IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Qian v. Tian*,
2023 BCSC 2388

Date: 20231220
Docket: S204418
Registry: Vancouver

Between:

RuiYing Qian, also known as Ingrid Qian

Plaintiff

And:

**Ying Liang Tian, also known as John Tian,
Jia Qi Tian, Jia Yu Tian**

Defendants

Before: The Honourable Madam Justice Morellato

Oral Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	M.G. Goldberg
Counsel for the Defendants:	B.C.Y. Lau
Place and Dates of Hearing:	Vancouver, B.C. November 14, 2023
Place and Date of Judgment:	Vancouver, B.C. December 20, 2023

I. INTRODUCTION

[1] The applicant defendant, Jia Qi Tian (also known as Edward Tian) seeks the following orders:

(i) Under to s. 215 of the *Land Title Act* ["*LTA*"], the Certificate of Pending Litigation ("CPL") filed by the plaintiff against title to the property on Tomicki Avenue, Richmond, B.C. (the "Edward Property") be cancelled.

(ii) An order for summary judgment under Rule 9-6 of the *Supreme Court Civil Rules* ("Rules") to dismiss "that part of the plaintiff's claim seeking a CPL against the Edward Property on the basis that the claim as pleaded does not give rise to a genuine issue of material fact requiring trial, nor gives rise to a claim for an interest in the Edward Property.

(iii) In the alternative, the CPL be cancelled pursuant to s. 252 of *LTA*.

[2] For clarity of reference and with respect, I will refer to Jia Qi Tian as Edward. For clarity, I will respectfully refer to, his father the defendant Ying Liang Tian (also known as John), as John.

[3] The plaintiff respondent disputes each of these orders. I will address the issues subsumed within each order sought, following an outline of the background facts.

II. BACKGROUND FACTS

[4] The plaintiff and the defendant John met as members of Peace Evangelical Church located in Richmond, British Columbia (the "Church").

[5] The plaintiff deposes that in 2010, John approached her to make an investment in a company incorporated in China called Gansu Shengda Fangzhou Potato Modified Starch Co., Ltd. ("the Company"). John was the CEO and legal

representative of the Company. The plaintiff says John told her that her investment would be a good opportunity to spread the gospel in China. The plaintiff also deposes that John represented to her that the Company was in very good standing and would be a high value investment. She explains that as a result of representations made by John, she paid the amount of 1,500,000 RMB to a bank account controlled by John. In turn, she received 1,000,000 shares in the Company (the "Shares").

[6] The plaintiff recounts how in 2019, John informed her that her Shares were improperly pooled with John's shares in the Company and then were sold as a result of a decision of a Chinese court.

[7] The plaintiff deposes that in March 2020, the General Manager of the Company, Mr. Ting Hong Wang, advised the plaintiff that her Shares were not pooled with John's shares but instead were sold to a third party on John's instructions for a total of 5,300,000 RMB on July 11, 2015. Mr. Wang further advised her that John had taken the converted funds for himself. Mr. Wang repeated his understanding in a WeChat exchange with the plaintiff in October 2023.

[8] Before and after the plaintiff initiated this action, she continued her attempts to use the Church as an intermediary to resolve her dispute with John, in keeping with the Church's principles. The plaintiff deposes that the Church has a number of principles, one of which is to attempt to resolve matters within the Church when possible and without recourse to litigation.

[9] The plaintiff deposes that the effects of COVID-19 made these attempts more challenging as British Columbia's response to the outbreak of COVID-19 prevented parties from congregating in person together; nevertheless, she was hopeful progress would be made.

[10] The plaintiff deposes that in June 2019, John told that he “may sell his house to pay back [her] investment funds.” At that time, the plaintiff deposes that she also discussed with John the possibility that he would transfer one of two properties (i.e.,

two condominiums, one of which was the Edward Property) to her and she was prepared to make a payment if the equity in the condominium was more than her investment. The plaintiff deposes that she pursued these discussions but John became unresponsive; he disconnected his home telephone and changed his WeChat account.

