

CANADA / JUDGMENT

De Cotiis and Others v. De Cotiis et al

2004 BCSC 1658

COURT

Supreme Court of British Columbia

DECIDED

10 March 2004

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2004 BCSC 1658 De Cotiis and Others v. De Cotiis et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: De Cotiis and Others v. De Cotiis et al

2004 BCSC 1658

Date: 20040310

Docket: S036386

Registry: Vancouver

Between:

Nick Ninno De Cotiis, Marcangelo De Cotiis, Donato De Cotiis,

438336 B.C. Ltd. and 529616 B.C. Ltd.

Plaintiffs

And

Michael De Cotiis, Pinnacle International Realty Group Inc.,

Pinnacle International Realty Group II Inc., Amalio De Cotiis, Amacon Development Corporation, Amacon Management Services Corp., Innocenzo De Cotiis, Onni Development Corporation, Onni Property Management Services Ltd., all doing business as the Onni Group, Amalio De Cotiis, Concetta De Cotiis, Donato F. De Cotiis, Lilliana L. De Cotiis, Luca De Cotiis, Marcello De Cotiis, Teresa Sutherland, David Sutherland, all doing business as the Amacon Group Viam Holdings Ltd., Viam Properties Ltd., Newcorp Properties Partnership, Newcorp Properties Ltd., V.I.T. Estates Ltd., V.I.T. Estates Partnership, Viam Group Partnership, Allison De Cotiis, Carlo Meola, Concetta De Cotiis, David Sutherland, Donato F. De Cotiis, Donato I. De Cotiis, Giulio De Cotiis, Juanita De Cotiis, Les Steve Fovenyi, Lilliana L. De Cotiis, Luca De Cotiis, Marcello De Cotiis, Morris De Cotiis, Paulo De Cotiis, Rossano De Cotiis, Teresa Sutherland, Price Waterhouse Coopers LLP, John Kay, McCarthy Tetrault LLP, Peter Pagnan, Scott D. Smythe, Lisa

Vogt, Robert W. Cooper, Velia De Cotiis, Vittorio De Cotiis, 366466 B.C. Ltd., 421734 B.C. Ltd., 421735 B.C. Ltd., 429131 B.C. Ltd., 291144 British Columbia Ltd., 337710 British Columbia Ltd., 337988 British Columbia Ltd., 392660 British Columbia Ltd., 477489 British Columbia Ltd., 553362 British Columbia Ltd., 587112 British Columbia Ltd., 587114 British Columbia Ltd., 587116 British Columbia Ltd., 594702 British Columbia Ltd., 594705 British Columbia Ltd., 594708 British Columbia Ltd., 594710 British Columbia Ltd., 615050 British Columbia Ltd., 632508 British Columbia Ltd., 632509 British Columbia Ltd., 640724 British Columbia Ltd., 677129 British Columbia Ltd., 2005 Holdings Ltd., 3494 Investments Ltd., Amacon Development (Bute) Corp., Amacon Development (Farrow Ridge) Corp., Amacon Development (Fir) Corporation, Amacon Development (Hartley) Corp., Amacon Development (Hastings) Corp., Amacon Development (Kingsway) Corp., Amacon Development (Pacific) Corp., Amacon Development (Ridley Place) Corp., Amacon Development (Saba) Corp., Amacon Development (Seymour) Corp., Amacon Development (West Fourth) Corp., Amacon Holdings Ltd., Amacon-Onni Management (Davie) Inc., Amacon-Onni Management Inc., Cariboo Business Park Ltd., Cariboo Management Inc., Coast To Coast Project Management Ltd., Gateway Pacific Construction Ltd., Gateway Pacific Estates Limited, Guadagno Holdings Ltd., Harris Road Manor Ltd., LMLTD Holdings Corp., Map Development Corporation, Mondi Holdings Ltd., Mondi Management Ltd., Mondi Properties (155 Glacier) Inc., Mondi Properties (1551 Broadway) Inc., Mondi Properties (1611 Broadway) Inc., Mondi Properties (1647 Broadway) Inc., Mondiale Development Ltd., Newcorp Construction Ltd., Newcorp Construction (148th Street) Ltd., Newcorp Construction (Nelson) Ltd., OSFC Holdings Limited, Onni Development (66th Avenue) Corp., Onni Development (240 Street) Corp., Onni Development (1525 Broadway) Corp., Onni Development (1533 Broadway) Corp., Onni Development Capital Corp., Onni Development (Davie) Corp., Onni Development (Dominion) Corp., Onni Development (Firbridge) Corp., Onni Development (Halifax) Corp., Onni Development (Hastings) Corp., Onni Development (Imperial Landing) Corp., Onni Development (Ioco Road) Corp., Onni Development (Mayfair Place) Corp., Onni Development (Pacific) Corp., Onni Enterprises Ltd., Onni Holdings Ltd., Onni Project Management Services Ltd., Onni Property Management Services Ltd., Onni Real Estate Holdings Ltd., Pacific Star Properties Ltd., Pinnacle International (Hastings 2001) Plaza Inc., Pinnacle International (Pender) Plaza Inc., Pinnacle International (Taylor) Plaza Inc., Pinnacle International (Westminster) Plaza Inc., Pinnacle International (Wilson) Plaza Inc., Pinnacle International (Pender) Properties Inc., Pinnacle International Hotels and Resorts Inc., Pinnacle International Lands Inc., Pinnacle International Management Inc., Pinnacle International Plaza Inc., Pinnacle International Properties (Bloor) Ltd., Pinnacle International Realty (Bloor) Ltd., Pinnacle International Realty Group I Inc., Pinnacle International Resort Club Inc., Pinnacle Market Development (US) LLC, Pinnacle Market Development (Canada) Ltd., RPMG (Broadway) Holdings Ltd., RPMG (Edmonton) Holdings Ltd., RPMG Holdings Ltd., Seven Star Development Ltd., Update Properties Ltd., York-Trillium Properties Inc., York-Trillium Realty Inc., Wentworth Properties Inc., Bloor Street Development Limited Partnership, Bloor Street Development Partnership, Carlton Place Hotel Limited Partnership, CRERAR Property Limited Partnership, Onni Firbridge Development Limited Partnership, Onni Imperial Landing Development Limited Partnership, Onni Halifax Development Limited Partnership, Onni Mayfair Place Development Limited Partnership, Onni

