

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Memphis Blues BBQ International Ltd. v.
P.K. Johnson Inc.*,
2024 BCSC 497

Date: 20240325
Docket: S235142
Registry: New Westminster

Between:

Memphis Blues BBQ International Ltd.

Plaintiff

And

**P.K. Johnson Inc., Paul Daniel Johnson, Kathleen Suzanne Johnson,
1160578 B.C. Ltd. doing business as The Truckin' BBQ also known as
Truckin' BBQ, and Anthony David Kubek**

Defendants

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for the Plaintiff:

M. Pytlewski

Counsel for the Defendant, Paul Daniel
Johnson:

T. Suleyman

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
February 28, 2024

Place and Date of Judgment:

New Westminster, B.C.
March 25, 2024

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I. OVERVIEW

[1] This dispute arises from two franchise agreements involving restaurants in Surrey and Abbotsford, BC. The plaintiff alleges that the defendants collectively breached various terms of these agreements.

[2] The defendant, Paul Daniel Johnson, applies for an order cancelling a certificate of pending litigation filed February 26, 2021 (the “CPL”), on title to real property in his name with a civic address of 20199-70A Avenue in Langley, BC (the “Property”). The plaintiff, Memphis Blues BBQ International Ltd., opposes the order sought. The remaining defendants take no position on this application.

[3] Given time constraints, the balance of Mr. Johnson’s application filed February 14, 2024, was adjourned generally, together with the plaintiff’s parallel application for orders compelling document production filed March 31, 2024.

[4] For the reasons that follow, I conclude that the plaintiff’s pleading does not support a claim to an interest in land, as contemplated by s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA]. Accordingly, the CPL must be cancelled.

II. THE CLAIM

[5] On January 12, 2021, the plaintiff, a BC company, filed a notice of civil claim in this action (the “NOCC”).

[6] The plaintiff pleaded that it holds the Canadian rights to license to others a distinctive restaurant format, business system, and food services concept featuring “Southern U.S. style” barbequed pork, pork ribs, pulled pork, beef brisket, chicken and other food products under the name and trademark “MEMPHIS BLUES”. The plaintiff further pleaded that it holds the right, license, and authority to enter into franchise agreements with qualified franchises that it selects.

[7] The plaintiff alleges in the NOCC that Mr. Johnson, together with co-defendants, P.K. Johnson Inc. (“PK”) and Kathleen Suzanne Johnson, entered into a franchise agreement with the plaintiff for a restaurant in Surrey on or about January

14, 2010 (the “Surrey Franchise Agreement”). The plaintiff further alleges that Mr. Johnson, together with PK and Ms. Johnson, entered into a second franchise agreement with the plaintiff for a restaurant in Abbotsford on or about September 14, 2012 (the “Abbotsford Franchise Agreement”).

[8] The plaintiff pleads that the Surrey Franchise Agreement and the Abbotsford Franchise Agreement (collectively, the “Franchise Agreements”), granted PK the non-exclusive right and license to operate Memphis Blues franchised restaurants on strict terms and conditions. The plaintiff alleges that Mr. Johnson personally guaranteed that PK would observe and perform all of the terms and conditions of the Franchise Agreements.

[9] The plaintiff pleads that, despite not formally renewing the Franchise Agreements, Mr. Johnson, together with PK and Ms. Johnson, continued to operate a Memphis Blues restaurant, beyond the initial term set out in the Franchise Agreements. It alleges that, on or about April 16, 2018, defendant, Anthony David Kubek (whom the plaintiff refers to as David), incorporated a company and subsequently started doing business as “The Truckin’ BBQ”, also known as “Truckin’ BBQ” (collectively, “TTB”). The plaintiff pleads further that, on an unknown date, Mr. Johnson and PK entered into an agreement with Mr. Kubek to commence a competing business, directly contrary to the terms and conditions of the Franchise Agreements.

[10] The NOCC alleges that, commencing on or about April 30, 2015, Mr. Johnson and PK defaulted on their obligations to pay royalty fees arising from the Abbotsford Franchise Agreement. The plaintiff pleads that Mr. Johnson and PK defaulted on their obligations under the Surrey Franchise Agreement by failing to disclose revenues generated through various food delivery platforms, thereby resulting in further unpaid royalties.