[11] While the plaintiff attempted to resolve the issue within the Church and some progress was made, once John stopped participating in the Church's internal resolution process, the plaintiff retained Kahn Zack Ehrlich Lithwick LLP ("KZEL LLP") and filed a Notice of Civil Claim and CPL on April 23, 2020 (the "Claim"). The plaintiff deposes that John bought the property, including the Edward Property with the investment funds she provided to him. In the Claim, the plaintiff alleges that John's children, Edward and his sister Jia Yu Tian, each became a registered owner of a property by paying $449,000 even though they were each registered on title as students. The plaintiff further alleges the Edward Property, was purchased using her converted investment funds. The plaintiff claims an interest in the Edward Property and filed the CPL on the basis that her converted funds could be traced to the purchase of the Edward Property. The plaintiff also claims a constructive trust over this property.

[12] The defendants filed a joint response on their own behalf. The defendants' pleadings concede that the plaintiff lost her share investment in the Company. With respect to the purchase of the Edward Property, the defendants also state that part of the purchase price was paid by Edward's parents, one of whom is John. The defendants' pleadings state that the contracts to purchase the properties were signed after John received the plaintiff's funds.

[13] More specifically, the defendant Edward deposes that on or about March 27, 2017, his father John and his mother bought the Edward Property for him, using their family's own savings and by refinancing his parent's home.

[14] Edward submits that he is the sole titleholder and beneficial owner of the Edward Property. Edward deposes that neither he nor his father John used any

funds received from the plaintiff, including the alleged converted funds. Edward states that only 20% of the purchase price was paid "using my family's personal funds, which have been accumulated through [their] daily savings" and that "80% of the purchase price, the GST and other associated costs were paid by the mortgage that [his] parents secured by refinancing their home around March 2017".

[15] Edward denies that he or his father John hold any portion of the Edward Property in trust for the plaintiff. He further deposes that he has never applied or used: (1) any funds belonging to the plaintiff, whether related to any of the alleged converted funds, (the existence of which he expressly denies); or (2) any of the purported shares of the Company or proceeds from the sale of shares of the Company in any manner whatsoever.

[16] John swears a similar affidavit as his son and denies any wrong doing or conversion of funds.

[17] The defendants' Response to the Notice of Civil Claim was filed on May 14, 2020 and the parties exchanged lists of documents in May 2021.

[18] The plaintiff deposes that, in about July 2023, settlement discussions continued in an effort to resolve her Claim. On July 27, 2023, a Mr. Walia from the Imperium Law Group wrote a letter to the plaintiff's then legal counsel at KZEL LLP (the "Letter") as follows:

> We have received instructions from our client to pay out the above-mentioned CPL registered in your favor on or about July 28, 2023.
>
> Please provide a payout statement as of July 28, 2023, setting out the following information…

[19] In addition to requesting the balance due and owing as at July 28, 2023 to payout the CPL, the Letter requested the total amount required to release the CPL and the per diem rate together with a CPL release letter. The closing date for the refinancing was August 11, 2023.

[20] As KZEL LLP had initiated the Notice of Civil Claim and filed the CPL on behalf of the plaintiff, it was required to sign a CPL release letter. The plaintiff retained Watson Goepel LLP to oversee the discharge of the CPL. In order to do so, Watson Goepel LLP was required to file a Notice of Change of Solicitor, which it did on August 9, 2023. The plaintiff's new counsel advises that he intends to conduct examinations for discoveries in short order, noting also that the defendants have not disclosed documents relating to the purchase of the Edward Property or the source of its purchase and financing.

[21] On August 9, 2023, Mr. Ryan Lee, a lawyer with Watson Goepel LLP wrote a letter to Mr. Walia of the Imperium Law Group, which stated that they were recently appointed as counsel for the plaintiff and were provided a copy of their July 27, 2023 letter to KZEL LLP. The August 9, 2023 letter enclosed a filed copy of the Notice of Appointment of Change of Solicitor and also set out the plaintiff's offer to release the CPL on the basis of the receipt of a specified sum of money.

[22] Edward deposes that on August 10, 2023, while he was corresponding with the mortgage agent for Alpine Credits regarding refinancing the Edward Property, the mortgage agent "unexpectedly" emailed him a payout statement showing the amount needed to pay out the CPL. Edward deposes that he "never instructed any lawyer or anyone else to negotiate or make any offer to pay out the CPL on [his] behalf". He adds that he was "surprised" the mortgage agent made an offer to pay out the CPL on his behalf. Further, Edward deposes that he never hired lawyers from the Imperium Law Group to represent him in negotiations with the plaintiff.

[23] Edward opined that since he never intended to request the Payout Statement nor to pay out the CPL, he did not take further action and his refinancing with Alpine Credits did not proceed.

