

CANADA / JUDGMENT

Schmidt v. Balcom

2020 BCSC 651

COURT

Supreme Court of British Columbia

DECIDED

31 March 2020

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2020 BCSC 651 Schmidt v. Balcom

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schmidt v. Balcom,

2020 BCSC 651

Date: 20200331

Docket: S1548213

Registry: Prince George

Between:

Larry Schmidt and Luzia Torres

Plaintiffs

And

Ralph Balcom, Kathy Balcom, Madden Holdings Ltd., 0732734 B.C. Ltd.,

Asher Place Senior Residency Limited Partnership,

Asher Strata Homes, a Partnership, Chander Suri, 414052 B.C. Ltd.,

535895 B.C. Ltd., Central Planning and Management Consulting Ltd.,

and North Central Management Corporation

Defendants

- and -

Docket: S1751336

Registry: Prince George

Between:

Asher Place Senior Residency Limited Partnership

Plaintiffs

And

Ralph Balcom, Kathy Balcom, Madden Holdings Ltd., 0732734 BC Ltd.,

Asher Strata Homes, a Partnership, Chander Suri, 414052 B.C. Ltd.,

535895 B.C. Ltd., Central Planning and Management Consulting Ltd.,

and North Central Management Corporation and Ellora Enterprises Ltd.

Defendants

Corrected Judgment: Dates of hearing were added to the cover page of the Oral Reasons for Judgment on June 19, 2020

Before: The Honourable Mr. Justice Tindale

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs Larry Schmidt, Luzia Torres, and Asher Place Senior Residency Limited Partnership appearing by teleconference:

J.M. Duncan

Counsel for the Defendants Ralph Balcom, Kathy Balcom, and Madden Holdings Ltd., appearing by teleconference:

R.J. Stewart, Q.C.

Counsel for the Defendants Chander Suri, 414052 B.C. Ltd., 535895 B.C. Ltd., Central Planning and Management Consulting Ltd., North Central Management Corporation, and Ellora Enterprises Ltd. appearing by teleconference:

K.S.R. Henderson

Place and Date of Hearing:

Prince George, B.C.

January 22 & 24, 2020;

February 21, 2020

Place and Date of Judgment:

Prince George, B.C.

March 31, 2020

Introduction

- [1] The defendants Madden Holdings Ltd. ("Madden"), Ralph Balcom and Kathy Balcom (the "Balcoms"), pursuant to a notice of application filed October 5, 2017, seek an order that the action commenced in the name of Asher Place Senior Residency Limited Partnership in the Supreme Court of British Columbia, File Number 1751336, be dismissed on the following bases:
- (1) the plaintiff is not a separate legal entity; and
 - (2) the notice of civil claim is void ab initio or is a nullity.
- [2] The plaintiff Asher Place Senior Residency Limited Partnership ("Asher Place") is opposed to this relief.
- [3] The defendants Madden and the Balcoms pursuant to a notice of application filed July 31, 2019, in the Supreme Court of British Columbia, Court File Number 1548213, also seek orders that the plaintiffs Larry Schmidt ("Schmidt") and Luzia Torres ("Torres") submit to an examination for discovery by Madden and that the examination for discovery of both Schmidt and Torres be extended for a further period of 14 hours.
- [4] Schmidt and Torres are opposed to this relief in part.

Background

- [5] Asher Place is a limited partnership that was established in 2003. Asher Place's initial purpose was to construct three buildings which would be used as senior residency complexes.
- [6] The construction of the three buildings began in 2004 and was completed in 2007. There were 51 individual units constructed within these three buildings. In 2008, the three buildings were stratified into 51 individual strata lots.
- [7] Madden is the general partner for Asher Place.
- [8] The Balcoms are the controlling shareholders and controlling principals of Madden.
- [9] Between 2003 and 2007, Madden received investments funds on behalf of Asher Place.
- [10] Some investors purchased Class A partnership units and became Class A limited partners. There are 78 Class A limited partners holding 2,025 Class A limited partnership units in Asher Place.
- [11] Some investors purchased Class B non-voting shares.