[11] The plaintiff pleads various other breaches of the Franchise Agreements in the NOCC, including but not limited to the defendants’ alleged use of confidential information for purposes that were inconsistent with the Franchise Agreements. The

plaintiff claims loss and damage as a result of the defendants' breaches of the Franchise Agreements and seeks the following relief as against the defendants in the NOCC:

- a) Declaratory relief;
- b) General, aggravated, or exemplary damages;
- c) Judgment in the amount of \$166,357.72;
- d) Judgment for alleged additional unpaid royalties (as defined in the NOCC), as against the defendants, or any one of them;
- e) Damages for breach of contract, breach of fiduciary duty, breach of employment duties (by the defendant, Mr. Kubek), and for the tort of conspiracy;
- f) Disgorgement;
- g) Injunctive relief;
- h) Orders respecting the defendants' use of confidential information;
- i) An Anton Piller order permitting access to the personal computers of Mr. Johnson, Mr. Kubek, and/or TTB;
- j) An order for "all proper and necessary directions, accounts, inquiries and references";
- k) Damages for fraud and deceit;
- l) Alternatively, damages on a *quantum meruit* basis;
- m) Equitable compensation;
- n) Contractual interest or interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and
- o) Special costs or costs.

[12] The NOCC further alleges that the defendants, or any one of them, have been unjustly enriched and will continue to be unjustly enriched. The NOCC references unjust enrichment as part of the legal basis for the plaintiff's claim.

[13] The NOCC was amended on February 23, 2021 (the “ANOCC”). Paragraphs 45 and 46 in Part 1 of the ANOCC (setting out the plaintiff’s statement of facts) are relevant to this application. They plead as follows:

45. Memphis pleads that certain of the Unpaid Royalties, Additional Unpaid Royalties and profits made by the Defendants as a result of the behaviour plead in the notice of civil claim have been used by Kathleen, Paul, David, or any one of the Defendants, to purchase, maintain, repair or enhance real or personal property for themselves and others, including the use of the Unpaid Royalties, Additional Unpaid Royalties and profits made by the Defendants to maintain the family residences owned by Kathleen, Paul and/or David, Memphis has thereby acquired an interest in such properties. However, because Kathleen, Paul and/or David have deliberately concealed their actions, full particulars are unavailable at this time. Further particulars are within the Defendants’ knowledge and they will be provided as they are discovered.

46. Memphis alleges that a portion of the Unpaid Royalties, Additional Unpaid Royalties and profits made by the Defendants were directed into certain real property having the civic address of 20199 – 70A Avenue, Langley, British Columbia V2Y 2Y6, held solely by Paul, being:

Parcel Identifier: 025-994-158

Legal Description: Lot 14 Section 14 Township 8 New Westminster District Plan BCP12345.

[14] I refer to the property identified in para. 46 of the ANOCC as the Property in these reasons.

III. THE CPL

[15] On February 26, 2021, the plaintiff filed the CPL. The plaintiff relies on paras. 45 and 46 of the ANOCC to support its claim to an interest in land. On February 14, 2024, Mr. Johnson applied to cancel the CPL.

[16] The question before me is whether the ANOCC is capable of supporting a claim to an interest in land, as required by s. 215(1) of the *LTA*. Certificates of pending litigation that fail to meet this pre-condition may be cancelled for that reason: *Bilin v. Sidhu*, 2017 BCCA 429 at para. 55 [*Bilin*].

IV. LAW AND ANALYSIS

A. Section 215 of the LTA

[17] To register and maintain a certificate of pending litigation against land, a party must claim an interest in that land: *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 9 [*Nouhi*]; *LTA*, s. 215.

[18] Section 215(1) of the *LTA* provides as follows:

Registration of certificate of pending litigation in same manner as charge

215 (1) A person who has commenced or is a party to a proceeding, and who is

(a) claiming an estate or interest in land, or

(b) given by another enactment a right of action in respect of land,

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.

B. Does this Court have jurisdiction to cancel the CPL?

[19] This court has inherent jurisdiction to cancel a certificate of pending litigation based on a pleading which fails to meet the threshold criteria of asserting an interest in the lands that are subject to the certificate: *Berthin v. Berthin*, 2018 BCCA 57 at para. 44 [*Berthin*]; *Bilin* at paras. 54–56; *Yi-Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357 at para. 31.

C. When will this Court cancel a certificate of pending litigation?

[20] In order to be validly registered, a certificate of pending litigation must be supported by pleadings that assert an interest in the lands subject to the certificate of pending litigation: *Nouhi* at para. 9. Valid registration is a threshold criterion for the sustained registration of a certificate of pending litigation under s. 215(1) of the *LTA*: *Bilin* at para. 55; *Nouhi* at para. 9.

