

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canada Long Investment Group Corporation v. Russo*,
2023 BCSC 884

Date: 20230524
Docket: S232657
Registry: Vancouver

Between:

Canada Long Investment Group Corporation

Plaintiff

And:

**Antonio Russo, Joseph Crivici, Crivici Holdings Ltd., DT6 Developments Ltd.,
Circadian Construction Ltd., Circadian Developments Ltd., Allaire Circadian
(Rochester) Residences GP Ltd., Allaire Circadian (Rochester) Residences
Ltd., John Doe No. 1, and Circadian Developments (Falcon 2016) Limited
Partnership**

Defendants

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:

S.A. Griffin
A. Cocks

Counsel for the Defendants:

R.W. Cooper, K.C.
S.F. Stephenson

Place and Date of Hearing:

Vancouver, B.C.
May 1, 2023

Place and Date of Judgment:

Vancouver, B.C.
May 24, 2023

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[1] The defendant, Allaire Circadian (Rochester) Residences Ltd. (“Rochester”), applies under the Court’s inherent jurisdiction and s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA], for an order cancelling and discharging a certificate of pending litigation (or a “certificate”).

[2] On March 30, 2023, Canada Long Investment Group Corporation (“Canada Long”) filed a notice of civil claim (“NOCC”) and a certificate (the “CPL”) against a property (the “Property”) in Port Coquitlam, BC. Rochester is the Property’s registered owner.

[3] In the alternative, Rochester applies under s. 257 of the *LTA* for an order cancelling and discharging the CPL based on hardship and inconvenience. The order under s. 257 is sought on terms obliging Rochester to provide an undertaking as to damages.

I. The Underlying Claims

A. Introduction

[4] Canada Long is a limited partner of Circadian Developments (Falcon 2016) Limited Partnership (the “Partnership”).

[5] The NOCC advances a common law derivative action “for and on behalf of” the Partnership. Rochester takes no issue with the derivative action being conducted with Canada Long as the named plaintiff.

[6] The NOCC also advances a claim by Canada Long in its own right, however, Canada Long’s argument before me for sustaining the CPL was framed in reliance on the claims in the derivative action. For that reason, I will not summarize that aspect of the NOCC.

[7] The derivative action seeks to recover property and wrongfully diverted funds belonging to the Partnership and any profits derived therefrom, from the defendants as a result of their breaches of fiduciary duties, breaches of trust, knowing

assistance in breach of fiduciary duty, knowing assistance in breach of trust, and knowing receipt of trust funds.

[8] Aside from Canada Long and the Partnership itself, the parties to the proceeding are as follows:

- a) Antonio Russo and Joseph Crivici are the directors and directing minds of the Partnership's general partner, Circadian Developments (Falcon 2016) Limited Partnership (the "General Partner");
- b) Mr. Russo and/or Mr. Crivici are directors, officers, and/or owners of the remaining corporate defendants, including John Doe No. 1. In the NOCC, this group of defendants is defined as the "Crivici/Russo Corporate Defendants"; and
- c) Rochester is one of the Crivici/Russo Corporate Defendants. Mr. Russo is a director, officer, and/or owner (directly or indirectly) of Rochester.

[9] The NOCC includes a Schedule A setting out the legal descriptions of a number of properties. In the NOCC, these are collectively defined as the "Crivici/Russo Lands".

[10] The Property is one of the Crivici/Russo Lands listed in Schedule A. Rochester is the sole registered owner of the Property..

B. The Derivative Action

[11] Canada Long entered into an agreement ("Partnership Agreement") with the General Partner and became a limited partner in the Partnership. Canada Long advanced \$2.75 million as a contribution to the Partnership ("Partnership Contribution") in exchange for partnership units.

[12] The NOCC pleads the Partnership Contribution was impressed with a trust and was to be used by the General Partner on behalf of the Partnership solely for the purposes of advancing the business of the Partnership, which was to develop a

multi-family residential project on lands with a view to making a profit (the “Business”).

[13] It further pleads that the General Partner is the registered owner of lands that it holds in trust for the benefit of the Partnership (“Partnership Lands”). It is asserted that the Partnership Lands are impressed with a trust and were to be used by the General Partner on behalf of the Partnership for the sole purpose of advancing the Business.

[14] The Partnership Lands remain undeveloped.

[15] The term of the Partnership Agreement expired. No steps were taken to dissolve the Partnership. On March 1, 2022, Canada Long filed a petition seeking the appointment of a receiver over the assets of the General Partner and Partnership to effect a dissolution of the Partnership.