[24] No further steps were taken to pay out the CPL, and no explanation or further communications were received by the plaintiff from the defendants Edward and John, or the Imperium Law Group.

III. LEGAL FRAMEWORK AND DISCUSSION

A. Overview of the legislation and the applicable common law:

[25] Section 215 of the *LTA* provides:

> 215 (1) A person who has commenced or is a party to a proceeding, and who is
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> (a) claiming an estate or interest in land, or
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> (b) given by another enactment a right of action in respect of land,
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> may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the *Court Order Enforcement Act*, a copy of the notice of application or other document by which the claim is made.
>
> [Emphasis added]

[26] The defendants submit that the plaintiff has no "interest in land" in relation to the Edward Property. They rely on the decision in *Chen v. Jin*, 2019 BCSC 567 at para. 12; and *Xiao v. Fan*, 2018 BCCA 143 at paras. 15 and 27. The defendants assert that *Chen* sets out the test for an application to cancel a CPL and reasons that the correct test to be applied in an application to cancel a CPL is whether the pleadings disclose a claim for an interest in land.

[27] In *Xiao*, at paras. 15 and 27, the court affirms that, when examining whether a CPL is valid under s. 215 of the *LTA,* no evidence is to be considered; rather, the parties are to rely on the pleadings. The court also reasons that if the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4). The court in *Xiao* states at para. 27:

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

> issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.
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> [Emphasis Added]

[28] As such, the first issue, subsumed within the first order sought by the applicant, is whether the plaintiff's pleadings disclose an interest in land. The second issue, involving a challenge by the defendants to the merits of the claim for an interest in land, is whether under Rule 9-6 there is a *bona fide* triable issue of fact or law. That is, of course, is the issue that is subsumed within the second order sought by the applicant in this case.

[29] The third issue before me, subsumed with in the third order sought by the applicant defendant, is whether the CPL should be cancelled pursuant to s. 252 of the *LTA.* Section 252(1) states:

> Cancellation of certificate of pending litigation
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> 252(1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

[30] For ease of reference, I will address the case law elucidating the issues relating to the application of s. 252(1) of the *LTA* in this case, after addressing the first two issues relating to: (1) the application of s. 215 of the *LTA*; and (2) Rule 9-6 and how it applies to whether the validity of the CPL raises a triable issue.

1. Should the CPL be Cancelled under s. 215 of the *LTA*?

[31] The defendants submit the CPL should be cancelled due to the plaintiff's failure to properly claim an interest in the Edward Property, and because she is using the CPL as leverage to secure a monetary damage against the defendant John.

[32] The plaintiff respondent submits her pleadings affirm an interest in the Edward Property. Counsel correctly argues that on an application to cancel a CPL for non-compliance with s. 215(1), the question is whether the facts pleaded,

assuming they are true, are capable of supporting a claim to an interest in land. He adds that an interest in land is claimed where title may change as a result of the proceeding, relying on the decision of *GMC Properties Inc. v. Rampart Estates Ltd.,* 2023 BCCA 172, para. 41, and *Lipskaya v. Guo*, 2022 BCCA 118 at para. 64.

[33] The plaintiff submits that her pleadings set out a fairly common basis for an interest in land; that is, funds that belonged to the plaintiff were converted and used in the purchase of the Edward Property. Counsel for the plaintiff adds that because the plaintiff's pleadings are assumed to be true for purposes of this s. 215 issue, his client does indeed have an interest in the Property by virtue of the direct link between the converted funds and the property. That is, the plaintiff claims that her investment funds were converted and used by John in the purchase of the Edward Property, such that the registered and beneficial ownership will reflect her interest in that property. As such, the plaintiff argues the CPL is valid by virtue of her interest in the property, which is genuine and demonstrable through her pleadings.

[34] I have reviewed each of the parties' submission, the applicable case law and authorities, as well as the plaintiff's pleadings. I am satisfied that the pleadings set out a claim to an interest in the land itself. For example, paragraphs 18, 21, 22, 23, 24 and 30 plead unjust enrichment and/ or a constructive trust resulting in an express interest in the Edward Property: see also Part 3, "Legal Basis", paras. 4 and 5 of the plaintiff's pleadings. A constructive trust is sufficient to sustain a registration of a CPL.: see *Jacobs v. Yehia*, 2015 BCSC 267 at paras. 24-26; *Atlas Cabinets and Furniture v. National Trust Co.*, [1990] 45 B.C.L.R. (2d) 99 (C.A.) at 108; *BNSF Railway Co. v. Teck Manufacturing Ltd.*, 2016 BCCA 350 at 55-56. In light of these authorities and those cited earlier in these Reasons, such as *GMC Properties Inc*. at para. 41 and because the facts pleaded are capable of supporting a claim to an interest in land, I decline to grant the defendants' order seeking a cancellation of the CPL, under s. 215 of the *LTA*.