[21] Mr. Johnson submits that the ANOCC is incapable of supporting a claim to an interest in land. If that is so, the certificate of pending litigation will not meet the “interest in land” threshold criterion and this court will have the jurisdiction to cancel the certificate of pending litigation immediately for that reason: *Bilin* at paras. 54–55; *Nouhi* at para. 11. If the claim could not give rise to an interest in land, the certificate of pending litigation will be ordered to be cancelled because, in essence, it was improperly registered from the start”: *Bajwa v. Singh*, 2016 BCSC 916 at para. 20; *Bilin* at para. 51.

[22] The relevant time to assess the validity of the CPL, and the pleading on which it rests, is the date of filing of the CPL with the Registrar of Land Titles. I have therefore considered the pleadings filed in support of the CPL, and not as they might be further amended: *Bilin* at para. 62. As noted by the Court in *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2023 BCSC 1257:

[26] Unlike an application to strike pleadings or a cause of action, when reading the pleadings for the purposes of cancelling and discharging a CPL under s. 215, the pleadings are not read broadly, *1267070 B.C. Ltd. v. 1208471 B.C. Ltd.*, 2021 BCSC 2310 at para. 47.

[27] The test to be applied is whether the pleadings, assuming them to be true, are capable of supporting a claim to an interest in land. No evidence is to be considered and the court is not empowered to cancel a CPL on the basis that the claim to an interest in land is weak or unlikely to succeed: *Xiao v. Fan*, 2018 BCCA 143.

[23] The test for determining whether a person has an interest in land for the purposes of a certificate of pending litigation is whether there is an arguable case or a triable issue: *Samji (Trustee of) v. Chatur*, 2013 BCSC 1915 at para. 60 [*Samji*]. The issue is whether the plaintiff is claiming an interest in land, not whether they can prove an interest in land: *Samji* at para. 60.

[24] When the interest in land is based on a constructive trust, the question is whether there is a triable issue in that respect, not whether the plaintiff will be successful in proving it is entitled to a constructive trust; it is enough to establish that a constructive trust is a possible remedy: *Samji* at para. 61.

[25] The issue on this application is whether an interest in land has been claimed and not whether it can be proved: *Samji* at para. 60. At this point, whether or not the plaintiff has an interest in property is determined based on the pleadings and not by a summary determination of the issues between the parties: *Tiwana v. Rai*, 2018 BCSC 1893 at para. 29. The question before me is therefore whether the pleadings disclose a claim for an interest in land, without regard to the merits of the claim; it is purely a question of adequate pleadings: *Nouhi* at para. 13. Accordingly, in addressing this question, I have considered only the ANOCC.

D. Do the pleadings disclose a claim to an interest in land?

[26] In support of its claim to an interest in land, the plaintiff cites *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 91 [*Pro-Sys*], where the Court referenced *Kerr v. Baranow*, 2011 SCC 10 at para. 50 [*Kerr*]:

... 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 ...

[27] The plaintiff submits that it has pleaded such a causal connection between unpaid royalties and profits (allegedly earned by the defendants in breach of the Franchise Agreements) and the acquisition, preservation, maintenance or improvement of the Property in paras. 45–46 of the ANOCC.

[28] The use of funds to improve or maintain property can give rise to a claim for an interest in land: *Samji* at para. 64.

[29] A constructive trust is sufficient to sustain the registration of a certificate of pending litigation: *Nouhi* at para. 20. As noted by Justice Dickson, as she then was, in *Jacobs v. Yehia*, 2015 BCSC 267 at paras. 24, 25, 27, and 30, rev'd on other grounds 2016 BCCA 38 [*Jacobs*]:

[24] "An estate or interest in land" may include both legal and equitable interests. The test is not to be narrowly defined, but the mere fact that a claim relates to land does not convert it into a claim for a proprietary interest:

Montgomery v. Klaassen, [1996] B.C.J. No. 1739, para. 22; *Seville Properties Ltd. v. Coutre et al.*, 2005 BCSC 1105.

[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: [0861695 B.C. Ltd. v.] *Meola*, [2013 BCSC 121], 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.

[30] The plaintiff relies on *Jacobs* for the following additional principles:

- a) Where an interest in land is claimed based on a constructive trust, the question on an application to cancel a certificate of pending litigation is whether a constructive trust is a possible remedy;
- b) Tracing of funds may take place before or after legal or equitable rights have been established; and
- c) Tracing is a process and not a claim or a remedy.