[16] The NOCC pleads that in breach of their fiduciary duties to the Partnership, and in breach of trust, Mr. Crivici and Mr. Russo engaged in a scheme (“Scheme”) to defraud the Partnership and engage in widespread self-dealing, including unlawfully registering mortgages on property held in trust for the Partnership and diverting funds belonging to the Partnership (the “Partnership Funds”) for their own use and benefit, including to acquire, preserve, maintain, or improve the Property.

[17] The Partnership Funds diverted under the Scheme are defined in the NOCC as the “Misappropriated Funds”. As part of the Scheme, Mr. Russo and Mr. Crivici are said to have:

- a) diverted the \$2.75 million Partnership Contribution to themselves and “certain” Crivici/Russo Corporate Defendants for their benefit and profit. Rochester is not listed as one of those defendants (although the list is framed as inclusive);
- b) caused the General Partner to mortgage the Partnership Lands for a purpose unrelated to the Business (“First Mortgage”);

- c) diverted the \$907,500 in proceeds of the First Mortgage to themselves and to “third parties” (i.e., not Rochester);
- d) improperly paid out a secret commission of \$1.37 million;
- e) caused the General Partner to take a second mortgage on the Partnership Lands for a purpose unrelated to the Business (“Second Mortgage”);
- f) diverted the \$1.5 million proceeds from the Second Mortgage to themselves and to specified corporate entities days after the expiration of the Partnership term. The list of specified entities does not include Rochester. (It does include the similarly-named Allaire Headwater (Rochester) Residences Ltd. (“Allaire”), which is not a named defendant); and
- g) otherwise diverted business, assets, property, proceeds, and profits away from the Partnership for their own benefit, or the benefit of the Crivici/Russo Corporate Defendants (i.e., including Rochester).

[18] The statement of facts in the NOCC states, among other things, that:

- a) as directors and principals of the General Partner, Mr. Crivici and Mr. Russo were trustees and the Partnership was a beneficiary with respect to all the business, assets, and property of the Partnership (para. 24);
- b) by engaging in the Scheme, Mr. Crivici, Mr. Russo, and/or the General Partner committed breaches of trust (paras. 40 and 45);
- c) the General Partner engaged in the Scheme and committed breaches of trust (paras. 44 and 45); and
- d) Rochester knowingly participated or assisted in the Scheme, including by using Misappropriated Funds diverted under the Scheme for its own benefit, including by using such funds to acquire, preserve, maintain, or improve the Property (para. 46), and did so with actual or constructive knowledge that the funds were impressed with a trust (para. 48).

[19] Part 1 of the NOCC includes the following paragraphs:

Unjust Enrichment

50. By committing the Wrongful Conduct, and knowingly assisting with that conduct, and knowingly receiving trust property, Mr. Crivici, Mr. Russo, and [Rochester] have been unjustly enriched by the use of Partnership property and funds to acquire, preserve, maintain or improve the [Property], and the Partnership has been correspondingly deprived without juristic reason.

Constructive Trust

51. By reason of the foregoing, and in particular, their receipt of Partnership funds and property as a result of their breaches of trust, breaches of their fiduciary duties, knowing assistance in relation to the same, and knowing receipt. Mr. Crivici, Mr. Russo, and [Rochester] hold funds in trust for the benefit of the Partnership.

52. The Plaintiff may be unable to execute on any Judgment to recover for the Defendants' wrongdoing because they have insufficient assets to satisfy a monetary award for fraud, breaches of fiduciary duty, breaches of trust, knowing assistance, knowing receipt, or unjust enrichment in respect of the diverted Partnership Funds, proceeds of the First Mortgage and the Second Mortgage, and profits derived therefrom. The unlikelihood of recovering on a judgment makes a proprietary remedy necessary.

[20] In the relief sought, the NOCC includes the following:

2. An accounting of and tracing of all profits or benefits derived by the Defendants from the Wrongful Conduct, including an accounting and tracing of all of the Partnership funds ... and the benefits obtained therefrom, in the hands of Mr. Crivici, Mr. Russo, and [Rochester].

3. A declaration of constructive trust over the Partnership Funds in the hands of Mr, Crivici, Mr. Russo, and/or [Rochester], and the benefits therefrom, in whatever form they are currently held, and over the [Property], or a portion thereof.

[21] In the legal basis (Part 3) portion of the NOCC, Canada Long relies on fiduciary law, trust law, restitution, equity, and unjust enrichment. Edited to deal with Rochester specifically, the NOCC states:

7. [Rochester] is liable for knowing assistance in breach of fiduciary duty, knowing assistance in breach of trust, and/or knowing receipt.

8. [Rochester] received funds stemming from the Wrongful Conduct and the Misappropriated Funds that rightfully belonged to the Partnership. There should be an accounting of the funds received by them, and tracing order and declaration of constructive trust over any of the Misappropriated Funds received by them.

