

CANADA / JUDGMENT

Marzara v. Marzara

2011 BCSC 1142

COURT

Supreme Court of British Columbia

DECIDED

23 August 2011

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2011 BCSC 1142 Marzara v. Marzara

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marzara v. Marzara,

2011 BCSC 1142

Date: 20110823

Docket: E061957

Registry: Vancouver

Between:

Farzaneh Marzara also known as Farzaneh Hematanian

Plaintiff

And

Esmail Marzara, Pacific Coast Commodities (PCCI) Inc. Incorporation No. BC0395330, The Shad Family Trust, John Doe, The Trustee of Shad Family Trust, The Marzara Family Trust, Davood Marzara, The Trustee of the Marzara Family Trust, Ara Development Ltd. and Ara Manufacturing Company Limited also known as Ara Sales

Defendants

Docket: H080790

Registry: Vancouver

Between:

HSBC Bank of Canada

Petitioner

And

Esmail Marzara, Farzaneh Marzara also known as Farzaneh Hematianian,

B.C. Hardwood Floor Co. Ltd., BRL Restorations Ltd., 732288 B.C. Ltd.,

Suzanne Smith

Respondents

Corrected Judgment: Hearing dates were amended on page 2

on September 8, 2011.

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff Farzaneh Marzara also known as Farzaneh Hematianian:

Paul Daltrop

Agnes Huang

Counsel for the Applicants Getz Prince Wells LLP and Gerry Cuttler:

Gerry Cuttler

Counsel for the Applicant Clark Wilson LLP:

C. Michelle Tribe

Counsel for the Applicant Bayshore Law Group:

Jef Poulsen

Counsel for the Applicant Lorne N. MacLean Law Corporation dba MacLean Family Law Group:

Lorne N. MacLean

Counsel for the Applicant Shapray Cramer LLP

Abbas Sabur

The Applicant M. Kwan:

In Person

Counsel for the Defendant Esmail Marzara:

Thomas G. Keast, Q.C.

Counsel for the Defendants Ara Development Ltd., Ara Manufacturing Company Limited also known as Ara Sales and Pacific Coast Commodities (PCCI) Inc. and for the Applicant Singleton Urquhart LLP:

Mark Stacey

Wei Kiat Sun

Counsel for Interested Parties Mitra and Mohammad Marzara:

J. Zeljkovich

Place and Date of Hearing:

Vancouver, B.C.

May 19, June 20, 21 and

August 3, 4, 2011

Place and Date of Judgment:

Vancouver, B.C.

August 23, 2011

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Introduction

- [1] There are a number of applications brought subsequent to the judgment in this family litigation, reasons indexed at 2011 BCSC 408. During the course of the family litigation, HSBC Bank Canada commenced foreclosure proceedings, action numbers H080790, H080795 and H080793, whose reach encompassed all of the British Columbia real property owned by the personal and corporate parties to the family litigation. All of the Canadian real property was eventually sold with the proceeds remaining after discharge of the indebtedness owed to HSBC paid into court awaiting, among other things, the resolution of the family litigation.
- [2] The present applications include applications in action number H080790 foreclosure proceedings and in the family proceeding. The plaintiff in the family action, Farzaneh Hematanian, applies in the family action for the following orders:
1. That the sum of \$668,927.40 from the monies held in Court from the sale of 1592 Chippendale Court in West Vancouver (the Former Matrimonial Home) be paid forthwith to Schuman Daltrop Basran & Robin in trust for the claimant pursuant to the Order of Madam Justice Ross pronounced April 1, 2011.
 2. That 50 percent of the monies totalling \$432,963.09 held in trust by Singleton Urquhart LLP for Ara Development Ltd. from the sale of the Tsawwassen condominiums be paid forthwith to Schuman Daltrop Basran & Robin in trust for the Claimant pursuant to the Order of Madam Justice Ross pronounced April 1, 2011.
 3. That the sum payable to Esmaeil Marzara in respect of the division of the insurance funds held in trust by Schuman Daltrop Basran & Robin be fixed at \$12,290.46 as at March 31, 2011 and that those monies remain in trust, with Schuman Daltrop Basran & Robin being at liberty to use those funds:
 - a) to pay Esmaeil Marzara's half share of the monthly storage fees payable -- to The Storeroom;

At the hearing of the application liberty was given to use the proceeds of the insurance funds to pay Mr. Marzara's share of the storage fees payable to The Storeroom up to and including July 31, 2011.

- b) to pay Esmaeil Marzara's half share of the monthly storage fees payable to Williams Moving and Storage; and

This order was granted at the hearing of the application.

- c) to pay spousal support owing to Farzaneh Hematanian and the child support owing to Farinaz Marzara by Esmaeil Marzara pursuant to the Order of Madam Justice Ross pronounced April 1, 2011.

4. That the balance of the insurance funds held in trust by Schuman Daltrop Basran & Robin be paid forthwith to Farzaneh Hematanian.
5. That any monies allocated to Esmaeil Marzara from the sale of the Former Matrimonial Home and the sale of the Tsawwassen condominiums owned by Ara Development pursuant to the Order of Madam Justice Ross pronounced April 1, 2011 be held in trust by Schuman Daltrop Basran & Robin as security for the monthly spousal support and child support payable by Esmaeil Marzara.
6. In the alternative, that payment of any monies allocated to the respondent Esmaeil Marzara pursuant to the Order of Madam Justice Ross pronounced April 1, 2011, be stayed pending the hearing of the appeal and cross appeal of the Order.
7. That the carpets from the Former Matrimonial Home held with PCC Carpet Services Limited, save and except the two carpets claimed by the insurer Lloyd's of London, be sold through auction with Farzaneh Hematanian having sole conduct of sale, and that the net proceeds of sale be divided equally between Farzaneh Hematanian and Esmaeil Marzara, and that the proceeds payable to Esmaeil Marzara be held in the trust account of Schuman Daltrop Basran & Robin as security for the payment of monthly spousal support and child support by Esmaeil Marzara.
8. That Esmaeil Marzara retain the carpets owned by Ara Manufacturing Company Limited that were held on consignment at PCC Carpet Services Limited or the net proceeds of sale of those carpets, and that Farzaneh Hematanian retain the household contents presently held in storage with The Storeroom and Williams Moving and Storage.
9. In the alternative, that:
 - a) Esmaeil Marzara pay to Farzaneh Hematanian forthwith the sum of \$42,366.50; that is, half of the value of total "landing cost" of the carpets owned by Ara Manufacturing Company Limited, as set out in Exhibit 1 at trial;
 - b) Farzaneh Hematanian have sole conduct of the sale through auction of the household contents held in storage with The Storeroom and with Williams Moving and Storage, and that the net proceeds from the sale be divided equally between Farzaneh Hematanian and Esmaeil Marzara, and that Esmaeil Marzara's share of the proceeds be held in trust by Schuman Daltrop Basran & Robin to secure the payment of spousal support and child support payable by Esmaeil Marzara.
 - c) Farzaneh Hematanian be at liberty to distribute and/or dispose of any items not saleable or sold through auction as she deems fit.
10. That the balance of \$25,000 held in trust by Schuman Daltrop Basran & Robin from the sale of the condominium owned by Farshad Marzara located at #106-4883 Maclure Mews in Vancouver be paid to Farshad Marzara forthwith.

At the hearing of the application, Ms. Hematanian renounced any claim to these funds, and an order was made that \$12,500 be paid to Farshad Marzara forthwith and the issue of entitlement to the balance be determined on notice to Farshad.

[3] The defendant in the family action, Esmaeil Marzara, applies for the following orders:

1) Orders Sought

a. An Order that the Order of Honourable Madam Justice Ross as per the Summary of the Reasons for Judgment dated April 01, 2011, approved and signed by her Ladyship to enable respondent to enter the Order in the Supreme Court of British Columbia, as per the attachment to this application prepared by the respondent, Esmaeil Marzara.