- [12] Madden is the only Class B limited partner which holds 3,942 Class B partnership units in Asher Place in trust for Madden's 96 Class B shareholders.
- [13] Schmidt is a retired person and a Class B shareholder.
- [14] Torres is a retired person and a Class A limited partner.
- [15] The defendant 0732734 BC Ltd. (the "732") was a company created and controlled by the Balcoms. 732 is bankrupt.
- [16] The defendant Chander Suri is a businessman who resides in British Columbia. Mr. Suri was the controlling shareholder and principal of the following companies:
- a) 414052 B.C. Ltd. ("414");
 - b) 535895 B.C. Ltd. ("535");
 - c) Central Planning and Management Consulting Ltd. ("CPM");
 - d) North Central Management Corporation ("NCMC"); and
 - e) Ellora Enterprises Ltd. ("Ellora")
- (the "Suri Defendants")
- [17] Asher Strata Homes, a Partnership ("Asher Strata Homes"), had as their members Asher Place, Madden, 732, Mr. Suri, and the Suri Defendants.
- [18] Asher Strata Homes was formed to construct three additional complexes on lands to be purchased from Asher Place. These three complexes were completed in or about 2009 and consisted of 28 additional units.
- [19] In September 2015, Madden signed a contract of purchase and sale with Premier B.C. Properties Corp. and Premier B.C. 2.0 Corp. ("Premier"). Asher Place alleged that this was done without notice to the investors.
- [20] On November 24, 2015, Schmidt and Torres filed a notice of civil claim in the Supreme Court of British Columbia, Action Number 1548213 (the "2015 Action") in an effort to prevent Madden from selling assets of Asher Place. The 2015 Action alleged that Madden had misrepresented the financial affairs of Asher Place, breached its fiduciary duty to Asher Place, and had not accounted for the sale proceeds of units that had been sold.
- [21] The plaintiff in the 2015 Action caused certificates of pending litigation ("CPL") to be registered against the strata units owned by Madden. As a result of the CPLs being filed, Madden was unable to complete the sale of lands to Premier.
- [22] On July 4, 2016, Premier sued Madden for breach of contract (the "Third Action"). Madden in turn started a third-party proceeding against Schmidt and Torres on July 11, 2016, claiming damages against them for unlawfully filing a CPL.

[23] On December 30, 2016, Madam Justice Choi pronounced reasons in the 2015 action, which are indexed as Schmidt v. Balcom, [2016] B.C.J. No. 2752, granting leave to Schmidt and Torres to commence a derivative action in the name of Asher Place. In addition, Madam Justice Choi ordered that Schmidt and Torres were authorized to control the conduct of the proceeding at the expense of Asher Place.

[24] On April 7, 2017, Schmidt and Torres commenced a derivative action in the name of Asher Place in the Supreme Court of British Columbia, Number 1751336 (the "2017 Action").

Position of the Parties on the October 5, 2017 Notice of Application

Madden

[25] Madden argues that the 2017 Action should be dismissed because the plaintiff Asher Place is not a separate legal entity.

[26] Madden further argues that because the plaintiff is not a separate legal entity, it cannot bring an action at law and, as such, the 2017 Action is void ab initio or is a nullity.

[27] Madden argues that the 2017 Action should have been commenced in the name of the general partner which is Madden. However, the limitation period has expired for substituting Madden as the plaintiff in the 2017 Action.

[28] Madden argues that they are authorized by the Partnership Agreement to carry on business in the name of the plaintiff. There is no reasonable explanation for the plaintiff being described as a non-legal entity, and there is no reasonable explanation for there being no efforts by the plaintiffs or by Schmidt and Torres since 2015 to make the plaintiff a legal entity such as Madden.

[29] Rule 20-1 of the Supreme Court Civil Rules (the "Rules") states the following:

(1) Two or more persons claiming to be entitled, or alleged to be liable, as partners may sue or be sued in the name of the firm in which they were partners at the time when the alleged right or liability arose.