9. In the alternative, [Rochester] is liable for unjust enrichment.
10. A proprietary remedy is required because the Misappropriated Funds were used to acquire, preserve, maintain or improve the [Property] and a monetary award would be insufficient in the circumstances because the probability of recovery against [Rochester] is low.

II. The Application

A. Section 215

[22] Section 215 of the *LTA* deals with the registration of a certificate. Section 215(1) reads in the relevant part, as follows: “[a] person who has commenced ... a proceeding, and who is (a) claiming an estate or interest in land ... may register a certificate of pending litigation against the land ...”.

[23] The available procedures for challenging a certificate of pending litigation were summarized in *Wu v. Xiao*, 2021 BCSC 1692:

The legal framework

[19] Section 215 of the *LTA* entitles a person who is “claiming an estate or interest in land” to register a CPL against the land. A party may apply to court to cancel the CPL if the pleadings are not capable of supporting a claim to an interest in land. A party wishing to challenge the merits of a pleaded interest in land may, alternatively, apply for summary dismissal of that part of the claim pursuant to R. 9-6(4) of the SCCR. The tests under the two procedures are summarized by the Court of Appeal in *Xiao v. Fan*, 2018 BCCA 143:

[27] Accordingly, the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the *Land Title Act* is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered. If the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4), where evidence may be considered, and the test to be applied is whether there is a bona fide triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.

[24] Rochester has proceeded under the first of the two procedures. No evidence is to be considered. The question is “whether the pleadings disclose a claim for an interest in land”.

[25] The test to be applied where the registration of a certificate is challenged on the grounds that the pleadings fail to claim an interest in land is that set out by Justice MacNaughton in *1267070 B.C. Ltd. v. 1208471 B.C. Ltd.*, 2021 BCSC 2310:

[45] Section 215(1)(a) of the *LTA* provides that a person who has commenced, or is a party to, a proceeding may register a CPL if they are “claiming an estate or interest in land”. Section 216 sets out the effect of registering a CPL; it prevents the transfer of title to the land. CPLs are designed to preserve land claims before trial by preventing the land from passing to innocent third parties in advance of a determination of a claim. It is improper to file a CPL as leverage to secure a financial claim or as a negotiating tool in litigation: *Drein v. Puleos*, 2016 BCSC 593 at paras. 8 and 10; *Seville Properties Ltd. v. Coutre, et al*, 2005 BCSC 1105 at para. 20.

[46] On an application brought under s. 215 of the *LPA*, this Court may cancel a CPL. The applicable test is whether the pleadings disclose a proprietary claim for an interest in land. If the pleadings do not disclose the requisite proprietary claim, the CPL must be cancelled and discharged: *Xiao v. Fan*, 2018 BCCA 143.

[47] Unlike an application to strike pleadings or a cause of action, pleadings are not read broadly on an application to cancel and discharge a CPL: *Xiao* at para. 27; *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 30.

[26] Rochester advances two separate arguments in support of its position that the pleadings do not disclose a claim for an interest in land. First, it asserts that as a matter of law, a limited partnership cannot claim an interest in land. Second, it says the NOCC does not disclose a nexus to the Property that is sufficient to ground a proprietary interest or plead facts to establish Rochester could not pay a judgment.

Capacity to Advance a Claim for an Interest in Land

[27] Rochester submits that since, as a matter of law, a limited partnership itself cannot claim an interest in land, it follows that a limited partnership cannot advance a claim giving rise to an interest in land for purposes of s. 215 of the *LTA*. It argues that as the knowing assistance and knowing receipt claims pleaded against it are all claims made on behalf of the Partnership, those claims cannot be claims for an interest in land: *Schmidt v. Balcom*, 2016 BCSC 2438 at paras. 30–31; *1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP*, 2020 BCSC 1435 [1119727].

[28] Section 25 of the *Partnership Act*, R.S.B.C. 1996, c. 348 reads:

Partnership property treated as personalty

25 If land or any heritable interest in it has become partnership property, it must, unless the contrary intention appears, be treated as between the partners, including the representative of a deceased partner, and also as between the heirs of a deceased partner and his or her executors or administrators, as personal or movable and not real or heritable estate.

[29] Section 25 is located in Part 2 of the *Partnership Act*, and thus must be read in tandem with the following statutory definition:

Part 2 — The Nature of Partnership**Definitions**

1.1 In this Part:

...

"partnership property" means property and rights and interests in property

- (a) originally brought into the partnership stock,
- (b) acquired, whether by purchase or otherwise, on account of the firm, or
- (c) acquired for the purposes and in the course of the partnership business.

[30] In *Schmidt*, the two personal plaintiffs, Mr. Schmidt and Ms. Torres, had invested money in the development of seniors' complexes by way of a limited partnership, the Asher Place Senior Residency Limited Partnership ("Asher Place Limited Partnership"). The defendant Madden Holdings Ltd. ("Madden") was the general partner for the Asher Place Limited Partnership. Madden was also the registered owner of lands that the partnership was building complexes on (the "Complex Lands"). The personal defendants were Madden's controlling shareholders and officers.

