Court File No.: CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

DBDC SPADINA LTD.,
AND THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

and

NORMA WALTON, RONAULD WALTON and THE ROSE & THISTLE GROUP LTD.,
AND THOSE CORPORATIONS LISTED ON SCHEDULE "B" HERETO

Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE "C" HERETO,
TO BE BOUND BY THE RESULT

ABBREVIATED FACTUM OF THE RESPONDENT NORMA WALTON

Part I - The Facts

1. The facts relied upon by the Respondent Norma Walton are set out in her Affidavits filed on October 31, 2013 and December 31, 2013.

Preliminary Issue

2. The Court has declared in its reasons for decision delivered November 15, 2013 (in regards to the Respondent's motion seeking an amendment to the November 5, 2013 endorsement) that the order granting a Receiver/Manager was "not interim". An order for Receiver/Manager can be a final order depending on its context. In this matter the Court granting the order has effectively declared the order for a Receiver/Manager to be final.

3. The order was granted pursuant to a motion brought within an application. The causes of action raised and the relief requested was identical in the Amended Notice of Application and the Notice of Motion. Both the cause of action in oppression and the cause of action in fraud were dealt with by the Court in its reasons for decision dated November 5, 2013. The question is what aspect of the Application was determined and therefore what was the subject of a final order.

4. It is respectfully submitted that all of the matters raised in the Notice of Motion which were all of the matters raised in the Amended Notice of Application and all matters which could have been raised in the Application have merged in the final order, rendering any further decisions by this Honourable Court estopped. The doctrine of cause of action estoppel prevents any further consideration of the matters raised in the Application unless Rule 59.06 relief is sought.

5. The fact that the Court gave reasons for decision which purported to reserve other matters such as the Certificates of Pending Litigation to a later date does not change the impact of a final order as it was taken out. Indeed, the Respondents opposed the terms of the order, unsuccessfully.

6. The fact that the order stated that the parties were not precluded from bringing other proceedings in spite of the terms of the order does not alter the impact of the doctrine of cause of action estoppel.

7. It is therefore respectfully submitted that this Court has no further jurisdiction to deal with the matters which were raised or could have been raised in the motion and therefore in the Application. The only relief that can be obtained by the investors who were not properly served as parties is by way of appeal to the Court of Appeal. The Respondents have served a Notice of Appeal to the Court of Appeal (and to the Divisional Court, if this is only an appeal regarding the oppression remedy finding, which the Respondents say is not the case).

Part II - Issues & Law

1. Order for the Payment of Money

8. It is well-established that, as a general rule, an order for specific performance is not available in respect of an obligation to advance funds or pay money.

***Gilchrist v. Dasko*, [2003] A.J. No. 1336 at para. 24**

***Syndicate of the Rothchild condominium phase 1 v. Kadoche*, [1999] Q.J. No. 4341 at para. 4**

9. The principal rationale for this rule is that the breach of a promise to advance funds can be fully and adequately compensated by an award of damages, and therefore cannot satisfy the fundamental criterion for equitable injunctive relief. Presumptively, where a defendant has defaulted on an obligation to advance funds the plaintiff can simply borrow the money from another source and claim as damages the increased cost of such borrowing, if such costs can be proven. As with any claim for equitable relief (as opposed to common law damages), the onus is upon the claimant to demonstrate that damages will not be an adequate remedy.

***Frankel Structural Steel Ltd. v. Goden Holdings Ltd.*, [1969] 2 O.R. 221 at 225 (C.A.), var'd on other grounds [1971] SCR 250**

***Cumming & Dobbie (1986) Ltd. v. 3567258 Manitoba Ltd.*, 2002 MBQB 290 at para. 35**

***Two Hills Rental Properties Ltd. v. First City Trust Co.*, [1982] A.J. No. 605 (Q.B.) at paras. 31-33**

10. This is a rule of long standing. In an 1897 decision subsequently affirmed by the House of Lords, Lopes L.J. in the English Court of Appeal summarized the law on this point as follows:

> If the contract is to make a loan, that specific performance will not lie is too clear for argument. We must look at the agreement as a whole. Surely in its very nature it is a contract to lend money for a certain fixed period to the company, the payment to be made in the way specified.
>
> On a contract to lend money, no action will lie for the money; an action will only lie for breach of the contract. The borrower may go into the market the next day after the breach, and get the money without incurring any loss, or he may not be able to get it without suffering a loss, in which case the measure of the damages is the loss he suffers. My brother Chitty puts the matter very clearly in *Western Wagon and Property Company v. West*, [1892] 1 Ch. 271, at p. 277: "It was contended for the plaintiffs that on a contract to make a loan the measure of damages for breach was the sum agreed to be lent, and that the damages were thus liquidated and ascertained. ... On a contract to make a loan of money, the measure of damages is the loss sustained by the breach, and the damages may be merely nominal. For instance, if A. agrees to lend B. 100 pounds at interest for a week, and makes default, and B. within a

