

CANADA / JUDGMENT

Instafund Mortgage Management Corp. v. Garrow

2020 BCSC 1017

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1017 Instafund Mortgage Management Corp. v. Garrow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Instafund Mortgage Management Corp. v. Garrow,

2020 BCSC 1017

Date: 20200624

Docket: S202773

Registry: Vancouver

Between:

Instafund Mortgage Management Corp.

Plaintiff

And

Phil Garrow also known as Philip Deane Garrow, Raven Michelle Garrow, ADC Projects Ltd., 1449 Sandhurst Place Holdings Limited, 1103 Gilston Road Holdings Inc., 1133 Millstream Ventures Ltd., Benbow Residences Inc., and 1091833 B.C. Ltd.

Defendants

And

IMOR Capital Corp., Instafund Mortgage Management Corp., Instafund Financial Services (2000) Ltd. and Adam Korbin

Defendants by Counterclaim

Before: The Honourable Justice Branch

Oral Reasons for Judgment

Counsel for the Plaintiff:

K. Robertson, T. Boyd

Counsel for the Defendants:

R. Holmes Q.C., O. Holmes

Place and Date of Hearing:

Vancouver, B.C.

June 16 & 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 24, 2020

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I. OVERVIEW

- [1] This is a request by the defendants 1449 Sandhurst Place Holdings Limited, 1103 Gilston Road Holdings Inc., 1133 Millstream Ventures Ltd. and 1091833 B.C. Ltd. (the "Applicants") to cancel or discharge Certificates of Pending Litigation ("CPLs") registered against four properties, each of which is owned by one of the Applicants.

II. FACTUAL BACKGROUND

- [2] The action underlying this application seeks the recovery of \$2,600,000 (the "Mortgage Funds") advanced under a mortgage (the "Mortgage") to the defendant ADC Projects Ltd. ("ADC") in 2017. ADC is a developer who obtained the Mortgage from IMOR Capital Corp. ("IMOR"). The plaintiff Instafund alleges that it is an assignee of IMOR.
- [3] The plaintiff says that the Mortgage Funds were advanced on the basis of fraudulent misrepresentations relating to the state of construction and the available equity in 733 20th Street, West Vancouver (the "20th Street Property").
- [4] The plaintiff alleges that the Mortgage Funds were subsequently transferred between ADC and the other defendant companies including the Applicants. The corporate defendants are part of a group of companies operated by the defendants Phillip and Raven Garrow (the "Garrows"). Phillip Garrow ("Mr. Garrow") is a director of all of the defendant companies.
- [5] The plaintiff concedes that approximately \$1.8 million of the Mortgage Funds were immediately returned to IMOR in order to repay the amounts owing under earlier mortgages granted to ADC, leaving \$861,702.81 (the "Residual Mortgage Funds").
- [6] The Applicants filed an expert report from Robert Mackay (the "Mackay Report") purporting to trace the Residual Mortgage Funds on a "first in/first out" basis. Relying on this report, the Applicants say that none of the Residual Mortgage Funds went into the coffers of the Applicants. The report indicates that in the period from April through May 5, 2017, \$398,741.45 went to the construction at 928 Groveland Road, West Vancouver (the "Groveland Property"), overhead and administration expenses, vehicle leases for the Garrows, a \$35,000 repayment to a company named Highland Mortgage, and a further \$23,557.00 to IMOR, leaving only \$237,707.52. (I note that the plaintiff disputes whether such a "first in/first out" approach is proper in the context of alleged fraudulent conduct, and argues that it needs discovery in order to properly assess the monetary flows. Given that this application was filed with the defendants' Response, no such discovery has yet taken place. Given the defendants' position that the "first in/first out" approach is correct, they declined to provide full disclosure of financial records for the period after May 2017.)
- [7] IMOR agreed to extend the Mortgage later in 2017, receiving in return further security over other properties.
- [8] In or about January 2018, IMOR assigned the Mortgage to the plaintiff.