[31] Both plaintiffs owned shares in Madden, but Ms. Torres had also invested directly and was a limited partner in the Asher Place Limited Partnership. The plaintiffs filed an action asserting that their investments were mismanaged, and alleging negligent and fraudulent misrepresentation, and breach of contract, trust, and fiduciary duty. The claim asserted that the Complex Lands were held in trust for

the Asher Place Limited Partnership. They also filed a certificate against the Complex Lands.

[32] Madden applied to strike the certificate, and the plaintiffs cross-applied for leave to convert their action into a common law derivative action.

[33] Justice Choi cancelled the certificate under s. 215 of the *LTA*. Her summary of the parties' positions and her central finding for instant purposes were as follows:

[23] Madden submits that the CPL must be cancelled because:

(a) the plaintiffs, in their personal capacities, do not have an "interest in land" as is required under s. 215 of the *Land Title Act*, to file and maintain a CPL against the property; and

(b) the plaintiffs cannot invoke a derivative basis upon which to assert an interest in land on behalf of Asher Place Limited Partnership and maintain the CPL against the property by way of a derivative claim.

The plaintiffs oppose the cancellation of the CPL on two grounds: 1) they have filed and seek leave to continue with a derivative action on behalf of Asher Place Limited Partnership, and 2) they assert that the Class A limited partners of Asher Place Limited Partnership have an interest in partnership assets ...

...

Can Limited Partnerships Claim an Estate or Interest in Land?

[29] The plaintiffs assert that Asher Place Limited Partnership had beneficial title to Lot A and Madden having legal title as of June 4, 2003.

[30] The *Partnership Act*, R.S.B.C. 1996, c. 348 sets out in s. 23(1) that partnership property is held by the partners themselves. Section 25 provides that land that has become partnership property is treated as personal or movable, and not real or heritable estate. A partnership is merely an agreement between persons or partners in carrying out a business with a view to profit: *Molson Brewery B.C. Ltd. v. Canada* (2001), 2001 CanLII 22132 (FC), 199 F.T.R. 210.

[31] Accordingly, in my view, a limited partnership itself cannot claim an estate or interest in land.

[34] Thus, Ms. Torres, as a limited partner in the Asher Place Limited Partnership, could not assert a proprietary interest in the underlying assets of the partnership (which were alleged to include the Complex Lands).

[35] As seen in the summary of arguments, the parties had raised the question of whether the outcome for the certificate would be any different if the action were

made into a derivative action. As Choi J. ultimately found it appropriate to authorize a derivative action (see paras. 65–66), she went on to address that further issue. She held that the change to a derivative action made no difference to the question of whether an interest in the Complex Lands could be claimed in the action:

[66] For certainty and clarity, the derivative action will not, however, ground a claim for the CPL and cannot serve to continue the CPL filed on the Properties.

[36] The result would be the same under a derivative action because the Complex Lands would continue to constitute “partnership property” under the *Partnership Act*

[37] The statement found at para. 31 of *Schmidt* cannot be read in isolation from the two paragraphs that precede it. The real property in issue was alleged to be “partnership property” within the meaning of s. 25 of *Partnership Act*. The registered owner, Madden, was another partner. A unified restatement of those paragraphs would state that “a partner or partnership cannot claim an interest in land alleged to comprise “partnership property” within the meaning of that term under Part 2 of the *Partnership Act*.”

[38] The reasoning in *Schmidt* was followed in *1119727* because the proposition as I have just restated it also applied on the facts of *1119727*. The plaintiffs, who were all limited partners, were on the face of their claim asserting that the properties (the “Project Properties”) the certificate had been registered against were “partnership property”. The first defendant was the general partner in the partnership. The second defendant was a nominee company, having the same directors as the general partner, and had executed a declaration of trust confirming that the Project Properties were held by it in trust for the LP and its partners.

[39] The defendants’ application to cancel the certificate was granted by Chief Justice Hinkson:

[47] ... I conclude that I must allow the defendants’ application.

[48] As Choi J. explained in *Schmidt*, partnership property is held by partners themselves, and land that has become partnership property is

treated as personal or movable, and not real or heritable estate, and thus, a limited partnership itself cannot claim an estate or interest in land.

...

[51] In conclusion, I find that the plaintiffs' pleadings are inadequate in their present form, as they do not disclose a claim for an interest in land based on a constructive trust nor for any other interest in land that can support a CPL under s. 215 of the *Land Title Act*. Consequently, the CPL filed against the Project Properties was not valid when it was filed, and is thus cancelled.