> few minutes after the time at which the 100 pounds ought to have been lent, obtains from his bankers a loan of 100 pounds at the same rate of interest and for the same period of time, the damages would be merely nominal. Damages recovered are not recovered by way of loan; the plaintiff puts them in his pocket and keeps them."
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> ***South African Territories v. Wallington*, [1897] 1 Q.B. 692 at 695 (C.A.), aff'd [1898] A.C. 309 (H.L.)**

11. An alternative rationale for the presumptive prohibition on specifically enforcing an obligation to advance funds is that such an order lacks mutuality between the parties: the defendant is burdened with a court order mandating that funds be advanced, but the plaintiff borrower is subject only to its contractual obligation to repay such advances. This "rule of negative mutuality" is cited by Sharpe J.A. in his text *Injunctions and Specific Performance* as underpinning the rule that an obligation to advance funds will not be specifically enforced, quoting the following passage from a New Zealand decision:

> There is an obvious objection in principle to granting specific performance of an unsecured loan. It would have a one-sided operation, creating a position of inequality. The borrower obtains immediately the whole advantage of the contract to him, namely the loan itself – a sum of money placed completely at his disposal. The lender on the other hand has to wait and hope for the payment of interest from time to time and for the eventual repayment of the capital.
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> **Robert J. Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 1992+) at ¶10.440-10.450, quoting *Loan Investment Corp. of Australasia v. Bonner*, [1970] N.Z.L.R. 724 (P.C.)**

12. The Applicants have not established that this is an exceptional case or demonstrated any reason why the general prohibition against specifically enforcing an obligation to advance funds should not be applied. On the facts of this case, damages are an adequate remedy.

2. Availability of a Certificate of Pending Litigation

13. Section 103 of the *Courts of Justice Act* provides for the issuance of a "certificate of pending litigation" (a "CPL") in respect of real property where an interest in that property is in issue in a proceeding:

> **103.** (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).
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> ***Courts of Justice Act*, R.S.O. 1990, c. C.34, subs. 103(1)**

14. Under subsection 103(2), such a CPL may be registered on title and effectively prevents that property from being dealt with until the CPL is discharged or the litigation is resolved. While the CPL does not technically freeze the land or prohibit transactions relating to the land, notice to a prospective purchaser or mortgagee that it would be buying into a lawsuit and that any interest acquired might subsequently be determined to be subordinate to that of the plaintiff has the practical effect of preventing such transactions.

> ***Courts of Justice Act*, R.S.O. 1990, c. C.34, subs. 103(2)**
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> ***Interrent International Properties Inc. v. 1167750 Ontario Inc.*, 2013 ONSC 4746 at para. 12**

15. It is axiomatic that a CPL is only available where the plaintiff or applicant claims an interest in land; this requirement is expressly stipulated in section 103. Accordingly, a CPL is not available for the purpose of ensuring that the defendant's property will stand as security for the plaintiff's monetary claim. The plaintiff must, in the originating process, claim an interest in the land in respect of which the CPL is sought.

16. Furthermore, there must be a realistic prospect that the plaintiff will succeed on its proprietary claim and that the action will result in an order vesting the property in the plaintiff. While subs. 103(1) requires only "an interest in land", subs. 103(6) makes it clear that this must be a "reasonable claim to the interest in the land claimed" because if this standard is not met, the CPL is to be discharged. The court must be persuaded that there is a genuine triable issue that the plaintiff will be able to make out such a proprietary claim because damages will not be an adequate remedy. In making this determination, the court is not limited to the pleadings, but may consider the evidence adduced by the parties. If the court finds that there is no reasonable claim to the land, there is no need to go on to consider the equities as between the parties.

> ***Courts of Justice Act*, R.S.O. 1990, c. C.34, subs. 103(6)**

***Todd Family Trust v. Barefoot Science Technologies Inc*., 2013 ONSC 523 at para. 13, 18**

***Interrent International Properties Inc. v. 1167750 Ontario Inc*., 2013 ONSC 4746 at para. 15**

***Correct Group Inc. v. Barrie (City)*, 2013 ONSC 4477 at paras. 5-7**

17. However, if the court determines that the plaintiff has a good triable claim for a proprietary remedy in respect of the specific property claimed, a CPL may still be refused; in such circumstances the court must consider all the equities and determine whether the balance of convenience weighs in favour of restricting the defendant's freedom to deal with the property pending trial. The factors that the court should consider include the following:

(a) Whether the plaintiff is, or is not, a shell corporation;

(b) Whether the land is, or is not, unique;

(c) The intent of the parties in acquiring the land;

(d) Whether there is an alternative claim for damages;

(e) The ease or difficulty of calculating damages;

(f) Whether damages would be a satisfactory remedy;

(g) The presence or absence of another willing purchaser; and

(h) The harm done to the defendant if the certificate is allowed to remain, or to the plaintiff if the certificate is removed, with or without the requirements of alternative security.