- [9] In late 2017 and early 2018 a further \$230,653.67 was paid to IMOR and Instafund on account of the Mortgage and a prior mortgage on the Groveland Property.
- [10] On June 14, 2018, the plaintiff obtained an order nisi in foreclosure proceedings. The plaintiff was awarded judgment in the amount of \$2,722,085.32, as against ADC and the Garrows. There is evidence which suggests that there will be little or no equity in the 20th Street Property.
- [11] On December 20, 2018, Instafund obtained an Order for Sale in the foreclosure proceedings, but not over any of the properties owned by the Applicants that are the subject of the present application. The plaintiff has been unsuccessful in obtaining full satisfaction of the amounts payable, only receiving certain limited amounts pursuant to agreements with the Garrows, ADC, and mortgagees on non-Applicant properties. The amount still owing on the Mortgage is said to be approximately \$2.6 million.
- [12] On March 9, 2020, the plaintiff commenced the present litigation and filed CPLs on the four subject properties, as well as on 3151 Benbow Road, West Vancouver ("Benbow") owned by the defendant Benbow Residences Inc., and 928 Groveland Road, West Vancouver, B.C, ("Groveland") owned by ADC.
- [13] In their claim, the plaintiff alleges that as a result of fraudulent misrepresentations, unjust enrichment, fraudulent preferences, and fraudulent conveyances, the plaintiff is entitled to an accounting and tracing of the Mortgage Funds. The plaintiff also seeks a declaration that to the extent that the Mortgage Funds were used to purchase, or can be traced into, properties held by the corporate defendants, including those held by the Applicants that are the subject of the four challenged CPLs, the properties are held on a constructive or resulting trust in favour of the plaintiff.

III. EVIDENTIARY ISSUES

- [14] The Applicants objected to the provision of Affidavit #1 of Sarah Soukasian. They argued that this affidavit was delivered late, and is not proper in any event given that it contains substantive evidence, and Ms. Soukasian is simply a legal assistant with the plaintiff's firm.
- [15] I conclude that this affidavit should be admitted as (1) it attaches material gathered by the plaintiff's firm which efforts could reasonably be expected to be in the direct knowledge of a paralegal, and (2) the material was in response to issues raised by the Applicants in reply affidavits that should reasonably have been addressed in their primary material.
- [16] The Applicants also objected to the provision of the assignment agreement between IMOR and the plaintiff. I find that this agreement should also be received, as the assignment was referred to in the pleadings, and the wording of the agreement is relevant to an assignment argument raised by the Applicants in oral submissions which was not adequately identified in their Notice of Application: *Hamouth v. Edwards & Angell*, 2005 BCCA 172 at paras.16-19.

IV. THE TEST

- [17] The first step on an application to remove a CPL is to determine whether the pleadings disclose an interest in land: Land Title Act, R.S.B.C. 1996, c.250 ("LTA"), s. 215. If the pleadings fail to disclose an interest in land, the CPL must be cancelled, as stated in *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357:
- [35] As the appellant submits, until recently the proper approach to determining whether the pre-conditions required by s. 215 of the Land Title Act were met was unsettled, with some courts looking only at the pleadings to see whether they "disclose a claim for an interest in land", while others "engaged in a limited review of the merits and considered not only the pleadings but also evidence adduced to demonstrate whether there is a triable issue": *Xiao* at para. 20; *NextGen* at para. 7.
- [36] In *Bilin, Xiao and Berthin v. Berthin*, 2018 BCCA 57, this Court confirmed an application to cancel a CPL for non-compliance with s. 215 does not permit an analysis of the merits of the underlying claim. Rather, the court must consider only whether the pleadings contain a claim for an interest in land. In other words, it is not open to a judge to cancel a CPL on the basis a claim to an interest in land is weak or there is no triable issue: *Bilin* at paras. 53-55; *Berthin* at para. 40; *Xiao* at para. 27; *NextGen* at para. 9.
- [18] If an applicant does not succeed in establishing that there is no claim for an interest in land under s. 215, the court may still cancel a CPL if the applicant can establish hardship and inconvenience caused by the presence of a CPL: LTA, ss. 256-257. The onus is on the applicant to establish that they are suffering hardship and inconvenience. The B.C. Court of Appeal discussed the evidentiary threshold in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 [*Youyi*]:
- [28] As a preliminary matter the applicant must show that it is experiencing or likely to experience "hardship and inconvenience" as a result of the registration of the CPL. It appears that the degree of hardship required is the subject of disagreement in the Supreme Court of British Columbia. While some judges have proceeded on the basis that the hardship need not be "significant" ... others have required "severe suffering". To the extent that these or other decisions of the trial court suggest that "hardship" in s. 256(1) may be met by proof of hardship that is "insignificant" or "not significant", I would disagree. I doubt that the Legislature intended the threshold under s. 256 to be surmounted by proof of hardship that is only "trifling". On the other hand, I agree that a court should not be "exacting" in its analysis of hardship and inconvenience.
- [19] An applicant must do more than make general allegations of inconvenience, but rather must provide particulars that demonstrate hardship. Generalizations unsupported by specific proof of hardship and inconvenience are insufficient, as discussed in *Grant v. Sandhu*, 2019 BCSC 2236:

- [34] The affidavits contain vague conclusory statements, such as the "bank is not pleased" with the CPL. There is no correspondence from the bank or accountants appended to the affidavits, nor are there affidavits from Ms. Diaz or the accountant. There is no evidence that would establish that it is the CPL as opposed to the litigation over the easement that may be impeding re-financing. The comments regarding the position of the Bank of Montreal and the opinion of the accountant are hearsay (without the required specific reference to the source) and possibly double hearsay. It is not clear that either of the adult children have personal knowledge of some of the matters stated. The way the affidavits are worded leaves me in doubt that they have personal knowledge of some of the matters stated. Mr. Sandhu, who is the owner of the property, did not swear his own affidavit.
- [20] Speculation about potential business opportunities or sales is insufficient: *Kaur v. Chandler*, 2018 BCSC 1283 at paras. 46-48.
- [21] The alleged hardship must be caused by the registration of the CPL: *Liquor Barn Income Fund v. Mather*, 2011 BCCA 141 at paras. 23 and 37.
- [22] Even if an applicant has established hardship and inconvenience, it does not follow as a matter of course that the CPL will be cancelled. The court retains a residual discretion. This discretion allows for other factors, including equitable principles, to be considered: *Youyi* at para. 29; *Saunders v. Jaremco*, 2015 BCSC 2019 at para. 21; *Javaheri v. Heidari*, 2019 BCSC 1438 at paras 37-39.

IV. THE ABUSE OF PROCESS ALTERNATIVE

- [23] Beyond relying on ss. 215, 256, and 257, the Applicants also asserted that they were entitled to have the CPL set aside under Rule 9-5, given their argument that the claim should be struck as an abuse of process. With respect, there were two flaws in this position.
- [24] First, the Applicants did not seek an order for dismissal as an abuse of process under either Rule 9-5 or Rule 9-6 in their Notice of Application. This should have been raised expressly. The fact that the words are used elsewhere in the Notice of Application is no substitute for providing a clear indication to the plaintiff that it needed to respond to a request for such an order: Rule 8-1(4)(a).
- [25] Second, even if this issue had been properly raised, the Applicants would only have been entitled to a dismissal of the Notice of Civil Claim. They would still have had to seek removal of the CPLs from the Registrar of Land Titles under s. 254 of the LTA. Section 254 of the LTA provides as follows:

254 If an action in respect of which a certificate of pending litigation is registered has been dismissed, the registrar must cancel the registration as provided in the regulations, or, on

- (a) application, and

- (b) production of a certificate of the registrar of the court that issued the certificate of pending litigation, endorsed by the registrar of the Court of Appeal, certifying that
 - (i) the action has been dismissed and that the time limited for appeal has expired and no notice of an appeal has been filed with the registrar of the Court of Appeal, or
 - (ii) a notice of appeal has been filed and has been finally disposed of, and the dismissal of the action has not been set aside by the Court of Appeal or the Supreme Court of Canada.
- [26] Given the language of s. 254, the court does not have the jurisdiction to cancel a CPL immediately upon an action being struck. This was confirmed in *Berthin v. Berthin*, 2018 BCCA 57:
- [44] I conclude that a judge has jurisdiction to make an order immediately cancelling a CPL when the claim does not meet the threshold requirements of s. 215, or when the property owner affected by the CPL establishes hardship or inconvenience under s. 256. A judge does not have jurisdiction to make an order cancelling a CPL when a claim is dismissed under Rules 9-5, 9-6, 9-7, or following a full trial. In those circumstances, s. 254 of the Land Title Act governs and an order purporting to immediately cancel a CPL cannot be given effect and should not be made. In short, when a claim underpinning registration of a CPL is dismissed, the CPL must remain on title until the requirements of s. 254 are satisfied or a subsequent application under s. 256 establishes hardship or inconvenience.
- [27] The Applicants obviously remain at liberty to properly apply to strike under any grounds provided in Rules 9-5, 9-6 or 9-7.