[40] This case is quite different. Here, the CPL is filed against the Property. Rochester is the owner of the Property, Rochester is not a partner to the Partnership, and neither side in the proceeding asserts that the Property meets the definition of "partnership property" under Part 2 of the *Partnership Act*.

[41] Section 25 is not a bar here to the interest claimed under the NOCC. Accordingly, s. 25 of the *Partnership Act* is not a bar to the filing of the CPL against the Property.

Is the Interest Pleaded Capable of Sustaining a Certificate?

[42] The argument before me was, on the part of both parties, focussed on the constructive trust claims in the NOCC.

[43] Canada Long submits that the NOCC discloses both a substantive constructive trust and a remedial substantive trust. I agree. The NOCC paragraphs reproduced above are materially equivalent to those which were found to disclose a claim of substantive constructive trust in *Vidcom Communications v. Rattan*, 2022 BCSC 562 at paras. 28–30 [*Vidcom*].

[44] A discussion of the difference between substantive and remedial constructive trusts can be found in *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 24; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; and *Mayer v. Mayer*, 2018 BCSC 8 at 136–139.

[45] The discussion in *Mayer* is an apt illustration here given that the NOCC alleges that Rochester is in knowing receipt of trust funds that were improperly diverted by a trustee. In *Mayer*, Justice Grauer (as he then was) wrote:

[134] With respect to knowing receipt, Mhinder relies on that subset involving strangers to a trust (here the brothers' trust), who receive trust property for their own use and benefit and with the knowledge that the property was transferred to them in breach of trust. It is that knowledge that establishes the "unjust" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy; constructive knowledge (knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice. In the absence of constructive or actual knowledge of the breach of trust, the recipient may well have a lawful claim to the trust property, and would not be considered to have been unjustly enriched.

[135] ...A remedial constructive trust, as discussed above, is a judicial remedy constructed by the court and imposed to enforce an equity obligation arising from two categories: breach of fiduciary duty or (in our case) unjust enrichment. A substantive constructive trust, on the other hand, arises by operation of law as from the date of the circumstances that give rise to it, and may arise outside of the two categories that pertain to remedial constructive trusts. The court's function is merely to declare that it has arisen in the past. The court may declare that either type of constructive trust operates retrospectively.

[Citations omitted]

[46] In *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 26, Justice Matthews held that a party seeking to establish a constructive trust must satisfy two criteria (in addition to the cause of action or circumstances on which any remedial trust is based):

- a) a substantial and direct link, a causal connection, or a nexus between the claim and the property on which the remedial constructive trust is to be based; and,
- b) a monetary award is inadequate, insufficient, or inappropriate in the circumstances.

[47] For its part, Rochester acknowledges that the NOCC pleads that it holds funds in constructive trust for the Partnership and that those funds were used by Rochester to "acquire, preserve, maintain or improve" the Property. It also acknowledges that the NOCC pleads that the Partnership may be unable to execute on a monetary award as a basis for seeking a proprietary remedy. Rochester does

not take issue with the adequacy of the pleadings for the purposes of disclosing the causes of action alleged.

[48] Rather, Rochester's position is that the NOCC fails to plead material facts capable of establishing those allegations at the level required to sustain the registration of a certificate under s. 215 of the *LTA*. Rochester argues that the NOCC does not establish a nexus or causative link to the Property sufficient to give rise to a proprietary interest in the Property. It also says that the NOCC fails to set out any material facts that, if proven, would establish that Rochester is unable to pay a judgment.

[49] The central focus of Rochester's argument about the insufficiency of the pleading for purposes of s. 215 of the *LTA* is the requirement for a nexus or causative link to the Property. Rochester cites *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357:

[39] While the court has a "narrow" jurisdiction to cancel a CPL outside an application under ss. 256 and 257 of the *Land Title Act*, it is apparent from *Bilin* that the facts pleaded, assuming them to be true, must be capable of supporting a claim to an interest in land: see also *Sun Wave Forest Products Ltd. v. Xu*, 2018 BCCA 63 at para. 33. This connotes a nexus or causative link between the facts alleged and the interest to which they would give rise if the facts were ultimately proved. If the facts assumed to be true would not give rise to an interest in land, then they are incapable of supporting such a claim and the pleadings do not meet the threshold criterion.

[Emphasis added]

[50] In *Nouhi*, Matthews J. described the connection requirement in these terms:

[26] ...The first is that there must be referential property, i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: *BNSF* at paras. 57 and 60.

[51] Neither party asserted that these are anything other than different articulations of the same standard, and neither party asserted that this standard varied in any respect as between substantive and remedial constructive trusts.