At the hearing of the applications I directed the parties to apply to settle the order before the registrar pursuant to Rule 13-1(11).

b. An Order for the assessment of the entire Trial Court cost and determination of each party's cost before attending to any other applications from other parties involved in this proceeding. In accordance to the Rule 14 of the Supreme Court of British Columbia, Civil Rules.

This matter was adjourned generally with the direction that costs be dealt with globally, that is all outstanding costs issues including the costs of the motions that were reserved to be dealt with at the conclusion of the trial.

c. An Order be stayed of execution of distribution of any fund of the sales proceeds of Chippendale and Ara Development properties out of the trust funds held in the trust of Honourable Court and Singleton Urquhart LLP, until the priorities of creditors claiming against those funds have been otherwise determined.

In the alternative that:

i) The payment of any monies allocated to the Claimant, Farzaneh Hematanian, be stayed pending the hearing of the Appeal and Cross Appeal of the Order of April 01, 2011 of your Honourable Court.

d) An Order for the Respondents to select a liquidator to liquidate all the assets of the Corporations, Ara Development Ltd., Ara Manufacturing Co. Ltd. and Pacific Coast Commodities (PCCI) Inc., if any. Under Division 4 of Part 10 of the Business Corporation Act. For the purpose of the liquidation of three corporations, Respondents are introducing ABAKHAN & Associate Inc. Mr. Philip McCourt, CGA, CIRP, Senior Vice-president to act as a liquidator under the Division 4 of part 10 of the Business Corporation Act. The selected liquidator to be liquidates all the assets of the companies and after settlement of their corporate liabilities pays 50% of shares value to the Claimant and the Respondents, if any.

- e) An Order that the household items stored in "Storeroom" by the Order of Master Tokarek on May 26, 2010, which list of these items is in exhibit "D" of my affidavit no.42 sworn dated May 11, 2011, to be released to the Claimant in order to avoid any extra monthly storage charges of Storeroom storage.

This order was granted at the hearing of the application on terms that the storage fees were to be paid from the insurance proceeds held in trust until July 30, 2011 on a 50/50 basis with any storage fees after that to be the sole responsibility of Ms. Hematianian.

- f) An Order that all the house hold items stored in Williams moving to be evaluated and appraised by an expert selected by Respondent and to be divided 50/50 based on the value of the items.
- g) An order that the Carpets held in PCC Carpet Services as a result of Chippendale flood to be divided 50-50 between the claimant and respondent based on replacement value indicated in PCC Carpet services letter dated February 12, 2007 exhibit "F" page 5 in the affidavit no. 47 of the claimant.
- h) An Order that the sum payable to the respondent in respect to the division of Insurance funds held in Trust of Schuman Daltrop fixed at \$12,290.46 as of March 31, 2011 to be paid to respondent immediately and respondent will pay 50% of the monthly storage fees directly to Williams Moving.
- i) An Order be stayed the Order of \$9200 spousal support to claimant pronounced April 01, 2011 by Honourable Court, pending the hearing of the appeal and cross appeal of the Order. Since the respondent has paid extra amount of \$94,494.41 as per exhibit "C" of the affidavit no.42 May 11, 2011 of the Respondent. Also the Order of October 1, 2010 of Honourable Madam Justice Ross pronounced pursuant to the order of Madam Justice Loo of August 2007 and Mr. Justice McEwan pronounced April 22, 2008 that the spousal support to the claimant is advance of Capital.
- j) An Order that 50% of the money of \$25,000 held in Trust of Schuman Daltrop as a result of sales of 106-4883 Maclure Mews to be released to respondent immediately and 50% remaining to be released to Farshad Marzara as per suggestion of the Claimant.
- k) An Order to cancel the interim Order of November 18, 2009 with respect to child support.

This application was adjourned generally with directions that Farinaz provide further information.

I) Such a directions and further or alternative orders that this Honourable Court deems just for the purpose of realizing or enforcing the above orders sought.

- [4] Margaret Kwan, a judgment creditor of Mr. Marzara with respect to a Human Rights Tribunal decision, applies in the foreclosure action number H080790 for the following order:

The sum of \$7,120.00 plus pre-judgment interest of \$104.14 and post-judgment interest of \$276.46, together making the sum of \$7,500.60, be paid out of court to the Applicant in satisfaction of the Decision obtained on December 8, 2009 in the British Columbia Human Rights Tribunal Case No. 4425, Indexed as: Kwan v. Marzara and another (No. 3), 2009 BCHRT 418 and registered in the Land Title to the lands in question in this proceeding on April 20, 2010.

[5] Lorne N. MacLean Law Corporation dba MacLean Family Law Group ("MacLean"), former counsel for Mr. Marzara in the family action, applies in the foreclosure of action number H080790 for the following orders:

1. An Order that Lorne N. MacLean Law Corporation dba MacLean Family Law Group be added as a respondent in this proceeding.
2. The style of cause in the within proceeding be amended accordingly:

...

Orders (1) and (2) were not opposed and were granted at the hearing of the application.

3. The sum of \$17,150.00 plus post-judgment interest of \$1,274.97, together making the sum of \$18,424.97, be paid out of court to the Applicant in satisfaction of the Certificate of Fees obtained on September 30, 2008 in that proceeding bearing the number S-085086 in the Vancouver Registry of this Court and registered in the Land Title Office against title to the lands in question in this proceeding on October 21, 2008 under no. BB0906025.

[6] Bayshore Law Group, a partnership of Steven N. Mansfield Law Corporation and Kenneth B. Oliver Law Corporation ("Bayshore"), former counsel for Mr. Marzara in the family action, apply in the family action for the following orders:

1. A Declaration that Bayshore Law Group have a first charge (the "Charge") on all property (collectively, the "Property") recovered or preserved for Esmaeil Marzara, Ara Developments Ltd., Pacific Coast Commodities (PCCI) Inc., and/or Ara Manufacturing Company Limited as a result of their efforts in BC Supreme Court Vancouver Registry, action #E061957 (the "Family Action"), including for the proper fees, charges and disbursements (collectively the "Fees") of these lawyers in relation to the Family Action, including counsel fees.
2. A Declaration that the Property includes, but is not limited to:
 - a) The proceeds of sale of the "Chippendale" property that were apportioned to the respondent, Esmaeil Marzara by the Order of the Honourable Madam Justice Ross made April 1, 2011, which proceeds were paid into Court pursuant to the Order of the Honourable Mr. Justice Rice made May 18, 2010;

- b) The portion of the net proceeds of sale from the sale of condominium units sold by Ara Development Ltd., and which were apportioned to the Respondent, Esmaeil Marzara, by the Order of the Honourable Madam Justice Ross made April 1, 2011, which are held in the trust account of Singleton Urquhart solicitors for Ara Development Ltd. (the "Ara Development Fund");
- c) The portion of the insurance funds that were apportioned to the Respondent, Esmaeil Marzara by the Order of the Honourable Madam Justice Ross made April 1, 2011, which funds are held in the trust account of Schuman Daltrop, Basran & Robin, solicitors for the claimant (the "Insurance Fund").
- 3. An Order that the sum of \$101,952.89 plus post judgment interest of \$5,553.64, for a total of \$107,506.53 be paid forthwith from the Chippendale Proceeds, or alternatively the Ara Development Fund or the Insurance Fund, to Bayshore Law Group;
- 4. An Order that the sum of \$110,887.20 plus post judgment interest of \$5,956.74, for a total of \$116,843.94 be paid forthwith from the Chippendale Proceeds, or alternatively the Ara Development Fund or the Insurance Fund, to Bayshore Law Group;
- 5. An Order that the sum of \$50,084.69 be paid forthwith from the Chippendale Proceeds, or alternatively the Ara Development Fund or the Insurance Fund, to Bayshore Law Group;
- 6. Such directions and further or alternative orders that this Honourable Court deems just for the purpose of realizing or enforcing the Charge.

Bayshore sought the same relief in the foreclosure of action number H080790 in addition to the following:

- 1. An Order that Bayshore Law Group be added as a respondent in this proceeding
- 2. The style of cause in the within proceeding be amended accordingly.

These were not opposed and this relief was granted at the hearing of the applications.