V. STEP 1: DO THE PLEADINGS DISCLOSE AN INTEREST IN LAND

- [28] As noted, the plaintiff alleges that the Mortgage Funds were advanced in reliance on fraudulently made misrepresentations about the state of construction of, and the state of the other financial charges on, the 20th Street Property. In particular, the plaintiff says it relied on documentation purportedly from the City of West Vancouver, and a series of other lenders, provided by the defendants, which documentation was not from whom it appeared to be from.
- [29] The plaintiff alleges that the Mortgage Funds, or some portions of them, were transferred to the remaining defendants, and were used for the purchase, betterment, improvement and maintenance of properties, including the Applicants' properties, or to service mortgage debt on them.
- [30] In particular, the fraudulent misrepresentations alleged are that:
- a) Mr. Garrow provided IMOR with a District of West Vancouver Field Inspection Notice indicating that construction was complete on the 20th Street Property, when it was not; and

- b) Mr. Garrow provided balance statements, on letterhead stated to be that of mortgagees holding mortgages on the 20th Street Property in priority to IMOR, grossly understating the balances that would be owing in priority to IMOR upon funding its mortgage.
- [31] The Applicants put forward a long list of critiques of the plaintiff's pleading. I will address those that I found most material. For clarity, none of the other arguments were sufficient to undermine my ultimate conclusion that the current pleading adequately engages an interest in land.
- [32] First, the Applicants argue that the pleading does not raise an interest in land, as the claims are purely economic and there is no claim for specific performance. However, there is a claim for constructive trust. The case law supports a conclusion that a pleading of a constructive trust can be sufficient to trigger the right to file a CPL. See *Jacobs v. Yehia*, 2015 BCSC 267:
- [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 [In Chambers], paras. 19, 22 and 36; *Samji (Trustee of) v. Chatur*, 2013 BCSC 1915, paras. 60-64; *Lament v. Constantini*, [1985] B.C.J. No. 2988 (B.C. S.C.).
- [26] Constructive trusts are equitable remedies available for acts such as fraud and unjust enrichment. In *Ibbotson v. Fung*, 2013 BCCA 171, Garson J.A. commented that the distinction between a value survived monetary remedy and a constructive trust largely dissipates in some unjust enrichment claims, except to the extent that a constructive trust encompasses additional property rights over an asset until it is sold. Remedies for unjust enrichment retain a large measure of remedial flexibility to deal with differing circumstances according to principles rooted in fairness and good conscience. However, a plaintiff must establish that a monetary award would be an insufficient remedy before a constructive trust will be imposed. One of the factors for consideration is whether a monetary award will be paid: *Drucker*, para. 30; *Ibbotson*, para. 28; *Kerr v. Baranow*, 2011 SCC 10, paras. 53 and 72; *Wilson v. Fotsch*, 2010 BCCA 226, at para. 47.
- [27] Where an interest in land is claimed based on a constructive trust, the question on an application to cancel a CPL is not whether the plaintiff will be successful in proving entitlement to a constructive trust. It is enough to establish that a constructive trust is a possible remedy to sustain the CPL: *Samji*, para. 61.
- [33] See also *Samji (Trustee) v. Chatur*, 2013 BCSC 1915 at paras. 60-64 and *Syed v. Randhawa*, [1992] B.C.J. No. 3071 where the court said:

- [9] On this application, the first argument made by the defendants is that the Statement of Claim does not claim an estate or an interest in land. That is because there is no claim for specific performance and because the plaintiffs themselves admit to agreeing to dispose of their interests.
- [10] The pleadings do, however, raise the issue of a constructive trust. While I may have doubts as to the plaintiffs chances of success, I cannot go so far as to say there is no case to be tried, particularly as it appears that credibility will be a major issue. Not only is it argued that a constructive trust may arise here by operation of law, but affidavit material filed Mr. Devji alleges that had title to Lot 20 not been acquired by the defendants in the manner set out above, title would have been transferred to a company which would have held title as trustees for the benefit of the joint venturers.
- [34] Further, the extant foreclosure proceedings and the plaintiff's inability to recover on the judgment obtained therein, is also supportive of at least the potential for a constructive trust order being made: *Mariash v. 0715422 B.C. Ltd.*, 2012 BCSC 788 at para.14.
- [35] The Applicants' next critique is that any claim in tort supporting the constructive trust remedy was never properly assigned to the plaintiff. They argue that all that was assigned was the strict contractual rights under the mortgage. The plaintiff says that it is obvious, or at least arguable, that tort claims arising out of a mortgage are assigned with the mortgage. I find that the plaintiff's position is at least arguable in light of the language adopted by *McLachlan J.A.* (as she then was) in *Fredericksen v. I.C.B.C.*, [1986] CanLII 1066 (B.C. C.A.), *aff'd* [1988] 1 S.C.R. 1089:
- [23] On the assumption that, as a general rule, causes of action in tort are not assignable, it is clear that that rule is subject to a number of exceptions. In dealing with those exceptions it must be borne in mind that the categories of exceptions are not closed. In each case the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason: *Fleming, The Law of Torts*, 6th ed. (1983), p. 593.
- [24] First, it is clear that the fruits of an action, as opposed to the action itself, are assignable. In *Glegg v. Bromley*, *supra*, the issue was the validity of an assignment by a wife to her husband of the damages of a slander action. The court accepted that an assignment of a tort action based on a "personal wrong" would be invalid. It held, however, that if there were words in the assignment which purported to convey the cause of action as opposed to the fruits of the action, those words would be inoperative, leaving intact the portion of the assignment conveying the right to the fruits of the action.

