

CANADA / JUDGMENT

Kaur v. Chandler

2018 BCSC 1283

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1283 Kaur v. Chandler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaur v. Chandler,

2018 BCSC 1283

Date: 20180731

Docket: S1711845

Registry: Vancouver

Between:

Charanjit Kaur, Simrat Viridi, Mukhtiar Singh Nijjar, Mohan Vilkh, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Sat Pal Bansal, Parminder K Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd., 1083516 B.C. Ltd., Ik Onkar Transport Ltd., 1083677 B.C. Ltd., Raymond Au, Juliana Au, Damandeep Singii Cheema, Kulbir Kaur Kegal, Sierra West Properties Inc., Arun Ramamurthy, Lyana Huynh, Jonas Renaud, Shawn Girard, Navpreet Kaur, 1056835 B.C. Ltd., Ashleigh Marilyn Mcauley, David Wesley Stanley, Alice Linda Jensen- Stanley, Christopher Brant Stanley, Jaswinder Saini, Candice Liberatore, 1403428 Alberta Inc., Jaspal Mashiana

Plaintiffs

And:

Natalie Lauren Chandler

208th Street Yorkson re Ventures Ltd.

Defendants

- and -

Docket: S183601

Registry: Vancouver

Between:

Forjay Management Ltd. and Reliable Mortgages Investment Corporation

Plaintiffs

And

Natalie Lauren Chandler, 208th Street Yorkson Ventures Ltd., 0981478 B.C. Ltd., and 0969311 B.C. Ltd.

Defendants

- and -

Docket: S177349

Registry: Vancouver

Between:

Charanjit Kaur, Simrat Viridi, Mukhtiar Singh Nijjar, Mohan Vilkh, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Sat Pal Bansal, Parminder K Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd., 1083516 B.C. Ltd.

Plaintiffs

And

0981478 B.C. Ltd., 0969311 B.C. Ltd., Mark Chandler

Defendants

- and -

Docket: S183567

Registry: Vancouver

Between:

Charanjit Kaur, Simrat Viridi, Mukhtiar Singh Nijjar, Mohan Vilku, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Sat Pal Bansal, Parminder K Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd., 1083516 B.C. Ltd., Ik Onkar Transport Ltd., 1083677 B.C. Ltd., Raymond Au, Juliana Au, Damandeep Singi Cheema, Kulbir Kaur Kegal, Sierra West Properties Inc., Arun Ramamurthy, Lyana Huynh, Jonas Renaud, Shawn Girard, Navpreet Kaur, 1056835 B.C. Ltd., Ashleigh Marilyn Mcauley, David Wesley Stanley, Alice Linda Jensen- Stanley, Christopher Brant Stanley, Jaswinder Saini, Candice Liberatore, 1403428 Alberta Inc., Jaspal Mashiana, Kashmir Mander, Gurdeep Nijjer, Paramjit Gosal, Harbans Malhi, Gurdeep Malhi, Sangita Dale, Charanjit Dhillon

Plaintiffs

And

Newmark Sagebrush Holdings Inc.

Defendant

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Eric Aitken

Counsel for the Kaur Group:

Kimberley Robertson

Tom Boyd

Place and Date of Hearing:

Vancouver, B.C.

May 31, June 1, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 31, 2018

INTRODUCTION

- [1] The genesis of these four actions is the financial failure of 0981478 B.C. Ltd. ("098"), who was the developer of a condominium development in Langley, known as "Murrayville House". Most of the issues arising from those circumstances are being addressed in a foreclosure proceeding involving mortgagees who have security against that development, including the plaintiff Forjay Management Ltd. ("Forjay") and Reliable Mortgages Investment Corporation ("RMIC") (Action No. H170498).
- [2] Anticipating difficulties in obtaining full or even partial recovery from 098 and its assets, Forjay, RMIC and other creditors of 098, known as the "Kaur Group" (who I will collectively refer to as the plaintiffs), have taken certain measures. Those measures include commencing the subject actions against parties who are related to 098. Forjay, RMIC and the Kaur Group claim that monies they advanced to 098 were improperly diverted into the hands of these related parties, and also, into real properties owned by these related parties. They have filed certificates of pending litigation (CPLs) against those properties in these actions.
- [3] Two of the related parties, the defendants 0969311 B.C. Ltd. ("096") and Newmark Sagebrush Holdings Inc. ("Newmark Sagebrush"), now apply for an order cancelling the CPLs registered against their properties--the "86 Street Property" owned by 096 and the "Sagebrush Property" owned by Newmark Sagebrush--on terms. In the alternative, if the CPLs are not removed, these defendants seek an order that the plaintiffs' post security.
- [4] The defendant 208th Street Yorkson Re Ventures Ltd. ("208") had previously applied to discharge CPLs which had been registered against its property--the "208 Street Property". By consent, at the hearing of that application, an order was granted to remove the CPLs so as to allow a sale to complete. The net sale proceeds are currently held in trust and 208 now seeks to determine the proper amount of security to be held from those net sale proceeds.

LITIGATION OVERVIEW

- [5] As alluded to above, these four actions, and these applications, cannot be viewed in isolation. They can only be fully understood as a subset of the entire litigation landscape.