[52] Rochester relies on a series of cases in which pleadings have been found insufficient to sustain a claim to an interest in land for purposes of s. 215(1)(a) of the

LTA: 1077708 BC Ltd. v. Agri-Grow Farm Services Ltd., 2019 BCSC 977 [*Agri-Grow*]; *Wai v. Chung*, 2020 BCSC 34; *Gill v. Pannu*, 2021 BCSC 2607 [*Pannu*]; and *Beijing Tian Zi Property Group Trading Ltd. v. Jia*, 2021 BCSC 423 [*Beijing*].

[53] In *Agri-Grow*, it was alleged that funds that would otherwise have been used to pay rent to the plaintiff landlord were misappropriated by the personal defendant and used to “maintain” a real property. The pleadings were truly minimal. The misappropriation appears to have rested on an inference from the failure to pay rent. There was no specified time period as to when the misappropriation had occurred and no indication of how, or how much, money had been misappropriated. There was no factual information as to what was meant by “maintained” and, remarkably, no plea about who owned the property the certificate was registered against. Justice Murray, at para. 39, stated: “An interest in land can not be based solely on unsubstantiated assertions with no factual - whether they ultimately are proved to be true or not - underpinning. Such an extraordinary and powerful pre-trial tool must be grounded on more than mere conjecture.”

[54] In *Wai*, the relevant factual assertions in the pleadings were that:

- a) Ms. Wai had advanced funds for the ongoing operation of several businesses;
- b) the defendants had failed to use the plaintiff’s advances for the ongoing operations and instead used it to invest in real estate; and
- c) the defendants had misappropriated some or all of the plaintiff’s advances to purchase a residential property in Richmond or, in the alternative, to maintain, upkeep, and pay the mortgage on that property.

[55] Justice D. MacDonald concluded that the pleadings were insufficient to sustain a certificate. She identified a number of concerns about the pleading, stating as follows:

[27] In the case before me, there is no factual foundation in the plaintiff’s pleadings that gives rise to a CPL. My concerns are:

- a) The plaintiff did not plead an interest in the Property. She simply asserts the Investment Funds were used to purchase the Property. The last injection of Investment Funds was in December 2017. The purchase of the Property was December 2018. This was a whole year later.
- b) The primary relief sought in the plaintiff's pleadings is in para. 1 of Part 2, judgment in favour of the plaintiff in the amount of \$282,341.81. This is a financial claim by the plaintiff for repayment of her Investment Funds. The trust and fraud claims are sought in the alternative.
- c) Paragraph 7 of the plaintiff's pleadings sets out the basis for the relief with respect to the Property, constructive trust, resulting trust, and unjust enrichment. Not only are they alternative claims, no specific facts were pleaded to support these claims, including unjust enrichment.
- d) The plaintiff did not claim anything to support a constructive trust or a resulting trust such as the holding of land or holding property beneficially for another. As set out in the jurisprudence, there must be more than broad statements and bald assertions.
- e) More importantly, no funds were directly linked to the purchase of the defendants' Property. There must be some basis set out in the pleadings establishing a connection or nexus between the misappropriated funds and an interest in land.

[56] In *Beijing*, the plaintiff company, Beijing, alleged that the defendant, Mr. Jia, had misappropriated money from a corporate bank account when he was a director. Mr. Jia counterclaimed that Beijing owed him money for shares. The amended counterclaim alleged that Mr. Jai had loaned money under an agreement whereby Beijing would be incorporated, he would get 20 percent of the shares, and the loan funds would be treated as a loan from him to Beijing and the loan funds were to be used to buy investment properties. The amended counterclaim sought a declaration that Mr. Jai had an equitable interest in three properties owned by Beijing and certificates were filed against those properties. He asserted that the three properties were purchased with loan funds and that he had done physical work to maintain the properties. The assertion that the properties were bought with loan funds and of having done work on the properties were the basis of the constructive trust claim.

[57] Justice Lyster concluded that the pleadings suffered many of the same weaknesses noted in *Wai*:

[45] Having considered the authorities relied upon by both parties, I conclude that Mr. Jia's amended counterclaim fails to give rise to an interest in land. As in *Nouhi* at para. 26, his pleadings are not sufficient to demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the Properties upon which the remedial constructive trust is to be imposed. Nor has he pled that a monetary award is inadequate, insufficient or inappropriate in the circumstances, which I find necessary to support a CPL.

[46] The present case is very similar to *Wai*, in that the primary relief sought is a monetary judgment. There are no specific facts pled to support the claims for unjust enrichment; there are broad statements and assertions. There is no connection pled between the Funds and the Properties. Providing a Loan, where those funds may then have been used to purchase the Properties, does not establish an interest in land.

[58] In *Pannu*, the plaintiff and the two defendants had a business together. They incorporated a company, ABCC, and divvied out the shares in proportion to capital investment. This made Mr. Pannu the majority shareholder. In 2004, ABCC took out two mortgages granted through PBH, a separate business operated by Mr. Pannu, and bought a property for \$1.075 million.

