IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Treasure Bay HK Limited v. 1115830 B.C. Ltd.,* 2024 BCSC 294

Date: 20240221
Docket: S219889
Registry: Vancouver

Between:

Treasure Bay HK Limited

Plaintiff

And

1115830 B.C. Ltd., 1104227 B.C. Ltd., Kang Yu Canning Zou aka Kenny Zou, Harlow Holdings Ltd. and GM International Holding Limited

Defendants

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Plaintiff:	D.R. Shouldice
Counsel for the Defendant, Harlow Holdings Ltd. and the Attendee, Haro-Thurlow Street Project Limited Partnership by its general partner, Haro and Thurlow GP Ltd.:	S.A. Turner
No other appearances	
Place and Dates of Hearing:	Vancouver, B.C. January 22-24 and 29, 2024
Place and Date of Judgment:	Vancouver, B.C. February 21, 2024

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Introduction

[1] Harlow Holdings Ltd. (“Harlow”) is the legal owner of development property located at Haro and Thurlow Streets in downtown Vancouver (“Haro Property”), and is said to hold it for its beneficial owner, a limited partnership known as Haro-Thurlow Street Project Limited Partnership (“Limited Partnership”). The general partner of the Limited Partnership is a B.C. company known as Haro and Thurlow GP Ltd. (“Haro GP”). Harlow and the Limited Partnership (through Haro GP) apply for an order discharging a certificate of pending litigation (“CPL”) filed by the plaintiff in this action, Treasure Bay HK Limited (“Treasure Bay”). In submissions, Harlow and the Limited Partnership grounded the application on s. 215 (the claim fails to disclose an interest in land) and in the alternative, on s. 256 (hardship) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*].

[2] Although the Limited Partnership is not a party to this action, Treasure Bay does not object to its standing, through Haro GP, as an applicant. Section 256 of the *LTA* provides standing to a person who claims to be entitled to an interest in land, which the Limited Partnership contends it does as the beneficial owner of the Haro Property, to apply to discharge a CPL.

[3] As the Court of Appeal points out in *Harrison Hydro Project Inc. v. British Columbia (Environmental Appeal Board)*, 2018 BCCA 44 (which I discuss at paras. 52–54 below), a limited partnership is not a legal entity and its property is typically owned and managed by its general partner (absent a specific agreement to the contrary, in which case it would lose its protection from liability).

[4] In a related receivership proceeding, discussed at length in a subsequent section of these reasons, Justice Fitzpatrick said, when outlining the parties’ factual circumstances, that the Limited Partnership is the beneficial owner of the Haro Property, and in turn, the Limited Partnership is beneficially owned by its limited partners: *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 [*Receivership RFJ*] at paras. 5–6.

[5] The applicants and Treasure Bay agree that I may rely on Justice Fitzpatrick's findings where necessary to determine the issues raised on the instant application.

[6] On this basis, I agreed to allow the Limited Partnership to make submissions as a joint applicant with Harlow, who, as pointed out above, is the legal owner of the Haro Property.

[7] The other defendants did not appear on the application.

[8] All of the relief sought by Harlow and the Limited Partnership was opposed by Treasure Bay.

[9] In my analysis under s. 215 of the *LTA*, I must, for the purpose of determining whether Treasure Bay's claim discloses an interest in land, assume the pleadings in its notice of civil claim ("NOCC") are true: *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2023 BCSC 1257 at para. 27, citing *Xiao v. Fan*, 2018 BCCA 143 at para. 27.

[10] The NOCC must be read as a whole: *Batth v. Sharma*, 2024 BCCA 29 at paras. 28–30.

[11] For the alternative relief per s. 256 of the *LTA* premised on hardship, Harlow and the Limited Partnership seek to discharge the CPL on their undertaking to pay damages. In oral submissions, the applicants advanced a further alternative submission, suggesting that if I were to order security, it should charge the interest of one of the limited partners of the Limited Partnership.

Background

The Other Parties

[12] Treasure Bay is a Hong Kong company. It owns a minority (40%) interest in the defendant, GM International Holding Limited ("GMIH"), which is another Hong Kong entity.

[13] Treasure Bay brings this common law derivative action seeking relief from what it alleges is the oppressive conduct of GMIH's majority (60%) shareholder, Best Access Global Holdings Limited ("Best Access"), a British Virgin Islands entity, facilitated by its beneficial owner and "directing mind", the defendant, Kang Yu Canning Zou, aka Kenny Zou ("Mr. Zou").

[14] The law of British Columbia, the forum chosen by Treasure Bay to assert its claims, is the applicable procedural law and substantive law to construe the loan agreements in issue, which Treasure Bay refers to in the NOCC as the "Haro Loan Agreements": *Treasure Bay HK Limited v. 1115830 B.C. Ltd*., 2022 BCSC 761 at para. 26 [*Treasure Bay SC*], aff'd 2022 BCCA 380 at para. 13 [*Treasure Bay CA*].

[15] Treasure Bay brings its derivative action under the common law as opposed to the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*], since it and GMIH are foreign entities: *Treasure Bay SC* at para. 25, *Treasure Bay CA* at para. 30.

[16] A common law derivative action may be brought by a minority shareholder in circumstances where the company is doing or intending to do something which constitutes a fraud on the minority, and the persons controlling the company's activities are the beneficiaries of the fraud: *Treasure Bay SC* at paras. 23–27.

[17] The reasons in *Treasure Bay SC* and *Treasure Bay CA* concern a dispute between the parties to this action regarding Treasure Bay's standing to commence this common law derivative action without leave. In *Treasure Bay CA*, the Court of Appeal upheld the chambers judge's decision that unlike a derivative action brought under the *BCA*, leave is not required for a common law derivative action brought in British Columbia: *Treasure Bay CA* at paras. 7, 28–29, 53, 66.

[18] According to Treasure Bay's pleadings in the NOCC, Mr. Zou beneficially owns and controls Best Access and acts as the *de facto* director of GMIH. As against Mr. Zou, Treasure Bay seeks relief on account of what it alleges was Mr. Zou's breaches of his fiduciary duty to GMIH in relation to loans that GMIH made

to the defendants, 1115830 B.C. Ltd. (“1115830”) and 1104227 B.C. Ltd. (“1104227”).

[19] The loan proceeds from GMIH (“Haro Loans”) were comingled with other funds to acquire the Haro Property by Harlow for the Limited Partnership.

[20] Mr. Zou owns 1115830, which in turn wholly owns 1104227. Mr. Zou resides in Vancouver. He is the sole director of 1115830 and 1104227. He is also a director of Harlow and Haro GP as well as Cloudbreak Holdings Ltd. (“Cloudbreak”) and CM (Canada) Asset Management Co. Ltd. (“CM Asset Management”), who are two of the guarantors of the secured debt owed to the Bank of Montreal (“BMO”) whose mortgage and other security is registered as a first charge against the Haro Property. BMO is owed over $82.2 million.

[21] Mr. Zou, 1115830, and 1104227 are referred to collectively by Treasure Bay in the NOCC as the “Zou BC Debtors”.

[22] The Limited Partnership is beneficially owned by its three limited partners. The first is 1104227. It holds 45 class A units. The other limited partners are entities unrelated to Mr. Zou: Forseed Haro Holdings Ltd. (“Forseed Haro”), with 45 class B units; and Terrapoint Developments Ltd. (“Terrapoint”) with 10 class C units. Forseed Haro and Terrapoint are also guarantors of the debt to BMO.

[23] 1115830 is one of three of Haro GP’s shareholders (with a 45% ownership stake). The other two shareholders are Forseed Group Holdings Ltd. (a different entity related to Forseed Haro) and Intracorp Projects Ltd. (an entity related to Terrapoint) at 45% and 10%, respectively.

Treasure Bay’s Claim

[24] Treasure Bay alleges in the NOCC that Mr. Zou improperly obtained control of and made decisions for GMIH through Best Access:

> 14. Upon its incorporation, GMIH’s sole director was Laurence Liao (“**Mr. Liao**”), the then-CEO of CMIH. At that time, Mr. Liao reported to Mr. Dong [Mr. Zou’s father-in-law], the then-chairman of CMIH and

> CMIG. Mr. Liao resigned from CMIH in November 2019 and Treasure Bay nominated a successor as its nominee to the board of GMIH.
>
> 15. Mr. Zou subsequently obtained indirect control of GMIH through Best Access Global Holdings Limited ("**Best Access**"), a company incorporated in the British Virgin Island. The sole recorded shareholder of Best Access is Lap Chuen Chan ("**Mr. Chan**"). However, at all times Mr. Zou has been the directing mind and beneficial owner of Best Access.
>
> 16. On July 12, 2017, Best Access obtained 60% of the outstanding shares of GMIH and its nominee, Mr. Chan, was appointed as a second director of GMIH, along with CMIH's nominee, Mr. Liao. However, Mr. Chan has never played an active role in GMIH's corporate governance. Mr. Chan has not attended board meetings with Treasure Bay's nominee and has not taken part in the company's decision-making. Instead, Mr. Zou has dealt with Treasure Bay and CMIH, made decisions on behalf of GMIH and has otherwise taken part in its board meetings and corporate governance.
>
> 17. Mr. Zou initially exercised his powers as a de facto director of GMIH by obtaining Mr. Chan's signature on board resolutions and other documents. Then, on or about December 15, 2020, he obtained Mr. Chan's power of attorney. Through Mr. Chan's power of attorney, Mr. Zou has signed corporate documents and continued to act as a de facto director of GMIH.
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> [Bold in original]

[25] Treasure Bay pleads that Mr. Zou improperly leveraged close family relationships to induce the other director of GMIH to approve improvident loans – the Haro Loans – to 1115830 ($20 million) and 1104227 ($10 million), in breach of his fiduciary duty, to fund the acquisition of the Haro Property.