- [6] Mark Chandler is a developer and the principal of 098. The defendant Natalie Chandler is his wife. Mr. Chandler operates through what is described as the "Newmark Group", which includes a complex web of corporations who presumably undertake various development projects and perhaps other undertakings. Within that corporate group is included: 098, 096, 208 and Newmark Sagebrush.
- [7] The 098 foreclosure proceeding in relation to Murrayville House were filed in August 2017.
- [8] At the hearing of the petition in October 2017, it was very evident that various stakeholders in that project were concerned about how that project had failed and, more importantly, why? The "why" question led many creditors to ask--where had all the money advanced to 098 for the Murrayville House project gone? Many suspected that Mr. Chandler used that money for other purposes within the Newmark Group or otherwise. Mr. Chandler and 098 have vigorously denied these accusations from the outset. At that time, I appointed The Bowra Group Inc. (the "Receiver") as receiver and manager of 098's property, namely Murrayville House.
- [9] Despite that appointment, the process of monetizing the project has not gone smoothly. Various stakeholder persons or groups are battling over the right to either the condominiums themselves or their proceeds. Disclaimer issues were addressed by this Court in relation to the pre-sale contracts (*Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, *aff'd* 2018 BCCA 251, and *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1251). There have been and are significant disputes over the validity, enforceability and priority of virtually every type of claim, whether it be those of pre-sale purchasers of the condominiums or mortgagees or other lenders. Some factions face the very real prospect of receiving far less from the disposition of the Murrayville House units than what is claimed to be owing or perhaps, no recovery at all.
- [10] To add to this uncertainty and confusion, 098 continues to oppose many positions taken by various stakeholders or advances opposition itself to many of the claims.
- [11] More importantly for the purpose of these applications, there are significant disputes between 098, on the one hand, and the Receiver and the creditors, on the other, as to whether 098 has fully disclosed its books and records to the Receiver. The Receiver continues to take the position, disputed by 098, that full disclosure has not yet been received in accordance with previous orders granted in the foreclosure proceeding. Many of the creditors support the Receiver, taking the position that 098 has "cherry picked" what information to disclose to the Receiver under the court orders and also, what disclosure 098 has made in response to various applications heard to date.
- [12] The plaintiffs allege that 098's "cherry picking" has continued on these applications to remove the CPLs such that the related parties are seeking relief without a full disclosure of the inflows and outflows of monies in respect of the Murrayville House project, and where the outflows landed.

- [13] Immediately before this hearing, on May 29, 2018, I issued reasons in relation to the process by which the Receiver would release its reports, including as to disclosure of information and documentation provided by 098 to the stakeholders: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1023.
- [14] Since then, the now unredacted Supplemental Second Report to Court filed by the Receiver on May 30, 2018, has confirmed what many creditors already suspected--namely that substantial funds (approximately \$15.7 million) flowed from 098's coffers into the hands of related parties, including Mr. Chandler's other companies and his wife. 098 advises that the recipients of these funds do not have the ability to repay these amounts back to 098. 098 has listed what it describes as \$17.3 million in "operational expenses" many of which clearly do not fall within that category. Within those "operational expenses" are found numerous and large payments to related parties, including Mr. Chandler's wife and many of his companies, including 208.
- [15] There are other issues in progress that may materially affect the ability of 098 and Mr. Chandler to address all of this litigation. On July 4, 2018, I heard an application by Forjay and its co-lenders under the second mortgage to obtain judgment against Mr. Chandler. On July 6, 2018, I heard an application by Forjay to place 098 into bankruptcy pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Both of those applications are under reserve.

THE APPLICATIONS

- [16] The four actions can be summarized as follows:
- a) Action No. S177349: commenced August 4, 2017; action by the Kaur Group in respect of the 86 Street Property, and others;
 - b) Action No. S1711845: commenced December 22, 2017; action by the Kaur Group in respect of the 208 Street Property, and others;
 - c) Action No. S183567: commenced March 8, 2018; action by the Kaur Group in respect of Sagebrush Property; and
 - d) Action No. S183601: commenced March 9, 2018; action by Forjay and RMIC in respect of the 86 Street Property and 208 Street Property, and others.
- [17] As stated above, the defendants have brought four separate applications in each action to deal with the CPLs registered against the 86 Street Property, the 208 Property and the Sagebrush Property. At the time of the hearing, I was also advised that Forjay and RMIC were in the process of filing a further action against Newmark Sagebrush and filing a CPL in respect of the Sagebrush Property. All parties agree that the disposition of Newmark Sagebrush's application in Action No. S183567 will similarly address what will be identical issues arising in that new action.

THE CLAIMS ADVANCED

- [18] At this stage, I will summarize the nature of the claims advanced by Forjay/RMIC and the Kaur Group. The causes of action are fairly uncontroversial; however, the parties significantly disagree as to what relief is available to Forjay and the Kaur Group in the CPL actions if they are successful in prosecuting their claims. This latter issue is more relevant as to what amount of security should be held if the CPLs are removed.
- 1) Forjay/RMIC
- [19] In their action (and presumably in the one to be filed), Forjay/RMIC allege that they jointly advanced approximately \$34.3 million to 098 for the development of Murrayville House. They claim that it was an express term of the mortgage advances that the monies were to be used solely for the purchase and construction of Murrayville House.
- [20] They claim that the funds were subject to a trust, known as a Quistclose trust. A Quistclose trust is a purpose trust that arises "when moneys are loaned by a lending institution expressly for the purpose for which the borrower intends to use the loan": *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 57, citing *D.W.M. Waters, Mark Gillen & Lionel Smith, Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005).
- [21] Monies advanced by loan normally become the property of the borrower, who is free to apply the money as it chooses. In a Quistclose trust, the money is loaned for a specified purpose where the borrower is not free to apply the money for any purpose other than that specified. "The question in every case is whether the parties intended the money to be at the free disposal of the recipient": *Cliffs* at para. 64, citing *Twinsectra Ltd. v. Yardley*, [2002] 2 All E.R. 377.
- [22] On these applications, Forjay/RMIC have produced evidence that supports their contention that their advances to 098 were specifically provided for use in the development: it is not disputed that their loans were advanced to 098 for the express purpose of purchasing and developing Murrayville House; commitment letters for the loans expressly state that their purpose is for the purchase and development of lands; commitment letters further required verification of the work in place and for 098 to provide cancelled cheques to prove funds had been used to pay for the work in place; and finally, letters for each draw expressly stated that a condition of the advance was that the funds be applied in accordance with an attached draw summary indicating certain payables.
- [23] Forjay/RMIC also allege that the Quistclose trust was breached by 098 and that 096, 208 and Newmark Sagebrush knowingly participated in and/or assisted in that breach of trust. Other allegations include knowing receipt of trust monies, unjust enrichment, fraudulent conveyance and fraudulent preference.