[30] Madden acknowledges that Rule 20-1 allows a partnership to be sued in its own name. However, Madden argues that this rule does not apply to limited partnerships.

[31] In *Devon Canada Corp. v. PE-Pittsfield, LLC*, (c.o.b. Pittsfield Generating Co., LP), [2008] A.J. No. 1263 the Alberta Court of Appeal, in discussing whether Rules 80 and 201 of the Alberta Rules of Court apply to limited partnerships so as to allow examination for discovery of limited partners as parties to the proceeding, stated the following at para. 16:

She observed that, like the B.C. and Ontario Rules considered in the above cases, the Alberta Rules were developed for ordinary partnerships. Because the liability, management and control of limited partnerships are fundamentally different from those of ordinary partnerships, the case management judge found that the Rules do not apply to limited partnerships.

[32] Madden argues that the 2017 Action can no longer be salvaged by naming Madden as the plaintiff.

Asher Place

[33] Asher Place notes that a certificate of limited partnership was filed on April 2, 2013, establishing that the name of the partnership is Asher Place Senior Residency Limited Partnership.

[34] Asher Place notes that Madam Justice Choi in *Schmidt v. Balcom*, in granting leave to Schmidt and Torres to commence the 2017 Action, stated the following at para. 67:

The application to commence a derivative action in the name of the partnership is granted, and the plaintiffs are authorized to control the conduct of the proceeding at the expense of the partnership.

[35] Asher Place acknowledges that it is trite law that partnerships, including limited partnerships, are not legal entities.

[36] Asher Place argues that it would be improper for the general partner in a limited partnership to commence legal proceedings on behalf of the limited partnership in the name of a general partner.

[37] In that regard, Asher Place relies on the decision in *872928 Ontario Ltd. v. Gallery Pictures Inc. et al*, 75 O.R. (2d) 273 where the court stated the following at page 4:

Although the general partner controls the affairs of the limited partnership, the general partner cannot institute proceedings in its own name or on behalf of the limited partnership. Neither the Limited Partnerships Act nor the Partnerships Act, R.S.O. 1980, c. 370, authorizes the general partner to institute proceedings in its own name. The plaintiff must be the party wronged.

In *Lee v. Block Estates Ltd.* (1984), 50 B.C.L.R. 289, [1984] 3 W.W.R. 118 (S.C.) McEachern C.J.S.C. stated at p. 140 W.W.R.

Counsel for Block relies upon the first rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189, which is well described by Jenkins L.J. in *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 (C.A.), as follows:

"The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself."

The above establishes that the rule in *Foss v. Harbottle* applies in a proper case not just to corporations but also to associations of persons such as trade unions, and there are many American authorities which hold that the principle also applies to partnerships [citations omitted].

Notwithstanding what McKay J. said about common law derivative rights in corporate matters in *Shield Dev. Co. v. Snyder*, [1976] 3 W.W.R. 44 (B.C.S.C.), the absence from the Partnership Act of any provisions similar to s. 225[am 1980, c. 50, c. 21] of the Company Act, R.S.B.C. 1979, c. 59, leaves the common law rule stated in *Foss v. Harbottle*, *supra*, applicable in proper circumstances in partnership matters.

McEachern C.J.S.C. held that the limited partners did not have standing to institute proceedings for capital which should have been furnished to the limited partnership by the defendants. The proper plaintiff was the limited partnership which claimed to have been wronged.