- [25] The assignment in the case at bar purports to convey both the cause of action and the fruits of the action. If Miss Nielsen's only interest were in obtaining any damages which Mr. Fredrickson might obtain as a result of the suit, then the matter could be disposed of on the basis of this exception. However, it appears that she is desirous of prosecuting the action as well, through her agent, the Public Trustee. Her right to do so cannot be resolved on the basis of this exception.
- [26] A second exception concerns cases where the assignee has either a pre-existing property interest or a legitimate commercial interest in the enforcement of the claim. An assignment where the assignee possesses such an interest will be valid, provided the action in tort is not based on a personal wrong, such as assault, libel or personal injury. The reason for the latter stricture appears to be that in cases of personal torts, the assignee can have no legitimate property or commercial interest in recovery: *Trendtex Trading Corp. v. Crédit Suisse*, [1980] Q.B. 629 at 656-57, [1980] 3 W.L.R. 367, [1980] 3 All E.R. 721, per Denning M.R., affirmed [1982] A.C. 679, [1981] 3 W.L.R. 766, [1981] 3 All E.R. 520 at 530 (H.L.).
- [27] This raises the question of what constitutes a sufficient interest to support an assignment of a cause of action in tort. Certainly a property interest to which the cause of action is ancillary is sufficient: *Ellis v. Torrington*, [1920] 1 K.B. 399 (C.A.)
- [36] Furthermore, the written assignment agreement contains additional express language that at least arguably transfers such rights:
1. Assignment. The Assignor hereby absolutely assigns, transfers, conveys and sets over to the Assignee, to the extent assignable, all of the Assignor's right, title and interest, both at law and in equity, in, to and under the Assigned Contracts and all mortgages and other security granted in connection therewith (collectively, the "Security") held by the Assignor, including without limitation the rights and benefits of all representations, warranties, covenants, indemnities and guarantees in favour of the Assignor set out therein and all remedies connected therewith or arising therefrom, with full power and authority to enforce performance of covenants in the name of the Assignee.
- [Emphasis added.]
- [37] The third material critique raised a question of internal consistency. The Applicants say that there is no way the plaintiff could have believed that the Mortgage Funds were going to be put into the development of the 20th Street Property, as there is also a plea that they were earlier given the Final Building Inspection. As such, there is no way the plaintiff could have expected that much additional work to be required. Furthermore, the plaintiff was aware that more than \$1.8 million of the \$2.6 million was going to be returned to IMOR for the purpose of paying out their earlier construction mortgage.

- [38] The plaintiff responds that the reference to the funds being "for the express purpose of completing the development of 20th Street", could be read as including expenses that would need to be incurred after Final Building Inspection. Furthermore, the use of the funds to pay off an existing construction mortgage could also come within the scope of this language. I find that it is at least arguable that some or all of the funds could have been imprinted with this purpose without doing any violence to the balance of the pleading.
- [39] The fourth critique is that the pleadings necessary to create a path to a constructive trust are flawed in that:
- a) The fraud pleas do not meet the demanding requirements of such a plea, as detailed in Rule 3-7(18), *Grewal v. Sandhu*, 2012 BCCA 26 and other decisions;
 - b) The conspiracy plea does not adequately detail who did what and when, and why, according to the requirements set out in *Golden Capital Securities v. Rempel*, 2004 BCCA 565, *H.M.B. Holdings Ltd. v. Replay Resorts Inc.*, 2019 BCSC 1138, and other decisions; and
 - c) The pleas are illogical since the Applicants did not exist at the time that the Mortgage Funds were provided.
- [40] The plaintiff responds that:
- a) The Applicants' critique of the fraud pleading is a case of "hard-marking", particularly in a context where Mr. Garrow is a director of all of the companies, making it challenging to identify what acts he was performing wearing which hat, particularly where the plaintiff has not yet had the benefit of discovery;
 - b) The plaintiff is not pleading conspiracy as a separate tort, but simply used the term in its more common sense to communicate that the defendants were acting in concert to move the Mortgage Funds to where they did not belong; and
 - c) Although the plaintiff's use of "the Defendants" may be problematic in certain places given the date of incorporation of certain of them, it is clear that it would include at least some defendants. Further, all defendants engaged in the alleged fraudulent preferences when the funds were allegedly improperly delivered to them.
- [41] Although the claim is somewhat unartfully drafted, and could benefit from some greater particularization, I accept the plaintiff's arguments on these points.
- [42] Although I have reservations about the strength of the case on the merits, this is not the stage at which to factor in these concerns. At this stage, the question requires me to assess the pleadings alone. I conclude that the claim does adequately plead an interest in land.