[7] Shapray Cramer LLP ("Shapray"), former counsel for Mr. Marzara in the family action, applied in the family litigation for the following orders:

- 1. A declaration, pursuant to section 79(1) of the Legal Profession Act, S.B.C. 1998, c. 9, that Francis Lamer and Shapray Cramer LLP have a charge in this proceeding in the sum of \$17,355.28, or in such amount certified by a Registrar of this Court, against the interest of the defendant, Esmaeil Marzara, in all the property as defined in paragraph 2 below (the "Property"), which was recovered or preserved on behalf of the defendant, Esmaeil Marzara, in this action, as a result of this action, for their proper costs, charges and expenses, including counsel fees and disbursements for the professional legal services they rendered on behalf of the Defendant in relation to the recovery or preservation of the Property;
- 2. A declaration that the Property includes, without limitation,

- a. the portion of the proceeds of sale of the parties' matrimonial home located at 1592 Chippendale Court, West Vancouver, of \$1,078,384.85 that were apportioned to the defendant, Esmaeil Marzara, by the Order of Madam Justice Ross, made April 1, 2011, which proceeds were paid into court pursuant to the Order of Madam Justice Ross made May 27, 2010;
 - b. the net proceeds of sale from the condominium units sold by Ara Development Ltd. which are held in the trust account of Singleton Urquhart, solicitors for Ara Development Ltd.; and
 - c. the portion of the insurance funds that were apportioned to the Defendant, Esmaeil Marzara by the Order of Madam Justice Ross, made April 1, 2011, which funds are held in the trust account of Schuman Daltrop, Basran & Robin, solicitors for the Plaintiff.
3. Such further and other directions and orders that this Honourable Court deems just; ...

[8] Singleton Urquhart LLP ("Singleton"), counsel for Mr. Marzara and the corporate defendants in the foreclosure action, applies in the family action for the following orders:

1. A declaration that Singleton Urquhart LLP is entitled to, and has, a solicitor's lien and first charge pursuant to s. 79 of the Legal Profession Act, S.B.C. 1998, c. 9 and amendments thereto (the "LPA") against the all property recovered or preserved for Esmaeil Marzara, Ara Development Ltd. ("Ara Development"), Ara Manufacturing Company Limited ("Ara Manufacturing") and Pacific Coast Commodities (PCCI) Ltd. ("PCCI") (collectively, the "Clients") and, in particular, against:
 - a. the funds which are held in court to the credit of Supreme Court of British Columbia, Vancouver Registry, No. H-080790 pursuant to the Order the Honourable Mr. Justice Rice made May 18, 2010 (the "Chippendale Sale Proceeds") for accounts rendered totalling \$91,090.51; and
 - b. the Chippendale Sale Proceeds and, or alternatively, the funds which are held in trust by Singleton Urquhart LLP for Ara Development Ltd. pursuant to the Order of the Honourable Madam Justice Ross made April 13, 2010 (the "Ara Development Trust Funds"), for accounts totalling \$242,030.67;

said charges having first priority over all other liens and creditors against the Chippendale Sale Proceeds and the Ara Development Trust Funds, as the case may be.

2. Singleton Urquhart LLP be paid forthwith the amounts charged with solicitors liens described above.
3. Except in respect to the above, the Chippendale Sale Proceeds shall not be paid out of court or otherwise dealt with, and the Ara Development Trust Funds shall not be paid out of trust or otherwise dealt with, until the priorities of creditors claiming against those funds have been otherwise determined.

4. Creditors of the Clients have liberty to apply to this Court regarding their secured and/or unsecured claims, if any, as the case may be.
 5. Such further orders or directions that this Honourable Court deems just for the purposes of realizing or enforcing the orders described herein.
- [9] Getz Prince Wells LLP, Gerald A. Cuttler Law Corporation and Gerry Cuttler ("Cuttler"), former counsel for Mr. Marzara in the family action, apply in the family litigation for the following orders:
1. A Declaration that Getz Prince Wells LLP, Gerald A. Cuttler Law Corporation and Gerry Cuttler have a first charge (the "Charge") on all property (collectively, the "Property") recovered or preserved for Esmaeil Marzara, Ara Development Ltd., Pacific Coast Commodities (PCCI) Inc. and/or Ara Manufacturing Company Limited as a result of this proceeding for the proper fees, charges and disbursements (collectively the "Fees") of these lawyers of or in relation to this proceeding, including counsel fees;
 2. A Declaration that the Property includes, but is not limited to:
 - a. The proceeds of sale of the "Chippendale" property that were apportioned to the Defendant, Esmaeil Marzara by the order of The Honourable Madam Justice Ross made 1 April, 2011, which proceeds were paid into Court pursuant to the order of The Honourable Mr. Justice Rice made May 27, 2010 (the "Chippendale Proceeds");
 - b. The net proceeds of sale from the sale of condominium units sold by Ara Development Ltd. which are held in the trust account of Singleton Urquhart, solicitors for Ara Development Ltd. (the "Ara Development Fund");
 - c. The portion of the insurance funds that were apportioned to the defendant, Esmaeil Marzara by the order of The Honourable Madam Justice Ross made 1 April, 2011, which funds are held in the trust account of Schuman Daltrop, Basran & Robin, solicitors for the plaintiff (the "Insurance Fund");
 3. An order that the sum of \$43,559.75 be paid forthwith from the Chippendale Proceeds, or alternatively the Ara Development Fund or the Insurance Fund, to Gerald A. Cuttler Law Corporation, or alternatively, Getz Prince Wells LLP;
 4. Such directions and further or alternative orders that this Honourable court deems just for the purpose of realizing or enforcing the Charge.
- [10] Clark Wilson LLP ("Clark"), former counsel for Mr. Marzara in the family action, applies in the family action for the following orders:

- (a) A Declaration that Clark Wilson LLP have a first charge (the "Charge") on all property (collectively, the "Property") recovered or preserved for Esmaeil Marzara, Ara Development Ltd., Pacific Coast Commodities (PCCI) Inc. and/or Ara Manufacturing Company Limited as a result of this proceeding for the property fees, charges and disbursements (collectively the "Fees") of these lawyers of or in relation to this proceeding, including counsel fees;
- (i) The proceeds of sale of the "Chippendale" property that were apportioned to the Defendant, Esmaeil Marzara by the order of The Honourable Madam Justice Ross made April 1, 2011, which proceeds were paid into Court pursuant to the order of The Honourable Mr. Justice Rice made May 27, 2010 (the "Chippendale Proceeds");
- (ii) The net proceeds of sale from the sale of condominium units sold by Ara Development Ltd. which are held in. the trust account of Singleton Urquhart, solicitors for Ara Development Ltd. (the "Ara Development Fund");
- (iii) The portion of the insurance funds that were apportioned to the defendant, Esmaeil Marzara by the order of The Honourable Madam Justice Ross made April 1, 2011, which funds are held in the trust account of Schuman Daltrop, Basran & Robin, solicitors for the Plaintiff (the "Insurance Fund");
- (c) An order that the sum of \$41,721.80 be paid forthwith from the Chippendale Proceeds, or alternatively the Ara Development Fund or the Insurance Fund to Clark Wilson LLP;
- (d) Such directions and further or alternative orders that this Honourable court deems just for the purpose of realizing or enforcing the Charge.

Ms. Hematianian's Application for a Stay

- [11] At trial, Ms. Hematianian sought an order for 100% reapportionment in her favour of the family assets located in Canada, together with a determination that she held interests in the assets of Ara Development pursuant to a constructive trust and was accordingly entitled to take the proceeds of sale of condominiums owned by Ara Development in priority to creditors of the company. The trial decision reapportioned assets 60% in Ms. Hematianian's favour and dismissed the trust claim, holding that her interest in Ara Development was in the shares, not the assets of the company. Ms. Hematianian has filed an appeal.
- [12] The family assets situated in Canada, which are at issue in this regard, are three funds currently held in trust pending further order of the Court. The first is the proceeds of sale of the former matrimonial home referred to as Chippendale. The second is the proceeds of sale of the condominiums formerly owned by Ara Development. The third is the proceeds of the settlement of an insurance claim arising from a flood that occurred at Chippendale in 2006.
- [13] In this application, Ms. Hematianian applies for a partial stay of proceedings seeking to restrain any payment to Mr. Marzara or his creditors of any portion of these family assets until after the appeal is determined. Ms. Hematianian submits there is merit in her appeal

and there is a need to preserve the subject matter of the appeal. She says if funds are paid out, her appeal will be rendered fruitless and hence she will suffer irremediable harm. Her appeal will be of no practical effect, citing *R.S.M. v. M.S.M.*, 2005 BCSC 1578 and *Gold v. Gold* (1992), 70 B.C.L.R. (2d) 216 (S.C.).