[26] In its pleading, Treasure Bay says that GMIH did so without obtaining adequate security and that Mr. Zou has thwarted GMIH's efforts to register security and to recover funds now owed under the Haro Loan Agreements:

> 1. This is a common law derivative action to recover approximately $25 million owed by the British Columbia numbered company defendants to [GMIH]. The action is brought for and on behalf of GMIH by its sole minority shareholder, [Treasure Bay].
>
> 2. The defendant, [Mr. Zou], wholly owns and controls the defendants, [1104227] and [1115830], together with [1104227], the "**Zou BC Debtors**"…
>
> 3. In breach of his fiduciary duties to GMIH, Mr. Zou had GMIH advance $30 million to the Zou BC Debtors (the "**Haro Loans**") without adequate security. After the Haro Loans were in default, Mr. Zou then

committed further breaches of his fiduciary duties by preventing GMIH from acting to recover the indebtedness owed to it.

4. In light of Mr. Zou's misconduct, Treasure Bay may act for and on behalf of GMIH to recover the indebtedness owed to it under the Haro Loans and to obtain damages against Mr. Zou for the breaches of his fiduciary duties to GMIH. This action is in the best interests of GMIH and is brought by Treasure Bay in good faith.

…

26. The express purpose of the Haro Loans was to assist the Zou BC Debtors with the purchase of the Haro Property.

…

29. Notwithstanding the acquisition of the Haro Property, GMIH advanced the Haro Loans without any security whatsoever. …

30. Mr. Zou, in acting on both sides of the transactions, obtained the Haro Loans on terms that are overly favourable to the Zou BC Debtors and prejudicial to the interests of GMIH. Specifically, as a result of Mr. Zou's interventions, the Haro Loan Agreements:

    (a) did not provide for adequate security in favour of GMIH;

    (b) automatically renewed, perpetually in the case of the [loan agreement with 1104227], unless the Zou BC Debtors elected otherwise; and

    (c) required either no installment payments of principal or interest, or, in the case of the [loan agreement with 1115830], only annual interest payments.

…

39. As a de facto director of GMIH, Mr. Zou owed fiduciary duties to GMIH to act honestly, in good faith and in the best interests of GMIH.

40. Mr. Zou breached his fiduciary duties to GMIH by arranging for GMIH to advance the Haro Loans on terms that favoured the Zou BC Debtors and without adequate security. He then further breached his duties by failing to obtain even the limited security in favour of GMIH contemplated in the Haro Loan Agreements.

41. As the controlling mind of the Zou BC Debtors, Mr. Zou knew or ought to have know that there was a high likelihood that [1115830] and/or [1104227] would default under the Haro Loan Agreements. Mr. Zou also knew or ought to have known that the failure to obtain adequate security in favour of GMIH could significantly impair GMIH's ability to recover the full amount of the Indebtedness.

…

44. Treasure Bay and its nominee on GMIH's board of directors have made numerous requests that GMIH take steps to recover the Indebtedness and/or demand that the Zou BC Debtors perfect the security contemplated in the Haro Loan Agreements. …

…

> 46. By letter dated July 23, 2021, Peter Tan ("Mr. Tan"). Treasure Bay's nominee on the board of directors of GMIH, proposed to Mr. Chan that they hold a directors' meeting on July 29, 2021 to consider resolutions authorizing GMIH to pursue the actions demanded in the June 16th Letter. Mr. Zou responded, apparently on behalf of Mr. Chan, to indicate Best Access (or presumably its nominee) would not participate in the directors' meeting proposed by Mr. Tan.
>
> 47. As a result, GMIH has not pursued any of the actions demanded in the June 16th Letter from Treasure Bay. Mr. Zou has improperly blocked GMIH from pursuing such actions. In doing so, Mr. Zou has preferred his own interests over the interests of GMIH.

[27] According to its NOCC, following repayments totalling $15 million, which Treasure Bay allocated to extinguish the indebtedness of 1104227, approximately $25 million remains owing by 1115380. Treasure Bay pleads in the alternative that if it should not have allocated those funds to pay off the debt of 1104227, then both numbered companies remain indebted to it under the Haro Loan Agreements.

[28] The applicants characterize Treasure Bay's claim as purely a debt claim. The excerpts from the NOCC above and my summary (below) of the relief sought show otherwise.

[29] Treasure Bay's claim for the outstanding amount owed under the Haro Loan Agreements is only one aspect of Treasure Bay's multi-pronged claim. Treasure Bay also seeks damages from Mr. Zou suffered as a result of his breach of fiduciary duties as well as constructive trust and tracing remedies in respect of the funds advanced under the Haro Loan Agreements used to acquire the Haro Property.

[30] The remedies sought by Treasure Bay in the Relief Sought section of the NOCC, include:

(a) judgment against 1115830 in an amount exceeding $24 million;

(b) a declaration that Mr. Zou is in breach of his fiduciary duties to GMIH;

(c) judgment against Mr. Zou for damages for his breach of fiduciary duty;

(d) a declaration that GMIH is entitled to a constructive trust over the Haro Loans and any proceeds thereof;

(e) a declaration that Treasure Bay is entitled to register an equitable mortgage charge against the Haro Property in favour of GMIH to secure the indebtedness of 1115830;

(f) a certificate of pending litigation against the Haro Property;

(g) a full tracing and accounting of the Haro Loans and any proceeds of those loans; and

(h) disgorgement of the Haro Loans and any proceeds of those loans.

[31] Those remedies are not sought in the alternative. Treasure Bay does not plead unjust enrichment.

Receivership

[32] Complicating matters is the Limited Partnership's outstanding debt to BMO, which has been in default since July 2023. In October 2023, BMO filed a petition (VA H230802) seeking, *inter alia*, judgment over $82.2 million and the appointment of a receiver. Justice Fitzpatrick issued the receivership order on January 11, 2024: *Receivership RFJ* at paras. 1, 159.

[33] There is a second mortgage registered against the Haro Property in favour of 1104227, Forseed Haro, and another company.

[34] In her reasons, Fitzpatrick J. said the Haro Property was purchased in 2018 for a total cost of $172,500,000, including property transfer taxes, commissions, and other expenses: *Receivership RFJ* at para. 18.

[35] Justice Fitzpatrick's receivership order constrains the Receiver, whose appointment took effect on January 12, from taking steps to market the Haro Property until February 23, 2024 and to file any application for approval of any sale

until April 26, 2024, to allow the Limited Partnership the opportunity to redeem: *Receivership RFJ* at paras. 163–164.

[36] Justice Fitzpatrick recognized that the Limited Partnership needs to raise funds in order to redeem and, as she said in her reasons, it could only do so by removing the CPL (on application or with Treasure Bay's consent):

> [48] As can be seen from Mr. Zou's evidence, the Borrowers are still facing significant headwinds in achieving any refinancing. They could only do so by removing Treasure Bay's CPL or obtaining Treasure Bay's consent. In addition, even assuming that occurs, they have not secured any concrete offers to refinance the Debt.

[37] Treasure Bay does not consent to a temporary discharge of the CPL on terms that preserve the *status quo* while the applicants pursue refinancing.

[38] As a consequence, the applicants contend there is great urgency in discharging the CPL to allow them to attempt to redeem. Their position is that the CPL is impeding them from obtaining refinancing. Without redemption, they say that in view of the amount owing to BMO, increasing at some $450,000 per month on account of interest, the Limited Partnership, along with its limited partners will lose any potential equity in the Haro Property (to the detriment to GMIH to recover the debt owing on the Haro Loan Agreements, and thus, indirectly, to Treasure Bay).

The NOCC Must Disclose an Interest in Land

[39] A pleading must disclose an interest in land in order to register a CPL against real property.

[40] A CPL serves to preserve a clam to an interest in land before trial by preventing it from passing to an innocent third party prior to the determination of the claim. An interest in land is either a legal or equitable proprietary interest: *LTA*, s. 215; *Save-A-Lot Holdings Corp. v. Christensen*, 2021 BCSC 2540 at para. 52, rev'd 2022 BCCA 39 [*Save-A-Lot 39*].

[41] This court has inherent jurisdiction to cancel a CPL that does not meet that precondition. A discharge application brought under s. 215 of the *LTA* is determined

solely on an examination of the pleadings; no evidence is adduced. The outcome of the application succeeds or fails on the current state of the pleading. Unlike an application brought per Rule 9-5 of the *Supreme Court Civil Rules,* the application under s. 215 may not be adjourned to allow the party who filed the CPL to amend their pleading. If the pleading fails to disclose an interest in land, the CPL must be discharged since it was never valid: *LTA*, s. 215*; Beach Estate v. Beach*, 2021 BCCA 238 at para. 56*; Xiao* at para. 27; *Canada Long Investment Group Corporation v. Russo*, 2023 BCSC 884 at paras. 22–26; *1267070 B.C. Ltd. v. 1208471 B.C. Ltd.,* 2021 BCSC 2310 at paras. 45–47; *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 30; *1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP*, 2020 BCSC 1435 at para. 46.

[42] Harlow and the Limited Partnership contend that the NOCC fails to disclose an interest in land in part because under the *Partnership Act*, R.S.B.C. 1996, c. 348 [*Partnership Act*], the interest of the limited partners in the Limited Partnership is personal or movable property. They also argue that Treasure Bay's claims for an equitable mortgage and remedial constructive trust and tracing remedies are, as pleaded, insufficient to establish an interest in land.

Does Treasure Bay's Claim Disclose a Claim for an Interest in Land?

The *Partnership Act* Issue

[43] The applicants' opening position is that the CPL must be discharged because under ss. 25 and 55 of the *Partnership Act*, the limited partners to the Limited Partnership, including 1104227 (who received the proceeds from the Haro Loans both directly from GMIH and through the entity who owned it, 1115830), do not own a proprietary interest in the Haro Property.

[44] The combined effect of the *Partnership Act* and the case authorities is that except on dissolution, and unless a contrary intention appears, a partner does not hold a proprietary interest in the property of a limited partnership: *Partnership Act*, s. 25; *Schmidt v. Balcom*, 2016 BCSC 2438 [*Balcom SC*] at paras. 30–31; *Bold and Cypress* at paras. 48–49.