- [38] Asher Place argues that it is not an unusual practice for an action to be brought in the name of a limited partnership. It is a matter of convenience permitted by the Rules of Court and by the common law.
- [39] Asher Place says that the decision in *Devon* is distinguishable because that case was dealing with whether or not to allow the examination for discovery of limited partners in a limited partnership and not with the proper naming of the limited partnership as a plaintiff. I agree with Asher Place's assessment of that case and I find that it is distinguishable.
- [40] Rule 20-1 allows two or more persons as partners to sue in the name of the partnership. Asher Place argues that there is no language contained in the rule suggesting that it ought to be read narrowly in such a way as to preclude limited Class A partners and those holding a beneficial interest in Class B partnership units from commencing an action.
- [41] Asher Place says that Rule 20-1 should be construed as remedial and should be given a fair, large, and liberal construction that best ensures the attainment of its objects.
- [42] Asher Place submits that there is no reason in law or policy suggesting that Rule 20-1 should be interpreted in such a way as not to apply in a situation where the legal action is commenced with leave of the court by a limited partner or partners on behalf of the limited partnership. Asher Place says Rule 20-1 does apply to a claim being commenced by a limited partner and a shareholder who has a beneficial interest in the partnership.
- [43] The 2017 Action was commenced as a convenient method to refer to the parties within the partnership. There is nothing improper about this.
- [44] Asher Place further argues that there could be an amendment to the pleadings to allow for strict compliance with Rule 20-1.
- [45] Asher Place also argues that Madden's application should be dismissed simply on the basis that Madam Justice Choi granted leave to Schmidt and Torres to commence the 2017 Action in the name of Asher Place.
- [46] This order has not been appealed. It is an existing order of the court which authorizes Schmidt and Torres to commence the 2017 Action using the name of the partnership as the plaintiff.

[47] The limited partnership does in fact have a legal name. Asher Place argues that there can be no other interpretation of the order of Madam Justice Choi than she meant the 2017 Action was to be taken in the name of Asher Place Senior Residency Limited Partnership.

[48] Asher Place argues that if Madden was substituted as the plaintiff, then Madden would in effect be suing itself.

Decision

Application to Dismiss

[49] I agree with the parties that a limited partnership is not a separate legal entity. In that regard, there is a number of authorities, including *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, at para. 30 and *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, [2009] B.C.J. No. 1355 (BCCA) at para. 16.

[50] I do not agree with Madden that the proper party to be the plaintiff in this action is in fact Madden, the general partner. There is, as I have mentioned, authority that the general partner is not the appropriate party to commence a derivative action: 872928 Ontario LTD.

[51] In addition, the alleged allegations of wrongdoing brought in the 2017 Action are primarily against Madden and its principals, the Balcoms. This would create a situation where the alleged wrongdoer would be suing itself and its principals, the Balcoms.

[52] Finally, without commenting on the merits of the 2017 Action, the allegations are that Madden and Balcom would benefit from the alleged wrongdoings.

[53] It is important to remember that Madam Justice Choi granted the application in *Schmidt and Torres* to commence a derivative action in the name of Asher Place; *Schmidt v. Balcom* para. 67.

[54] It is also useful to review some portions of Madam Justice Choi's decision in *Schmidt v. Balcom*. The relevant portions being paras. 55, 59 - 60, 62 - 65 and 67:

[55] The plaintiffs now apply for leave to commence or continue the action as a derivative claim on behalf of Asher Place Limited Partnership and to amend their pleadings to the extent necessary.

...

[59] In the present case, there is no evidence before the court that the plaintiffs requested Madden or Asher Place Limited Partnership to pursue the intended action, or that such a request was refused. The plaintiffs contend that it is obvious that Madden would refuse to commence action on behalf of Asher Place Limited Partnership because Madden, Ralph Balcom, and Kathy Balcom who control it are the alleged wrongdoers. As such, it is unreasonable to expect that Madden, as general partner, would commence action on behalf of Asher Place Limited Partnership, where Madden is alleged to be the wrongdoer.

[60] In that regard, the plaintiffs rely on University Students' Council of the University of Western Ontario at para. 117, as well as Watson at paras. 34-36 in support of the proposition that a prior request that the company or partnership commence an action against the wrongdoer is not required where it would be futile. I accept that this precondition is met and asking the company under the control of the defendants to commence an action against themselves is likely futile.

...

[62] Extrapolating from the principles stated in Carr for application to a common law derivative action for a partnership, good faith requires that the applicants bring the claim primarily for the benefit of the partnership and can be granted in situations where the general partner fails to respond adequately, or at all, to alleged significant financial irregularity.