[31] The plaintiff also cites *B.C. Teachers' Credit Union v. Betterly* (1975), 61 D.L.R. (3d) 755 at 758, 1975 CanLII 1032 (B.C.S.C.), where Justice Bouck stated as follows:

The principle as to the equitable right of tracing is set out in *Nelson et al. v. Larholt*, [1947] 2 All E.R. 751 at p. 752, where Denning, J., held that if property is taken from a rightful owner it can be recovered from any person into whose hands it can be traced unless the person who receives it does so in good faith, for value and without notice of want of authority. Also, where a volunteer acquires property burdened by a trust, then regardless of whether the volunteer has knowledge of the trust, he holds the property on behalf of the beneficiary: *Swanson v. Smith*, [1945] 3 D.L.R. 431 at p. 437, [1945] 2 W.W.R. 469, 61 B.C.R. 243 at p. 252 (B.C.C.A.).

[32] A constructive trust may be granted where the plaintiff can establish that misappropriated funds can be traced to property by means of following or tracing: *Samji* at para. 63. Plaintiff's counsel concedes that tracing is not pleaded in the ANOCC.

[33] As the Court of Appeal explained in *Atlas Cabinets and Furniture Ltd. v. National Trust Co.* (1990), 45 B.C.L.R. (2d) 99 at 108, 1990 CanLII 1312 (C.A.)

[*Atlas Cabinets*], cited by Justice Newbury in *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 20 [*BNSF*], and Matthews J. in *Nouhi* at para. 22, there is a difference between substantive and remedial constructive trusts:

A substantive constructive trust is to be distinguished from a remedial constructive trust. In a substantive constructive trust, the acts of the parties in relation to some property are such that those acts are later declared by a court to have given rise to a substantive constructive trust and to have done so at the time when the acts of the parties brought the trust into being. ... In a remedial constructive trust, on the other hand, the acts of the parties are such that a wrong is done by one of them to another so that, while no substantive trust relationship is then and there brought into being by those acts, nonetheless a remedy is required in relation to property and the court grants that remedy in the form of a declaration which, when the order is made, creates a constructive trust by one of the parties in favour of another party. ...

[34] A remedial constructive trust is available in Canada to remedy unjust enrichment and breach of fiduciary duty: *BNSF* at paras. 55–56. When a constructive trust is referred to in Canada, it is generally taken to mean a remedial constructive trust: *Nouhi* at para. 25. Accordingly, a plaintiff who seeks a substantive constructive trust should plead that expressly: *BNSF* at paras. 54 and 85.

[35] The ANOCC does not plead a substantive constructive trust in relation to the Property. The ANOCC does not conform to the definition of a substantive constructive trust, as set out in *Atlas Cabinets*. I therefore assume that the plaintiff's claim in relation to the Property is for a remedial constructive trust based on alleged unjust enrichment.

[36] As noted by Matthews J. in *Nouhi*:

[26] A party seeking either type of constructive trust must satisfy two criteria, in addition to the cause of action or circumstances on which the remedial or substantive constructive trust is based. The first is that there must be referential property, i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: *BNSF* at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is inadequate, insufficient or inappropriate in the circumstances: *Kerr v. Baranow*, 2011 SCC 10 at para. 50; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 92; *Li v Li*, 2017 BCSC 1312 at para. 227.

[37] The cause of action on which the plaintiff relies for its remedial constructive trust claim must be pleaded: *Nouhi* at para. 31. Here, as in *Nouhi*, the plaintiff pleads that it is entitled to a constructive trust as a result of the defendants' alleged unjust enrichment (as set out in paras. 45–46 of the ANOCC).

[38] The law regarding unjust enrichment is not controversial. Both parties cite *Kerr* at para. 32 and agree that proving a claim based on unjust enrichment requires a plaintiff to establish the following three elements:

- 1) The defendant has been enriched;
- 2) The plaintiff has suffered a corresponding deprivation; and
- 3) There is no juristic reason for the enrichment.

[39] Mr. Johnson submits that the ANOCC fails to disclose the material facts required to establish that the plaintiff is entitled to a remedial constructive trust, citing *Nouhi* at paras. 26, 49, and 50; *1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP*, 2020 BCSC 1435 at paras. 50–51.

[40] The plaintiff asserts that it has pleaded all of the elements required to establish a claim based on unjust enrichment in the ANOCC. It submits that the plaintiff is entitled to damages due to unjust enrichment by virtue of:

- 1) Granting to the defendants the right and benefit of operating the franchises (i.e., a benefit);
- 2) The defendants' receipt of revenues, which, in turn, triggered obligations to pay the plaintiff royalties in accordance with the Franchise Agreements (i.e., an enrichment); and
- 3) The defendants' non-payment of royalties as alleged in the ANOCC (i.e., a deprivation to the plaintiff).