[45] Section 25 of the *Partnership Act* is the first step in the analysis:

> **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 the deceased partner's executors or administrators, as personal or movable and not real or heritable estate.
>
> [Bold in original; underlining emphasis added]

[46] I took the effect of Treasure Bay's submissions is that the NOCC engages the "contrary intention" referred to in s. 25 of the *Partnership Act*.

[47] However, since s. 25 refers to partnerships as opposed to limited partnerships, it is irrelevant to the application.

[48] Thus, the analysis turns to s. 55, which deals with the interests of limited partners of a limited partnership. That section does not include the "contrary intention" language found in s. 25:

> **Contribution of Limited Partner**
>
> 55 (1) A limited partner may contribute money and other property to the limited partnership, but not services.
>
> (2) A limited partner's interest in the limited partnership is personal property.
>
> [Bold in original; underlining emphasis added]

[49] No case was cited in submissions suggesting that the "contrary intention" language in s. 25 is imported into s. 55. To the opposite, the decision of Justice Choi in *Balcom SC* was brought to my attention for her discussion of proprietary interests of partners as opposed to limited partners.

[50] In her reasons, Choi J. said, in the context of her discussion of ss. 25 and 55 of the *Partnership Act*, that the proprietary interest arising in the context of s. 25 (partners) upon the dissolution of a partnership sufficient to support a CPL does not apply to limited partners.

[51] The key passage from Choi J.'s reasons are excerpted below:

> [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), 199 F.T.R. 210.
>
> [31] Accordingly, in my view, a limited partnership itself cannot claim an estate or interest in land.
>
> …
>
> [42] Section 55(2) of the *Partnership Act* specifically defines the interest of a limited partner as "personal" property. The assertion made by the plaintiffs that a limited partner holds a direct proprietary interest in the assets of the limited partnership including land, cannot be reconciled with s. 55(2), which describes the character of the interest as personal property.
>
> [Emphasis added]

[52] A limited partnership is a creature of statute. It is not a legal entity like a limited company but a form of partnership with special characteristics. In an appellate decision of a proceeding related to *Balcom SC*, *Asher Place Senior Residency Limited Partnership v. Balcom*, 2021 BCCA 162 [*Balcom CA*], Justice Harris described the essential nature of a limited partnership:

> [27] A limited partnership is a creature of statute in British Columbia. Limited partnerships are governed by Part 3 of the *Partnership Act*, R.S.B.C. 1996, c. 348. It represents a combination of limited liability and partnership principles. In *Harrison Hydro* at para. 41, this Court quoted with approval Alison R. Manzer, *A Practical Guide to Canadian Partnership Law*, loose-leaf (updated to December 2014) (Aurora, Ont.: Canada Law Book, 1994) at 9–10 and 9–11:
>
> > The limited partnership is a relatively modern concept, evolving essentially during the 20th century. The limited partnership combines the limited liability, shareholder-type contribution, in the relationship of a limited partner to the remaining partners, with many of the concepts of a general partnership. The purpose behind the development of the limited partnership assists in understanding the evolution of the statutory entity. The limited partnership was designed to facilitate the raising of capital, while maintaining the partnership structure required for many enterprises, resulting in a combination of legal concepts. A limited partnership, like a corporation, can only be formed by statutory compliance, taking its existence from the filing of a statutory declaration and from the powers stated in the statute. It is often confusing that the limited partnership is similar to the corporation, which also takes its powers from statutory authority, because limited

> partnerships legislation encompasses the concept of general partnership powers for the undertaking of business.
>
> [28] A limited partner has an interest in the limited partnership and is liable only for the amount of property contributed to it. Typically, a limited partner does not participate in the management of the limited partnership, a function reserved to the general partner. As a general rule, a limited partnership acts only through its general partner. Limited partners are passive investors in a limited partnership but, nonetheless, they have an interest in it. Section 55(2) of the *Partnership Act* provides that a limited partner's interest in the limited partnership is personal property: see also *Harrison Hydro* at para. 42.
>
> [Emphasis added]

[53] A limited partnership acts through its general partner, and as a result, retains its protection from legal liability, unless the limited partnership becomes involved in the management of its business, in which case it loses is protection from limited liability (there is no specific pleading to this effect in the NOCC). Its general partner has exclusive control of the management of its business and its property: *Balcom CA* at paras. 20–21.

[54] Of significance for this application is the Court of Appeal's reliance in *Balcom CA* at para. 20, on its prior decision in *Harrison Hydro* at para. 55, excerpted below, that the property of a limited partner can be held only by the general partner, which in this case is Haro GP:

> [55] Several propositions come from these authorities. First, a limited partnership is not a legal entity. Second, a limited partnership acts through its general partner (subject to the hypothetical possibility that a limited partner could act contrary to the typical provisions of a limited partnership agreement and become involved in the management of the limited partnership, in which case he or she would lose the protection of limited liability and become the equivalent of a general partner). Third, a general partner has exclusive control of the management of the business of the limited partnership and its property. Fourth, the property of the limited partnership can be held only by the general partner.
>
> [Emphasis added]

[55] However, in the case at bar, legal title to the Haro Property is owned by Harlow. According to the applicants' submissions, Harlow owns it pursuant to a nominee agreement. However, neither that agreement nor any of its terms are pleaded in the NOCC or discussed in the *Receivership RFJ.* There is no indication of

whether it holds it for Haro GP or for the Limited Partnership. Despite the pleading in the NOCC (Statement of Facts, para. 28) referring to the Limited Partnership as the beneficial owner of the Haro Property, there is no means to determine the basis in which the beneficial interest is held for the Limited Partnership.

[56] In these circumstances, what is the effect of s. 55 of the *Partnership Act*? Does it mean, as Harlow and the Limited Partnership contend, that the enquiry is at an end such that the CPL must be discharged?

[57] I have determined that it does not, for these reasons.

[58] Treasure Bay does not seek a proprietary remedy against the Limited Partnership. The specific proprietary remedies it seeks – equitable mortgage, remedial constructive trust, and tracing, based on GMIH's funds used to acquire the Haro Property – all grounded in equity, are against the property owned by Harlow, who is not a limited partner of the Limited Partnership.

[59] The case at bar does not involve a claim of a limited partner seeking to sustain a CPL against the equitable proprietary interest of a limited partnership. Hence, s. 55 is inapplicable.

[60] The same approach was taken by Justice Tucker in *Canada Long*, where, in analogous circumstances, she declined to discharge a CPL, filed by a limited partner (referred to in the reasons as "Canada Long") of a limited partnership, against land where legal title was held by a company related to the limited partnership's general partner (whose name was abbreviated in the judgment to "Rochester"). Canada Long brought a common law derivative action on behalf of the limited partnership to recover wrongfully diverted funds as a result of the defendants' alleged breach of fiduciary duty. Justice Tucker determined the case before her was quite different from *Balcom SC* because Rochester, against whose property the CPL was filed, was not a partner of the limited partnership: *Canada Long* at paras. 4–7, 27–41. Although Tucker J.'s determination (at para. 41) refers to s. 25 of the *Partnership Act*, her analysis is apposite to s. 55.

[61] Consequently, my analysis must now turn to consider whether Treasure Bay's claims for those remedies as pleaded in the NOCC disclose an interest in land.

Equitable Mortgage

Requirements

[62] An equitable mortgage arises from a contract which does not pass the legal estate to the mortgagee but in equity creates a charge on the property. The purpose of an equitable mortgage is to charge certain property as security for a debt due or a present or future advance. Thus, common intention of the parties, the property in question, and the obligation it was intended to secure, even if not yet acquired, must be ascertainable. A description of the property will suffice; a legal description is unnecessary: *Vancouver v. Smith*, 1985 CanLII 461 at paras. 11–12 (B.C.C.A.); *Forjay Management Ltd. v. 0981478 B.C. Ltd*., 2020 BCSC 637 at paras.177–182; *Stonewater Ventures (No. 185) Ltd. v. Stonewater Ventures (No. 168) Ltd*., 2022 BCSC 114 at paras. 35–44.

[63] A recent discussion of the nature of an equitable mortgage is found in *Stonewater Ventures* at para. 38:

> [38] In *Vancouver*, the Court referred at para. 11 to the decision of *Re: Sikorski and Sikorski*, (1978), 1978 CanLII 1448 (ON SC), 89 D.L.R. (3d) 411 (Ont. H.C.), where Falconbridge, *The Law of Mortgages of Land*, 3rd ed. (1942) ("Falconbridge"), was cited as follows:
>
> > "An equitable mortgage therefore is a contract which creates in equity a charge on property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.
> >
> > "The equitable nature of a mortgage may be due either (1) to the fact that the interest mortgaged is equitable or future, or (2) to the fact that the mortgagor has not executed an instrument sufficient to transfer the legal estate. In the first case the mortgage, be it never so formal, cannot be a legal mortgage, in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately. (3) An equitable mortgage may also be created by a deposit of title deeds…

> "An agreement in writing duly signed, however informal, by which any property is made a security for a debt due or a present advance, creates an equitable charge upon the property…
>
> "The intention of the parties as to the terms and extent of the security may be established by extrinsic evidence. The agreement need not specifically describe the property if it is otherwise sufficiently ascertained or ascertainable, and the charge created by the agreement may extend to after acquired lands. A general charge for value on all the existing property of the mortgagor is not void for uncertainty if the property to which it attaches can be ascertained at the time of enforcement, and such a charge is not contrary to public policy."