VI: STEP 2: HARDSHIP AND INCONVIENCE

- [43] In *Kaur*, Justice Fitzpatrick provided examples of what may constitute hardship and inconvenience caused by CPLs remaining on title:

- [45] Examples of hardship and inconvenience will vary from case to case and require an analysis of the particular circumstances before the Court. Examples of hardship and inconvenience caused by CPLs can generally include: impeding the ability to close a sale (Marrello and Enigma); impeding a sale process where the CPL is dissuading persons from making an offer (Watson Island Development Corp. v. Prince Rupert (City), 2015 BCSC 1474 at paras. 37-41); and impeding the ability to obtain financing for the continued development of the lands: Syed v. Randhawa, [1993] B.C.W.L.D. 1899 at paras. 15-19 and 23 (S.C.) (WL).
- [44] The evidence of hardship and inconvenience on this application is set out in affidavits of Philip Garrow. It is useful to review the evidence of the alleged hardship on a property by property basis.

Gilston

- [45] This property is being marketed for sale. The Applicant owner 1103 Gilston Road Holdings Inc. must disclose any third-party claims or interest to a potential seller. Mr. Garrow says that his realtor advises (and he agrees) that the existence of the CPL will make negotiations for purchase difficult, given that the CPL will give the appearance of distressed circumstances, or that the seller may be unable to deliver clear title.
- [46] The plaintiff says there is no basis for the speculative conclusion that the existence of the CPL will prevent or dissuade purchasers from making offers at fair market value.
- [47] Counsel for the plaintiff has written to counsel for the Applicants to advise that, if a bona fide offer from an arm's length purchaser is received, it will agree to lift the CPL, on terms that a sufficient amount of equity from the sale be paid into court. The plaintiff accepts that this offer was too vague to be accepted in its current form. I find that as written, it leaves too much control in the plaintiff's hands, and hence does not truly mitigate any potential hardship. For an offer to mitigate hardship, there should be a clear and workable solution to the parties' competing rights.
- [48] I accept that the presence of a CPL will make it more difficult for the owner Applicant to sell the property. A purchaser will either have to do detailed and difficult legal assessment to determine the likelihood of success of the claim, or the purchaser would have to demand removal of the CPL. This latter route would in turn require a difficult and uncertain negotiation with the plaintiff. This is not to say that any property up for sale will be entitled to removal of a CPL thereon, but the Applicants have provided adequate particulars of the likely effect of the CPL on the active sale process here to support a finding that there will be a hardship and inconvenience in this case.
- [49] The Applicants also note that having a CPL as a subsequent charge is a breach of the terms of at least one of the current mortgages. Although I do not view this as determinative, as this issue will arise in the case of almost any CPL on a previously mortgaged property, it is some additional evidence of hardship and inconvenience.

- [50] The plaintiff responds that there is a builder's lien registered on title so that regardless of the presence of the plaintiff's CPL, there are title issues which would demand inquiries from a prospective purchaser. In his latest affidavit, Mr. Garrow provides evidence that this charge will be removed, and hence I find that it does not disrupt the causal link.

Sandhurst

- [51] Mr. Garrow deposes that this construction project will require financing through a construction mortgage. He provides particulars of a lender who has expressed an interest in offering construction financing, but who has verbally included a requirement that the CPL be discharged.
- [52] Mr. Garrow also notes that the existence of the CPL is a breach of at least one of the existing mortgages.
- [53] Again, I find that this is adequate evidence of hardship and inconvenience.

Millstream

- [54] Mr. Garrow states that the company holding this property is in the process of refinancing, including seeking a further advance for construction. Mr. Garrow has had discussions with a lender who would provide financing conditional on proof that the CPL registration has been removed from title. Again, there is also a breach of one of the existing mortgages.
- [55] The plaintiff argues that the CPL is only one of a number of issues facing this project, given that a CPL has also been filed by People's Trust Company ("People's Trust") in foreclosure proceedings (filed in November 2019, well before this action was commenced). However, People's Trust have now indicated that its CPL will be removed as part of the refinancing.
- [56] Counsel for the plaintiff wrote to counsel for the Applicants to advise that if a bona fide offer from an arm's length lender is received for this property, it would allow refinancing of existing security, on terms so as to not erode equity, to stand in priority to the CPL, and would consider terms relating to security for further financing for construction. However, this proposal raises the same uncertainty concern expressed above in relation to the Gilston Property. Again, I find that hardship and inconvenience has been established.