[41] Notably, the ANOCC does not plead the absence of a juristic reason for the alleged enrichment and deprivation, supported by material facts, as required by *Supreme Court Civil Rules*, R. 3-1(2)(a).

[42] The juristic reason analysis is to be considered in two parts, with the plaintiff firstly having the onus to show that there is no juristic reason from an established category: *Tige Industries Ltd. v. 0763636 B.C. Ltd.*, 2017 BCSC 2218 at para. 16 [Tige], citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44 [Garland].

[43] The Court in *Garland* outlined these “established categories” at para. 44:

... The established categories that can constitute juristic reasons include a contract (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, 1980 CanLII 22), a disposition of law (*Pettkus, supra*), a donative intent (*Peter v. Beblow*, [1993] 1 S.C.R. 980, 1993 CanLII 126), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[44] Constructive trusts are designed to determine beneficial entitlement to property when a monetary award is inappropriate or insufficient: *Pro-Sys* at para. 92, citing *Kerr* at para. 50. In *Pro-Sys*, the Court noted that the plaintiff’s claim neither explained why a monetary award was inappropriate or insufficient, nor showed a link to specific property. The Court found it was plain and obvious on the pleadings that the claim based on constructive trust could not succeed and must be struck: *Pro-Sys* at para. 92.

[45] The ANOCC pleads that the defendants allegedly used wrongfully obtained funds to purchase, maintain, repair or enhance the Property. I conclude that this allegation satisfies the requirement to plead a causal connection to the Property.

[46] However, as in *Nouhi*, the ANOCC does not plead that monetary damages are, or may be, an inadequate or insufficient remedy with regard to its claim for unjust enrichment. Justice Matthews found that to be a fatal deficiency in *Nouhi*:

[49] ... Pleadings (and eventual proof) of the inadequacy of damages is a pre-condition to the impression of a remedial constructive trust. The constructive trust is Mr. Nouhi’s only assertion of, or claim to, an interest in land. Accordingly, Mr. Nouhi’s pleadings do not disclose a claim for an interest in land as they do not state that monetary damages are, or may be, an inadequate or insufficient remedy.

[47] Those comments are analogous here. I reach the same conclusion for the same reason. The ANOCC does not adequately plead a constructive trust based on unjust enrichment: *Nouhi* at para. 50.

[48] In essence, the ANOCC alleges a claim based on contract. The plaintiff's claim for a remedial constructive trust, based in turn on allegations of unjust enrichment, is not pleaded as an alternative claim to those based on contract. That fact distinguishes this case from *Tige*, where Fitzpatrick J. found that the unjust enrichment claim was clearly and specifically pleaded as an alternative claim to those based on contract: at para. 29. Accordingly, she found that the unjust enrichment claims could be advanced, even if the contract claim failed: *Tige* at para. 29. Unlike Fitzpatrick J., I am not considering an application to strike pleadings.

[49] As noted in *Berthin* at para. 32, a certificate of pending litigation is an extraordinary pre-judgment mechanism to protect a valid claim to an interest in land until the issues in dispute can be resolved. The purpose of a certificate of pending litigation is not to provide pre-judgment security: *Samji* at para. 53.

[50] It is not incumbent on the defendant to take steps to try to make sense of the pleadings, or to try to tease out of the plaintiff the specific allegations it will need to answer at trial; it is the plaintiff's onus to plead its case: *Ossudallah v. Swiss Consulting Management Ltd.*, 2020 BCSC 567 at para. 32.

[51] In summary, I conclude that the ANOCC, in its present form, is inadequate to disclose a claim to an interest in land, based on a remedial constructive trust. The ANOCC does not disclose a claim for any other interest in land. I therefore conclude that the CPL was not valid when it was filed, as required by s. 215 of the *LTA*. Accordingly, the CPL must be cancelled.

[52] This action is now scheduled for a seven-day trial commencing April 14, 2025. It is open to the plaintiff to seek leave to amend the ANOCC to plead further and better particulars of its alleged claim to an interest in land. If leave is granted,

the plaintiff can then file a valid certificate of pending litigation, supported by a pleading that discloses a claim to an interest in land: *Bilin* at para. 68; *Nouhi* at para. 30.

V. DISPOSITION

[53] I make the following orders:

- a) BY CONSENT, para. 47 of the ANOCC (which refers, in error, to a Paul and Rinske Joeke Johnson who are not intended parties to this action) is struck; and
- b) The CPL is cancelled.

[54] The defendant, Mr. Johnson, is entitled to costs of this application on the ordinary scale.

“Douglas J.”