- [24] All defendants have filed responses to the Forjay/RMIC claims denying the allegations. In particular, they deny that funds loaned to 098 were impressed with a Quistclose trust or that the use of funds by 098 constituted or could constitute a breach of trust. 096, 208 and Newmark Sagebrush further deny that they received funds impressed with a trust in favour of Forjay/RMIC, and refute Forjay/RMIC's allegation that they are able to trace trust proceeds into either the 86 Street Property, the 208 Street Property or the Sagebrush Property.
- [25] The defendants point out, quite rightly, that Forjay/RMIC have significant hurdles ahead in respect of establishing liability on their part. In *Right Business Limited v. Affluent Public Limited*, 2012 BCCA 375 at para. 77, the court described this cause of action as "exceptional".
- [26] It will be evident that the prosecution of this action will entail a consideration of substantial contested factual and legal issues.
- [27] In any event, I find that Forjay and RMIC have shown an arguable case: *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379 at para. 31. In addition, none of the defendants dispute that Forjay and RMIC's claims, if successful, are sufficient to establish an "interest in land" sufficient to presumptively establish a right to file a CPL pursuant to s. 215(1)(a) of the Land Title Act, R.S.B.C. 1996, c. 250 (the "LTA").
- 2) The Kaur Group
- [28] The Kaur Group's claims in its three actions arise from contracts between plaintiffs in the Kaur Group and 098 related to Murrayville House. The terms of the Kaur Group agreements varied, but in general, the many individuals in that Group signed a pre-sale contract with respect to a particular unit in Murrayville House that included a term to the effect that they would loan funds to 098 secured by a promissory note.
- [29] The Kaur Group claims specific performance of the contracts, although that claim has been overtaken by the Receiver's disclaimer of all pre-sale contracts by the Receiver, which was not contested by the Kaur Group. In the alternative, the Kaur Group seeks damages.
- [30] The crux of the Kaur Group actions is its characterization of the funds it advanced to 098 as "deposits" pursuant to the Real Estate Development Marketing Act, S.B.C. 2004, c. 41 ("REDMA"). The Kaur Group alleges that 098 contravened REDMA by not placing those funds into trust. 098 denies all of the Kaur Group's allegations, in particular contending that the monies advanced were loans, rather than REDMA deposits, and that there was no contravention of REDMA.
- [31] The Kaur Group's claims against 096, 208 and Newmark Sagebrush stem from its allegation that 098 is in breach of a statutory trust imposed by REDMA. The Kaur Group alleges that funds payable to 098 can be traced into the 86 Street Property, the 208 Street Property and the Sagebrush Property since these funds were "used to purchase, improve, and/or make mortgage payments" towards those properties. The Kaur Group seeks the imposition of a constructive or resulting trust over those properties on the basis that 096, 208 and Newmark Sagebrush are liable for knowing assistance or knowing receipt. Finally, the Kaur Group

alleges that the transfers of the funds to 096, 208 and Newmark Sagebrush can be set aside as a fraudulent conveyance or fraudulent preference.

- [32] 096, 208 and Newmark Sagebrush deny that the Kaur Group has any claim to a proprietary interest in their properties. None of the defendants dispute that the Kaur Group's claims, if successful, are sufficient to establish an "interest in land" so as to presumptively establish a right to file a CPL pursuant to the LTA.
- [33] I agree with 098 that the resolution of the Kaur Group actions engages significant factual and legal issues that will take some time to resolve. I find that the Kaur Group have shown an arguable case: Enigma at para. 31.

LEGAL PARAMETERS

- [34] 096 and Newmark Sagebrush apply for the cancellation of the CPLs registered against their respective properties pursuant to s. 256(1) and 257 of the LTA. Sections 256(1) and 257 of the LTA provide:

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.

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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] Therefore, the first question is whether 096 and Newmark Sagebrush are suffering or are likely to suffer hardship and inconvenience by reason of the registration of the CPLs: s. 256(1)(b). If that is established, the Court may then consider whether it will make an order under either s. 257(1)(a) or (b). If hardship and inconvenience are not established, the application must be dismissed: *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at para. 26.
- [36] It remains the case that, even if hardship and inconvenience are shown, the court retains the discretion to make an order under s. 257 of the LTA: *Liquor Barn* at para. 26; *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 29.
- [37] 096 and Newmark Sagebrush submit that an order cancelling the CPLs registered against the 86 Street Property and the Sagebrush Property are necessary and appropriate in this case. They contend that the CPLs are causing hardship and inconvenience, damages are clearly an adequate remedy and the Court can fashion an appropriate order for security that is fair to the parties and consistent with the evidence.
- [38] The issues relating to 208 and the 208 Street Property stands on a slightly different footing.
- [39] 208 and Ms. Chandler initially brought an application in early March 2018 to remove the CPLs registered against the 208 Street Property and another property. 208 alleged hardship at that time, principally arising from the fact that the CPLs were preventing the closing of the sale of the 208 Street Property. There was considerable opposition to that application by the plaintiffs, particularly arising from the shifting explanations offered up by Ms. Chandler as to why she needed access to some of the sale proceedings for other real estate deals (which was also advanced as establishing hardship).
- [40] The matter was resolved by a consent order dated March 15, 2018, discharging the CPLs against the 208 Street Property conditional upon the net sale proceedings being placed in trust. That sale closed and approximately \$5.1 million is being held in trust at this time.