Eastcot

- [57] One of the lenders on this property has taken the position that the CPL has created a default on its existing mortgage. Although this is not particularly clear on the language of the mortgage, the lender is taking this position and this does qualify as hardship and inconvenience.

General Arguments and Conclusion on Hardship and Inconvenience

- [58] The plaintiff argues that there is insufficient evidence that the lenders are concerned about the CPLs rather than the underlying litigation, or any other problems with the developments. In *Liquor Barn Income Fund v. Mather*, 2011 BCCA 141, the court concluded that the evidence did not show that a lender was concerned about the CPL, as opposed to the underlying litigation. Here, the Applicants have provided sufficient evidence to show that there is a concern on the part of lenders about the existence of the CPLs themselves.
- [59] The plaintiff argues that there is insufficient proof that the Applicants could not finance the four projects without lender assistance. However, the plaintiff simultaneously (and inconsistently) argues that its need for the CPLs is supported by the poor financial condition of the defendants including the Applicants. This is not a situation as in *TCC Mortgage Holdings Inc. v. Rohland*, 2020 BCSC 420, where evidence indicated that there was substantial equity in the property such that lenders should not be deterred from further lending by the mere existence of a CPL (para. 30).
- [60] The plaintiff also argued that in the case of each of the properties, there are other steps that will need to be satisfied in order for the project to proceed, such as ensuring the Applicants are in good standing. However, in any development there will obviously be many steps that need to be taken, of which clearing away the CPL will only be one. I conclude that clearing away the CPL is a material step for each of the development projects, and that none of the other steps required to proceed with the projects appear to be insurmountable. Hence the required causation element has been satisfied.
- [61] The plaintiff says that there are insufficient particulars of the lenders' interest in and requirements for financing. While that was a fair criticism of Mr. Garrow's initial affidavit, I find that he provided adequate particulars in his subsequent affidavit. Specifically, he has now provided evidence of greater quality than that which was available in *Kaur*. These CPLs have "impeded further progress" in discussions with various lenders and potential lenders: *Mariash*, para. 44.
- [62] I conclude that the Applicants have proffered sufficient evidence to meet the statutory threshold in terms of establishing hardship and inconvenience in relation to the four properties.

VII. STEP 3: RESIDUAL DISCRETION

- [63] The plaintiff argues that even if the s. 256 test is met, the court should exercise its discretion not to grant the order for the following reasons:

- a) **Mr. Garrow's Credibility:** The plaintiff alleges that Mr. Garrow's evidence (1) contains sworn statements which appear to be either wrong, or unsupported by the evidence provided in support, and (2) repeatedly overstates the actual position. In particular, the plaintiff complained about the lack of sourcing for the evidence of the lenders, and a misleading statement as to ownership.
- b) **Flaws in the Expert Report:** The plaintiff argues that the scope, assumptions and analyzed documents in the Mackay Report were improperly limited to exclude transactions that did not fall within the Applicants' theory of the case. On a request for the expert file, the Applicants' counsel provided redacted records, showing only specific transactions. The plaintiff asks the court to draw the inference that the Applicants are intentionally not revealing transfers which would support the plaintiff's pleaded position.
- c) **The Plaintiff's Inability to Collect on its Foreclosure Judgment:** The plaintiff argues that the Court ought not to deprive the plaintiff of its remedies. The plaintiff has an outstanding judgment which has not been paid. Mr. Garrow did not attend an Examination in Aid of Execution for that judgment and, the judgment creditors have refused to provide any further dates. The plaintiff believes there is limited equity in the 20th Street Property. Accordingly, the plaintiff argues that unless it is able to maintain the CPLs, there is a serious risk that none of the Mortgage Funds that have allegedly been improperly transferred to the defendants will be recovered. The plaintiff argues that it would be inequitable to deprive the plaintiff of any chance of recovering its funds.
- d) **The Strength of the Plaintiff's case:** The plaintiff argues that their case is very strong, in that there is clear evidence that there was a forgery of documents purportedly from the District of West Vancouver and certain lenders. Further, any weaknesses in its tracing arguments are simply a result of not yet having full discovery.