Palladio Development Limited Partnership, Pinnacle Development Partnership, Pinnacle Pender Development Partnership, SRI Realty & Mortgage Partnership, SRMP Realty & Mortgage Partnership, The Brava Development Partnership, The Palladio Development Partnership, The Perla Development Partnership, Viam Properties #1 Limited Partnership, Viam Properties #2 Limited Partnership, John Doe, Jane Doe, and John Doe Company,

Defendants

- and -

Docket: S032609

Registry: Vancouver

Between:

529616 B.C. Ltd.

Plaintiff

And

Viam Properties Ltd.

Defendant

And

438336 B.C. Ltd.

Defendant by Counterclaim/Third Party

Before: The Honourable Mr. Justice Sigurdson

REVISED Oral Reasons for Judgment

March 10, 2004

Counsel for Plaintiff:

D.G. Sanderson, Q.C.

S. Fitzpatrick

T. Mihoc

Counsel for Pinnacle Defendants:

D. Church

A. Pearson

Counsel for Amacon Defendants:

R. McFee, Q.C.

M. Buhler

Counsel for Onni Defendants:

R.J.R. Hordo, Q.C.

P.R. Bennett

Counsel for McCarthy Tetrault:

P. Freeman, Q.C.

T. Rogers

Place of Hearing:

Vancouver

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

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

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

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

[4] The defendants oppose the application. They contend that the plaintiffs' claim in the amended statement of claim and the affidavit material filed on this application does not raise an arguable claim or triable issue that they have a claim to an interest in land. If it does, the defendants assert that they will suffer hardship and inconvenience if the certificate of pending litigation is allowed to be re-filed. Given what they argue is the demonstrably

weak claim of the plaintiffs in this action, the defendants say that it should be removed upon adequate security being given. They contend that the undertaking required by the order of Madam Justice Gerow, which they are prepared to maintain, is adequate security for any damages the plaintiffs might possibly be entitled to. The defendants also oppose the appointment of a receiver.