2. Should that portion of the plaintiff's claim, seeking a CPL against the Edward Property, be summarily dismissed pursuant to Rule 9-6?

[35] The defendants argue that there is no evidence that the converted funds even exist, or that even if they do exist, such funds were applied towards the Edward Property. They add that the plaintiff's bald allegations as to the existence of the converted funds and their application towards the Edward Property is wholly speculative and cannot support the CPL lien against title to the Edward Property which, they say, is unrelated to the plaintiff's claim.

[36] The plaintiff submits that the bar on an application for summary judgment is high; that is, the applicant bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": see *Anderson v. Double M Construction Ltd.*, 2021 BCSC 1473 at para. 24. The plaintiff argues that she has had conversations with Mr. Wang disclosing that John took possession of the converted investment funds before the Edward Property was purchased. She points out that the defendants concede in their pleadings that her Shares went missing and that John took steps to recover the Shares. Based on the pleadings alone, argues the counsel for the plaintiff, there are obvious issues of fact that will need to be determined before this legal action can be resolved. He submits that in light of the pleadings of the parties and the evidence adduced by the plaintiff, coupled with the denial of the defendants, there are genuine issues of material fact which will require a trial; accordingly, the plaintiff submits this application for summary judgment must fail.

[37] I have carefully considered the record before me and the applicable authorities. I am unable to conclude, at least at this juncture in time particularly given the status of these proceedings, that there is no triable issue relating to the merits of the plaintiff's CPL claim.

[38] In so concluding, I am mindful that in *Xiao* our Court of Appeal reasoned, at para. 27, that if the merits of the claim for an interest in land are challenged, the defendant should apply for a summary dismissal of that part of the claim under

Rule 9-6(4) and, further, that in such a proceeding evidence may be considered. However, the court also reasons that:

> …the test to be applied is whether there is a *bona fide* triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.

[39] Rule 9-6 (4) states:

> Application by answering party
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> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

[40] The difficulty with the defendants' application is that they must satisfy the court, that there is no *bona fide* triable issue of fact or law. This is a high threshold because this court must be satisfied that it is beyond doubt that the action cannot succeed.

[41] Rule 9(6) sets out the power of the court in such applications as follows:

> (5) On hearing an application under subrule (2) or (4), the court,
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> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
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> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d) may make any other order it considers will further the object of these *Supreme Court Civil Rules*.

[42] In *Leger v. Metro Vancouver YWCA*, 2013 BCSC 2021, at paras. 16-17, the court reasoned that a case may be dismissed by way of summary judgment where it is plain and obvious or beyond doubt that the action cannot succeed. That is, where there is no genuine issue for trial.

[43] In *Beach Estate v. Beach*, 2019 BCCA 277, our Court of Appeal affirms the requirement in Rule 9-6 applications that it must be "beyond a reasonable doubt" that there is "no genuine issue for trial:

> [65] …"Beyond a reasonable doubt" is the high bar set by Justice Esson (then of the Supreme Court) in *Progressive Construction Ltd.,* quoted with approval by this Court in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137. There the court (per Lambert J.A.) adopted this summary of the law stated by Esson J. in *Progressive Construction Ltd.*:
>
> > The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 [now Rule 9-6] application for summary judgment. On all such applications the issue is whether on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.
> >
> > In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[44] In a similar vein, in *Beach Estate*, the court also reasons at para. 48 that a defendant "can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case".