[64] The critical feature for this case is the requirement for a common intention of the parties to the contract to secure the debt against the property. The reasons in *C.I.B.C. v. Zimmerman* (1984), 27 B.L.R. 38, 1984 CanLII 485 (B.C.S.C.) point out that if the real intention of the parties can be inferred from the document, the court may infer such other matters necessary to give effect to the security:

> 10 In *First City Invts. Ltd. v. Fraser Arms Hotel Ltd.; Cumberland Mtge. Corp. v. Fraser Arms Hotel Ltd.*, [1979] 6 W.W.R. 125, 13 B.C.L.R. 107, 104 D.L.R. (3d) 617, where the borrower's primary argument to defeat the claim of the lender was that the commitment letter was not a binding agreement as it was too vague or uncertain, the British Columbia Court of Appeal held that if the real intention of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and that although the agreement is silent on such matters as acceleration on default, taxes and insurance, and consequences of default, that does not necessarily render the agreement void for uncertainty. In the case at Bar, in my view there was no uncertainty as to the terms of the agreement when one looks to the terms of the promissory notes signed by Surrey Speed Centre Ltd. and guaranteed by the respondent Zimmerman.
>
> [Emphasis added]

Issues Arising from the Applicants' Position

[65] The applicants argue that no equitable mortgage arises on the allegations pleaded in the NOCC. They advance two grounds.

Whether a Specific Request to Provide the Security is a Necessary Requirement

[66] Harlow and the Limited Partnership submit that for an equitable mortgage to exist, GMIH must have made a request for the security to be provided. They assert it

is a precondition for an equitable mortgage to come into existence where the agreement concerning security is to provide it when requested. They point to Treasure Bay's pleading (e.g., at paras. 29, 40, 44, 46–47 of the Statement of Facts section in the NOCC) that Mr. Zou never took any steps to cause GMIH to make the demand that the security be granted and that he "improperly blocked" Treasure Bay's requests to "perfect the security contemplated in the Haro Loan Agreements": NOCC, Statement of Facts at para. 44. Harlow and the Limited Partnership cited two cases in support of their argument that the request to provide security is a precondition, both from other provinces – *National Bank of Canada v. Merit Energy Ltd*., 2001 ABQB 680 at para. 17; and *Wiseman's Sales and Services Limited v. Atlantic Insurance Company Ltd*., 2007 NLCA 15 at para. 36 – but did not cite any authority decided in British Columbia.

[67] I agree with Treasure Bay's position that the applicants' position and the two case authorities they rely on do not align with the law in this province. An equitable mortgage may arise where the contract states that the security will be provided on request.

[68] Treasure Bay correctly points to *Golam (Re)*, 2009 BCSC 25, where at para. 14, excerpted below, Justice Chamberlist cited with approval the 2008 Edition of the *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz & Sarra, at 399–400, where the authors said that an agreement to give a mortgage when requested to do so will also create an equitable mortgage:

> [14] Equitable mortgages are referred to in Houlden Morawetz & Sarra in their 2008 Edition of the Annotated Bankruptcy and Insolvency Act, with respect to equitable mortgages. In ***Re Little Souris Holdings Ltd: Kellehar v. Westoba Credit Union Ltd.*** (1979), 32 C.B.R. (N.S.N.) 178 (Man. Q.B.), it was held that the holder of an equitable mortgage is a secured creditor in the bankruptcy of the mortgagor. At p. 399-400 of the 2008 Edition of the Annotated Bankruptcy and Insolvency Act, Houlden, Morawetz & Sarra, the authors further state:
>
> > An agreement to give a mortgage when requested to do so will also create an equitable mortgage. The agreement does not have to provide for payment of interest or other matters commonly found in mortgages; it need only contain three essentials: the names of the parties, a description of the property (not the legal description) and the amount owing:

> *Royal Bank v. Exner* (1995), 30 C.B.R. (3d) 295, 170 A.R. 1 (Master); *Canadian Imperial Bank of Commerce v. Saskatchewan Lawyers' Insurance Assn. Inc.,* [1996] 4 W.W.R. 123 (Sask. Q.B.).
>
> [Bold in original; underlining emphasis added]

[69] In the Alberta King's Bench decision in *Royal Bank v. Exner*, cited by Chamberlist J. in the excerpt from *Golam* above, Master Funduk said an agreement to give a mortgage when requested constitutes an equitable mortgage:

> [28] An agreement to give a mortgage when requested to do so is an equitable mortgage: *Bank of British Columbia v. Davis* (1982), [1983] 1 W.W.R. 185 (Alta. Q.B.); *Canadian Imperial Bank of Commerce v. Zimmerman* (1984), 33 R.P.R. 29 (B.C.S.C.).

[70] Although Harlow and the Limited Partnership submit that the comments of Chamberlist J. in *Golam* are *obiter dicta* since he found that no equitable mortgage had been established because the foundational document did not refer to the amount owing, his reasoning aligns with the holding in *Zimmerman*, a decision from this Court cited and relied on by Master Funduk in *Exner.*

[71] In *Zimmerman*, the written commitment of the debtor provided that security would be granted should the bank request it:

> As I/we are using our equity in this property as a continuing collateral security for the present and future liabilities of SURREY SPEED CENTRE LTD. I/we undertake to provide the Bank with mortgage security or to arrange mortgage financing against the above piece(s) of property or any others in my/our control in an amount sufficient to liquidate Bank loans should the Bank so request.
>
> [Capitals in original; underlining emphasis added]

[72] An equitable mortgage was found. Judge Cooper (as he then was) relied on case authorities from Ontario and Alberta:

> [8] Counsel for the petitioner says that in equity a mortgage was created by the agreement and undertaking contained in the letter of June 22, 1982. He relies on a decision of MacDonald J. of the Alberta Queen's Bench, *in Bank of B.C. v. Davis,* 1982 CanLII 1207 (AB KB), [1983] 1 W.W.R. 185, 22 Alta. L.R. (2d) 258 *(sub nom. R.* v. *Collens),* 26 R.P.R. 73 *(sub nom. Re Collens),* 40 A.R. 336, 140 D.L.R. (3d) 755. In circumstances similar to the case at Bar the bank sought a declaration that it held an equitable mortgage against certain lands of bankrupts. In a letter to the bank the bankrupts said:

> "We further agree to provide mortgage security over the above mentioned property if so requested by Bank of British Columbia."
>
> [9] At p. 186, MacDonald J. referred to The Law of Mortgages of Land by Falconbridge (3rd ed., 1942) where the author said at p. 73:
>
> > "An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage operating as a present charge of the lands described in the agreement."
>
> That statement of law was supported by the finding of Osler J.A. in *Rooker v. Hoofstetter* (1896), 1896 CanLII 5 (SCC), 22 O.A.R. 175 [affirmed (1896), 26 S.C.R. 41], where the learned Judge said at p. 183: "The lands intended to be charged being specified, there is no substantial difference between the words, 'I agree to charge', and 'I hereby charge'."
>
> [10] In *First Citylnvts. Ltd. v*. *Fraser Arms Hotel Ltd.; Cumberland Mtge. Corp. v*. *Fraser Arms Hotel Ltd.,* 1979 CanLII 606 (BC CA), [1979] 6 W.W.R. 125, 13 B.C.L.R. 107, 104 D.L.R. (3d) 617, where the borrower's primary argument to defeat the claim of the lender was that the commitment letter was not a binding agreement as it was too vague or uncertain, the British Columbia Court of Appeal held that if the real intention of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and that although the agreement is silent on such matters as acceleration on default, taxes and insurance, and consequences of default, that does not necessarily render the agreement void for uncertainty. In the case at Bar, in my view there was no uncertainty as to the terms of the agreement when one looks to the terms of the promissory notes signed by Surrey Speed Centre Ltd. and guaranteed by the respondent Zimmerman.
>
> [11] I find that the documents tendered by the petitioner bank sufficiently set out the intentions of the respondent Zimmerman to create an equitable mortgage over the lands and premises described to secure the amount of the promissory notes.
>
> [Emphasis added]

[73] *Exner* (decided in 1995) was not cited or discussed in the *Merit Energy* (also an Alberta Court of King's Bench decision, decided in 2001) or *Wiseman's Sales* (which cited *Merit Energy* with approval), nor were the latter two decisions cited or addressed in *Golam*.

[74] Importantly, *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.) was not addressed by Harlow and the Limited Partnership in submissions, and more importantly, no basis was shown to depart from the case authorities decided in this province.

Common Intention Requirement

[75] The other ground advanced by Harlow and the Limited Partnership is that the NOCC does not allege that is was the common intention of the Limited Partnership or Harlow, on the one hand, and GMIH, on the other, to grant security over the Haro Property for the funds GMIH advanced on account of the Haro Loans. They submit that the security alleged in the NOCC was agreed to between GMIH and the Zou BC Debtors and concerned 1104227's interest, as a limited partner, in the Limited Partnership.

[76] Treasure Bay relies on the reasoning in *Ben 102 Enterprises Ltd. v. Ben 105 Enterprises Ltd.,* 2007 BCSC 1069, in support of its submission that an equitable mortgage was created in this case. In *Ben 102*, two companies, Ben 102 Enterprises Ltd. ("Ben 102") and Ben 105 Enterprises Ltd. ("Ben 105"), entered into a joint venture agreement to develop lands in Westbank held by a third company incorporated for the purpose to acquire and hold title to those lands in trust for the joint venturers. On closing, Ben 102 loaned Ben 105 funds to make up the latter's shortfall in its contributions towards the purchase price. In the loan agreement, Ben 105 acknowledged that the loan "represents a first financial charge against its Joint Venture Interest until it has been fully repaid": *Ben 102* at para. 20.

[77] Faced with competing submissions concerning whether the lands were part of the joint venture interest of Ben 105 and thus the loan agreement, Justice Barrow determined at para. 30 that the "issue falls to be determined by the term of the loan agreement and surrounding evidence, including the joint venture agreement."