[14] Given the magnitude of the claims brought by Mr. Marzara's solicitors, the true contest here is between Ms. Hematanian and Mr. Marzara's solicitors. A practical answer to Ms. Hematanian's concern insofar as it applies to the solicitor applicants was provided at the hearing. All solicitor applicants provided undertakings that they would return any funds that proved to have been paid out in a manner inconsistent with the effect of a subsequent order of the Court of Appeal.

[15] The decision of Madam Justice Saunders in *Vukelic v. Vukelic*, [1993] B.C.J. No. 2206, provides an answer with respect to the registered judgment creditors. *Vukelic* was an application for a stay and a determination of priorities between creditors. The facts are summarized as follows in the head note:

... The sale of the matrimonial home had been ordered and the net proceeds were reapportioned 60 per cent in favour of the wife in lieu of maintenance. She was also awarded costs. The parties' creditors had been joined as defendants. The wife's lawyer claimed a solicitor's lien and charge which ranked ahead of her other creditors. The wife had redeemed three mortgages and registered two against her one-half interest in the property before judgment. The bank and Revenue Canada had registered judgments against the property.

[16] One issue in *Vukelic* was the priority between the wife's interest in the reapportioned share of real property and charges registered against the husband's share of that property. Saunders J. stated that the answer to this issue is found by looking "at the relationship between orders for reapportionment of real property which is a family asset and the Torrens system of land registration". She cited *Malhotra v. Malhotra* (1983), 49 B.C.L.R. 8 (C.A.), in which MacFarlane J.A., for the court, said at pp. 12-13:

... In reapportioning the family assets under s. 51, the Court can only deal with the spouse's equity in those assets. The order made under s. 51 cannot ignore registered charges against the real estate. The court may order that the encumbrances be discharged out of other assets belonging to the spouses, but it cannot divest the holder of a registered charge of his legal interest.

Section 52(2)(b) of the Family Relations Act empowers the court to order that title to a specified property in the name of one spouse vest in the other spouse. That order has the effect of a conveyance. But conveyance of such title is subject to registered charges under the Land Title Act. In this case the wife could not acquire, by vesting order or otherwise, an interest greater than that which her husband held at the date of the registration of the order. The interest of the husband was subject to the judgments registered against him in the Land Title Office. Any interest of the husband vested in the wife must be subject to those judgments. ...

- [17] Saunders J. then cited *Antenen v. Antenen* (Guardian ad litem of) (1992), 68 B.C.L.R. (2d) 300 (S.C.) and concluded at para. 27:

It is clear that entitlement to a share acquired by reapportionment will only rank ahead of a registered charge in the event that both a triggering event under section 44 of the Family Relations Act and registration of a *lis pendens* under section 31 of the Land Title Act precede registration of the charge.

- [18] In the present case, while Ms. Hematanian did file a *lis pendens* that preceded the registration of the charges at issue in this application, the triggering event was the trial judgment. Applying the principles in *Vukelic* and *Antenen* suggests that any entitlement by Ms. Hematanian to a share acquired by reapportionment will rank behind any registered charges since at the time of the triggering event Mr. Marzara's interest was subject to these judgments.
- [19] I am conscious of the fact that this aspect of the *Vukelic* and *Antenen* decisions were criticized by Mr. Justice Burnyeat in *RBS Management Ltd. v. Chao*, 2004 BCSC 87, and further, that this issue of priorities arose in an earlier interlocutory decision in the family litigation that is one of many matters under appeal. Nevertheless, in these circumstances I have concluded that it is not appropriate to grant a stay of proceedings that would have the effect of delaying payment to Mr. Marzara's creditors. As a practical matter, the solicitor's undertakings provide protection to Ms. Hematanian's position for all but \$7,000 of the charges. With respect to the situation of the registered charges, the decision of the Court of Appeal in *Malhotra* seems to me to be on point.
- [20] Accordingly, I dismiss Ms. Hematanian's application for a stay of proceedings pending the appeal of the family litigation. [Paragraph 6 of Ms. Hematanian's Notice of Motion.]

Mr. Marzara's Application for a Stay

- [21] Mr. Marzara has sought a stay of the payment out of any of the funds held in trust until priorities of creditors have been otherwise determined and, in the alternative, a stay of any payment of monies allocated to Ms. Hematanian until the hearing of the appeal. The issue of priorities is being dealt with in the course of these applications.
- [22] With respect to the issue of the stay, I accept there is merit in Mr. Marzara's appeal and given the history between these parties and the state of the Canadian assets, that there is a real risk if he succeeds he may find it difficult to realize the fruits of the appeal from Ms. Hematanian. However Mr. Marzara has made no payments whatsoever with respect to the child support and spousal support ordered at trial. This continues a pattern he established with respect to the interim support orders. A stay is a discretionary order and I am not prepared to exercise my discretion in Mr. Marzara's favour in these circumstances. Accordingly, his application for a stay of payments out of trust to Ms. Hematanian pending hearing of the appeal is dismissed [Paragraph 1(c) and (i) Mr. Marzara's application].

Ms. Hematanian's Application for Payment from Her Share of Funds held in Trust

- [23] I have dismissed Mr. Marzara's application for a stay of the order as it pertains to payments to Ms. Hematanian of family assets and spousal support. Neither the solicitors nor Ms. Kwan seek to charge any portion of assets allocated to Ms. Hematanian in the family litigation. Accordingly there should be no further delay in the implementation of those aspects of the trial order. Therefore, paragraph 1 of Ms. Hematanian's notice of motion pertaining to the proceeds from the sale of Chippendale is granted. It is premature to deal with the proceeds of the Ara Development sales since it is the net proceeds after payment of any remaining liabilities that are to be distributed to the parties. On the evidence before me it appears the liabilities of Ara Development remain to be addressed. Accordingly, paragraph 2 of Ms. Hematanian's notice of motion is adjourned generally.
- [24] With respect to the insurance proceeds, I am satisfied that Mr. Marzara's portion of the insurance proceeds as at March 31, 2011 is \$12,290.46 and that it is appropriate that the balance of the proceeds be paid to Ms. Hematanian. Accordingly, the first portion of paragraph 3 and the relief sought in paragraph 4 of Ms. Hematanian's Notice of Motion is granted.

Ms. Hematanian's Application for Security for Support

- [25] Ms. Hematanian submits that Mr. Marzara's share of the family assets currently held in trust should be not be made available to satisfy Mr. Marzara's creditors but rather should be held as security for child and spousal support. She notes that Mr. Marzara has not made any payments of child or spousal support since the judgment at trial. This was consistent with his history of non-compliance prior to trial. She says in such circumstances, it is appropriate to make an order for security, citing *Bramhill v. Dick*, 2007 BCSC 262; *Afzali v. Zargar Kashi*, 2008 BCSC 747, *M.E.C. v. D.E.J.*, 2009 BCSC 519; and *S.C. v. A.D.*, 2010 BCSC 954.
- [26] She submits further that securing Mr. Marzara's obligations for spousal and child support ought to take priority over any charges or liens, citing *Pullman v. Pullman*, 2002 BCSC 141 and *Kuznecov v. Kuzencov*, 2006 BCSC 1926.
- [27] Mr. Marzara opposed the application for security and submits in the circumstances security for support ought not to take priority over the other charges. He says in substance Ms. Hematanian seeks a further reapportionment of family assets. The result would be that all of Mr. Marzara's capital representing his share of the family assets would be tied up as security for support. This would result in significant prejudice to Mr. Marzara who requires access to his capital to re-establish himself in business, citing *Witherow v. Witherow*, [1994] B.C.J. No. 2124. He notes further that the quantum and scope of security sought by Ms. Hematanian far exceeds anything ordered in the cases she relies upon.