[59] ABCC did not do well. Mr. Pannu claimed that he made financial contributions to ABCC for which he was not reimbursed by the other shareholders. In 2020, ABCC sold the property for \$2.8 million and ceased operations. ABCC had never made mortgage payments and the balance owing exceeded the net sale proceeds. Mr. Pannu also sold some miscellaneous ABCC assets and kept the money on the basis that he had made extra contributions.

[60] Mr. Gill alleged that Mr. Pannu had wrongfully taken money from ABCC and distributed it to PBH and to a related company he owned, PBT, and to the other shareholder (the second defendant, Mr. Randawa). Mr. Gill alleged Mr. Pannu and PBT had used diverted profits and wrongfully taken shareholder loans to purchase and build on two pieces of property, the Bradner Road Property and the Fraser Highway Property.

[61] With regard to these investments, Mr. Gill's claim read as follows:

42. To the detriment of the Plaintiff ... Mr. Pannu and Pannu Bros Trucking Ltd has diverted operating profits, asset sale proceeds and "cash"

funds from ABCC and the Plaintiff's shareholders loans to their Fraser Hwy Property and the Bradner Road Property and used those funds for:

- (a) clearing and excavating the properties;
- (b) readying the property for development and commercial purposes;
- (c) constructing, maintaining and improving structures and buildings;
- (d) constructing, maintaining and improving a yard for trucks, trailers and vehicles;
- (e) making payments that increased the equity in both the Fraser Highway and the Bradner Road Propert[ies];
- (f) maintaining the lands; and
- (g) other improvements and benefits as the Plaintiff will advise in due course.

[62] The claim also alleged that the defendants were unjustly enriched and claimed a constructive trust and a resulting trust in these two properties by virtue of the defendants' alleged investments.

[63] Finally, the claim alleged:

In these circumstances, a monetary award is inadequate, insufficient, and inappropriate to compensate the Plaintiff for the Defendant Mr. Pannu's unjust enrichment and profitable wrongdoings.

[64] Justice Kirchner held as follows:

[23] [T]he mere fact that a notice of civil claim pleads that the defendant appropriated money and spent that money on a piece of property is not necessarily sufficient to disclose a claim to an estate or interest in that property such that it would support the registration of the extraordinary prejudgment remedy of a CPL. In *Wai [v. Chung]*, 2020 BCSC 34, Justice MacDonald ordered a CPL cancelled on the basis of s. 215. She described the pleading in that case as follows at para. 29:

[29] The plaintiff pleaded generally that the defendants used her Investment Funds to purchase the Property. How they did so is not set out or particularized in any way. The plaintiff's pleadings are vague and imprecise, without any direct connection between the Investment Funds and the Property.

[24] In my view, para. 42 of the notice of civil claim in this case suffers from the same deficiencies. While that paragraph provides a list of ways in which it is alleged the properties were improved with monies allegedly drawn from ABCC, it is nothing more than a longer list of the same kind of bare assertions described in *Wai*. The only parcel of land that is truly the subject of

this litigation is the Laurel Street Property [the banquet hall] which was owned by ABCC and sold. The Bradner Road Property and the Fraser Highway Property have nothing to do with Mr. Gill's claim and have only been drawn into this litigation by way of the bare assertions made in para. 42 of the notice of civil claim.

[25] Moreover, the lack of particularity in para. 47 of the notice of civil claim, where it is said that a monetary award is inadequate, underscores the point that this claim is not about an estate or interest in the Bradner Road or Fraser Highway Properties. If a monetary award is truly inadequate, the plaintiff ought to be able to say why in the notice of civil claim.

[26] I acknowledge the plaintiff may not be in a position to provide more detailed particulars of the allegations in para. 42 of the notice of civil claim at this stage. This is evident by the fact that subparagraph (g) of para. 42 states the funds were used for "other improvements and benefits as the plaintiff will advise in due course." However, the inability to provide particulars of the allegations at the pleadings stage does not justify registration of a CPL: see *Wai* at para. 29.

[65] Notably, in the cases just reviewed, the pleadings were found to suffer from a plenitude of weaknesses. Here, an interest in land is claimed. The NOCC does not primarily set out a claim for money. It contains a detailed unjust enrichment claim and discloses both a substantive and remedial constructive trust claim.

[66] The NOCC also provides detail regarding the Scheme. The facts of the Scheme provide time frames and in some instances even dates, and there is a description of at least some of the mechanisms allegedly employed to divert identified amounts of Misappropriated Funds. (That said, the specificity in the pleading does not extend to Rochester in particular. Rochester is not identified as a recipient of funds diverted from the Partnership Contribution nor of the proceeds of the First or Second Mortgages. Rochester is expressly included in only the NOCC's residual allegation regarding otherwise diverted Partnership Funds.)

