mechanism to cancel a certificate of pending litigation will apply. If the pleadings disclose a claim to an interest in land, the summary dismissal approach must be taken: NextGen Energy Watervliet TWP, LLC v. Bremner, 2018 BCCA 219 at para. 9. Xiao [Xiao v. Fan, 2018 BCCA 143] explains this point as follows:

[27] Accordingly, the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the Land Title Act is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered. If the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4), where evidence may be

considered, and the test to be applied is whether there is a bona fide triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.

[32] At para. 30, Matthews J. concluded that an application to strike a claim for failing to disclose a cause of action required the court to determine whether the pleadings disclosed a claim to an interest in land so as to support a CPL. She found that if the pleadings were not adequate when the certificate was filed, the certificate was never valid and is immediately cancelled.

[33] In *Nouhi*, the plaintiff contended that he had properly pleaded claims for constructive trusts, based on fraud and entitlement to misappropriated funds through tracing. He had pleaded unjust enrichment and a constructive trust over disputed shares and sought a declaration that he had an equitable interest in the disputed shares. He sought a tracing and an order that all property traced be disgorged to him, arguing that he was entitled to an equitable lien on the assets of the partnership.

[34] Matthews J. explained a constructive trust as follows:

20 A constructive trust is sufficient to sustain a registration of a certificate of pending litigation. Madam Justice Dickson (as she then was) said as follows in *Jacobs v. Yehia*, 2015 BCSC 267:

[24] "An estate or interest in land" may include both legal and equitable interests. The test is not to be narrowly defined, but the mere fact that a claim relates to land does not convert it into a claim for a proprietary interest: *Montgomery v. Klaassen*, [1996] B.C.J. No. 1739 (B.C. S.C.), para. 22; *Seville Properties Ltd. v. Coutre*, 2005 BCSC 1105 (B.C. S.C.).

[25] Where funds are obtained through wrongful means and can be traced to the acquisition or improvement of land, the court may impose a remedial constructive trust sufficient to sustain a CPL. In addition, the claim for tracing may, in and of itself, justify an equitable charge on land for purposes of supporting a CPL: *Meola*, para. 9; *Drucker Inc. v. Hong*, 2011 BCSC 905, paras. 19, 22 and 36; *Samji (Trustee of) v. Chatur*, 2013 BCSC 1915 paras. 60-64; *Lament v. Constantini*, [1995] B.C.J. No. 2988.

[26] Constructive trusts are equitable remedies available for acts such as fraud and unjust enrichment.

[35] Matthews J. set out the two steps necessary to establish a constructive trust: a connection to the property and the inadequacy of monetary damages:

26 A party seeking either type of constructive trust must satisfy two criteria, in addition to the cause of action or circumstances on which the remedial or substantive constructive trust is based. The first is that there must be referential property, i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: *BNSF* at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is inadequate, insufficient or inappropriate in the circumstances: *Kerr v. Baranow*, 2011 SCC 10 at para. 50; *Pro-Sys Consultants*

Ltd. v. Microsoft Corporation, 2013 SCC 57 at para. 92; Li v Li, 2017 BCSC 1312 at para. 227.

[36] Matthews J. found that the plaintiff failed to meet the second requirement:

49 However, Mr. Nouhi does not plead that monetary damages are, or may be, an inadequate or insufficient remedy with regard to the claim for unjust enrichment. Pleadings (and eventual proof) of the inadequacy of damages is a precondition to the impression of a remedial constructive trust. The constructive trust is Mr. Nouhi's only assertion of, or claim to, an interest in land. Accordingly, Mr. Nouhi's pleadings do not disclose a claim for an interest in land as they do not state that monetary damages are, or may be, an inadequate or insufficient remedy.

[37] Based on the inadequacy of the pleadings, Matthews J. concluded that the certificates of pending litigation were not valid when filed as required by s. 215 of the Land Title Act and cancelled the certificates.

[38] The plaintiffs contend that based on the reasoning of Mr. Justice Leask in Pallot v. Douglas, 2015 BCSC 1296 [Pallot], they have an interest in the Project Properties as the beneficial owners of those properties. They rely as well on the decision of Mr. Justice Kelleher in Naramalta Development Corporation v. Therapy General Partner Ltd., 2012 BCSC 191 [Naramalta].

[39] In Pallot, Leask J. addressed a petition for partition and sale of property brought pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347. I do not find that decision of assistance in the determination of a property interest for the purposes of the Land Title Act.

[40] In Naramalta, Kelleher J. addressed the fiduciary duty of a general partner, to limited partners, and like the decision in Pallot, I do not find that decision of assistance in the determination of a property interest for the purposes of the Land Title Act.

[41] In Schmidt v. Balcom, 2016 BCSC 2438 [Schmidt], Madam Justice Choi dealt with four applications for the cancellation of CPLs arising out of a proposed sale of land in three seniors' complexes in Prince George, developed under a limited partnership. The plaintiffs in that case claimed that their investment was mismanaged, alleging negligent and fraudulent misrepresentation, and breach of contract, trust, and fiduciary duty by the defendants, and placed a CPL on that project's properties.

[42] The plaintiffs in that case opposed the cancellation of the CPLs on the grounds that: (1) they had filed and sought leave to continue with a derivative action on behalf of the limited partnership, and (2) that they had asserted in their pleadings that the Class A limited partners of the limited partnership had an interest in partnership assets and that Class B shareholders had a beneficial interest in the partnership assets by virtue of the trust created in the offering memorandum.