[28] With respect to the issue of priorities, Mr. Marzara submits the solicitor's lien is granted priority both at common law and pursuant to statute, citing *Neepawa-Gladstone Co-operative Ltd. v. Colin Campbell Farms Ltd.*, [1982] 4 W.W.R. 744 (Man. Q.B.), *Patten v. Jajcaj* (1994), 97 B.C.L.R. (2d) 195 (S.C.) and s. 79(6) of the Legal Profession Act which provides in part:

Lawyer's right to costs out of property recovered

79 (1) A lawyer who is retained to prosecute or defend a proceeding in a court or before a tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper fees, charges and disbursements of or in relation to the proceeding, including counsel fees.

...

(6) All acts done and conveyances made to defeat, or that operate or tend to defeat, the charge are void against the charge, unless made to a bona fide purchaser for value without notice.

[29] Mr. Marzara states further that while Ms. Hematianian relies upon s. 28 of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127, in support of her argument that support is entitled to priority, that section refers to unsecured judgment debts, however the solicitor's lien is a secured charge, citing *Re Moriseau* (1982), 40 B.C.L.R. 98 (S.C.). Finally, he notes the priorities granted in *Pullman* and *Kuznecov* were with respect to arrears, not prospective support.

[30] It is clear that Mr. Marzara's history suggests he will not respect his obligations to provide support pursuant to the orders of the court. However, in this case Ms. Hematianian has been made whole with respect to the amounts payable pursuant to the interim orders through a combination of interim orders for payment of support from funds held in trust and the trial order. Further, while ongoing spousal support was ordered, it is also the case that spousal support is not Ms. Hematianian's sole source of income. She receives rental income from the property in Rasht. Further, I agree with the submission of Mr. Marzara's counsel that what is sought is in substance a re-apportionment of assets to achieve the same result I rejected at trial, a re-apportionment of all Canadian assets to Ms. Hematianian. Finally, I note that Mr. Marzara will require access to capital to re-establish himself. In the circumstances, I am not prepared to exercise my discretion to order security for spousal support.

[31] With respect to child support, I note that Farinaz's life has been tumultuous during this litigation. She is in the final stages of her undergraduate program at the University of British Columbia. I accept Mr. Marzara's submissions with respect to the priority to be given to solicitor's liens, both at common law and by statute. It is not clear whether the liens and charges will exhaust all of Mr. Marzara's share of funds held in trust as will be evident in the reasons dealing with the applications concerning solicitor's liens. However, to the extent to which such claims do not exhaust those funds, I order that \$10,000 is to be held in trust for one year as security for Mr. Marzara's obligation to pay child support.

Priorities - Charge Holders

[32] As the applications for stays and security having been disposed of, the next questions relate to the applications regarding solicitor's liens and the issue of priorities.

The Registered Charges

[33] The first question is whether the holders of registered charges take priority over the unregistered solicitor's liens. Section 86 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78, provides in part:

Registration of judgments after October 30, 1979

86 (1) In this section, "purchaser" includes lessee or mortgagee.

- (2) After October 30, 1979, a judgment entered or obtained in British Columbia may be registered against the title to specified land in any or all of the land title offices in the manner provided in section 88.
- (3) From the time of its registration the judgment forms a lien and charge on the land of the judgment debtor specified in the application referred to in section 88 in the same manner as if charged in writing by the judgment debtor under his or her signature and seal,
 - (a) to the extent of his or her beneficial interest in the land,
 - (b) if an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is a judgment debtor, and
 - (c) subject to the rights of a purchaser who, before the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment.

[34] Priority of registered charges is dealt with in s. 28 and 29 of the Land Title Act, R.S.B.C. 1996 c. 250, which provide in part:

Priority of charges based on priority of registration

28 If 2 or more charges appear entered on the register affecting the same land, the charges have, as between themselves, but subject to a contrary intention appearing from the instruments creating the charges, priority according to the date and time the respective applications for registration of the charges were received by the registrar, and not according to the respective dates of execution of the instruments.

Effect of notice of unregistered interest

29 (1) For the purposes of this section, "registered owner" includes a person who has made an application for registration and becomes a registered owner as a result of that application.

(2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner

(a) a transfer of land, or

(b) a charge on land, or a transfer or assignment or subcharge of the charge,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than

(c) an interest, the registration of which is pending,

(d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or

(e) the title of a person against which the indefeasible title is void under section 23 (4).

[35] The registered charges are all registered against Mr. Marzara's interest in Chippendale, the former matrimonial home. Pursuant to the Land Title Act, and leaving aside for the moment the issue of priorities with the solicitor's lien claims, they are, in order of registration and hence priority, as follows:

1. MacLean - October 21, 2008 - \$17,150
2. Bayshore - April 3, 2009 - \$101,952.89
3. Bayshore - April 20, 2009 - \$110,887.20
4. Kwan - April 20, 2010 - \$7,120

Do the Registered Charges Take Priority Over the Solicitors Liens?

[36] The registered claimants, MacLean, Bayshore and Kwan submit they are entitled to priority, in order of their registration, over the other creditors, and in particular, they have priority over the claims of counsel asserting a solicitor's lien. They submit this follows from the order approving sale of the Chippendale property in the foreclosure proceedings and from the provisions of the Land Title Act.

[37] The order approving sale was granted by Mr. Justice Rice on May 18, 2010. That order contains the following provision concerning the disposition of the proceeds of sale:

5. (d) Fourth, the balance, if any, to be paid into Court to the credit of these proceedings. For greater certainty, any funds paid into Court shall stand in place of the Lands and be subject to the same registered and unregistered charges and priorities existing against title to the Lands as of the date of this Order, and held pending further Order or the consent of all registered chargeholders and Mark Stacey on behalf of Singleton Urquhart.

Accordingly, the registered claimants submit, the registered claimants should be paid out in accordance with the priority set out in s. 28 of the Land Title Act, that is, in order of the date of filing.

[38] The registered claimants submit this result is consistent with s. 29 of the Land Title Act, citing Vukelic, in which Mrs. Vukelic's solicitor sought a solicitor's lien with respect to property his efforts preserved or recovered in the litigation. That property was in any event mortgaged. In the circumstances, Saunders J. declined to exercise the court's discretion to grant a lien. However, she noted at para. 41:

In any event, a charge in favour of Mr. Adelaar for unpaid fees would not rank in priority to the charges registered against Mrs. Vukelic's interest in the land.

After referring to the provisions of s. 29 of the Land Title Act, Saunders J. concluded at para. 43:

The cases urged by Mr. Adelaar: *Walker v. Saunders*, [1983] 5 W.W.R. 544 (B.C.S.C.); *Greer v. Young* (1883), 24 Ch.D. 545; and *Scholey v. Peck*, [1893] 1 Ch.D. 709, concern jurisdictions which do not have a Torrens system of land registration. Their conclusion that a solicitor's lien, at common law or by statute, ranks ahead of mortgages or judgment creditors, is not applicable in British Columbia where the legislation gives priority to registered charge holders against unregistered charge holders except in cases of fraud, which this is not. In this case, all the holders of charges registered against Mrs. Vukelic's interest in the land rank in priority to any charge against her interest in the land which Mr. Adelaar might have had under the Legal Profession Act, whether or not any of the charge holders had express or implied notice of Mr. Adelaar's claim (which they did not).

[39] The solicitors who do not have a registered charge, Shapray, Cuttler, Clark and Singleton, assert that once a solicitor's lien is declared, it takes priority over all but secured charges, which the charges in this case are not, and that priority where several lawyers in succession had represented a party to litigation was settled by Madam Justice Baker in *Hama v. Werbes*, 2004 BCSC 463.