[67] I would be inclined to view the NOCC as addressing all of the concerns identified in the above cases but for one: the absence of any material facts establishing a nexus between the Misappropriated Funds and the Property.

[68] Canada Long relies on a number of cases in which allegations involving buying or maintaining property with funds subject to a valid constructive trust claim were found to establish a sufficient connection between a property and a claim: see,

for example, *Nouhi* at para. 48. I agree that the use of the misappropriated funds to make monetary contributions to purchase, service, and maintain a property creates a link between the disputed funds and the property sufficient for the purposes of pleading a constructive trust. But, as stressed in *Nouhi* at para. 30, it is not a question of proper pleading but rather a question of whether “the pleadings disclose a claim to an interest in land so as to support a certificate of pending litigation”. In *Nouhi*, the subject properties were the subject matter of the litigation and there was a factual background in the pleading as to how they had been acquired.

[69] On the pleadings here, the sole factual connection between the Property and the Scheme and Wrongful Conduct is the fact that Mr. Russo is an officer, director, and shareholder in Rochester. Aside from the connection to Mr. Russo, all the NOCC tells us about Rochester is that it currently exists, has a records office, and currently owns the Property. It does not, for example, indicate when Rochester came into existence, what it does, whether it is actively operating, when it bought the Property, the state of the Property, or whether Rochester made significant investments or expenditures in relation to the Property coincident with alleged misappropriations.

[70] Connecting the dots to establish the required nexus may be easier in some pleading scenarios than others. Further, as noted in *Wai* and *Gill*, there may be cases where a certificate cannot be obtained until some disclosure has been made.

[71] Here, the pleadings disclose nothing more than the fact that Mr. Russo, as its officer, director, and owner, would have had an opportunity to divert Misappropriated Funds to Rochester and that Rochester would, on receipt of same, have had the ability to invest those into the Property. In my view, that is not sufficient. A certificate is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land while the underlying issues can be resolved: *Berthin v. Berthin*, 2018 BCCA 57 at para. 32. A certificate is not, as was noted by Kirchner J. in *Gill*, “a shortcut to a *Mareva* injunction” as a way to freeze assets to secure a judgment.

[72] As it is possible that an amendment and a further certificate will be forthcoming here, I will also address the argument that the pleading does not adequately establish a need for a proprietary remedy.

[73] Unlike the pleading in *Gill*, the NOCC does plead a reason for the assertion that a monetary award would be insufficient: i.e., because the probability of recovery against Rochester is low. Rochester argues that Canada Long must go yet further and plead material facts that, if proven, would establish that Rochester would be unable to pay.

[74] I do not agree. First, the NOCC does not merely seek to recapture the Misappropriated Funds, but to obtain all profit and benefit generated by use of those funds, including by developing the Property, up until trial. The amount of that profit is unknown.

[75] Second, I note that a similar argument was rejected in *Wu* by Justice Horsman (as she then was):

[30] Unlike the plaintiff in *Nouhi*, and other cases relied upon by the defendants, the plaintiff also pleads that “an award of monetary damages alone is insufficient or inadequate” as an alternative remedy to her constructive trust claim (Notice of civil claim, Part 1, para. 38). The defendants say that there is no evidence that a monetary award for such claims would be insufficient. However, the defendants’ application under s. 215 of the LTA is based only on a review of the pleadings. No evidence may be adduced at this stage. Further, this application is brought at a very early stage of the proceeding. The requirement for the plaintiff to show that damages are an inadequate remedy requires evidence and factual findings, and the relevant evidence may change during the litigation. For example, an apparently solvent defendant may become insolvent, which would make a monetary award much less appropriate than a proprietary one: *BNSF Railway Co. v. Teck Metals Ltd.*, 2016 BCCA 350, at paras. 66–68 [*BNSF Railway*].

[76] Finally, without deciding the point, I note that the NOCC claims a substantive constructive trust as well as a remedial constructive trust. The decision in *Vidcom* suggests that the existence of a tracing claim in the NOCC is an alternative and sufficient pleading with respect to a substantive trust: at para. 34; see also the discussion in *Dhanani v. Kassam*, 2022 BCSC 2271 at paras. 27–32.

B. Section 257

[77] Given the finding above, I decline to address Rochester's alternative application under s. 257 of the *LTA*.

III. Disposition

[78] For these reasons, I order that:

- a) the certificate of pending litigation in respect of the Property be cancelled;
- b) the Registrar of Land Titles shall remove the certificate of pending litigation registered against the Property; and
- c) Rochester will have its costs of this application at Scale B in the cause.

"Tucker J."