- [5] To put in context the issue of whether the plaintiffs are in fact advancing a claim to an interest in land, whether the re-filing of the certificate of pending litigation would cause hardship and inconvenience, and the apparent merits of the plaintiffs' claims, some brief history is required.
- [6] Generally speaking, the plaintiffs and the defendants are large and, it appears, very successful property developers. They began their endeavours in the 1950s. Four brothers of the De Cotiis family, Marc, Mike, Inno and Amalio started a landscape business that became, in Mr. Justice Tysoe's words, "a very profitable real estate development and management business".
- [7] One of the plaintiffs in this action, Marc De Cotiis, suffers from a disability. His sons, Don and Nick De Cotiis, and two companies, 438336 B.C. Ltd. (owned and controlled by the three individual plaintiffs) and 529616 B.C. Ltd., are the other plaintiffs.
- [8] The defendants, of whom there are many, include the other three brothers of Marcangelo De Cotiis, their individual companies, which I will refer to as the Pinnacle Group (which are Mike's companies), the Amacon Group (which are Amalios'), and the Onni Group (which are Inno's). There are numerous other defendants who are related companies and family members of the defendants which I will identify as required during the course of these reasons.
- [9] First, some further background.
- [10] Marc and Don were dismissed from the family business in 1992 and brought oppression and related proceedings. Nick had apparently been dismissed from the family business in 1989 but subsequently settled his personal claims. In a trial heard in 1995, Tysoe J. considered a claim brought by Marc and Donato De Cotiis and others for a determination of the business affairs involving the brothers.
- [11] It appears to be common ground that at the time of the trial before Tysoe J., there was a partnership called Newcorp Properties Partnership, made up of Viam Properties Ltd. as to 99%, Viam Holdings Ltd. as to 0.65% and Newcorp Properties as to 0.35%. The plaintiffs held 20% of Viam Properties Ltd. through 438336 B.C. Ltd. and Marc and Don held a total of 1,590,000 Class B Preferred Shares in Viam Holdings Ltd. In Newcorp Properties Ltd., Marc had 1%, Don had 18% and 392660 B.C. Ltd. had 15%. (I pause to note that Viam Holdings Ltd., Newcorp Properties Partnership and Newcorp Properties Ltd. are also defendants, amongst other companies, in the current proceeding.)

- [12] Mr. Justice Tysoe in written reasons for judgment dated June 27, 1995 [see: [1995] B.C.J. No. 1423 (Q.L.)(S.C.)] ruled that Newcorp Properties Ltd. and Viam Properties Ltd. should be wound up. He also ruled that it was not equitable to wind up Viam Holdings Ltd., but that the plaintiffs' shareholding interest should be purchased by the defendants in that proceeding.
- [13] Tysoe J. also ruled that the partnership was dissolved effective December 31, 1992. He also ruled that the new development projects that were undertaken through the defendants' companies, Amacon, Pinnacle, and Onni, which were then the relatively new companies of the three brothers other than Marc, were not corporate or partnership opportunities of the partnership as it was dissolved at the end of 1992, prior to the acquisition of the properties in question.
- [14] Tysoe J. noted at the end of his reasons, after mentioning the costs issue, that "the litigation is not over because Newcorp and Viam Properties are to be wound up and the shares of Marc and Don in Viam Holdings are to be purchased after they have been valued".
- [15] Following the decision of Mr. Justice Tysoe, it is acknowledged, I think, that a settlement agreement was reached among the parties. There is, however, a significant dispute about its terms. While it is generally acknowledged that tax issues caused the parties to settle on different terms than perhaps contemplated by the reasons for judgment of Tysoe J., the issue is whether the plaintiffs' interest in the joint business or partnership was fully satisfied by monies and property, with the parties essentially going their own ways, or whether there was a settlement that simply reflected the payment of monies owing to the plaintiffs for past wrongs or liabilities and that the partnership continued, in fact expanded, with the plaintiffs having a more significant role.
- [16] The defendants say that the winding up of Newcorp Properties Ltd. and Viam Properties Ltd. as ordered by Mr. Justice Tysoe, would have serious tax consequences and the parties agreed to a settlement which would see Marc and Don's interest in the family business bought and paid out.
- [17] The defendants say that an agreement was reached over a period of time and is reflected by correspondence between counsel for the parties, memoranda from advisors, and the actions of the parties and their representatives. They say that it was agreed that the shareholding interest of the plaintiffs in Viam Properties Ltd. and Newcorp Properties Ltd. would be paid out by the plaintiffs taking properties or managing properties and bearing the tax consequences accordingly and in the case of Viam Holdings Ltd., that the shares of Marc De Cotiis and Don De Cotiis therein were purchased.
- [18] The defendants say that the first part of the settlement dealt with the distribution of assets and that the shareholders of Viam Properties, including 438366 B.C. Ltd. as to its 20% interest, could either take assets in kind or could manage those assets under a Management Agreement while legal title to the property remained in Newcorp Properties Ltd. or Viam Properties and if they chose the former, they would have to bear the tax consequences. If

they chose the latter course, they were to manage the properties, collect the revenue and that under this agreement, specific properties and assets belonging to Newcorp Properties Partnership, Newcorp Properties Ltd. and Viam Properties were allocated to Amalio, Mike, Inno, Don and Marc and their respective companies. The defendants say the individual elements were documented by lawyers and other professionals.