[78] Evidence concerning the loan and joint venture agreements was before Barrow J., since the matter was a determination of the issue on its merits, as opposed to a CPL discharge application. The joint venture agreement was specifically referred in the recitals of the loan agreement which defined a joint venture interest to be their respective proportionate interest in the land as well as the joint venture itself and their proportionate share in the costs and revenues associated with the land and the joint venture. The loan agreement contained an

acknowledgment from Ben 105 that the loan "represents a first financial charge against its joint venture interest until it has been fully repaid": paras. 35–36. In the circumstances, Barrow J. found the words of the loan agreement "can only be taken to mean that the loan was to constitute a first financial charge on Ben 105's proportionate share of the lands" and moreover, the word "charge" means only that Ben 105's joint venture interest, which includes its interest in the lands, "would stand as security for the repayment of the debt": paras. 37, 44.

[79] Treasure Bay also relies on para. 38 of *Stonewater Ventures* reproduced at para. 63 of these reasons for, *inter alia*, the point that, "The intention of the parties as to the terms and extent of the security may be established by extrinsic evidence."

[80] Neither the terms nor the extent of the security are issues on this application. The specific terms of the Haro Loan Agreements contained in the NOCC, Statement of Facts at paras. 21–25, refer to the amounts of the loans, repayment terms, interest rates, the absence of monthly or annual payments prior to the end of term, and remedies on default. However, the foundational factual requirement of a common intention to secure the Haro Loans against the Haro Property is the determinative issue for the equitable mortgage aspect of the application.

[81] The only pleading that could be said to liken the case to *Ben 102* is at paras. 27–28 of the Statement of Facts in the NOCC, which I have excerpted below with several surrounding paragraphs for context:

> **Part 1: STATEMENT OF FACTS**
>
> 26. The express purpose of the Haro Loans was to assist the Zou BC Debtors with the purchase of the Haro Property.
>
> 27. Consistent with this purpose, the Haro Loan Agreements expressly contemplate that the Haro Loans would be secured by a charge against the interest of the Zou BC Debtors in the Haro Property. Each of the Haro Loan Agreements provides for the Zou BC Debtors to grant such security upon the acquisition of the Haro Property and the written request of GMIH.
>
> 28. Using the funds advanced under the Haro Loan Agreements, Mr. Zou acquired an indirect interest in the Haro Property in August 2018. From the time of the acquisition, Harlow has been the registered owner of the Haro Property. The beneficial owner of the Haro Property

> has been the Haro & Thurlow Limited Partnership. 110 Limited [1104227] is a limited partner in the Haro & Thurlow Limited Partnership.
>
> 29. Notwithstanding the acquisition of the Haro Property, GMIH advanced the Haro Loans without any security whatsoever. Although the Haro Loan Agreements expressly contemplate security in the Haro Property being granted on demand, Mr. Zou never took any steps to cause GMIH to make such a demand. Mr. Zou has also failed to take steps to ensure that GMIH obtained the charge on the shares of 111 Limited [1115830] contemplated in section 11(c) of the 111 Limited [1115830] Loan Agreement.
>
> …
>
> **Part 3: LEGAL BASIS**
>
> 11. GMIH is entitled to an equitable mortgage charging the Haro Property in accordance with the Haro Loan Agreements. An agreement to grant a mortgage when requested to do so, as provided for in the Haro Loan Agreements, creates an equitable mortgage. The Haro Loan Agreements contain the three essentials necessary for an equitable mortgage: the names of the parties, a description of the Haro Property and the amount owing between the parties and secured by such mortgage.
>
> [Bold in original, underlining emphasis added]

[82] In response to the applicants' submissions, Treasure Bay says in its written submissions at para. 11 that the meaning of "a charge against the interest of the Zou BC Debtors in the Haro Property", pleaded in para. 27 of the NOCC, "is to be determined with reference to both the wording of the Haro Loan Agreements and extrinsic evidence to be established at trial."

[83] I respectfully disagree. No basis exists on the current pleading to send the issue to trial to determine the matter with extrinsic evidence. I have reached that conclusion for the following reasons.

[84] First, there is no pleading that the documents founding the Limited Partnership, Haro GP, or Harlow contained any terms recognizing that a security interest would be granted over the Haro Property to secure the Haro Loans.

[85] Second, there is no pleading that limited partners, Haro GP or Harlow otherwise agreed to grant a security interest over the Haro Property to secure the Haro Loans. The allegation (in para. 27) is that the Zou BC Debtors (i.e., 1104227,

1115830, and Mr. Zou, not the Limited Partnership, Haro GP or Harlow) agreed to secure the Haro Loans by a charge against their interest in the Haro Property, which is described (in para. 28) as an indirect interest.

[86] Third, there is no pleading that the Zou BC Debtors were given the authority, direct or implied, by the Limited Partnership, Haro GP or Harlow, to agree to such security over the Haro Property.

[87] Consequently, although two of the three terms necessary to establish an equitable mortgage (the amount of the loan and the property) are pleaded, there is no pleading to engage the common intention requirement.

Disposition

[88] In conclusion, I reject the applicants' position that it is necessary for a request to provide the security to be made first in order for an equitable mortgage to exist. However, the allegations in the current NOCC, when assumed to be proven true, do not establish the common intention requirement for an equitable mortgage, and hence do not satisfy Treasure Bay's entitlement to the CPL.

Remedial Constructive Trust and Tracing

Introductory Remarks

[89] Where funds are obtained through a wrongful means and can be traced to the acquisition, improvement, or maintenance of property, the court may impose a remedial constructive trust sufficient to sustain a CPL: *Kerr v. Baranow*, 2011 SCC 10 at para. 50; *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 20; *Jacobs v. Yehia*, 2015 BCSC 267 at para. 25.

[90] This excerpt from *Kerr* provides a useful description of a remedial constructive trust:

> 50 The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the

> constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).
>
> [Emphasis added]

[91] Thus, the claimant must establish a direct link between the claim and the property upon which the constructive trust is to be impressed and that a monetary award is inadequate or inappropriate in the circumstances (as Justice Newbury points out at para. 57 in *BNSF Railway Company v. Teck Metals Ltd*., 2016 BCCA 350, there is “a longstanding rule of equity which generally prefers to act *in personam*”): *Kerr* at para. 50; *BNSF* at paras. 4, 57–59; *Nouhi* at para. 26.

[92] A remedial constructive trust is available to remedy unjust enrichment and breach of fiduciary duty: *BNSF* at paras. 55–56. Breach of fiduciary duty is pleaded in the NOCC and grounds a part of Treasure Bay’s claim.

Issues Arising from the Applicants’ Position

Remedial Constructive Trust

[93] Harlow and the Limited Partnership contend that Treasure Bay cannot establish an interest in land based on a remedial constructive trust or tracing based on its pleading in the NOCC.

[94] They advance two grounds.

No Nexus

[95] Their first ground is that no link to the Haro Property exists since 1115830 and 1104227 advanced funds per the Haro Loans for which they acquired interests in the Limited Partnership but not the Haro Property.

[96] I agree with Treasure Bay that the applicants' argument is answered by the allegation that the Haro Loans were "to assist the Zou BC Debtors with the purchase of the Haro Property" and the allegation that Mr. Zou obtained the Haro Loans in breach of his fiduciary duty to GMIH. The NOCC, Statement of Facts at paras. 19–20, 26, 39–43 pleads the link between the Haro Loans and the Haro Property and Mr. Zou's breach of fiduciary duties to GMIH.

Failure to Plead Damages Are or May be an Inadequate or Insufficient Remedy

[97] The applicants' second ground is that the NOCC fails to plead, as they say it must, that a monetary award is inadequate or insufficient remedy. Relying on *Nouhi* at para. 49, *Bold and Cypress* at para. 50; and *Saadatmandi v. 1252988 B.C. Ltd*., 2020 BCSC 1469 at paras. 24 and 26, they contend that when a plaintiff fails to plead that monetary damages are an inadequate or insufficient remedy, the pleadings do not meet "the precondition" of a remedial constructive trust and thus will not disclose an interest in land.

[98] In *Bold and Cypress*, Chief Justice Hinkson cited *Nouhi* when determining that the plaintiffs' failure to plead that monetary damages are, or may be, an inadequate or insufficient remedy, in a case where they sought damages for breach of fiduciary duty, was fatal to a claim for an interest in land based on a remedial constructive trust: paras. 32, 50–51. The same conclusion was reached in *Saadatmandi* at para. 23. The CPLs were discharged in each of those cases on the basis that they were never valid.

[99] However, that line of reasoning has been questioned by Justice Newbury in a subsequent decision she released in *Save-A-Lot 39*, where she considered whether to order a stay of the decision of the court below pending the appeal:

> [11] The first question, then, is whether an arguable issue has been raised as to whether the fact the plaintiff did not plead specifically that damages would be an inadequate remedy is fatal to its claim for a constructive trust. Certainly the inadequacy of damages must be *shown* in due course, for a (remedial) constructive trust to be granted. But should a plaintiff be denied a

> proprietary remedy because he or she has not also pleaded that a personal remedy would be inadequate?
>
> [Emphasis added]

[100] Justice Newbury then referred to *Nouhi* and other cases reaching the same conclusion, writing at para. 12 that they "hearken back to the 'analytical framework'" in the Court of Appeal's decision in *Bilin v. Sidhu*, 2017 BCCA 429.

[101] Justice Newbury observed that the Court of Appeal's reasons in *Bilin* said nothing about the necessity for particular wording to be used in pleadings.