[45] Further, although Rule 9-6 applications invoke the court's consideration of evidence, it is not a summary trial. The court states in *Beach Estate*:

> [49] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial: *Tran v. Le,* 2017 BCCA 222; *Skybridge Investments Ltd. v. Metro Motors Ltd.,* 2006 BCCA 500 at paras. 8-12.
>
> [50] The summary trial procedure is of course covered in Rule 9-7. It is just that – a trial in summary form based on affidavit evidence, answers to interrogatories, evidence taken at examinations for discovery, and admissions in addition to other forms of evidence (Rule 9-7(5)).
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> [51] Because it is a trial, the chambers judge hearing a Rule 9-7 application must weigh the evidence, make findings of fact and apply the law

> thereto unless the conditions set out in Rule 9-7(15)(a)(i) or (ii) are found to exist. The burden of proof to apply is the traditional civil burden of proof on the balance of probabilities.
>
> [Emphasis added]

[46] Later in its judgment, the court in *Beach Estates* cautions against conflating Rules 9-7 and 9-6 and reasons:

> [67] …On an application under Rule 9-6, if the evidence needs to be weighed and assessed, then the test of "plain and obvious" or "beyond a doubt" has not been satisfied and the application is to be dismissed: *Skybridge Investments Ltd. v. Metro Motors Ltd.* at paras. 8-12.

[47] More recently, and in a similar vein, in *Aubichon v. Grafton*, 2022 BCCA 77, the court states:

> [18] In relation to the R. 9-6 application, the judge again correctly sets forth the proper legal framework for her analysis:
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> > [21] On a Rule 9-6 application, the court must determine if there is a genuine issue for trial. The court must assume that uncontested material facts as pleaded by the plaintiff are true, matters of fact cannot be weighed, and inferences from the facts must be viewed in a light most favourable to the plaintiff: *Sandhu v. Sun Life Assurance Company of Canada,* 2016 BCSC 1077 at para. 12. If the court is satisfied that there is no genuine issue for trial, then it must dismiss the claim – Rule 9-6(5) is mandatory …

[48] Having very carefully considered the application materials, the submissions of the parties, and the above noted legal authorities, I am unable to conclude, that it is "beyond a reasonable doubt" that there is "no issue for trial."

[49] While the record before me is rather sparse, it raises material issues that are hotly contested; yet, *Beach Estate* makes it clear that I cannot weigh the conflicting evidence in this regard on this application. In light of the jurisprudence that a judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible and, further, that any further weighing may only be done at trial, I cannot grant the relief sought by the applicant: see *Beach Estate* at para. 48. The affidavit evidence before me is conflicting and requires that the evidence be weighed. The plaintiff alleges her investment funds were converted and

used by the defendants to purchase the Edward Property. The defendant denies this fact. Yet, I cannot weigh this evidence.

[50] My conclusion is also informed by the incomplete record before me. In this regard, I have accepted that the plaintiff is not to be faulted for any delay given she tried to resolve the dispute between the parties rather than litigate it. I have also considered that, following the plaintiff's failed efforts to resolve this case in August of this year, the plaintiff retained new counsel. As noted earlier in these Reasons, plaintiff's counsel advises that he has now been instructed to conduct examinations for discoveries in short order, and pursue further document production, because the defendants have not disclosed documents relating to the purchase of the Edward Property and the source of the funds for the property's purchase and financing. Further, plaintiff's counsel emphasizes there have yet to be examinations for discovery of the parties. As an officer of the court, I accept his submission that his client intends to pursue further document discovery and to proceed to examination for discoveries in a timely way.

[51] As well, I am unable to discern, on the limited record before me, that monetary damages will be sufficient in regard to the availability of the remedy of constructive trust relating to the Edward Property. Counsel argues the plaintiff cannot demonstrate that a monetary reward is inadequate, insufficient or inappropriate to establish a constructive trust. This is a triable issue: see *Kerr v. Baranow*, 2011 SCC 10 at para. 50; *Motz v. McKean*, 2009 BCSC 1133 at para. 23. The plaintiff claims there is no liquidated amount that would be sufficient as the value of her converted investment funds used to purchase the Edward Property is now tied to the value of the Edward Property; as such determining an amount of damages that would be sufficient would allow Edward to profit from the converted funds as the value of the Edward Property increases. Counsel for the plaintiff argues that Edward is not entitled to be placed in a better position than he would have been in if the plaintiff's funds had not been converted for his own benefit. Again, this is a triable issue. Furthermore, settlement discussions are without prejudice in this context.

[52] Considering the record before me as a whole, I find that the defendants' R. 9-6 application is, at best, premature.