- [19] The second part of the settlement which the defendants say is reflected in a letter agreement of February 28, 1997 deals with the purchase of Marc and Don De Cotiis' shares in Viam Holdings. Because of tax implications the defendants say the purchase was undertaken by having Marc and Don exchange their common shares in Viam Holdings for preferred shares and then by having Viam Holdings subscribe for \$15.9 million dollars worth of preferred shares in Marc and Don's company, 529616 B.C. Ltd.
- [20] The plaintiffs as I said, agree, but only in part.
- [21] The significant disagreement between the parties is this. The plaintiffs say that the settlement, which contained the transactions which are mainly not disputed, was, however, only a settlement to compensate the plaintiffs for past monies owing for past wrongs or liabilities. The plaintiffs' allegation is that between 1997 and 1998 a settlement agreement was reached that the partnership would continue and the parties would share profits and assets along the same basis as they had in the past with the plaintiff entitled to a 20% interest. They say that it was agreed that as of July 1998, the plaintiff 438336 B.C. Ltd. would have a 20% interest in the Newcorp Properties Partnership and retain its 20% interest in Viam Properties after which the interest of Viam Properties would then be a 79% owner of the partnership. This, they say, effectively gave the plaintiffs' entities a 35% interest.
- [22] The plaintiffs say that they would be paid about \$9,000,000 to compensate for property and cash wrongfully taken, which part of the settlement agreement made in June 1997 was documented. The plaintiffs contend that through their numbered company, 529616 B.C. Ltd., they would provide management services to the partnership through Viam Properties Ltd. The plaintiffs' position is that they were to be paid \$24,000,000 in 1997 and 1998 and continue as well with the partnership arrangement on an ongoing basis. They contend that their partnership interest at that time was worth approximately \$55,000,000; hence they only received a partial payment, the plaintiffs assert.
- [23] What are the claims upon which the plaintiffs say they have an arguable interest in land that entitles them to file a certificate of pending litigation? (Those are the claims in the statement of claim that I will focus on in these reasons.)
- [24] The allegation in the amended statement of claim is that 438336 B.C. Ltd. would become a 20% partner in Newcorp and would be entitled to 20% ownership interest in the assets, income and losses of that partnership after the implementation of the 1998 agreement, and Viam Properties ownership interest reduced to 79%. The plaintiffs contend that Don, Marc and Nick would continue to hold their direct and indirect shareholders' interest in Viam Holdings, Newcorp Properties Ltd. and Viam Properties and that the partnership, including

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

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

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

(i) The properties that they allege are in fact beneficially owned by the plaintiffs under what they call the 1997 Minutes of Settlement;

(ii) The properties that are registered in the name of Viam Properties;

(iii) The properties that are registered in the name of Newcorp and Viam Holdings;

(iv) The properties transferred from Newcorp or Viam Holdings to the individual defendants or their companies allegedly without any or without adequate consideration;

(v) The properties acquired by other related defendants through what they allege are the wrongful taking of corporate opportunities properly belonging to the Newcorp Properties Partnership; and

(vi) The properties purchased or developed using money taken from the Newcorp Properties Partnership or one of the corporate partners.

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

1. reneging on the terms set out in the 1997 Minutes of Settlement;
2. knowingly accepting transfers of certain properties from Newcorp or Viam Holdings without giving consideration or adequate consideration;

3. wrongfully taking, with knowledge, corporate opportunities known to properly belong to the Newcorp Properties Partnership; and
4. using money taken from the Newcorp Properties Partnership or one of the corporate partners to develop their own projects.

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

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

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

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

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

STATUTORY PROVISIONS

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

215 (1) A person who has commenced or is a party to a proceeding, and who is

(a) claiming an estate or interest in land, . . .

may register a certificate of pending litigation against the land in the same manner as a charge is registered, ...