- [41] There are many examples of situations where a CPL has been removed from title on the basis of hardship and inconvenience under s. 256 of the LTA in order to allow the net sale proceeds to stand in stead of the property, particularly when damages will suffice: for example, see *Marrello v. Okinshaw Water Company Ltd.*, 2016 BCSC 453 at paras. 24-30.
- [42] In my view, this is what occurred here. Accordingly, I agree with 208 that s. 256 of the LTA has been satisfied and the Court may now consider whether any order under s. 257 of the LTA is appropriate.

HARDSHIP AND INCONVENIENCE

- [43] The threshold question is whether 096 and Newmark Sagebrush have proven hardship and inconvenience arising from the registration of the CPLs, pursuant to s. 256(1)(b) of the LTA.
- [44] It is not enough to show "insignificant" or "trifling" hardship or inconvenience; on the other hand, the court is not to be "exacting" in its analysis: *Youyi Group* at para. 28.
- [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).
- [46] Much of the submissions on this issue concerned whether 096 and Newmark Sagebrush had adduced sufficient evidence to meet the onus upon them. Any person seeking to cancel a CPL registered against their title must include affidavit evidence that sets out the "particulars" of the hardship and inconvenience experienced or likely to be experienced by the registration of the CPL: *Liquor Barn* at para. 26.
- [47] Generalizations, unsupported by specific proof of hardship and inconvenience, are not sufficient to meet the requirements of s. 256(1)(b): *Kwan v. Kwan* (1992), 33 A.C.W.S. (3d) 101 at paras. 27-28 (S.C.) (WL); *0771252 B.C. Ltd. v. 0764735 B.C. Ltd.*, 2012 BCSC 2039 at paras. 42-48.
- [48] In addition, speculation about potential business opportunities or sales are not sufficient: *Saunders v. Jaremco*, 2015 BCSC 2019 at paras. 23-28; *Aviawest Resorts Inc. v. Memory Lane Developments Inc.*, 2004 BCSC 999 at paras. 26-31.
- 1) The 86 Street Property
- [49] The 86 Street Property is a vacant development site in Langley, B.C.

- [50] Mr. Chandler says that he is a director of and has "effective control" of 098, 096 (the registered owner of the 86 Street Property) and 1117462 B.C. Ltd., said by Mr. Chandler to be the beneficial owner of the 86 Street Property, with 096 holding it as bare trustee.
- [51] In May 2017, 096/1117462 B.C. Ltd. acquired the 86 Street Property for \$6,675,000. Mr. Chandler says that the funds for this purchase came from loans from an unrelated party, 0718925 B.C. Ltd. ("071"), that were secured against the 86 Street Property. No payments were made by 096 under that mortgage, and it appears that the inevitable increase in the amount outstanding could be secured under the face amount of the mortgage, being \$8 million.
- [52] In July 2017, 071 made demand under its mortgage for the amount outstanding of approximately \$8.6 million. In December 2017, 071 commenced a foreclosure action in this Court. The Kaur Group and other persons (presumably judgment holders) were named as respondents in that action. On February 2, 2018, this Court granted an Order Nisi setting a redemption amount of approximately \$8.8 million. 071 also obtained an immediate order for sale effective after a six-month redemption period, expiring August 3, 2018.
- [53] 096's evidence of hardship and inconvenience arises from the evidence of Jasprett (JP) Dhaliwal, who is 098's chief financial officer. On May 10, 2018, Mr. Dhaliwal stated (Action No. S177349):
17. [096] is taking steps to sell the 86th Avenue Property before the expiry of the redemption period. There have been several interested purchasers. However, the certificates of pending litigation filed by the plaintiffs in this proceeding and the plaintiffs in Action No. S-183601, Vancouver Registry are impeding [096]'s ability to sell the Property. [096] cannot sell the 86th Avenue Property unless the plaintiffs' CPL is cancelled from title. [096] will suffer substantial hardship if the CPL is not cancelled and it is unable to sell the 86th Avenue Property, as [096] will then inevitably lose the 86th Avenue Property as a result of an order absolute of foreclosure or a court-approved sale driven by a mortgagee that does not maximize equity in the 86th Avenue Property.
- [54] This Court has stated in Saunders and Aviawest that such general and conclusory statements are insufficient to establish hardship as required under s. 256. As noted by Forjay's counsel, Mr. Dhaliwal's statement above is remarkably similar to the evidence before this Court in Aviawest, as set out at para. 26 of that decision.
- [55] Mr. Dhaliwal's statement gives rise to more questions than answers: what are the "steps to sell" that 096 has undertaken? And, who are these "several interested purchasers" and what communications came from them and when?
- [56] Further, it is inexplicable that these CPLs are the sole cause of any difficulty, when no doubt, 071 has similarly filed its own CPL. 096 argues that the fact of a foreclosure is evidence, in and of itself, of hardship and inconvenience. That may be true, but the hardship arises from actions taken by 071 alone, including the filing of its own CPL.

[57] The usual course of such a foreclosure action is that the debtor, (096 here), would take steps to sell and when a sale was in hand, it would go to the various respondents and seek agreement to lift the charges to allow that to happen. If the sale proceeds were not sufficient to pay all charges, the debtor can always bring an application to approve the sale, which would typically be granted in the event that the sale is at fair market value. In that event, all charges including those filed under Forjay/RMIC and the Kaur Group's CPLs would be vested off title.

[58] 096 argues that this process may be the usual one available to it, but it:

ignores the obvious depressing impact CPLs filed by over 50 trust claimants would have on the number of potential purchasers who would be interested in this type of property and the amount they would pay for it.