[64] In relation to these points, I find as follows, using the same lettering system:

- a) Many of the criticisms of Mr. Garrow's evidence were corrected through his later filed reply affidavit. The credibility issues raised are not clear cut, and will require a trial.
- b) The expert report is not so flawed that I cannot have regard to it, but I consider it properly modulated to account for the fact that it has not yet been subject to cross-examination, and that the plaintiff has not yet received the benefit of full discovery.
- c) The argument regarding the effect of the foreclosure judgment is flawed. The plaintiff has obtained its remedy under the Mortgage. The fact that the plaintiff is having difficulties collecting in another proceeding against other parties is not a proper reason to refuse the Applicants a remedy in this proceeding, in which the plaintiff seeks remedies far beyond those sought in the foreclosure proceeding, and against additional parties.

- d) The strength of the plaintiff's case is not so strong as to justify depriving the Applicants of the order requested. That said, I do consider the strength of the plaintiff's case in determining the appropriate level of security below.

VIII. STEP 4: SECURITY TERMS

- [65] Even if the Applicants have made out a case for removal of the CPLs, the court retains the ability to impose such security terms as it deems appropriate: LTA s. 257(1)(a). 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: s. 257(3). At this stage, the Court is entitled to consider the available evidence, as well as the pleadings: *Aviawest Resorts Inc. v. Memory Land Developments Inc.*, 2004 BCSC 999 at para. 28.
- [66] I have found that the plaintiff has adequately plead their claim for a constructive trust. I have also found (1) the hardship and inconvenience and (2) the ability of damages to provide adequate relief, justify removal of the CPLs.
- [67] I am concerned that, in light of the financial situation of the Applicants, there is a material risk of non-payment of any damages award such that security is justified: *Youyi* at paras. 49 and 57.
- [68] However, on the basis of the limited record before me, I have concerns about the strength of the plaintiff's case for an interest in the Applicant's lands. The available evidence is quite compelling in terms of supporting the argument that a fraud was committed in the preparation of the purported West Vancouver and lender documents. Where the plaintiff faces far greater challenges is in relation to additional steps required to draw a line between any apparent fraud by ADC, and a property right to the Applicants' properties. It is the probability of success of the proprietary claims that is to be considered at this stage: *Mariash* at para. 46. In evaluating such prospects of success, I have considered the following factors:
- a) The fact that approximately \$1.8 million of the \$2.6 million in Mortgage Funds were returned to IMOR as repayment of earlier mortgages undermines the plaintiff's argument that IMOR believed the funds were to be used for development of the 20th Street Property.
 - b) The plaintiff will apparently need to rely on oral representations to support this plea, as there appears to be no documents providing for such a restriction.
 - c) The plaintiff conceded that, on the present record, there is no evidence that any of the Residual Mortgage Funds were transferred by ADC into the Applicants' hands. The plaintiff is simply hopeful that such information will be revealed through discovery.
 - d) Although less compelling, the Applicants also have arguments to advance about merger and *res judicata*, as these principles may apply in relation to the effect of pursuing and obtaining an order nisi, and the 2017 mortgage renegotiation.

- e) Carrying even less weight is the Applicants' argument that the plaintiff cannot advance the causes of action given the law on assignments and the terms of the assignment between IMOR and the plaintiff. While there may be interesting arguments in relation to the proper interpretation of the agreement, it appears that the plaintiff has a strong case that it did receive the right to assert the claims being advanced. However, this remains one further hurdle that the plaintiff will need to clear in order to succeed.
- [69] Given these concerns about the strength of the plaintiff's case, I find that the security should be constrained. However, the case is not so weak that the security should be nominal: 1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd., 2012 BCSC 1058 at paras. 24-26.
- [70] In setting the security, I note that the Applicants own only four of the six properties over which there are CPLs. Absent agreement of the parties or further order of the court, CPLs will remain on the other two properties, to the plaintiff's benefit.
- [71] I conclude that the required security should be \$50,000 per property, to be paid by the Applicant owner of each property. This creates security of \$200,000 from these owners of four of six implicated properties. This represents approximately 35% of 4/6th of the \$861,702.81 in Residual Mortgage Funds. This is a reasonable proxy for my assessment of the strength of the plaintiff's case and the other equitable factors based on the limited record before me. These views should obviously have no influence on the ultimate determination of the merits on a full record.
- [72] The full \$200,000 must be paid in trust into the account of Applicants' counsel before any of the CPLs are released.

IX. CONCLUSION

- [73] The application is granted on the terms set out above.
- [74] The parties asked for the right to make submissions on costs after they had an opportunity to digest these reasons. If they are unable to arrive at an agreement, they may make written submissions on the following schedule: the Applicants will provide written submissions 30 days from today, with the plaintiff responding 30 days thereafter, and the Applicants having a further 10 days for reply.

"Branch J."

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