[34] Sections 256 and 257 state as follows:

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

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

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

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

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

(ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or

- (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

[43] Mr. Sanderson, counsel for the plaintiffs, argued that the defendants' contention of an overall final settlement is inconsistent with the fact of partnership/corporate assets worth in the range of \$150 - \$200 million dollars. That it was only a partial working out of past wrongs

or liabilities and an agreement for the partnership to continue with the plaintiffs in it and having an expanded role, the plaintiffs say, is supported by the absence of a final general release. The plaintiffs suggest that their evidence was found credible before Tysoe J. and it will likely be found credible at trial again. Moreover, the plaintiffs point to the May 1998 Management Services Agreement, something that they say shows that the plaintiffs had a continuing role in the partnership regarding all properties and that the partnership continued. Notwithstanding past and significant acrimony, the plaintiffs say that this was put aside because of the impact of tax considerations. The plaintiffs assert that their interest in the partnership and their increased interest in the partnership is confirmed by correspondence: in particular there is a letter of July 15, 1998 from Nick De Cotiis for 438336 B.C. Ltd. to Mike De Cotiis at Viam Properties confirming the new interest of the numbered company and the fact that the plaintiffs together had a 35% interest. The letter closes with this reference: "looking forward to an ongoing profitable partnership".

- [44] The plaintiffs say that a trust claim to a beneficial interest in land can ground a *lis pendens* [Amu Bros. Investments Ltd. v. Pirbhai Estate (1985), 63 B.C.L.R. 81, [1985] B.C.J. No. 1178 (Q.L.)(S.C.)] and that the partnership claim and the claim to unjust enrichment gives rise to a remedy in constructive trust, both of which provide the proper foundation for a claim to an interest or an estate in land.
- [45] The defendants' position is that factually and legally the plaintiffs' claim is without merit. They say that there is no new Family Agreement as alleged. Factually, the defendants' counsel, Mr. Church, Mr. McFee, and Mr. Hordo, say that the whole of the evidence shows that the allocation of assets to the plaintiffs was a settlement in full, something which they say is supported by the value of the assets as reflected by the documents that were exchanged at the time. Mr. McFee argues that Viam is just holding properties that were allocated for the parties.
- [46] Given the longstanding and ongoing acrimony, the defendants say that the suggestion of a partial settlement with the plaintiffs participating fully in a revived partnership that brought in additional properties that were never before partnership assets is a ludicrous suggestion. Mr. Hordo describes the plaintiffs' claim as lacking an air of reality. He says that the false premise is that there were \$150 million in assets to divide. He points to the lack of particularity in the oral contract that the plaintiffs allege.
- [47] The affidavits of the professionals including Richard Crosson, the chartered accountant John Kay, and Peter Pagnan, including the affidavits of Mr. Fovenyi, the principal financial person at Viam, which affidavits I was taken through in detail, all suggest that the working out and transfer of assets was part of the settlement of the plaintiffs' interest rather than a part payment and the beginning of an new and expanded relationship. (The schedule at Exhibit F to Mr. Fovenyi's third affidavit, taken in conjunction with other documents, I find, is particularly telling in this respect.)

- [48] The defendants argue that the July 15, 1998 letter, under which the numbered company is said to have received a 20% interest in the partnership, is of dubious validity. The defendants' argument is that the letter was never sent at the material time and did not surface until this litigation. The defendants says that receipt of this letter is unknown to any of the principals; in particular its receipt is denied by the person to whom it was allegedly sent, Michael De Cotiis, or seen by the other brothers. Litigation was started in the spring of 2003 between the parties and, it appears, this document was not produced in the initial list of documents.
- [49] Not only is its receipt unheard of and denied by the other defendants, but the letter's purported confirmation of an interest in a partnership is inconsistent with other documentation signed by Nick De Cotiis. I mention one example referred to by Mr. Church. In correspondence of September 9, 2003 signed by Nick De Cotiis, and apparently copied to his lawyers he wrote:

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

- [50] This is inconsistent with the suggestion that 438336 B.C. Ltd. is a partner in Newcorp Properties Partnership as to 20 percent.
- [51] What of the conduct of the plaintiffs over the past several years if there was this ongoing relationship between the parties that they assert as the foundation for their claim to a certificate of pending litigation? The plaintiffs appear to have sat quietly by, which appears inconsistent with their claim to an ongoing interest in all of the projects of the defendants. One further example will suffice for the moment. In evidence was filed a transcript of the May 26, 2003 meeting of Viam Properties. Nick and Don attended as representatives of 438336 B.C. Ltd. They did not correct or state that the report "under company assets" that Viam Properties held a 99% interest in the Newcorp Partnership was wrong. It was not mentioned at the meeting that the interest was reduced to 79% under the new Family Agreement; it appears the opportunity to say so was available to Nick and Don.
- [52] The defendants argue that if the plaintiffs' position is meritorious that a new company was receiving an assignment of a substantial interest in a partnership, it presumably would have attracted tax consequences and one would expect at least, the defendants contend, a flurry of advice from the professional advisors who are around these litigants. There is no sign that happened.
- [53] I was taken through the affidavit material at some length by all counsel. It appears that the transactions between the parties, which were extensive and detailed, are far more consistent, on the evidence that I reviewed, with a working out as part of a final settlement than they were as partial payments made as part of an ongoing and revived relationship. Mr. Don De Cotiis filed an affidavit in this respect to suggest that the deal changed from what was proposed at an earlier stage. Mr. Hordo filed a written memorandum called "notes re

Don De Cotiis affidavit number 2". I have read that document and find that it appears to largely explain and answer the points raised in that affidavit.