[59] I see little merit in this argument. A bona fide purchaser simply wants to get the property at a proper price. Needless to say, any sale would be conditional upon all charges, including all of the CPLs, being removed. The background to the CPL being filed has little or no bearing on that approach. In sum, there is no reason why the normal sale process in a foreclosure proceeding cannot unfold here. In that event, I see no basis upon which it can be alleged that it is only the plaintiffs' CPLs that are hindering that process.

[60] 096's evidence is simply insufficient to meet the burden upon it to particularize real or expected hardship arising from the subject CPLs. On that basis alone, 096's applications in Action Nos. S183601 and S177349 should be dismissed.

2) The Sagebrush Property

[61] The Sagebrush Property is located approximately 20 kilometres northeast of Merritt, B.C. It is a golf course property that is not in operation, having been closed for years. The clubhouse and restaurant are not yet completed.

[62] The Sagebrush Property is owned by QCC Properties Ltd. ("QCC Properties"), who is said by Mr. Dhaliwal to be an arm's length landlord. In October 2015, Newmark Sagebrush leased the Sagebrush Property from QCC Properties pursuant to a residential ground lease dated April 11, 2016, as amended and assigned to Newmark Sagebrush. Newmark Sagebrush paid \$2 million plus a \$500,000 lease payment to QCC Properties. Most of those funds were borrowed from HP Eastern Financial Corp. ("HP").

[63] Mr. Dhaliwal claims that since October 2015, Newmark Sagebrush has paid approximately \$1.375 million toward development of the property, including the refurbishment of one of the golf holes and construction of a clubhouse and restaurant.

[64] In May 2016, Newmark Sagebrush refinanced the mortgage granted by HP by receiving advances of \$4.1 million from Pacific Oriental Financial Corporation ("POFC"). In May 2016, Newmark Sagebrush also obtained a second loan of \$1.525 million from 1003961 B.C. Ltd. ("1003961") which was secured in second position against the Sagebrush Property. It bears

noting at this point that, after leasing this property for only eight months, Newmark Sagebrush has obtained total funding of approximately \$5.6 million, some \$1.8 million in excess of the purchase price and development costs (approximately \$3.8).

- [65] On June 20, 2017, POFC and 1003961 commenced foreclosure proceedings in the Kamloops Registry of this Court. POFC claimed that as of March 23, 2017, there was due and owing to POFC the sum of \$4,505,580.52, with a per diem of \$3,700.63. 1003961 claimed that as of March 23, 2017, there was due and owing to 1003961 the sum of \$1,694,082.14, with a per diem of \$1,389.81.
- [66] On November 14, 2017, Master Baker granted an order that POFC be granted immediate and exclusive conduct of sale of Newmark Sagebrush's interest in the Sagebrush Property. There is no indication of what evidence was before the Master, however, one might reasonably assume that there was evidence of value indicating potential jeopardy to POFC's security to support such an immediate sale, rather than grant the usual six-month redemption period.
- [67] Newmark Sagebrush contends that it has been making "diligent efforts to secure refinancing to pay out the first and second mortgages". To the contrary, despite the foreclosure proceeding having crystallized in mid-late 2017, it appears that any such efforts have only recently been undertaken.
- [68] Very recently, a dispute arose between Newmark Sagebrush and POFC as to the marketing of the Sagebrush Property.
- [69] On May 28, 2018, POFC listed the Sagebrush Property at a list price of \$8.1 million. Newmark Sagebrush contends that the list price is substantially lower than the estimated market value, which it estimates at \$23 million. It has demanded that POFC cease marketing the Sagebrush Property at the lower price, which POFC has refused to do. However, excerpts of appraisals produced by Mr. Dhaliwal in support of the higher amount confirm, as best I can tell, that these amounts are for a completed golf course, and bare land strata lots when they are serviced, and completed cottage properties. In other words, these are anticipatory values and do not support Mr. Dhaliwal's statement that there is "substantial equity" in the Sagebrush Property that is at risk of being lost from a sale in the foreclosure.
- [70] Newmark Sagebrush asserted at the outset that it needed to refinance the first and second mortgages to not only pay them out and avoid a foreclosure sale, but also to make outstanding lease payments and to put the golf course into operation. There is no evidence to support that Newmark Sagebrush has any operational plan to put the golf course into operation. In addition, there is no evidence as to any amounts owing to QCC Properties.

- [71] Newmark Sagebrush's sole focus now arises from its contention that, just recently, an urgent need arose to refinance the first and second mortgages to avoid having the property sold at a price that is substantially below fair market value. It also contends that the subject CPLs registered on title to the Sagebrush Property are impeding Newmark Sagebrush's ability to obtain a refinancing commitment, and that the CPLs are thus causing hardship and inconvenience.
- [72] On May 5, 2018, Newmark Sagebrush entered into an agreement with Rockwater Group Inc. ("Rockwater") for a \$10 million loan facility. While the document is entitled "loan agreement", in my view, it is more properly described as a term sheet. In the term sheet, the loan proceeds are to be used to pay existing mortgages of \$7.2 million; legal and closing costs; a collateral reserve of \$200,000; and \$2,550,000 for "working capital for the borrower". As security, Rockwater requires a first mortgage and assignment of rents. Rockwater also requires that there be no subsequent financial charges against the Sagebrush Property. Specifically, Rockwater requires the removal of the subject CPLs in order to do the refinancing.
- [73] On May 31, 2018, Mr. Dhaliwal stated that Newmark Sagebrush has continued to be in active discussions with Rockwater concerning the refinancing. Due diligence questionnaires have been completed and a due diligence interview has been held, however, he did not produce any questionnaires. On May 28, 2018, Newmark Sagebrush paid a \$10,000 fee to Rockwater for application funding. There is no evidence as to the source of these funds. Mr. Dhaliwal said he expected a funding proposal in the next several days but nothing materialized by the time of this hearing.
- [74] The plaintiffs raise serious questions and concerns about the veracity and reliability of the evidence of a refinancing with Rockwater. I agree with many of those concerns. They include:
- a) at present, there is only the very preliminary document, being the term sheet. There is no loan agreement or even any funding proposal;
 - b) the term sheet is highly conditional, being subject to inspection of the Sagebrush Property by Rockwater; a final review and approval by Rockwater's investment committee and solicitors; and an unqualified appraisal showing \$20 million minimum market value for the Sagebrush Property. In 0771252 B.C. Ltd. at para. 44, this Court found that such conditional financing does not mean that hardship or inconvenience exists;
 - c) there is no evidence of any satisfactory inspection of the Sagebrush Property by Rockwater;
 - d) there is no evidence of a final review and approval by Rockwater's investment committee and solicitors;