[63] The applicants here allege various attempts to obtain information about the impugned transactions involving the related companies and have identified some financial and accounting discrepancies that present an arguable case. If there was impropriety or a breach of duties, those duties would be owed to the partnership, and not to the applicants in their individual capacities. A derivative action would be the only way to find redress for wrongs that may have been committed.

[64] Given that the plaintiffs attempt to secure documents and information relating to the business dealings with the related companies and the subsequent lack of financial details about the mortgages, and the sale and transfers of the properties, the plaintiffs have satisfied the good faith requirement.

[65] In my view, the derivative action is in the best interests of the Asher Place Limited Partnership and is being brought in good faith. Without trying the case before it is ready, the evidence of the applicants is sufficient to establish that the applicants have an arguable case, and given the value of the project and the value of the disputed transactions, these are not insignificant issues and it would be in the partnerships interest to recover those monies if, in fact, they were misappropriated.

...

[67] The application to commence a derivative action in the name of the partnership is granted, and the plaintiffs are authorized to control the conduct of the proceeding at the expense of the partnership.

[55] It is clear, in my view, from the reasons in Schmidt v. Balcom that the 2017 Action was authorized to be made in the name of Asher Place. It is also clear that Madam Justice Choi rejected the notion that Madden should be the plaintiff in the 2017 Action. This is in keeping with the decisions in both 872928 Ontario and Lee.

- [56] In my view, the proper plaintiff in the 2017 Action is Asher Place. This action was brought as a common law derivative action and Madam Justice Choi found that the pre-conditions for bringing a common law derivative action were met.
- [57] Rule 20-1 does not strictly authorize one partner and a shareholder to commence a derivative action. The plaintiff may be correct that a liberal reading of Rule 20-1 does in fact authorize the 2017 Action.
- [58] However, the principles in *Foss v. Harbottle* are applicable in appropriate circumstances allowing for associations of people, such as limited partnerships, to bring an action in the name of the aggrieved party which in this case is Asher Place.
- [59] Given the allegations against the defendants in the 2017 Action, the number of general partners in Asher Place, and the complicated limited partnership structure of Asher Place, this is one of those appropriate circumstances.
- [60] The decision in *Schmidt v. Balcom* has not been appealed. That decision authorized the 2017 Action to be brought in the name of Asher Place with the litigation being controlled by Schmidt and Torres.
- [61] The common law allows for a derivative action to be brought in partnership matters and Schmidt and Torres were granted leave to commence the 2017 Action.
- [62] The decision in *Schmidt v. Balcom* is the authority for the commencement of the 2017 Action in the manner that it was commenced.
- [63] For all of these above reasons, I dismiss the notice of application filed October 5, 2017, by Madden and the Balcoms. The manner in which this action was commenced is appropriate.
- [64] The plaintiff is entitled to its costs of this application.

Notice of Application of July 31, 2019

Madden

- [65] Now, with regard to the notice of application of July 31, 2019, Madden seeks orders that Schmidt and Torres submit to an examination for discovery by Madden. Madden seeks to extend both of these examinations for discovery for a further 14 hours, and wishes to examine them in relationship to the 2015 Action and the Third Action.
- [66] Madden seeks these orders, even though examinations for discovery have not been conducted, because the plaintiffs' position in the 2015 Action is that they are not compellable to answer questions with regard to any derivative claims in that action as they are only acting in a representative capacity.

- [67] Madden argues that the 2015 Action is not a derivative action because Asher Place is not, in fact, the proper plaintiff. Madam Justice Choi did not grant leave for the 2015 Action to continue as a derivative action and the remedies sought in the 2015 Action are primarily for the benefit of the plaintiffs.
- [68] Madden argues that Schmidt and Torres unlawfully filed CPLs against lands owned by Madden in the Third Action and, as such, they should be allowed to conduct an examination for discovery on them in that regard.
- [69] Madden argues that Madam Justice Choi in *Schmidt v. Balcom* rejected the notion that the 2015 Action was a derivative action, or at least did not grant leave to continue the 2015 Action as a derivative action.
- [70] Madden argues that this is a complicated case with literally tens of thousands of documents which will require more than seven hours for the examination for discovery which is allowed by the Rules.