- [54] The defendants say that the affidavits of the professionals are consistent with a final settlement, but the professionals acting for the plaintiff have not filed materials to suggest that the deal was as the plaintiffs contend. The plaintiffs say that while its lawyers have not filed affidavits the same can be said for the solicitors acting for some of the defendants.
- [55] What of the conduct of the parties over the last few years? Although the plaintiffs point to the management agreement, which suggests an ongoing relationship, and the lack of a final general release, the conduct of the plaintiffs, the defendants suggest, in essentially that of sitting back quietly, something which seems inconsistent with the agreement that they say was made several years ago that they are now seeking to enforce. I understood the plaintiffs' position to be that they were silent partners. The conduct of the plaintiffs, however, appears inconsistent with their having an interest in the partnership that is ongoing with all the future projects going through it. In the amended statement of claim the plaintiffs allege that all properties registered in the names of Viam Properties, Newcorp Properties Ltd. and Viam Holdings were at all material times held in trust for Newcorp Properties Partnership although it appears that Newcorp never held Viam's assets, but now the plaintiffs allege that it does.
- [56] If the plaintiffs were entitled to the monies generally under the Management Agreement as opposed to in connection with the properties they received, or managed, the defendants say that one would have expected the plaintiffs to complain earlier.
- [57] The defendants suggest that the scope of the certificate of pending litigation itself, something they describe reveals a scattergun approach, suggests that there is little, if any, merit to the plaintiffs' claim. The defendants point to the fact that the certificate of pending litigation: attached properties that, they say, were clearly were not partnership properties, i.e. properties that Mr. Justice Tysoe held to be separate from the business carried on by Newcorp Partnership Properties; attached a property that was allocated to the plaintiffs in the settlement and then listed and sold by the defendants and bought by a member of the Onni Group and now the subject of the pending litigation claim; and, attached another property which Mr. Justice Tysoe held had been properly acquired by the defendant Inno De Cotiis. The defendants argue that the rather "scattergun" approach of the pleadings and the breadth of the claim suggests an absence of merit.
- [58] The defendants say the evidence must be assessed in light of the longstanding and serious acrimony between the parties, which is sharply inconsistent, they say, with the alleged new Family Agreement that forms the subject matter of the action. The logic of the plaintiffs receiving a 35% interest, the defendants contend, is not properly explained.

- [59] Apart from the factual difficulties with the plaintiffs' claim, the defendants argue: in essence, as a matter of law, it is a damage claim; a partner does not have a direct interest in partnership assets; and, if assets were in fact misappropriated, there is no direct claim by a partner, given the rule in *Foss v. Harbottle* (1843), 67 E.R. 189, 2 Hare 460.
- [60] The plaintiff argues that there is a direct claim or a claim that entitles them to file a certificate of pending litigation, because where assets have been improperly taken or used by a partner there is a claim in unjust enrichment. This is something, the defendants say, might give rise to a remedy in constructive trust, but not an interest in land. The plaintiff however relies on *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214, and *LeClair v. LeClair Estate* (1998), 159 D.L.R. (4th) 638, 48 B.C.L.R. (3d) 245 (C.A.), as support for the proposition that a claim in constructive trust, based on unjust enrichment, can ground a certificate of pending litigation. Given those authorities that touch on when a constructive trust may arise and that, in certain circumstances, constructive trust claims arising upon an unjust enrichment, may support the filing of a certificate of pending litigation, it is probably arguable, if the facts were as the plaintiffs assert them to be in the pleadings, that in some circumstances they would give rise to an interest in land.
- [61] However the defendants say more. They say that generally a partner does not have an interest in the underlying assets of the partnership, except on dissolution, and that to the extent that there are wrongs to the "reconstituted and continued partnership called Newcorp Properties Partnership", the rule in *Foss v. Harbottle*, *supra*, applies. In any event, the defendants say that if a general allegation was sufficient to support a claim of constructive trust, the beneficiary of such a trust is the partnership and not the partners and this pleading cannot, as a matter of law, support a claim.
- [62] Given the complex legal issues raised by the extensive pleadings, the factual disputes that appear in the extensive material, the caution expressed in the authorities, and what I think is a relatively low threshold, I find that I am unable to conclude that there are not triable claims by the plaintiffs to an interest in land. In other words, there is a triable issue that there are claims to an interest in land advanced by the amended statement of claim. I will however return to this question of the merits of the plaintiffs' claim in a moment.