[102] Moreover, even though the question arose in *BNSF* in respect of a substantive constructive trust, Newbury J.A. noted that the Court of Appeal in *BNSF* rejected the proposition that an "immutable rule" exists requiring a plaintiff to demonstrate in its pleadings, without the advantage of evidence or findings, that a monetary award would be inadequate or inappropriate:

> [13] As I read *Bilin*, it stands for the proposition that counsel may seek the cancellation of a CPL by relying on the common law and is not limited to argument based on non-compliance with ss. 256–7 of the *Land Title Act*. If no triable issue is raised by the pleadings, for example, the CPL may be cancelled: see, for example, *Kamil v. Transtide Industries Ltd.* (1980) 23 B.C.L.R. 344 (S.C.), a decision of Chief Justice McEachern. This is the first scenario referred to in *Bilin*. The second arises where the pleadings are incapable of supporting an interest in land, which the defendants say is the case here.
>
> [14] *Bilin* said nothing about the necessity for particular wording to be used in pleadings. That question did arise in *BNSF Railway Company v. Teck Metals Ltd.* 2016 BCCA 350, which concerned a so-called "substantive" or "institutional" constructive trust as opposed to a remedial one. (The distinctions between the two types of constructive trust were described in *BNSF* at paras. 24–55.) The Court in *BNSF* rejected the proposition that there is an "immutable rule" that "a plaintiff must in its pleadings, and without the advantage of evidence or findings of fact, demonstrate that a monetary award would be inadequate or inappropriate and point to 'identifiable property' to which it contributed, before it may seek a declaration of constructive trust founded on a valid cause of action." (At para. 3.)
>
> [Emphasis added]

[103] Justice Newbury's point concerning the absence of an immutable rule, is also shown in this extract from her reasons for the Court in *BNSF*:

> [3] The defendants' success in having portions of the plaintiff's Amended Notice of Civil Claim struck out in this case depended on the drawing of absolute lines and the adoption of unequivocal rules of law by the chambers judge – a rule that the substantive constructive trust has been wholly superseded in Canada by the remedial constructive trust developed here in the 1980s and 1990s; a rule that constructive trust may be imposed only in two situations and not otherwise; a rule that every constructive trust takes effect on the date of judicial pronouncement; and a rule that a plaintiff must in its pleadings, and without the advantage of evidence or findings of fact, demonstrate that a monetary award would be inadequate or inappropriate and point to "identifiable property" to which it contributed, before it may seek a declaration of constructive trust founded on a valid cause of action.
>
> [4] As will be explained below, it is my view that none of these generalities is an immutable rule and that, as suggested by the majority in *Soulos v. Korkontzilas* [1997] 2 S.C.R. 217, the existence of constructive trust as a remedy in two types of situations does not negate the availability of the substantive constructive trust in other circumstances. Notwithstanding the prevalence in Canada of the remedial constructive trust, it is open to a Canadian court to recognize a substantive constructive trust; to do so outside the categories of breach of fiduciary duty and unjust enrichment; and to declare a constructive trust retrospectively. Further, there are circumstances in which a plaintiff may satisfy the two criteria for the finding of a constructive trust − i.e., demonstrate that a monetary award would be inadequate and identify property to which the plaintiff contributed in some manner − in the course of discoveries or trial, or be able to trace its funds into a mixed account or elsewhere, *once the defendant's liability has been established*. Thus it may be incorrect to rule, before any facts have been found, that a constructive trust is "bound to fail" on the basis that the two criteria have not been satisfied in the plaintiff's pleading.
>
> [Emphasis added]

[104] At the end of the day, Newbury J.A. determined that she was not required to decide the pleadings issue, although added that an arguable issue was raised:

> [15] Save-A-Lot submits that the reason why damages may be inadequate in this case may not arise until "long after" pleadings have been filed. It argues that consistent with this reasoning, the Supreme Court of Canada in *Moore v. Sweet* 2018 SCC 52 held that a constructive trust was appropriate on the basis of circumstances that arose after the claim was filed, including the fact that the disputed funds had been paid into court, and the fact that enforcing the judgment indirectly would be unduly complicated and would create a risk that the trust money would be accessed by other creditors. As Save-A-Lot emphasizes, the defendants in the case at bar filed their proposals under the *BIA* after the pleadings were filed. They now seek to "access" the equity to which funds belonging to Save-A-Lot have allegedly been 'contributed'. This would likely result in the non-availability of the funds sought to be impressed with a trust. Arguably, to lift the CPL because of the alleged defect in the pleadings would be a harsh result resting on a technicality. The defendants are certainly aware that an equitable remedy is

> being sought, so that the granting of a constructive trust would not take it by surprise; and as mentioned, the plaintiff has already applied to amend its pleading to correct the alleged deficiency.
>
> [16] In his submissions on behalf of the defendants, Mr. Magnus referred to *Pro-Sys Consultants Ltd. v. Microsoft Corp.* 2013 SCC 57, which he contended determines the point. With respect, I do not read *Pro-Sys* as doing so. *Pro-Sys* was concerned with the existence of a cause of action, and para. 92 thereof may be read a suggesting that *either* of two conditions must be met, i.e., the claim must "explain" why damages would be inappropriate, *or* a "link" between the plaintiff's funds and specific property must be shown. Strictly speaking, *Pro-Sys* was not about what must be *pleaded*; and in any event, the second condition has been pleaded in this instance.
>
> [17] At the end of the day, I am not called upon to decide this pleadings issue. It is sufficient to say that in my opinion, an arguable issue has been raised, so that the first criterion for granting a stay is met.
>
> [Italics in original; underlining emphasis added]

[105] The Supreme Court of Canada's decision in *Moore v. Sweet*, 2018 SCC 52, cited by Newbury J.A. in *Save-A-Lot 39*, does not state such a pleadings requirement for remedial constructive trust claims exists. What the Court's reasons do articulate is that the plaintiff must be able to establish in order to succeed, that a monetary award is insufficient and a link exists between its contributions and the disputed property:

> 33 What is therefore crucial to recognize is that a proper equitable basis *must* exist before the courts will impress certain property with a remedial constructive trust. The cause of action in unjust enrichment may provide one such basis, so long as the plaintiff can also establish that a monetary award is insufficient and that there is a link between his or her contributions and the disputed property (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 997; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269(S.C.C.), at paras. 50-51). Absent this, a plaintiff seeking the imposition of a remedial constructive trust must point to some other basis on which this remedy can be imposed, like breach of fiduciary duty.
>
> [Emphasis added]

[106] In that case, the circumstances supporting a remedial constructive trust arose only after the claim was filed.

[107] In the instant application, Harlow and the Limited Partnership argue that since Justice Newbury's decision concerned a leave application, it is not binding on me. Instead, they say, I am bound by decisions of this Court in *Nouhi*, *Bold and Cypress*,

and *Saadatmandi*, which have not been overturned. They also point to the decision in *NRI Solutions Ltd. v. Chohan*, 2022 BCSC 2486, where the decision in *Save-A-Lot 39* was seen to determine only that an arguable case exists on the point:

> [15] The plaintiff says that the amended notice of civil claim does address the concerns that were initially raised with its pleadings, and it points to the recent decision of our Court of Appeal of Justice Newbury sitting in chambers (*Save-A-Lot Holdings Corp. v. Christensen,* 2022 BCCA 39*),* in which reliance upon the *Nouhi v. Pourtaghi,* 2019 BCSC 794 decision is questioned. *Nouhi* has not been overturned, because the only question before Madam Justice Newbury on that application was whether there was an arguable case. However, that decision does suggest that the Court of Appeal for British Columbia, or at least a judge of that Court, is of the view that the reasoning in *Nouhi* may be overly onerous on a plaintiff in terms of what material facts must be pled to support a constructive trust. In particular, the question of whether damages are an adequate remedy may not need to be addressed at the pleading stage.
>
> [16] My earlier reasons in this matter that this is a claim about money, and that the primary focus of the claim as originally pled was the recovery of money, and that the Property was primarily being looked to, as I viewed it, as a security as opposed to a trust claim, may now be of less importance in light of the *Save-a-Lot* case.
>
> [17] That said, *Nouhi* still remains part of the common law, and the other cases that followed it since then also remain good law in our court, unless or until they are returned by the Court of Appeal for British Columbia.

[108] However, Treasure Bay correctly points out that the reasoning of the Court of Appeal in *BNSF*, which was a decision of a three-member panel, concerning the pleadings issue was not considered in *NRI Solutions*, nor was Justice Newbury's point concerning *Bilin*. Treasure Bay argues that based on *Hansard Spruce Mills*, I am not bound by the remarks in *NRI Solutions*, which it also correctly submits, are, as seen from the excerpt below, *obiter dicta* as the decision to uphold the CPL was based on a tracing remedy:

> [26] Nevertheless, with the caution of the Court of Appeal's decision in mind, I find that the amended notice of civil claim does plead material facts in support of a constructive trust over the Property through a tracing of funds over which there is a claim in remedial and substantive constructive trust, and I decline to cancel the CPL pursuant to s. 215 of the *LTA* as outlined in these pleadings.

[109] The parties also drew my attention to the reasons of Justice Skolrood in *Batth* (cited at the outset of these reasons), also a decision of a three-member panel,

which was released just prior to the hearing of this application. In his reasons, Skolrood J.A. rejected the submission that based on *BNSF*, a plaintiff claiming a constructive trust in property must plead that a remedy in damages is inadequate:

> [34] Citing *BNSF Railway* at paras. 57 and 60, the appellants assert that a plaintiff claiming that a constructive trust in property arises because of fraudulent use of the plaintiff's money towards the acquisition or maintenance of the property must also plead that a remedy in damages would be inadequate.
>
> [35] I am not convinced this is necessarily a requirement where the plaintiff has pleaded a link between the fraudulent use of the plaintiff's money and the specific property which is said to be impressed with the constructive trust: see discussion in *Save-A-Lot Holdings Corp.* at paras. 14, 16 and *Vidcom* at para. 34. However, the judge did not need to decide this question because Mr. Sharma has pleaded that the Batths and ICGS do not have the ability to pay a monetary award: NOCC Part 1, para. 34, which amounts to pleading that a remedy in damages would be inadequate.
>
> [Emphasis added]

[110] I pause at this juncture to note that paras. 57 and 60 of *BNSF* do not, as the appellants argued in *Batth*, state that a specific pleading is required. Those paragraphs from the decision state that to succeed with the claim of a constructive trust, the plaintiff must establish a nexus between the funds and the property and that a monetary award would be inadequate. Nothing in those paragraphs detracts from the earlier point made by Newbury J.A. in paras. 3–4 of *BNSF* rejecting the notion of an immutable pleadings rule.