[53] It may be that following further document production as sought by counsel for the plaintiff and after the completion of discoveries, the defendants will be in a position to choose to either renew this application, proceed to a summary trial, or proceed to a full trial. The plaintiff may make a similar choice. In any event, it is premature, in light of the whole of the record before me now, to conclude that the plaintiff's claim to an interest in the Edward Property will undoubtedly fail. Nor does the record conclusively establish the plaintiff has filed the CPL for an improper motive.

[54] In summary, I decline to grant the second order sought by the defendants as it is not beyond a reasonable doubt that there is no issue for trial. More specifically, I am unable to conclude, at this juncture, that it is plain and obvious the CPL action will fail and that the plaintiff has no interest in the Edward Property. Again, my conclusion does not preclude the defendants from commencing a summary judgment or summary trial application at a later date.

3. In the alternative, should the CPL be cancelled pursuant to s. 252 of the *LTA*?

[55] Pursuant to s. 252 (1), if no step has been taken in the proceeding in question for a period of one year, any person who is the registered owner of, or claims to be entitled to an estate or interest in land against which a CPL has been registered, may apply for an order to cancel the registration of the certificate.

[56] Counsel for the defendants submits that the "one year" period referenced in s. 252(1) of *LTA* refers to the year immediately preceding the bringing of an application pursuant to that section: *Wiest v. Middelkamp,* 2005 BCSC 1626 at para. 11; and *Lawn Genius Manufacturing (Canada) Inc. (Drainmaster) v. 0856810 B.C. Ltd. Inc.*, 2016 BCSC 1915 at para. 12.

[57] The defendants add that in a s. 252 application, if some step has been taken in the year before the application, the step taken must be one that moves the action forward towards trial or resolution: see *Lawn Genius*, at paras. 12.

[58] The defendants rely on the reason in *Law Genius* and argue further that: the purpose of s. 252 of the *LTA* is to keep property from being tied-up in dormant litigation; prejudice to the landowner is presumed; and the respondent must show that the prejudice is either not serious or outweighed by other factors that suggest cancellation of the CPL would be unjust: see *Lawn Genius* at para.12-13.

[59] The defendants underscore that in the instant case, the Response to the Notice of Civil Claim was filed and served around May 14, 2020 and the lists of documents were exchanged around May 2021. They note there have been no examinations for discovery or even the canvassing of examination dates, and no case planning conference has been scheduled. They argue there has been no activity or advancement of the case since May 2021.

[60] The defendants also assert that Edward continues to suffer prejudice as a result of the CPL, both actual and presumed, as the CPL has prevented the Edward Property from being dealt with, either refinanced or sold thus impeding Edward's ability to raise funds which he urgently needs to finance his business plans.

[61] The plaintiff submits there have been steps taken in this matter to resolve the action, as recently as August of this year. Counsel submits that this effort qualifies as “a step” in a proceeding that has moved the action forward towards trial or resolution. Since the settlement efforts have failed, plaintiff’s counsel was retained to move this case forward. Indeed, the letter that the plaintiff’s new law firm sent to the Imperium Law group was an effort to move the case forward to some resolution. Edward’s denial of his involvement in the aborted pay-out of the CPL in August does not obviate the fact that this step was taken by the plaintiff.

[62] Counsel for the plaintiff also argues that a Notice of Change of solicitor was filed on August 9, 2023 in order to resolve the file pursuant to the Letter from Imperium Law Group regarding the payout of the CPL.

[63] Counsel for the plaintiff further submits that the one-year time limit prescribed by section 252(1) is not a strict limit. Rather, the Court retains a discretion to refuse to cancel a CPL based on whether, in all of the circumstances, cancellation is in the interests of justice.

[64] In considering the application of s. 251 in the context of the case before me, I am guided by the reasons of the Court of Appeal in *GMC Properties Inc.* at paras. 46 and 47:

> [46] The test to be applied on a s. 252(1) application is less onerous than the test applied on an application to dismiss a claim for want of prosecution [cite omitted]. In *Wiest v. Middelkamp*, 2005 BCSC 1626, Justice Halfyard described the test on a s. 252(1) application:
>
> > [12] In an application of this kind, where the applicant shows that no step has been taken in the proceeding for a period of one year, the court retains a discretion to disallow the remedy. However, prejudice to the owner of the land will be presumed, and the respondent bears the onus of proving that the prejudice is not serious or is outweighed by other factors which would make it unjust to cancel the certificate of pending litigation. [Cites omitted]…
> >
> > [13] In my opinion, the factors relevant to the exercise of the court's discretion in this type of application include the following:
> >
> > a) Whether the respondent has given an acceptable explanation for the delay in prosecuting the claim;
> >
> > b) Whether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted; and
> >
> > c) Whether the respondent's claim for an interest in the land has at least a reasonable prospect of succeeding.
>
> [47] A property owner may also apply under s. 256(1) for cancellation of a CPL on the basis that it is causing or likely will cause "hardship and inconvenience". However, where the applicant succeeds in establishing hardship and inconvenience a cancellation order does not follow automatically. Rather, under s. 257, upon being satisfied that an order for security is proper, that damages will provide adequate relief to the claimant