HARDSHIP & INCONVENIENCE

- [63] The defendants all contend that the re-filing of the certificate of pending litigation will cause hardship and inconvenience to them.
- [64] That was described particularly in the affidavit of Rosanno De Cotiis of December 5, 2003 and the affidavit of Donato De Cotiis sworn December 5, 2003.
- [65] It is apparent that the defendants are substantial and it appears successful property developers. The evidence before me is to the effect that the certificate of pending litigation, if re-filed, would affect the defendants in a number of ways. It would prevent consolidation of properties that are in the early stages of development, prevent titles being delivered in the

projects that are closing, restrict access to cash resources to meet trade payables and put at risk the defendant developer's ability to proceed with its ongoing projects and pursue other development opportunities. Rosanno De Cotiis suggests there would be an impact on the reputation, at least on the Onni group, as a reliable and reputable developer. The defendants also say that disruption to payment of contractors risks the loss of good contractors in a currently competitive building market, and potentially puts them in jeopardy with their lenders. They further say that some of the properties that have been subject to the certificate of pending litigation have no relationship to the plaintiffs at all.

- [66] The plaintiffs say that hardship and inconvenience must be proven, not simply assumed, and must not be the product of speculation.
- [67] The defendants say that the plaintiffs' contention ignores the fact that the defendants require equity from their projects and the ability to encumber them to carry on with their existing projects. There was some evidence that a bank advised its branch office to stop dealing with Pinnacle until the certificate of pending litigation was removed but the plaintiffs say that this evidence has not been produced.
- [68] The defendants do not assert issue estoppel but say that I should respect the findings of Gerow J. who found that there was hardship, in the circumstances, when she made the order that she did removing the certificate of pending litigation as a condition of an adjournment.
- [69] The plaintiffs say that the parties had made an arrangement in the past where certificates of pending litigation were removed on a case-by-case basis. The plaintiffs, as I understand it, suggest that on a sale there would be a payment on account of their alleged interest and payment of part in trust for the so-called additional interest in the partnership, or simply that the disputed monies be held in trust.
- [70] First of all, although I am not bound by her findings, I agree with Madam Justice Gerow that the filing of the certificate of pending litigation, particularly given its breadth and scope, will cause the defendant developers hardship and inconvenience. I find that has been clearly proven. I also agree with Gerow J. that the arrangement proposed by the plaintiffs is not workable, given the breadth of the certificate of pending litigation and the number of properties it was registered against. Although the defendants say that the certificates of pending litigation were registered against 1,500 properties, to which the plaintiff replies that it is really only 86, I think that, in itself, given that these are active developers, demonstrates the magnitude of the filing and suggests that inconvenience and the hardship will be experienced if it is not removed and must be dealt with on a case-by-case basis.
- [71] But there are other reasons why the plaintiffs' proposal is not a satisfactory method to remove the hardship and inconvenience. The past practice in the past litigation is not necessarily a guide, given that, as I was told, the certificate of pending litigation then was filed in connection with properties where the plaintiffs generally had a direct or indirect interest as opposed to here where the plaintiffs' interest is very much in issue. I think that I must also be mindful that the arrangement that is proposed may have to be resorted to in

circumstances other than simply to effect sales. From the evidence that was put before me it is clear that the plaintiffs are well aware of the pressure that the filing of a certificate of pending litigation may have. In these circumstances, what the plaintiff proposes, I think, is not workable.