[111] Do these cases establish an absolute pleadings rule currently exists in the common law in this province? In my opinion, guided by the decisions in *Batth*, *Save-A-Lot 39*, *BNSF*, and the Supreme Court of Canada's decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (discussed, e.g., in *Save-A-Lot 39*), they do not. Much depends on the specific pleading in issue when looked at as a whole.

[112] As Skolrood J.A. said in *Batth*, the pleadings must be looked at as a whole. In that case, he was not convinced that the specific pleading was required where the plaintiff pleaded a link between the fraudulent use of its money and the specific property said to be impressed with a trust, a point recognized by the chambers judge

when considering that a tracing claim was also apparent from the pleadings: *Batth* at paras. 29–30, 35.

[113] A similar approach was taken by the Court in *Pro-Sys*, where deficiencies with a constructive trust claim arose from the pleading due to a lack of a referential property and an explanation as to why monetary award was insufficient or inappropriate. The excerpts below are taken from the reasons in *BNSF* so as to place Justice Rothstein's remarks in *Pro-Sys* in context:

> [57] We have seen that it was on the basis of the requirement for a "proprietary nexus" and on the basis that BNSF had not shown that a monetary award would be inadequate (a longstanding rule of equity, which generally prefers to act in *personam)*, that the chambers judge ruled that BNSF's claim for a constructive trust was 'bound to fail'. These two conditions were re-affirmed in 2011 in what is now the leading Canadian case, *Kerr v. Baranow*, *supra*, from which the chambers judge quoted:
>
> > The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. … Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). …
> >
> > As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). *Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property* (*Sorochan*, at p. 50; *Pettkus*, at p. 852).
> >
> > The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of

> recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.). [At paras. 50-52.]

[58] In *Pro-Sys*, Rothstein J. quoted para. 50 of *Kerr* and continued [at para. 92]:

> In the present case, there is no referential property; Pro-Sys makes a purely monetary claim. Constructive trusts are designed to "determine beneficial entitlement to property" when "a monetary award is inappropriate or insufficient"... As Pro-Sys's claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that Pro-Sys's claim that an amount equal to the overcharge from the sale of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members cannot succeed. The pleadings based on constructive trust must be struck. [At para. 92; emphasis added.]

(See also para. 41 of *Sun-Rype*.)

[Underlining emphasis in *BNSF;* italics emphasis added]

[114] In the case at bar, the nexus between the use of GMIH's funds constituting the Haro Loans and the Haro Property is pleaded in the NOCC. So is the claim for a remedial constructive trust in respect of those loan proceeds on the basis that they were used to acquire the Haro Property. The nexus and referential property requirements discussed in *Pro-Sys*, *BNSF*, and *Batth* are met. It must also not be overlooked that damages are not sought in the NOCC against the Limited Partnership, Haro GP or Harlow.

[115] As well, just as Newbury J.A. pointed out in *Save-A-Lot 39* at para. 15, Harlow, Haro GP and the Limited Partnership are on notice from the NOCC and cannot say that they are surprised that a constructive trust is being sought against the Haro Property.

[116] Accordingly, I reject the applicants' submission that the CPL must be discharged on the basis that the NOCC does not plead that damages are an insufficient or inappropriate remedy.

Disposition

[117] The remedial constructive trust remedy pleaded in the Legal Basis section of the NOCC is set out below:

> 10. The Haro Loans were obtained through breaches of fiduciary duties. GMIH is therefore entitled to a remedial constructive trust over the Haro Loans and any proceeds thereof, as well as an accounting, equitable tracing and disgorgement of the Haro Loans and any proceeds thereof. The Zou BC Debtors, or any other person in receipt of the Haro Loans or proceeds thereof, holds the Haro Loans and any such proceeds as constructive trustee for GMIH.
>
> [Emphasis added]

[118] It is sufficient to support a claim for an interest in land and the CPL.

Tracing

[119] Independently of a claim for a remedial constructive trust, a claim for tracing may justify an equitable charge on land to support a CPL.

[120] In *Yehia*, Justice Dickson (as she then was), said this about tracing to support a CPL:

> [25] Where funds are obtained through wrongful means and can be traced to the acquisition or improvement of land, the court may impose a remedial constructive trust sufficient to sustain a CPL. In addition, the claim for tracing may, in and of itself, justify an equitable charge on land for purposes of supporting a CPL: *Meola*, para. 9; *Drucker, Inc. v. Hong*, 2011 BCSC 905, paras. 19, 22 and 36; *Samji (Trustee) v. Chatur*, 2013 BCSC 1915, paras. 60-64; *Lament v. Constantini*, [1985] B.C.J. No. 2988.
>
> [Emphasis added]

[121] In *Drucker, Inc. v. Hong*, 2011 BCSC 905, Justice Masuhara said that tracing is neither a claim nor a remedy. It is a process by which a claimant can demonstrate what has happened with its property (in this case, GMIH's funds) in support of its claim that the proceeds properly represent its property. If, for example, a plaintiff establishes a proprietary entitlement to misappropriated funds in the hands of the defendant, it may trace or follow those funds from there into the property. "The question," Masuhara J. said at para. 37, "is then whether or not the Property held by

the defendant is sufficiently connected to those misappropriated funds to satisfy the requirements for a constructive trust." [Emphasis added]

[122] Three conditions must be met to trace – the property must be traceable; there must be an equity to trace; and tracing must not produce an inequitable result: *Drucker* at paras. 37–38. Those are matters to be determined on the evidence.

[123] Harlow and the Limited Partnership rely on *Drucker* for their submission that tracing must not produce an inequitable result, which, they argue, would be the result in this case to the other "innocent" limited partners of the Limited Partnership. With respect, this submission does not take into account the close connection between the limited partners and shareholders of Haro GP pointed out by Fitzpatrick J. in the *Receivership RFJ* at paras. 5-11.

[124] Here, in the NOCC, Treasure Bay pleads a clear connection between the Haro Loans and the Haro Property, i.e., that the proceeds from the Haro Loans were advanced, in breach of Mr. Zou's fiduciary duty to GMIH, for the express purpose of assisting with the acquisition of the Haro Property: NOCC, Statement of Facts at para. 26. Assuming that to be true, the NOCC is sufficient to trace the Haro Loan proceeds into the Haro Property, which in turn is sufficient to sustain the CPL.

Hardship

Introduction

[125] Having determined that the pleading in the NOCC is sufficient to establish an interest in land, I turn now to consider the applicants' alternative position, grounded on s. 256 of the *LTA*, that the CPL should be discharged on account of hardship. They submit that the CPL is preventing them from securing refinancing which would allow them to pay out BMO, which would in turn allow them to preserve their equity in the Haro Property. To succeed on this ground, Harlow and the Limited Partnership must demonstrate that they are or likely are to suffer hardship and inconvenience caused by the registration of the CPL, and that it is something more than trifling or insignificant: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.,*

2014 BCCA 388 at para. 28; *Liquor Barn Income Fund v. Mather*, 2009 BCSC 1092 at paras. 5–12 [*Liquor Barn SC*], aff'd 2011 BCCA 141 [*Liquor Barn CA*] at paras. 26–27; *TCC Mortgage Holdings Inc. v. Rohland*, 2019 BCSC 190 at paras. 13–16.

[126] A useful discussion of hardship is found in *Stonewater Ventures* at paras. 69–72. In the reasons, Master Robertson (as she then was) referred to one case authority stating that the court should not be exacting in its analysis of hardship and inconvenience and to another decision where evidence that a party's ability to obtain alternative refinancing to avoid default of their mortgage was impeded by the CPL was sufficient to constitute hardship: *Stonewater Ventures* at paras. 71–72, citing *Uppal v. Rawlins*, 2008 BCSC 650 at paras. 29–30 and *Nu Stream Realty Inc. v. 1116191 B.C. Ltd.*, 2018 BCSC 911.

[127] Harlow and the Limited Partnership submit they have established hardship, relying in part on the finding of Fitzpatrick J. in para. 48 of the *Receivership RFJ*., set out in the extract below:

> [45] In Mr. Zou's affidavit sworn December 12, 2023, he provides the only update on the Borrowers' refinancing efforts in the face of BMO's foreclosure.
>
> [46] Mr. Zou states:
>
> > In late September 2023, at or about the time forbearance negotiations with the petitioner came to an end, the Borrowers retained consultants to assist them in securing take-out financing.
> >
> > These consultants have identified a syndicate of three lenders who have indicated a strong willingness to provide the Borrowers with a loan or loans in amounts sufficient to fully repay the Petitioner's loan.
> >
> > However, the Borrowers' consultants have identified the CPL registered against title to the property in favour of the Respondent Treasure Bay HK Ltd. ("Treasure Bay") as an impediment to the new lenders proceeding to finalize their commitments and provide funding. Accordingly, Borrowers are proceeding with an application to have the Treasure Bay CPL discharged from title. That application is set for January 22, 2024.
> >
> > The Borrowers are confident that they will be able to secure take-out financing by no later than June 30, 2024.

> [47] BMO emphasizes that absolutely no documents have been provided by the Borrowers to support any of Mr. Zou's statements, including the identity or involvement of the "three lenders" or their "strong willingness" to provide financing sufficient to repay the Debt.
>
> [48] As can be seen from Mr. Zou's evidence, the Borrowers are still facing significant headwinds in achieving any refinancing. They could only do so by removing Treasure Bay's CPL or obtaining Treasure Bay's consent. In addition, even assuming that occurs, they have not secured any concrete offers to refinance the Debt.
>
> [Emphasis added]

[128] Treasure Bay submits that I should not lose sight of para. 49 of the *Receivership RFJ*, where Fitzpatrick J. said, "They [the applicants] are, at best, 'hoping' that they will be able to refinance by June 2024."