[40] In *Hama*, the parties to the application were all lawyers who in succession had represented the plaintiff in a family law dispute and who each asserted a solicitor's lien over the proceeds of disposition of certain family assets. Baker J. concluded that the solicitor who had conducted the action to a conclusion would have the first claim to the fund recovered or preserved at paras. 68 and 69:

The issue of priority to payment out of the recovered property where more than one lawyer has acted for the client in the recovery of the property arose in *In re Wadsworth* (1886), 34 Ch.D. 155. In that case, a former solicitor argued that he should be paid his fees and disbursements "pari passu" with the solicitor who was acting at the time the fund came into being. The former lawyer had conducted the greater part of the client's lawsuit, and had been discharged almost on the eve of the trial in which the property was recovered. The court held that the charge created by a solicitor's lien only becomes effective when the fund or property has been recovered, and it is

always subject to the chance whether the fund will be recovered or not. In the result, the court held that the solicitor who conducted the action to a conclusion and to the point at which the fund was recovered should have first claim on the fund, and that subject to that claim, the previous solicitor would be entitled to his lien.

This reasoning was affirmed in *re Knight* (1892), 2 Ch. 368. In that case, there were three solicitors whose work had, in succession, contributed to the recovery of a fund. The argument made was that priority to the fund should be determined by the order in which the lawyers had obtained charging orders against the fund. The court rejected that argument and ruled that the law in *Re Wadsworth* remained good law, and that the lawyer who had acted most recently was to be paid first, followed by the next to last, and then his predecessor. The court also held that the lawyers' costs in relation to the application to determine the priority of payment should be paid out of the fund in the same order.

- [41] The solicitors submit that, once declared, the solicitor's lien is a charge that takes priority over the registered charges, citing *Miller v. Miller*, [1984] B.C.J. No. 2698. All counsel advised that they had been unable to find authority that dealt specifically with the particular issue raised in these applications.
- [42] I note that in the passage quoted above from *Vukelic*, Saunders J. states that holders of registered charges take priority over a solicitor's lien. The priority referred to is not limited to holders of secured charges. Further, the granting of priority to registered charges is consistent with the reasoning in a series of cases, not referred to by counsel, concerning priorities as between solicitors liens and rights of set off: see, for example, *White Resource Management Ltd. v. Durish* (1997), 154 D.L.R. (4th) 158 (Alt. Q.B.); *St. Vital School Division No. 6 v. Trnka*, 2002 MBCA 32; and *Durall Construction Ltd. v. H.J. O'Connell Ltd.* (1977), 16 O.R. (2d) 713 (H.C.J.). Each of these cases makes reference to the principle that the right of the solicitor to the fund stands no higher than the rights of the client. In the present case, Mr. Marzara's interest in Chippendale at the time of the trial judgment was encumbered by the registered charges, hence applying the principle from the *White Resource* line of cases, any solicitor's liens declared by the court would be subject to those registered charges.
- [43] The *Miller* decision, which is to the contrary, does not address s. 29(1) of the *Land Titles Act* which is expressly considered in *Vukelic*. In addition, granting priority to the registered charges is consistent with the order of *Rice J* in the foreclosure proceeding and with the decision in *Canadian Imperial Bank of Commerce v. 1679 Investments Ltd.* (1982), 41 B.C.L.R. 115 (S.C.), in which the court held that the judgment debtor cannot alienate his land free of charge. The priorities in relation to the fund held in court must be the same as those in relation to the land which the foreclosure funds replace.
- [44] I have concluded that the charges registered against the Chippendale property, that is *MacLean*, *Bayshore* and *Kwan*, take priority over any solicitor's liens. Accordingly, there will be an order for payment out of these charges in the order of their registration, from the funds held in trust from the sale of Chippendale.

Solicitor's Liens Asserted

Family Litigation

[45] Solicitors who represented the defendants in the family litigation claim solicitor's liens for outstanding fees. The liens are asserted with respect to the proceeds of sale from Chippendale, the Ara Development proceeds of sale and the insurance proceeds, all held in trust. The claims in respect of the family litigation, exclusive of interest in reverse order of the dates of representation, are as follows:[1]

1. Cuttler - September 2010 to April 2011 - \$43,374.96
2. Clark - September 2010 to October 2010 - \$41,485.46
3. Shapray - April 15, 2009 to September 15, 2009 - \$17,355.28
4. Bayshore - December 2007 to April 2009 - \$50,084.69

[46] The applications are brought pursuant to s. 79 of the Legal Profession Act, S.B.C. 1998 c. 9 which provides in part:

Lawyer's right to costs out of property recovered

79 (1) A lawyer who is retained to prosecute or defend a proceeding in a court or before a tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper fees, charges and disbursements of or in relation to the proceeding, including counsel fees.

- (2) Subsection (1) applies whether or not the lawyer acted as counsel.
- (3) The court that heard the proceeding or in which the proceeding is pending may order the review and payment of the fees, charges and disbursements out of the property as that court considers appropriate.

[47] In *Hosseini v. Oreck Chernoff*, 1999 BCCA 386, Donald J.A., for the court, stated the test as follows at para. 26:

... A lawyer employed to prosecute a claim regarding property seeks to recover that property; a lawyer employed to defend the claim strives to preserve it. The relationship between the words connects the lien with the lawyer's employment. In other words, the lien must relate to what the lawyer was hired to do and what the lawyer accomplished; it can only go against the property that the lawyer recovered or preserved as the case may be.

[48] In determining whether property was recovered or preserved, the court is to have regard to the pleadings throughout the proceeding and the substance both of what was in dispute and what was recovered or preserved: see *D.J.G. v. P.D.G.*, 2002 BCSC 1479; *aff'd* at 2003 BCCA 205; *Wilson, King & Co. v. Lyall (Trustees of)* (1987), 12 B.C.L.R. (2d) 353 (C.A.).

[49] The lien arises only in relation to that portion of the retainer attributable to the preservation or recovery of the property. In *Exner (Bankruptcy of)*, 2003 BCSC 260, Mr. Justice McEwan stated at para. 17:

On the case law, however, it is quite clear that a solicitor's charge on property recovered attaches only to the portion of the solicitor's account attributable to the preservation or recovery of the property. ...

In that case McEwan J. directed that there be a reference to the Registrar, at para. 23:

... to enquire into the account rendered by the Firm to determine the proportion of the claim attributable to the preservation or recovery of property, and its reasonableness in accordance with the principles applicable as between the Firm and Mr. Exner on a review were the court acting under s. 79 of the Legal Profession Act.

[50] Finally, it is clear that the priority associated with a lien is an extraordinary privilege and the court retains a discretion to decline to grant the solicitor priority where it is not just and proper in the circumstances: see, for example, *Thompson v. Thompson*, 2000 BCSC 515.

[51] In the present case, I am satisfied that with respect to the family litigation, the proceeds of sale of Chippendale, the insurance proceeds, and the net proceeds of sale with respect to Ara Development property, were preserved for Mr. Marzara and, in the case of the Ara Development fund, for Ara Development. The position of Ms. Hematanian at trial was that she should receive through re-apportionment all of the family assets situated in Canada. In the result, she did not succeed and Mr. Marzara retained a share of both assets. In addition, she asserted a claim to the assets of Ara Development. The claim did not succeed. Ms. Hematanian was found to have a claim to the shares of Ara. Accordingly, the proceeds of the sale of the condominiums that were Ara's assets were available to Ara.

[52] Ms. Hematanian argues that property was not preserved because during the course of much of the litigation Mr. Marzara was seeking ownership of the property to the exclusion of Ms. Hematanian. It is the case that Mr. Marzara did not secure everything he sought in the litigation. However, that is not the test. The proper measure for what was preserved is in my view with respect to what was truly at issue, the difference between what was sought by the other party and what was retained. I am satisfied that the entirety of the defendant's share of the three funds was recovered or preserved as a result of the legal proceedings and, therefore, is available to satisfy lien claims arising under s. 79 from *Cuttler, Clark, Shapray and Bayshore*.