- e) there is no evidence of an unqualified appraisal showing \$20 million minimum market value for the Sagebrush Property. In fact, given the "anticipatory" values referred to in Newmark Sagebrush's appraisals, it seems unlikely in the extreme that any such appraisal could be obtained. It appears that the listing of the Sagebrush Property by POFC was consistent with an appraisal obtained by it in October 2017;
 - f) the term sheet does not reference that Newmark Sagebrush holds only a leasehold interest. In fact, the "Secured Property" is simply described as the fee simple title and interest. It is possible that Rockwater fails to appreciate the true nature of the interest held by Newmark Sagebrush;
 - g) the Kaur Group also notes that the intention under the term sheet is that Mr. Chandler will provide a personal guarantee. In addition, they note that Mr. Chandler is the sole officer and director of Newmark Sagebrush and therefore, the term sheet indicates that he would receive funds of over \$2.5 million for "working capital". This is said to potentially give rise to a breach of his bond condition (k), which does not allow him to receive money as loans except where proceeds are disbursed through a solicitor's trust account;
 - h) despite stating that discussions were ongoing with Rockwater in late May 2018, Newmark Sagebrush has not adduced any evidence or even written documentation from Rockwater beyond the term sheet so as to substantiate their ongoing interest and movement toward funding; and
 - i) the reference in the term sheet to "working capital" is inexplicable given that there is absolutely no evidence as to what operational expenses are required by Newmark Sagebrush in respect of the as yet uncompleted golf course. It is not even clear that the golf course is operating in any fashion. While there is some evidence of expenses being put into the Sagebrush Property during 2016, no receipts indicating any recent activity are before the Court.
- [75] Even assuming that this financing proposal is real and can be completed and funded, I agree with the plaintiffs' concerns that it seems to be designed, not only to refinance the existing debt on the property, but as a mechanism to remove at least \$2.5 million from the value of the Sagebrush Property directly into the hands of Mr. Chandler. Most importantly, such a payment would, in my view, deny absolutely any potential recovery of that value by the plaintiffs in these actions.
- [76] I conclude that Newmark Sagebrush's evidence is insufficient to meet the burden upon it to particularize real or expected hardship arising from the subject CPL. On that basis alone, Newmark Sagebrush's application in Action No. S183567 should be dismissed. This finding would also apply with respect to the CPL that was to be filed and registered by Forjay/RMIC in the impending action relating to the Sagebrush Property.

THE 208 STREET PROPERTY

- [77] 208 asserts that an order should be granted cancelling the subject CPLs upon 208 posting security in an amount to be determined by the Court pursuant to s. 257(1)(a) of the LTA.
- [78] It is at this stage where I am to consider the strength of the plaintiffs' allegations in terms of what relief, if any, is to be considered under s. 257: *Aviawest* at para. 28. In *Marrello*, Justice Thompson discussed the approach of the Court in setting an amount of security:
- [55] Subsection 257(3) makes it clear that the Court may consider the strength of the case in setting the amount of security to be given. However, the vendor is not required in every case to post security equal to the estimated damages even if the damages could be forecast with accuracy: *Mercedes-Benz of Can. Ltd. v. SAS Properties Ltd.* (1975), 10 B.C.L.R. 19 at 24 (S.C.), *aff'd* 10 B.C.L.R. 24 (C.A.); *Park & Tilford Canada Inc. v. Festival Markets Inc.* (1986), 6 B.C.L.R. (2d) 160 at 167 (S.C.); *Delesalle Holdings Limited v. Meakin*, 1997 CanLII 1807 at paras. 16 and 19 (BC SC).
- [79] The 208 Street Property is a vacant development lot located in Langley, B.C. It was acquired by 208 in March 2017 for approximately \$12.45 million. As stated above, it was sold in March 2018 for approximately \$21.5 million. After paying the four mortgages against the 208 Street Property, the net sale proceeds of approximately \$5.1 million remain.
- [80] 208, on the one hand, and the plaintiffs, on the other, take diametrically different approaches as to the potential remedies available to the plaintiffs in respect of the 208 Street Property in the event that they succeed in their actions.
- [81] 208 correctly asserts that the plaintiffs are not claiming a right to obtain a transfer of title from 208 of the 208 Street Property. Their consent to the order lifting their CPLs to allow a sale of the 208 Street Property is evidence enough that they simply seek a monetary damage award. Rather, the plaintiffs seek the imposition of a trust over those properties, (and now the monies held in trust), to secure the payment of monies that can be traced into those properties (assuming they prove their claims against 208).
- [82] 208 asserts that \$360,000 is the maximum amount that can be traced from 098 into the 208 Street Property and therefore, is the maximum amount of security that should be ordered from the net sale proceeds currently held.
- [83] On this application, Forjay/RMIC have provided some evidence which ties the mortgage funds they advanced to 098 to 098's later payment of amounts to the other defendants or on their behalf. There is sufficient evidence to suggest that, contrary to the specific uses to which the mortgage advances were to be directed, those funds were moved elsewhere by Mr. Chandler and his various companies to these other defendants (and perhaps others).
- [84] 208, through Mr. Dhaliwal, has undertaken what he says is a complete accounting of the flow of funds that could possibly be traced from 098's bank account. This analysis is based on a review of complex transactions dealing not only with the 208 Street Property, but also a

transaction involving another development project described as the "Poet's Wynd Lands". To describe these transactions and the flow of money as complex is, in fact, an understatement. They involve a myriad of companies, mostly numbered companies in the Newmark Group. 208 says that, based on these transactions, only a maximum of \$360,000 can be traced from 098's accounts.