[129] Treasure Bay also points to para. 162 of the *Receivership RFJ* where Fitzpatrick J. characterized the applicants' efforts to refinance as "somewhat minimal" and "hopeful".

[130] Yet, Fitzpatrick J. allowed the applicants more time, and as mentioned at the outset of these reasons, stayed the receiver's ability to market the Haro Property until after February 23, 2024 and postponed consideration of any offers to purchase until April 26, 2024: *Receivership RFJ* at paras. 162–164.

[131] Harlow and the Limited Partnership do not rely solely on the findings of Fitzpatrick J.

[132] They also rely on the affidavit evidence of Mr. Liu, a director of Haro GP, filed in this action, who deposed in his affidavit sworn November 20, 2023:

> **The Urgent Need for Refinancing**
>
> 13. The Limited Partnership is seeking to refinance the Property with a replacement first mortgage loan in a principal amount that will be sufficient to pay out Bank of Montreal under the Bank's credit agreement with the Limited Partnership and discharge the Bank's first mortgage charging the Property and other security, and has engaged a mortgage broker, Fanson Capital Solutions Corporation (the **Broker**), to assist it in arranging the loan.
>
> 14. The Broker informed the Limited Partnership on November 8, 2023, by letter that having the CPL charging the Property is impeding approval by a

> lender for a replacement first mortgage loan. Attached to this affidavit and marked as **Exhibit "C"** is a true copy of the Broker's letter.
>
> 15. Harlow and the Limited Partnership will face hardship, prejudice and inconvenience if the CPL is not canceled because it is hampering the ability to secure urgently needed refinancing.
>
> [Bold in original; underlining emphasis added]

[133] The letter from Fanson Capital Solutions Corporation ("Fanson Capital") states:

> To the Board of Directors of Haro and Thurlow GP LTD:
>
> I am writing this letter to express my opinion regarding the CPL on 1045 Haro St Vancouver B.C. (The Property) by Treasure bay HK Limited. As we are moving close the final approval stage of replacing current first charge at BMO, the lender's credit committee has raising concerns about the CPL charged on The Property. CPL has to be removed in order to acquire final approval from the credit committee.
>
> Having the CPL will delay the approval status which will likely to cause financial damage to the borrower known as Haro-Thurlow Street Project Limited Partnership.
>
> If you have any questions or concerns, please feel free to contact me at: …
>
> Ivan Qin
>
> Managing director of Fanson Capital
>
> [Emphasis added]

[134] In its oral submissions in response, Treasure Bay asserted, for the first time, that the evidence (letter) from Fanson Capital, whom Treasure Bay described as a part of a syndicate of lenders, was not new as it was caught within Mr. Zou's evidence that was before Fitzpatrick J. in the receivership proceeding and there was no further evidence from the applicants to establish hardship. Harlow and the Limited Partnership disagreed. I found the point raised by Treasure Bay was not clear from the evidence, and in light of the applicants' objection to what they said was a factually incorrect submission and request to adduce further evidence to demonstrate Treasure Bay's submission was incorrect, I granted Harlow and the Limited Partnership leave to file a further affidavit to clarify the factual dispute, with liberty to Treasure Bay to cross-examine the affiant on the new affidavit.

[135] Harlow and the Limited Partnership filed an affidavit from Mr. Zou. In it, he deposed that Fanson Capital is a mortgage broker continuing its efforts to seek refinancing on behalf of the Limited Partnership

> 5. I have read the Affidavit #1 of Chengzheng Liu sworn November 20, 2023, in this action. At paragraph 14 of his Affidavit, Mr. Liu refers to a broker, Fanson Capital, and to a letter from that broker which is attached as Exhibit "C" to Mr. Liu's Affidavit. The "consultants" referred to in the Borrowers' Petition Response (and therefore my Affidavit #1 in the Receivership Proceeding) include Fanson Capital.
>
> 6. The clarification I need to make has to do with paragraph 28 of the Borrowers' Response reproduced above. There, I said that the Borrowers had engaged consultants in "late September" 2023. That is true. However, the consultants referred to in that paragraph are not Fanson Capital, but a company called CMLS Financial, which acts as both a mortgage broker and as a private lender. The engagement referred to in paragraph 28 contemplates CMLS arranging take out financing through a syndicate of lenders, of which it would be one of the lenders.
>
> 7. Fanson Capital are strictly mortgage brokers. They had been working with the Partnership prior to September 2023, and since September they have been working with CMLS, to identify lenders who will participate in providing take-out financing for the Haro Street project.
>
> 8. The Partnership started working with Fanson Capital in June or July 2023, when it became apparent that the offers the Partnership had received for the Property would not be sufficient to avoid the losses to the Partnership that I described in my earlier Affidavit.
>
> [Emphasis added]

[136] Treasure Bay chose not to cross-examine Mr. Zou on his affidavit.

Must the CPL be the Sole Impediment to Refinancing?

[137] Treasure Bay's ultimate objection to the applicants' alternate relief was that an order discharging a CPL, which is a discretionary one (see, e.g., *Rohland* at para. 17), may only be granted where an applicant can show that the hardship is the only impediment to securing refinancing. Respectfully, I do not read the case authorities they cited – i.e., *Rohland*, *Montaigne Group*, and a subsequent decision in *Save-A-Lot Holdings Corp. v. Christensen*, 2023 BCCA 35 [*Save-A-Lot 35*] – going that far. There is no statement of principle in any of those cases to that effect.

[138] In *Rohland*, Justice Jackson declined to exercise her discretion to discharge the CPL because she was not satisfied that it caused hardship and inconvenience: para. 27.

[139] In *Montaigne Group*, Justice Majawa found the evidence fell short of establishing that the CPL was the only impediment to securing additional financing. But as I read his reasons, Majawa J.'s determination ultimately rested on his finding that the evidence concerning refinancing was "vague and conclusory" coupled with the absence of any evidence to establish what damages, if any, the applicant would suffer if the construction of the proposed school on the land was not ready for the 2023/2024 school year: paras. 70–72, 76.

[140] In *Save-A-Lot 35*, Justice Fisher observed (at para. 40) that the chambers judge "failed to consider whether the 'exorbitant' interest rate" charged in the refinancing was caused solely by the registration of the CPL and (at para. 44) failed to conduct any assessment as to whether the evidence provided sufficient particulars of real hardship caused solely by the CPL. Those comments must also be read in context with Fisher J.A.'s determination (at para. 32) that within the context of the dispute concerning hardship, the applicant's evidence "does not support the judge's finding that the 'exorbitant" interest rate was 'directly linked' to the CPLs."

[141] The determining finding in those decisions is the insufficiency of evidence to establish a direct link between the alleged hardship and the registration of the CPL, which aligns with the approach taken in the other cases cited to me in argument.

[142] For example, in *Liquor Barn SC*, Justice Burnyeat pointed to the direct nexus requirement when he said (at para. 14) that s. 256 of the *LTA* limits consideration of hardship and inconvenience "to what was caused by the registration of a [CPL] and not by the litigation itself." To that, he added (at para. 15), "The power of the Court to discharge a [CPL] pursuant to its inherent jurisdiction is limited to circumstances in which the Court can conclude that it is clear that the claim of a plaintiff cannot succeed." In *Tige Industries Ltd. v. 0763636 B.C. Ltd*., 2019 BCSC 1825,

Justice Crossin also spoke of the requirement (at paras. 18–21) of a nexus between the alleged hardship and the CPL, citing *Youyi Group* at para. 28 and *Liquor Barn CA* at para. 37. At para. 28 of *Youyi Group,* Newbury J.A. noted that "a court should not be 'exacting' in its analysis of hardship and inconvenience."

[143] I have not been taken to any case stating that to succeed on a hardship application (whether grounded on s. 256 of the *LTA* or inherent jurisdiction), the applicant must demonstrate that the CPL is the only cause of the alleged hardship, or as it was put by Treasure Bay, the only impediment to securing refinancing.

[144] What Harlow and the Limited Partnership must demonstrate is a direct nexus between the CPL and a direct impediment to their ability to refinance, which I am satisfied and find on the evidence adduced on this application, they have established.

Disposition

[145] As a consequence, I find that the applicants have demonstrated hardship arising from the registration of the CPL.

Should the CPL be Discharged?

[146] The applicants' position is that if I accept their alternative claim based on hardship, I should either discharge the CPL on their undertaking to pay damages or temporarily lift the CPL to allow them to attempt refinancing.

[147] Given the applicants' current financial circumstances, an undertaking to pay damages would provide insufficient security to Treasure Bay. Similarly, a charge against the interest of 1104227 in the Limited Partnership would not provide appropriate security in view of the constructive trust and tracing remedies arising from GMIH's funds that were used to acquire the Haro Property. The appropriate course is a temporary discharge of the CPL to allow the applicants the full opportunity to refinance. This approach aligns with Fitzpatrick J.'s decision to delay the activities of the receiver. In this respect, I would lift the CPL until April 26, 2024, to coincide with the earliest date the receiver may present offers for court approval.

A similar approach was taken in *Chilliwack Hop Farms Ltd. v. Briner*, 2018 BCSC 2387 at para. 41.

[148] However, two further terms must be ordered to protect the interests of the parties in the interim. First, no other charge or security may be registered against title to the Haro Property unless otherwise ordered by the court in this action or the Receivership proceeding. Second, no party to this action or anyone acting or purporting to act on their behalf may enter into any agreement that purports, directly or indirectly, to grant an equitable mortgage or any other charge in equity over the Haro Property.

Summary

[149] The application to discharge the CPL is dismissed.

[150] The CPL is temporarily discharged, until April 26, 2024 and in the interim, no other charge or security may be registered against title to the Haro Property unless otherwise ordered by the court in this action or the Receivership proceeding and no party to this action or anyone acting or purporting to act on their behalf may enter into any agreement that purports, directly or indirectly, to grant an equitable mortgage or any other charge in equity over the Haro Property.

"Walker J."