[53] Ms. Hematanian submits that there should be a reference to the registrar to determine the portion of the accounts at issue attributable to preservation of property. In that regard, she submits that, for example, accounts for particular motions in which Mr. Marzara's position was not sustained, should not be included. In my view, a reference to the registrar is not appropriate in relation to the claims of the solicitors in the family litigation. The only real issues of substance in this litigation were financial and interwoven. This is not a case in

which there were discrete issues, such as custody, not related to the property issues. It is the case that Mr. Marzara did not succeed in many of the countless interlocutory motions in this matter. It is also the case that many of the motions did not directly relate to the issue of assets. However, in my view, this case does not lend itself to such micro analysis. For example, the issue of interim spousal support, what was paid, from where it was paid, and what should have been paid given the true financial circumstances of the parties, was an essential part of the determination of the value of the family assets.

- [54] Ms. Hematanian submits that a reference is required to determine if the accounts are reasonable and that she should have standing to participate in such a review. The liens claimed here are in relation to Mr. Marzara's share of family assets. Accordingly, Ms. Hematanian is not being called upon to pay these accounts, nor are the liens coming from her share of the assets. I held in *Marzara v. Marzara*, 2011 BCSC 25, when Ms. Hematanian advanced these same arguments, that since she was not being called upon to pay the accounts, she did not have standing to attend any review of the accounts, and further, that privilege had not been waived. That decision is under appeal, but to my knowledge, the appeal has not been heard. For the reasons given in the earlier decision, I find that Ms. Hematanian does not have standing to participate in any review of the accounts of Mr. Marzara's solicitor's fees.
- [55] Ms. Hematanian submits the Court should exercise its discretion not to grant priority in this case. She says at least some of the accounts are "enormously high", that the positions taken by Mr. Marzara in the litigation increased the length and complexity of the proceedings and that the funds are required to pay child and spousal support.
- [56] It does not appear to me that the solicitors have secured certificates with respect to these accounts, or that the review process has been exhausted. That must be done before there can be any payment out in relation to these accounts. I would not want to state anything that could be seen to prejudge such a review, but for the purposes of this application, I will say that substantial fees are not surprising in litigation conducted with this ferocity. Moreover, it is my view, from the perspective of the case management judge, that each side contributed to the protracted length of and complexity of these proceedings.
- [57] Counsel for Bayshore and Shapray submit that I should not followed Hama with respect to the question of priorities among the liens. However, Hama is a considered decision on this issue. I am satisfied that it governs and, accordingly, the liens with respect to the family litigation will rank in reverse order from Cuttler and Clark first to Bayshore last.
- [58] Once the review process is finalized, payment out can be made consistent with the priorities set out in the following paragraphs.

Foreclosure Litigation

- [59] Singleton asserts a lien against the Chippendale funds for accounts totalling \$91,090.51 and against both the Chippendale fund and the Ara Development fund for accounts totalling \$242,030.67.
- [60] Action Number H0807935 related to the mortgages of commercial property owned by PCCI and Ara Manufacturing. HSBC applied for a one-day redemption which was opposed by Singleton on behalf of PCCI, Ara and Mr. Marzara. In the result, Master Donaldson granted a six-month redemption by order dated October 1, 2009.
- [61] The properties were eventually sold, reducing the overall indebtedness to HSBC, although resulting in no net proceeds of sale for those particular properties. Singleton submits that property was preserved in that the overall debt was reduced, ultimately resulting in net sale proceeds in relation to Chippendale. Singleton is advancing a claim for a solicitor's lien against the Chippendale Funds and the Ara Development Funds on the basis that the law firm's work and services generally in the foreclosure proceedings and in respect of the sale of other properties - that is, not the Chippendale Residence or the Ara Development condominiums - and, in doing so, Singleton argues that it has preserved property for its client.
- [62] Singleton is claiming a solicitor's lien in the amount of \$91,090.51 against the Chippendale Funds for accounts that involve the sale of properties owned by PCCI and PCCI/Ara Manufacturing, namely the 6th Floor Units and the 8th Floor Hotel Suite in the Terminal City Club, and 1349 Hornby Street.
- [63] In his affidavit, Wei Kiat Sun describes the work Singleton performed in respect of the sales of the properties:
- (a) communicating with purchaser's solicitor
 - (b) negotiating terms with HSBC's counsel for payment of HSBC's security interest
 - (c) communicating and negotiating with plaintiff's counsel and HSBC's counsel in respect to the discharge of the CPLs
 - (d) preparing application materials for discharge of CPL5 and attending the application
 - (e) communicating with judgment holders
 - (f) communicating with realtor and realty office
- [64] Singleton has already received the following amounts in relation to the sale of the commercial properties:

6th Floor Units

\$20,000.00 order of Goepel J., March 24, 2010

8th Floor Hotel Suite

\$10,000.00 order Ross J., May 7, 2010

1349 Hornby Street

\$10,000.00 order Ross J., May 7, 2010

- [65] In my view, Singleton has not established that it recovered or preserved property in relation to work done in the foreclosure proceedings in relation to commercial properties. There were no net proceeds of sale. In my view, the fact that the sale of these properties reduced the overall indebtedness to HSBC, with the cumulative result that there was a fund of net proceeds once Chippendale was sold, is too indirect to justify a lien attaching to the Chippendale property with respect to these legal services.
- [66] In any event, if I am wrong in this conclusion, I decline to order priority to the solicitor with respect to this claim on the basis that it would not be "just and proper" in the circumstances for the solicitor to receive this priority. In that regard, I note the not insubstantial amounts that Singleton has already received pursuant to the orders of March 24 and May 7, 2010.
- [67] In addition, part of the claim relates to fees charged by Singleton in relation to the January 11, 2010 notice of motion which sought, inter alia to allow PCCI to retain \$609,350.70 from the sale of the 6th Floor Units to pay its lawyers, the respondent's matrimonial lawyer (Bayshore) and a host of unsecured creditors, rather than applying that amount to the mortgage. That is, PCCI sought to pay to HSBC only \$2.3 million from the proceeds of sale of the 6th Floor properties. At the time, the amount owing on the mortgage, per the order nisi pronounced on October 1, 2009 was more than \$5.1 million. Singleton also sought a solicitor's lien.
- [68] The matters required two-days of hearings before Mr. Justice Goepel on February 10 and 12, 2010. On the second day of hearings, Singleton adjourned its application for a solicitor's lien. In the end, Mr. Justice Goepel dismissed the applications and the monies were paid to HSBC, save and except \$20,000.00 which was paid to Singleton for the conveyance work with respect to the sale of the 6th Floor Units. This application was to the extent to which it concerned the solicitor's lien sought for the benefit of Singleton.
- [69] Singleton is also seeking a lien in the amount of \$242,030.67 against the Chippendale proceeds of sale and the Ara Development fund. This too concerns generally the services provided in relation to the foreclosure proceedings.
- [70] Singleton acted for Ara Development, whose development was subject to foreclosure. In that regard, the bank sought and Ara did not oppose, a six-month redemption. All of the properties were sold within the redemption period. Singleton acted for Ara in relation to the sales. Singleton has been paid \$191,141.24 for its services in relation to the sale of the Ara condominiums, by agreement and by order of Mr. Justice Hinkson dated October 28, 2008, and my Orders of December 18, 2008, September 11, 2009, October 26, 2009, December 8,

2009, March 30, 2010, April 13, 2010, May 7, 2010 and December 9, 2010.