- [85] I have considered the matter carefully and have decided that it is a fool's errand to embark upon a detailed consideration of this accounting toward setting a proper security amount. As Forjay/RMIC and the Kaur Group point out, there are serious questions as to the reliability of the information and documentation produced by the defendants. The defendants refer to their "comprehensive analysis" and "volumes of materials" as supporting the suggestion that they have made adequate disclosure.
- [86] In point of fact, overall disclosure to the Receiver in the foreclosure action has not been as timely as it could have been and the Receiver still takes the position that it is incomplete. In addition, further information and documentation from 098 was only disclosed to the entire stakeholder group, including Forjay/RMIC and the Kaur Group, just a day before this hearing. At bottom, this is a one-sided accounting exercise on 098 and 208's part and is, as yet, untested.
- [87] Even 208 concedes that the tracing exercise is complicated by tracing rules, such as: that the funds must remain identifiable; that if there is a mixed fund, presumptions apply with respect to allocating later payments from that fund; and, the "lower intermediate balance rule" which limits tracing when the fund drops.
- [88] I have already alluded to the fact that there are serious concerns raised by the stakeholder group in the Forjay foreclosure action about where all the money advanced to 098 has gone. There are serious questions remaining to be answered and not surprisingly, there is no basis upon which the Receiver and the other stakeholders are prepared to trust the reliability of information from Mr. Chandler and his companies without independent confirmation. Given my involvement in those proceedings from the outset, I share those concerns. Those concerns are relevant on these applications.
- [89] Forjay/RMIC's counsel relies on *Boroudjerdi v. Lam* (1993), 41 A.C.W.S. (3d) 433 (S.C.) (WL). In that case, there was a suspicious conveyancing scheme and the credibility of the defendants was in serious question. The defendants sought to cancel the CPL that had been filed against the property. In those circumstances, Justice Leggatt fixed the amount of security in the amount of the plaintiff's claim. The Court stated:

14 However, I am satisfied that if the Defendants will pay as a security into Court an amount appropriate to the claim, then the Defendants will be granted relief from the *lis pendens*. As to security, s. 236(1)(b)(ii) of the Act provides the party wishing to remove the *lis pendens* to give a security in an amount satisfactory to the Court, and s. 236(3) provides that, in fixing the amount of security to be given, the Court may consider the probability of success of the action. In my view there are numerous inconsistencies in the Defendants' position which are evidenced from

their Affidavits and Examination for Discovery evidence, and which give credibility to the positions of the various creditor/plaintiffs. The entire conveyancing scheme appears to be fraught with suspicion and thus the credibility of the Defendants' is in serious question. As such, I fix the amount of security required to be paid into Court for the removal of the *lis pendens* at the amount of the plaintiff's claims including interest to date.

[Emphasis added]

- [90] In my view, these same types of concerns here would cause me to order that the full amount of the net sale proceeds from the 208 Street Property be held as security.
- [91] Besides the extremely complex and disputed accounting exercise proposed by 208 is an equally complex legal issue which is disputed by the parties. This legal issue directly affects what relief may be granted to the plaintiffs if they are successful in establishing liability in their actions.
- [92] This legal issue is whether Forjay/RMIC and the Kaur Group are limited to securing only the actual amounts traced into the various properties, versus the ultimate value of those properties when they are realized. This is an important distinction, particularly where land values in the Lower Mainland have skyrocketed over the last while. The dramatic increase in value of the 208 Street Property is evidence enough in that respect. It is also highly relevant in terms of how the Newmark Group appeared to operate, since there was, generally speaking, little money put down and property acquisitions were financed through mortgages upon which interest was not paid.
- [93] 208 contends that, although it is accurate to say that a constructive trustee can be deprived of the profit attributable to the wrongful use of trust funds, the beneficiary's entitlement is capped at the proportionate share of the asset or proceeds, not the entire asset or proceeds itself.
- [94] 208 relies on the discussion of the court in *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448 at paras. 40-44. That case addressed what remedy was available where a trustee had used trust money to purchase an asset. Citing *Foskett v McKeown*, [2001] 1 A.C. 102, Hall J.A. concluded that the wronged party was entitled to a proportional proprietary interest in the asset:
- [44] Thus, the circumstance that it may not have been exclusively funds of Nor Sham U.S. that funded the purchase of the Canadian hotel property is no bar to awarding a proprietary remedy to the respondents. I see no principled reason why a person whose monies were in part used to buy an asset cannot obtain a proportional proprietary interest in the asset. In my opinion, Pitfield J. was entitled to make the award he did. I would go further and say that indeed he was almost obligated to make such an order on the facts of this case, for to refuse such an order would amount to allowing wrongdoers to profit from their wrongful conduct, a result a court of equity could not countenance.

[Emphasis added.]

[95] To the contrary, Forjay/RMIC and the Kaur Group assert that, with one possible exception, all of these properties were acquired using only monies that were improperly diverted from 098. They point to these improperly used funds as being the only seed money that allowed Mr. Chandler to enter the market and obtain financing and thereafter, gain the substantial increases in value through market forces.

[96] Forjay/RMIC and the Kaur Group say that as such, they, and not the defendants, are entitled to any market increases or profits. They reject the tracing analysis put forward by the defendants on this application so as to limit their potential claim.