MERITS OF THE PLAINTIFFS' CLAIM

- [72] I have found that there will be hardship and inconvenience if the certificate of pending litigation is re-filed. Under s. 257, I may either cancel the certificate (not allow it to be re-filed) in which case I must have been satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief, or I may refuse to cancel it (allow it to be re-filed) upon an undertaking as to damages, perhaps with security.
- [73] I find that damages would be an adequate remedy for the plaintiffs, or to use the language of the section, it will provide adequate relief. Let me address the issue of security and the probability of the plaintiffs' success.
- [74] As to the merits, I recognize that there may be different witnesses at trial and the deponents of the affidavit material may be cross-examined. The court at trial will be able to fully address credibility issues. However, based on the material that is before me on this application for the purposes of whether I should discharge of the certificate of pending litigation (or rather, the question of whether it should be re-filed), I find that the defendants' arguments are compelling that the plaintiffs do not have a strong case. In fact, the evidence suggests the plaintiffs have a weak or thin case.
- [75] The central question appears to be whether there was an arranged division of assets following Mr. Justice Tysoe's decision or whether there was an agreement for a reconstituted and expanded partnership which included the plaintiffs in an increased way and included assets that were earlier found not to be partnership assets or opportunities.
- [76] The evidence, that is extensive and was reviewed for me in detail, appears to support the defendants' contention of a settlement. The plaintiffs' contention of an ongoing active property development operation, with all parties involved, appears contrary to the longstanding friction. It also appears illogical given the extent of the properties that the plaintiffs suggest are included. Although the question of whether a letter confirming the numbered company's interest in the partnership and the plaintiffs' increased interest is an important piece of evidence and gives rise to a significant question of credibility that I can not resolve on this application, the objective evidence before me, on this application, including the delay in complaining, the recent inconsistent acts, and the absence of expert advice or consultation concerning the alleged new interest in the partnership, speaks against the plaintiffs' assertion.

- [77] Although I have not concluded that the plaintiffs' claim is not arguable, my assessment, for the purposes of this application, is that it is weak.
- [78] I have concluded that damages are an adequate remedy. In deciding what order to make I may take into account the strength of the plaintiffs' case. In this respect the statutory provisions dealing with the discharge of certificates of pending litigation are similar to the considerations on an interlocutory injunction application.
- [79] Given my assessment of the strength of the plaintiffs' case, I have concluded that the security that the defendants are prepared to provide, i.e. the undertaking required by Gerow J., is sufficient. Provided it remains in place, I order that the certificate not be allowed to be re-filed.
- [80] Before making any order, however, I must consider the plaintiffs' alternate application for a receiver.

RECEIVER

- [81] Ms. Fitzpatrick, on behalf of the plaintiffs, applies for the appointment of a receiver. This is done pursuant to s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which allows for the appointment of a receiver or receiver-manager by an interlocutory order in all cases where it appears to be just or convenient.
- [82] The plaintiffs refer to the two general classes of cases where receivers are appointed: first, to enable persons who possess rights over property to obtain the benefits of those rights (which is not applicable here); and second (which is argued to be applicable), "to preserve property from some danger that threatens it".
- [83] The court must be satisfied that the applicant has established a good prima facie title, which has been interpreted to involve considerations similar to the injunction test of a fair question to be tried and that the balance of convenience favours the granting of the injunction. Therefore, if I find there is a fair question to be tried, as I have in connection with the certificate of pending litigation application, I must consider such factors as the likelihood that damages, if awarded, will be paid, which party acted to alter the balance of their relationship and affect the status quo and the strength of the applicant's case, among other things. Although there are cases where it is appropriate to appoint a receiver in the case of a partnership dispute, the question remains whether it is just or convenient to do so in the circumstances.
- [84] I think that the strength of the plaintiffs' case, the fact that I think damages are an adequate remedy, as well as the undertaking that remains, essentially protects the plaintiffs and preserves the status quo. I think the appointment of a receiver potentially could do great harm here. The appointment of a receiver has not been shown to be either just or convenient. Considering all of the circumstances, I do not think this is an appropriate case for the exercise of the court's discretion.

- [85] I have commented on the impact of the filing of a certificate of pending litigation against these defendants. As noted in *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267 (Gen.Div.), the appointment of a receiver may be particularly intrusive. I think it would have a serious and "potentially permanent adverse effect on the operations of the defendants". The plaintiffs, if their claim is valid, seem to have been content to sit by for some time. That reinforces my view that if there is liability, damages are an appropriate remedy and a receiver is unnecessary.
- [86] I have commented above that I do not think that the fact of a previous arrangement for removal of a certificate of pending litigation supports the re-filing, nor do I think that it is a good basis for the appointment of a receiver.
- [87] I think the plaintiffs' interests will be protected as well if they pursue this litigation expeditiously.
- [88] Accordingly the plaintiffs' applications are dismissed. Cost will be in the cause.

"J.S. Sigurdson, J."

The Honourable Mr. Justice J.S. Sigurdson

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/04/16/2004bcsc1658.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/de-cotiis-and-others-v-de-cotiis-et-al-2004-bcsc-1658>

Prepared on 28 October 2026 · Esheria