Schmidt and Torres

- [71] Schmidt and Torres are not agreeable to being examined for discovery on the Third Action and in relationship to the derivative claims in the 2015 Action as they are not the *de jure* plaintiffs in that regard. Their role in the Third Action relates to a CPL that was registered on behalf of Asher Place.
- [72] Schmidt and Torres argue that there is no discovery date that has been set and this is not a continuation of any discovery. The nature of the claims in the 2015 Action are primarily derivative claims made on behalf of Asher Place. These claims involve the operations and activities of the partnership, and Schmidt and Torres cannot speak to those activities.
- [73] Schmidt and Torres, however, do agree to be examined for discovery in relation to their personal claims in the 2015 Action. In that regard, they argue that seven hours is more than adequate to complete the examinations for discovery.
- [74] Schmidt and Torres argue that at common law, where a party commenced a derivative action without leave, they were required to name the company as one of the defendants: *Spokes v. Grosvenor and West End Railway Terminus Hotel Co., Ltd.*, [1897] 2 QB 124.
- [75] Schmidt and Torres argue that it is impossible to reconcile how the identical claims in the 2015 Action and the 2017 Action can be treated by the defendants as personal claims in one action and derivative claims in the other action.
- [76] Schmidt and Torres argue that paras. 20 - 28 and 75 - 80 of the amended notice of civil claim in the 2015 Action, which was filed December 18, 2015, relate to their personal claims and the remaining claims were made on behalf of Asher Place and its investors.

- [77] Schmidt and Torres argue that because this is a limited partnership, the common law procedures and law based on *Foss v. Harbottle* continue to apply to derivative actions for partnerships: *Lee v. Block Estates* [1984] B.C.J. No. 2828, at paras. 80 - 81 and 90; Schmidt at para. 50 and *Watson v. Imperial Financial Services Ltd. (BCCA)*, [1994] B.C.J. No. 271 at paras. 25 - 28.
- [78] Schmidt and Torres argue that it is not settled law whether leave is required to commence a common law derivative action.
- [79] Schmidt and Torres argue that they are the de facto plaintiffs in the 2015 Action in relationship to most of the relief claimed. In the Third Action they are acting in a representative capacity seeking remedies for Asher Place.
- [80] Schmidt and Torres argue that they have no relevant evidence to provide regarding the conduct of Asher Place because they were not involved in that.
- [81] Schmidt and Torres argue that they do not have sufficient knowledge or qualifications to give evidence in regard to the operation of Asher Place. Madden should be the party properly examined in that regard. Finally, they argue they have no useful information to give at an examination for discovery.

Examination for Discovery

[82] Rule 7-2 of the Rules is relevant to this application. That Rule reads:

(1) Subject to subrule (2), each party to an action must

(a) make himself or herself available, or

(b) if any of subrules (5) to (10) apply, make a person referred to in that subrule available,

for examinations for discovery by the parties of record to the action who are adverse in interest to the party subject to examination.

(2) Unless the court otherwise orders, the examinations for discovery, including all examinations under subrules (17), (22) and (24), conducted under this rule of a party of record, including any such examinations conducted of a person referred to in subrule (1) (b) who is examined in relation to that party of record, by any other party of record who is adverse in interest must not, in total, exceed in duration

(a) 7 hours, or

(b) any greater period to which the person to be examined consents.

(3) In an application under subrule (2) to extend the examination for discovery period, the court must consider the following:

(a) the conduct of a person who has been or is to be examined, including

- (i) the person's unresponsiveness in any examination for discovery held in the action,
- (ii) the person's failure to provide complete answers to questions, or
- (iii) the person's provision of answers that are evasive, irrelevant, unresponsive or unduly lengthy;
- (b) any denial or refusal to admit, by a person who has been or is to be examined, anything that should have been admitted;
- (c) the conduct of the examining party;
- (d) whether or not it is or was reasonably practicable to complete the examinations for discovery within the period provided under subrule (2);
- (e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.