[97] Forjay/RMIC and the Kaur Group argue that faithless fiduciaries are strictly prohibited from benefitting from their wrongdoing, citing *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at paras. 74-77. Binnie J. stated:

77 The concept of the prophylactic purpose is well summarized in the *Davis* factum as follows:

[W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits . . . equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted; para. 152.]

Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[Emphasis added]

[98] They also cite *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 672 where La Forest J., writing for the majority with respect to remedy for breach of confidence and fiduciary duty, stated:

The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources. The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary. If by breaching an obligation of confidence one party is able to acquire

an asset entirely for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset.

[Emphasis added]

[99] In the circumstances of this case, Forjay/RMIC and the Kaur Group say that disgorgement of 208's profits is warranted and that to find otherwise would be to reward 098 and 208 for their unlawful conduct and provide strong incentive to breach these or other similar obligations in the future.

[100] Forjay/RMIC and the Kaur Group dispute that Ruwenzori supports the position of 208. They says that this case actually supports the prophylactic purpose described in Strother. They particularly point to the following passage in Ruwenzori:

[41] To allow the appellants to profit from their own wrongdoing by receiving any increase in the asset value of the Canadian hotel property purchased with the funds of Nor Sham U.S. would seem a strange result to say the least.

[Emphasis added]

[101] The defendants reject the submissions of Forjay/RMIC and the Kaur Group as to their potential remedy, stating that it is "legally untenable".

[102] It will be evident from my discussion above that the factual and legal issues raised in relation to the plaintiffs' claims are complex. The defendants accept this and, in fact, say that they are not asking the Court to "delve deeply into the merits of the factual and legal issues that will be presented in these claims". However, the approach taken by 208 on these applications as to the question of the amount of security certainly would require me to do so.

[103] It is not my role to determine these complex factual and legal issues on this interlocutory application: *Stott v. Ramanathan*, 2017 BCSC 560 at paras. 28-29. It will suffice to say that I agree with Forjay/RMIC and the Kaur Group that they have an arguable case that they are entitled to the entirety of any value or profit found in the subject properties: *Enigma* at para. 31.

[104] In the above circumstances, I order that the full amount currently held with respect to the 208 Street Property sale proceeds shall continue to be held pending trial or the agreement of the parties.

FINAL THOUGHTS

- [105] I have already found that 096 and Newmark Sagebrush have not proven any hardship and inconvenience. Accordingly, it is not necessary to move to a s. 257 analysis in respect of the 86 Street Property and the Sagebrush Property, in respect of whether security should be ordered (if the CPLs are cancelled), or an undertaking ordered with or without security (if they are not): *Samji (Trustee) v. Chatur*, 2013 BCSC 1915 at paras. 83-84.
- [106] However, in light of the fact that further applications may arise where hardship and inconvenience might be later proven by 096 and Newmark Sagebrush, I will provide what I hope will be of some use to the litigants.
- [107] Similar to what was put forward in respect of the 208 Street Property, a tracing analysis was put forward in respect of the 86 Street Property and the Sagebrush Property. 096 and Newmark Sagebrush asserted that only \$100,000 or \$1.8 million respectively could be traced to those properties.
- [108] For the same reasons expressed above in relation to the 208 Street Property, I would not have acceded to these submissions. Rather, I would have ordered that the CPLs remain on title, failing evidence of any equity in those properties that could potentially be available to the plaintiffs and in which case, that equity might be considered under s. 257(1)(a).
- [109] That brings to me to the alternate relief sought by 096 and Newmark Sagebrush in the event that this Court did not cancel the CPLs. In accordance with s. 257(1)(b), they sought an order requiring that the plaintiffs enter into an undertaking and requiring that they give security for that undertaking, suggesting \$1 million for the 86 Street Property and \$2 million for the Sagebrush Property.
- [110] The imposition of an undertaking as to damages, while discretionary, will often flow from a decision refusing to cancel a CPL. However, ordering that security be posted for that undertaking is an extraordinary measure where the Court should take into account the plaintiff's likelihood of success. Where there is an arguable case, and the claim is not frivolous or vexatious on its face, security by the plaintiffs need not be ordered: see *Re Cloverlawn-Kobe Development Ltd. v. Tsogas* (1979), 104 D.L.R. (3d) 279 at 286-87 (B.C.S.C.); *Lam v. Vancouver City Savings Credit Union*, 2004 BCSC 1119 at para. 24.
- [111] The rationale for an undertaking as to damages where a CPL is not cancelled is that in the absence of the undertaking, the defendants would have no claim as to damages in the event that they successfully defend the plaintiff's action, absent proof of a malicious or unlawful purpose on the plaintiff's part: *Pulvers v. Shen* (1989), 8 R.P.R. (2d) 225 at 225 (S.C.); *Park & Tilford Can. Inc. v. Festival Markets Inc.* (1986), 6 B.C.L.R. (2d) 160 at 167 (S.C.).

[112] If hardship and inconvenience had been established, and if I had decided not to remove the CPLs from the 86 Street Property and the Sagebrush Property, I would have ordered that Forjay/RMIC and the Kaur Group provide an undertaking as to damages in accordance with s. 257(1)(b)(i). I would not have ordered any security be provided for that undertaking in accordance with s. 257(1)(b)(ii).

CONCLUSION

[113] The applications by 096 and Newmark Sagebrush are dismissed.

[114] The application of 208 is dismissed, save for my order that the amounts presently held in trust by Gowlings WLG (Canada) LLP arising from the sale of the 208 Street Property are to continue to be held in trust and stand as security for the plaintiffs' claims in Action Nos. S1711845 and S183601.

[115] Costs of all of these applications are in the cause.

"Fitzpatrick J."

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