- [71] It is not clear to me that a further lien is being sought in relation to work done in relation to the Ara condominium units. If that is the case, I would not grant priority with respect to such claim because of the substantial fees already approved in relation to the sales and the lack of any contested issues in relation to these units in the foreclosure proceedings.
- [72] Wei Kiat Sun describes services in relation to a number of hearings that in my view cannot be said to amount to activities that recovered or preserved property for the clients. These include the hearing in relation to the issue of rental monies received from the commercial properties, applications by Ms. Hematanian for conduct of sale, applications by Ms. Hematanian for document production in relation to the sales, and previous applications by Singleton for solicitor's liens. In addition, in my view, general work in relation to the foreclosure has not been established to have recovered or preserved property. For example, the foreclosure was not successfully resisted, and it does not appear that the overall amount of the indebtedness was reduced or that the scope of the bank's claims over particular properties was resisted. Thus, I would not grant Singleton priority with respect to the Ara Development fund.
- [73] It does appear, however, that the solicitors could be said to have preserved property with respect to Chippendale. There were a series of hearings in the foreclosure action described in Mr. Sun's affidavit in relation to the redemption period, conduct of sale and approval of sale of Chippendale. The net result of these applications was that the bank's efforts to have a sale of Chippendale approved at a significantly lower price were successfully opposed. In my view, the applications in the foreclosure proceeding related to the sale of Chippendale did result in the preservation of property.
- [74] The accounts are not presented in a way that isolates these applications. Accordingly, there will be a reference to the registrar to determine the portion of the accounts related to the hearings with respect to the sale of the Chippendale property. For the reasons noted above, Ms. Hematanian will not be a party at such review.

Priority as Between Singleton and the Liens Arising from the Family Litigation

- [75] Singleton asserts that since its efforts preserved property for the parties in the family litigation, its lien should take priority over those arising from the family litigation. The solicitors in the family litigation submit that it was their efforts in the family litigation that preserved property for Mr. Marzara, thereby creating a fund. Without their efforts there would be nothing against which to assert Singleton's claims.

[76] In my view, both submissions are correct with respect to describing the role that gives rise to the ability to assert a lien. Both actions were necessary, neither alone sufficient to give rise to the fund at issue. I have concluded that the appropriate course is to merge the claim with those arising from the family litigation. The priority will be determined according to the time when the work was done as per Hama.

[77] It appears from the evidence filed in support of the application that the work which I have concluded gives rise to the lien, that is the applications with respect to Chippendale, took place between October 1, 2009 and May 18, 2010. Accordingly, the priorities with respect to the solicitor's liens will be as follows:

1. Cuttler - September 2010 to April 2011
2. Clark - September 2010 to October 2010
3. Singleton - October 1, 2009 to May 18, 2010
4. Shapray - April 15, 2009 to September 15, 2009
5. Bayshore - December 2007 to April 2009

[78] The liens of Cuttler, Clark, Shapray and Bayshore will apply to the funds held with respect to Chippendale, Ara Development and the insurance proceeds. The lien with respect to Singleton applies only to the Chippendale fund.

Other Relief

PCC Carpets

[79] Ms. Hematanian seeks to have these carpets, save the two claimed by the insurer, sold at auction. She seeks conduct of the sale and that Mr. Marzara's share of the proceeds be held as security for child and spousal support. Mr. Marzara seeks to have the carpets divided in specie, with each party selecting carpets worth half of the value based upon the PCC letter dated February 12, 2007.

[80] Mr. Marzara's counsel acknowledges that the order he seeks would require a variation of the order made at trial, which was for a sale of all the goods and division of the proceeds. He submits that the goods are worth more to the parties than would be received at auction. Mr. Daltrop advises that Ms. Hematanian is opposed to the relief sought.

[81] The reasons at trial dealt with these carpets as follows at para. 114:

There is no third-party valuation of the other household furnishings and contents in evidence at trial. Mr. Marzara proposed that he would take the household contents and give credit to Ms. Hematanian in an amount set out in an appraisal that was not admitted into evidence at trial. In addition, he proposed that he would take the carpets if the parties could agree on their value and give Ms. Hematanian credit. Ms. Hematanian did not agree with either proposal and wished the contents to be sold. Given the extraordinarily litigious course of this litigation and the complete

inability of the parties to agree on anything, even the most trivial or routine arrangements, I see Mr. Marzara's proposals as leading only to further acrimony and sources of dispute. Accordingly, I direct that the household contents and furnishings, except those required to be retained by the insurer pursuant to the settlement, be sold at auction and the proceeds divided equally between Mr. Marzara and Ms. Hematanian.

[82] I am not prepared to revisit the requirement that the carpets be sold. It is now August and the sale ordered in April has not taken place. There had in fact been a previous order for sale of the household contents made in June 2009 that ultimately was not implemented because no agreement could be reached to deal with the storage charges that had been incurred to date.

[83] Since the parties are apparently still not able to reach agreement with respect to such routine arrangements, someone has to have the conduct of the sale, by which I mean organizing the auction house and transport of the carpets from storage to the sale and accounting for the net proceeds of sale. Ms. Hematanian will be given conduct of the sale. However, given my earlier reasons with respect to security for support, I do not grant the relief sought to hold Mr. Marzara's share in trust as security for child and spousal support. The same concerns do not apply to arrears of support and any arrears of spousal and child support are to be deducted from Mr. Marzara's share of the proceeds before payment to him. This disposes of paragraph 7 of Ms. Hematanian's notice of motion and paragraph (g) of Mr. Marzara's.

Ara Manufacturing Carpets

[84] Ms. Hematanian proposed that Mr. Marzara retain the carpets owned by Ara Manufacturing or their net sale proceeds and that she retain the household contents kept at Williams Moving and Storage or in the alternative, that Mr. Marzara pay her half of the landing cost of the carpets of \$42,366.50. Mr. Marzara proposed that a liquidator be retained to liquidate the assets of Ara Development, Ara Manufacturing and PCCI and to divide the net proceeds between the parties.

[85] By way of background, at trial I concluded that PCCI had no remaining assets. The assets of Ara Development had been liquidated and the proceeds of sale were being held in trust. The proceeds could not be paid out because there are remaining potential corporate liabilities that have not yet been determined. Once those claims are resolved, Ms. Hematanian would be entitled to 50% of the net sale proceeds. With respect to Ara Manufacturing, I found at para. 225:

It is not clear what assets remain in Ara Manufacturing or whether there are any remaining outstanding liabilities. I find that all of the shares of Ara Manufacturing are family assets and that Mr. Marzara holds 50% of those shares in trust for Ms. Hematanian. The remaining assets, if any, are to be liquidated and outstanding liabilities, if any, discharged. Ms. Hematanian will be entitled to half of any net proceeds.

- [86] It is clear that Ara Manufacturing had owned carpets that were carried on its books at \$84,733, the "landing costs". During closing submissions Mr. Marzara applied to introduce evidence in the form of certain documents from an auction house that suggested that carpets and certain other items had been sold for \$19,818.80. Mr. Daltrop opposed the admission of the evidence. I did not permit the documents to be introduced.
- [87] As to the proposal to appoint a liquidator, it does not appear there is anything of significance left to liquidate. Ms. Hematanian is opposed. There is no plan to provide for the payment of a liquidator and no obvious source for the payment of Mr. Marzara's share of such a retainer. This is of significance because in the course of the litigation it has been necessary to make use of funds held in trust to satisfy the accounts of the translator and the supervisor. Given the history of the litigation I foresee that settling the terms of reference would be protracted, even with the assistance of the Court. In short, the costs of this proposal appear to outweigh any benefits. Accordingly the application is dismissed. [Paragraph (d) of Mr. Marzara's notice of motion.]
- [88] As to Ms. Hematanian's proposal, I note Mr. Daltrop also argued successfully at trial against Mr. Marzara's attempt to introduce into evidence during closing submissions an appraisal of the contents of the goods in storage at Williams. It appears to me that what Ms. Hematanian seeks in the present application is in substance a reapportionment of the assets. I am not prepared at this juncture to reopen the subject of the household contents or their apportionment. Accordingly, Mr. Marzara will account to Ms. Hematanian for half of the proceeds of sale for the Ara Manufacturing carpets. The goods at Williams will be sold at auction with Ms. Hematanian having conduct of sale. After accounting for the sale of the Ara Manufacturing carpets sale proceeds, the net proceeds will be divided equally. Any arrears of spousal and child support are to be deducted from Mr. Marzara's share of the proceeds before payment to him. This disposes of the relief sought by Ms. Hematanian in paragraph 8 and 9 of her notice of motion.

"Ross J."

- [1] I have eliminated MacLean and the registered charges of Bayshore, which as registered charges I have found to be entitled to be paid out of the Chippendale fund in priority to holders of a solicitor's lien.

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