***Interrent International Properties Inc. v. 1167750 Ontario Inc*., 2013 ONSC 4746 at para. 15**

***Correct Group Inc. v. Barrie (City)*, 2013 ONSC 4477 at para. 8**

18. As these factors suggest, a CPL is generally only appropriate in cases where the plaintiff claims to have been wrongfully deprived of, and seeks to obtain title to, the subject property. This would include, for example, cases in which the plaintiff has contracted to purchase the property from the defendant and the defendant has refused to convey the property. Where the plaintiff claims an interest in the land by reason of a remedial constructive trust or on the basis that the plaintiff's funds may be traced into the property, it may be more difficult to satisfy the

foregoing factors. The detriment to the defendant in sterilizing the property may outweigh the plaintiff's interest in ensuring that the property is available to satisfy its claims.

> ***Seaton v. Bolton*, 2007 CanLII 46250 (Ont. S.C.J.) at paras. 11-17**
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> ***G.R.Ace Financial Corp. Inc. v. Terrelonge*, 2008 CanLII 869 (Ont. S.C.J.) at paras. 19-20**

19. The Applicants are not entitled to CPLs in the circumstances of this case. The Notice of Application does not assert any claim to the properties in issue and does not claim any proprietary interest in those properties. The Notice of Application claims only a CPL, apparently for the purposes of providing security for the Applicants' monetary claims. In any event, even if the Applicants' originating process did claim an interest in the subject properties, the evidence is insufficient to demonstrate a "reasonable claim" in this regard. The mere fact of monies being traced to some of the lands in question from the Don Mills mortgages does not support the grant of a remedial constructive trust over the properties/companies in question (namely the three companies which owe money to Donalda Developments on account of the Don Mills mortgages: Highland Creek, Front Church Properties Limited, and Carlaw Corner Corp).

3. Availability of a Mareva Injunction

20. In addition to CPLs over the subject properties, the Applicants seek orders enjoining the Respondents from entering into any transaction to dispose or, encumber, or otherwise deal with those properties. In other words, the Applicants seek relief in the nature of a Mareva injunction. This is a "drastic and extraordinary remedy" and very much an exception to the rule that execution must wait until after judgment.

> ***Pugliese v. Arcuri*, 2011 ONSC 3157 at para. 18**

21. To obtain such an injunction the Applicants must:

(a) make full and frank disclosure of all material facts within its knowledge;

(b) provide particulars of the claim, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;

(c) give some grounds for believing that there are assets in the jurisdiction;

> (d) give some grounds for believing that there is a real risk that the assets will be removed from the jurisdiction, disposed of within the jurisdiction or otherwise dissipated so that the moving party will be unable to satisfy a judgment awarded to him or her; and
>
> (e) provide an undertaking as to damages.

***Sibley & Associates LP v. Ross*, 2011 ONSC 2951 at para. 11**

***Chitel v. Robart* (1983), 39 O.R. (2d) 513 (C.A.)**

22. The first two of these criteria relate to the fact that injunctions of this sort are generally brought *ex parte*, on the grounds that if advance notice were given, the defendant would expedite the anticipated dissipation of assets. It is, therefore, telling that the Applicants seek such relief on notice to the Respondents; implicitly, there is no genuine concern that the Respondents will seek to render themselves judgment proof. Furthermore, the disclosure contemplated in the first two criteria must not only provide particulars of the claim, but must demonstrate a strong *prima facie* case of the defendant's liability. The third criterion is not in issue in the present case, as it is conceded that the real properties in issue are in this Province.

***Pugliese v. Arcuri*, 2011 ONSC 3157 at para. 6**

***Elsley v. Bordynuik*, 2013 ONSC 1210 at para. 52**

23. The central focus, therefore, is on the fourth criterion; in this connection, the Ontario Court of Appeal has explained:

> The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating his assets, in a manner … so as to render the possibility of future tracing of the assets remote, if not impossible in law.

***Chitel v. Robart* (1983), 39 O.R. (2d) 513 (C.A.)**

24. There is no "fraud exception" to the foregoing requirement. Even where the plaintiff's claim is founded upon allegations of fraudulent conduct, and even if a *prima facie* finding of liability on this basis is demonstrated in the plaintiff's evidence, an order enjoining the defendant from dealing with its property should only be made upon proof of a real risk that that property will be dissipated or removed from the jurisdiction.

***Sibley & Associates LP v. Ross*, 2011 ONSC 2951 at para. 63**

25. In other words, regardless of the conduct giving rise to the plaintiff's claims, the evidence must demonstrate that the defendant has taken measures, or is highly likely to take measures, to remove assets from the jurisdiction or otherwise render them unavailable to satisfy any judgment that the plaintiff might eventually obtain. It is submitted that in the present case, there is no evidence of such conduct.

***Elsley v. Bordynuik*, 2013 ONSC 1210 at para. 66**

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Applicants Respondents

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Proceeding commenced at TORONTO

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