> and that security is in fact provided, the court has a discretion to cancel a CPL or it may refuse to cancel and order the claimant to give an undertaking as to damages and security: *Yi Teng* at para. 28.

[65] The plaintiff submits that she has a legitimate reason for the delay in prosecuting the claim. She explains that:

a) following the commencement of the claim and the disclosure of documents, the plaintiff had attempted to resolve the matter personally with the defendants, which appears to have been fruitful given the production of the Letter;

b) the parties are members of a Church which frowns upon its members pursuing litigation and prefers them to resolve matters within the Church; the plaintiff has pursued that path and has not let the litigation sit stagnant for a significant amount of time in light of negotiations; and

c) in the circumstances, it was reasonable for the plaintiff to stop pursuing the litigation for a time, as the parties progressed to what seemed to be a negotiated resolution.

[66] The plaintiff further submits that there is limited potential for prejudice to Edward. She points out:

a) there is no evidence of a pending sale or evidence of an impending need for financing, only a vague desire for financing;

b) Edward has now made clear that he will not be paying-out the plaintiff, as stated in the Letter and accordingly the plaintiff has retained litigation counsel, and this matter will advance to discoveries and trial;

c) the prejudice to the plaintiff would outweigh the prejudice to Edward if the CPL were released as it would allow Edward to potentially profit from what the plaintiff says is an act of fraud, and would leave the plaintiff without a means of recovery: see *GMC Properties Inc.* at para. 90.

[67] Counsel for the plaintiff submits that there is, at least, a reasonable prospect to suggest the plaintiff will be successful and underscores:

a) there is a direct link between the converted funds and the purchase of the Edward Property in that funds under John's

control, and "personal funds" from John were used to purchase the Property.

b) the defendants, including Edward, have made a number of concessions in their pleadings that suggest a significant portion of what the plaintiff alleges is true:

i) the plaintiff's shares went missing; and

ii) John's shares did not go missing.

c) The General Manager of the Company, Mr. Wang, says that John was responsible for converting the Shares.

[68] I have considered the reasons in *GMC Properties Inc.*, and the record before me as a whole. I find that the plaintiff has given an acceptable explanation for the delay in prosecuting the Claim and has recently taken active steps towards resolution. I have also carefully reviewed the evidence of prejudice and hardship advanced by Edward. I am not persuaded that actual prejudice to any serious or significant degree would occur if the order was not granted at this stage. By way of example, the evidence before me refers to no active refinancing efforts or attempts to sell the Edward Property. Edward is living in this property and the record suggests he owns another property. Any presumed or other prejudice is out weighed by other considerations.

[69] Furthermore, the court has a discretion to refuse the cancellation of a CPL even where the preconditions set out in s. 252 are satisfied. In *GMC Properties Inc.* our Court of Appeal concluded as such at paras. 57 and 67. At para. 57 the court states:

> [57] … In my view, where the statutory preconditions provided for in s. 252 are met the Court has a discretion to refuse to cancel a CPL based on whether, in all of the circumstances, cancellation is in the interests of justice.

[70] Accordingly, the court may grant or refuse a s. 252 application to cancel a CPL based on the interests of justice considering all the circumstances of the case. I am of the view that the plaintiff ought to be given the opportunity to advance and prosecute her claim. In light of the circumstances I have outlined earlier in these reasons, including the plaintiff's past efforts to pursue alternative dispute resolution and the complications of doing so during COVID-19, in my view, it would not be in

the interests of justice to foreclose or restrict her ability to pursue her claim to an interest in the Edward Property through a constructive trust remedy in light of the record before me and the current status of these proceedings.

[71] The applicants' application is dismissed. Costs shall be in the cause.

[72] I reserve the right to edit these Reasons.

"MORELLATO J."