...

- (5) Unless the court otherwise orders, if a party to be examined for discovery is not an individual,
 - (a) the examining party may examine one representative of the party to be examined,
 - (b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of that party, and
 - (c) the examining party may examine
 - (i) the representative nominated under paragraph (b), or
 - (ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.

[83] There is a dispute among the authorities as to whether leave is required to commence a common law derivative action.

[84] The amended notice of civil claim in the 2015 Action clearly seeks relief on behalf of Asher Place, its investors, shareholders, and limited partners, as well as the plaintiffs.

[85] Madam Justice Choi did not authorize the 2015 Action to continue as a derivative action, but rather authorized Schmidt and Torres to commence a new common law derivative action in the name of Asher Place.

[86] Schmidt and Torres say that they are the de facto rather than the de jure plaintiffs as related to the derivative claims in the amended notice of civil claim in the 2015 Action, and as such have no useful or relevant knowledge to give.

[87] I have difficulty with the argument of Schmidt and Torres that they have no relevant information to give except in relationship to the limited paragraphs which they have characterized as their personal claims. I say that because of the nature of the claims brought in the amended notice of civil claim.

[88] First of all, a number of the claims are specifically related to Schmidt and Torres in their personal capacity.

[89] In addition, while the amended portions of the notice of civil claim include what appear to be derivative claims on behalf of Asher Place, they also include claims by the plaintiffs in the same paragraphs.

[90] For example, para. 32 of the amended notice of civil claim reads:

Notwithstanding that Madden used these funds, Madden has failed to account or adequately account for the use of the funds to Asher Place or the Plaintiffs or to other investors, shareholders and limited parties.

[91] Another example is para. 45 which reads:

Madden, Ralph Balcom and 732 have failed to account to the Plaintiffs, other investors, shareholders, and limited partners, and to Asher Place, for the funds received by 732 [on] its own . . .

[92] The majority of the paragraphs in the amended notice of civil claim that refer to wrongdoing being done to Asher Place also refer to the same wrongdoings being done to the plaintiffs.

[93] The amended notice of civil claim refers to a number of misrepresentations by Madden. In para. 77, those misrepresentations are summarized and are not only alleged to have been made to Asher Place, but to the plaintiffs as well.

[94] Wrongdoings such as misrepresentations and fraud are alleged against Madden and others to have been perpetrated on both Asher Place and the plaintiffs.

[95] The manner in which the amended notice of civil claim was drafted intertwines the derivative claims on behalf of Asher Place with the personal claims of Schmidt and Torres in such a manner that there is significant overlap as to the facts in issue, that is to say between what is alleged to be derivative claims and what is alleged to be personal claims of Schmidt and Torres.

[96] For the purpose of this application, it does not specifically matter whether the 2015 Action is characterized as a derivative action or not. The claims and allegations made in the amended notice of civil claim invariably relate not only to Asher Place but Schmidt and Torres as well. Clearly Schmidt and Torres would have relevant information in relationship to the actions by the defendants which they allege impacted them.

- [97] Further, while the plaintiffs may have registered a CPL on behalf of Asher Place which is part of the subject matter in the Third Action, they would have relevant information as to why they did that.
- [98] In my view, both Schmidt and Torres are compellable to be examined in the 2015 Action and the Third Action on matters where it is alleged they were impacted by the actions of the defendants or are otherwise mentioned in the amended notice of civil claim. Schmidt and Torres are also compellable to be examined on the Third Action in relationship to the filing of the CPL.
- [99] Now there has been no examination for discovery set, nor has there been any actions by Schmidt and Torres which would suggest that they are going to be unresponsive or difficult in an examination for discovery. In my view, the application to extend the time for the examination for discovery is premature and I will adjourn that part of the application generally.
- [100] I order that Madden can examine Schmidt and Torres on the 2015 Action. Madden can examine Schmidt and Torres on the Third Action as it relates to the filing of the CPL.
- [101] Now, Madden has been substantially successful on this application and they will have their costs of this application.

"The Honourable Mr. Justice Tindale"

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