[43] At paras. 30 - 31, Choi J. found:

30 The Partnership Act, R.S.B.C. 1996, c. 348 sets out in s. 23(1) that partnership property is held by the partners themselves. Section 25 provides that land that has become partnership property is treated as personal or movable, and not real or heritable estate. A partnership is merely an agreement between persons or partners in carrying out a business with a view to profit: *Molson Brewery B.C. Ltd. v. Canada* (2001), 199 F.T.R. 210.

31 Accordingly, in my view, a limited partnership itself cannot claim an estate or interest in land.

[44] Relying on the decision of in *Re Vancouver Lot 1* (1985), 63 B.C.L.R. 81 (S.C.), one of the owners of a limited partnership unit in the development asserted that she held an equitable lien on the limited partners' property, which she contended was an interest in land sufficient to permit her to file a CPL.

[45] At paras. 40 - 42, Choi J. dealt with that contention, finding:

40 In my view, the *Re Vancouver Lot 1* case does not stand as authority for any general proposition that in the context of a subsisting partnership, such as *Asher Place Limited Partnership*, a partner who owns a direct interest in the underlying assets of the partnership is sufficient to found and maintain a CPL against property owned by the partnership.

41 Moreover, *Re Vancouver Lot 1* does not concern a limited partnership or pronounce on the interest of a limited partner. The defendants' submission is correct in highlighting that a limited partnership is distinct from a partnership in general. As such, *Re Vancouver Lot 1* is not on point as concerns the character of the legal interest of a limited partner.

42 Section 55(2) of the Partnership Act specifically defines the interest of a limited partner as "personal" property. The assertion made by the plaintiffs that a limited partner holds a direct proprietary interest in the assets of the limited partnership including land, cannot be reconciled with s. 55(2), which describes the character of the interest as personal property.

43 Paragraph 13 of *Re Vancouver Lot 1* makes clear that the dissolution of a partnership is what triggers the partner's entitlement to an equitable lien, which in turn entitles the partner to a certificate of pending litigation:

13 ...think it clear from what the text writers say that there is an equitable lien available to the partners on the partnership assets on dissolution. As there has been dissolution in the case at bar, if a partnership existed, the deceased has an equitable lien against the partnership assets. As the estate of the deceased has an equitable lien against the assets, it is my view that such a lien must of necessity be an interest in land, calling for protection against distribution without regard to the partnership claim. I find, therefore that a partner is entitled to file a *lis pendens* against property held by a partner on behalf of a partnership in exercising his partner's lien and such a lien is "an interest in land" within the meaning of the Land Titles Act.

44 In my view, the case law does not support the claim that the plaintiffs, as shareholders of Madden, have a proprietary interest in the property owned by Madden, nor that the plaintiff Ms. Torres, as a limited partner in Asher Place Limited Partnership, holds a proprietary interest in the underlying assets of the partnership.

[46] For the purposes of the application before me, I will ignore the terms of the LP Agreement, as the application is for the cancellation of the CPL pursuant to the Land Title Act. To do otherwise would be contrary to the direction in Xiao (quoted by Matthews, J. in Nouhi above) that no evidence is to be considered on an application to cancel a CPL that is purportedly non-compliant with s. 215 of the Land Title Act.

[47] That said, I conclude that I must allow the defendants' application.

[48] As Choi J. explained in Schmidt, partnership property is held by partners themselves, and land that has become partnership property is treated as personal or movable, and not real or heritable estate, and thus, a limited partnership itself cannot claim an estate or interest in land.

[49] As Choi J. further explained in Schmidt, it is the dissolution of a partnership that triggers a partner's entitlement to an equitable lien. That has not occurred here. In the result, the plaintiffs' notice of civil claim does not assert a substantial or direct link to a referential property upon which the remedial constructive trust is to be impressed.

[50] As Matthews J. found in Nouhi, I too find that the plaintiffs' notice of civil claim does not disclose a claim for an interest in land as they do not state that monetary damages are, or may be, an inadequate or insufficient remedy. In fact, they seek damages for breach of fiduciary duty, breach of the Partnership Act, and, or alternatively, breach of the LP Agreement.

[51] In conclusion, I find that the plaintiffs' pleadings are inadequate in their present form, as they do not disclose a claim for an interest in land based on a constructive trust nor for any other interest in land that can support a CPL under s. 215 of the Land Title Act. Consequently, the CPL filed against the Project Properties was not valid when it was filed, and is thus cancelled.

[52] Given my conclusion, it is unnecessary for me to determine the issues of hardship or inconvenience were I to decline the application to cancel the plaintiffs' CPL, nor whether the plaintiffs' claims are limited to pecuniary damages.

[53] I order that pursuant to s. 258 of the Land Title Act, the Registrar of Land Titles, at the New Westminster Land Title Office, upon application, for the registration of an order of cancellation of registration of the certificate of pending litigation in respect of the Project Properties, and upon production of the order or a certified copy, shall cancel the registration of the certificate of pending litigation as to the land affected by the order.

[54] I decline to make orders that the plaintiffs be restrained from filing any further certificates of pending litigation against the Project Properties or enter into any undertaking to the court with respect to damages.

Costs

[55] After obtaining an order to have their application heard on short notice, the defendants set this matter for hearing for 90 minutes. The hearing of the application consisted of abbreviated submissions by counsel for both parties, on the basis that they were well aware of the time constraints. Notwithstanding their awareness, they took over two hours in their combined submissions.

[56] Given the extensive record of this case, counsel grossly underestimated the time required to argue this matter, with the result that they were able to set it on the chambers list, rather than the trial list, where it belonged. The hearing of this application therefore deprived other parties from having their matters heard.

[57] In the result, I decline to order costs of the preparation for, or hearing of the application to either party.

"The Honourable Chief Justice Hinkson"

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