COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Save-A-Lot Holdings Corp. v. Christensen,* 2023 BCCA 35

Date: 20230125
Docket: CA48376

Between:

Save-A-Lot Holdings Corp.

Appellant
(Plaintiff)

And

Tom Christensen, Rebecca Christensen, Tom Christensen Jr. and Alexandrea Christensen

Respondents
(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated June 28, 2022 (*Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCSC 1361, Vancouver Docket S1812676).

Counsel for the Appellant:	N.J. Muirhead J.F. Gray
Counsel for the Respondent:	D.K. Magnus E. Watson
Place and Date of Hearing:	Vancouver, British Columbia November 14, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 25, 2023

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Marchand

Summary:

The appellant appeals an order cancelling certificates of pending litigation (CPLs) under s. 256 of the Land Title Act [LTA] and setting the amount of security to be posted at $20,000. It also appeals orders dismissing applications to adjourn the s. 256 application to permit cross-examination on affidavits or further examinations for discovery. The appellant alleges that the chambers judge erred by (1) finding that hardship had been established on the evidence; (2) considering its claim to an interest in land only to the extent it was particularized rather than as pleaded; (3) failing to properly assess whether damages would provide an adequate remedy under s. 257(1)(a)(i) of the LTA; and (4) dismissing its applications to adjourn, being a consequence of the first three errors. Held: Appeal allowed with respect to the order cancelling the CPLs; appeal dismissed with respect to the orders dismissing the adjournment applications. The chambers judge erred by (1) giving no weight to relevant considerations on the question of hardship, resulting in a palpable and overriding error in his finding of hardship; and (2) failing to conduct any assessment of the probability of the appellant's success and the possible range of damages in its claim to land as pleaded and relying only on the particulars provided to limit that claim to $20,000. The order cancelling the CPLs is set aside. There was no need to cancel the first CPL, as it had already been cancelled under a previous order. Given the inadequacy of the evidence of hardship, the application to cancel the second CPL is dismissed. There is no basis to intervene in the orders dismissing the adjournment applications despite the judge's errors.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] This is an appeal from an order cancelling two certificates of pending litigation (CPLs) on the posting of security in the amount of $20,000. The appellant, Save-A-Lot Holdings Corp. (Save-A-Lot), asserts numerous errors by the chambers judge in his application of ss. 256 and 257 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*].

[2] The orders below allowed an application under s. 256(1) of the *LTA* by the respondent, Tom Christensen, for orders cancelling the CPLs on the basis of hardship. The orders were made pursuant to s. 257(1)(a):

> 257(1) On the hearing of the application referred to in section 256(1), the court
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> > (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
> >
> > > (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and

> (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court…

[3] Save-A-Lot also appeals two orders dismissing applications to adjourn the respondent's application to allow cross-examination on affidavits or examinations for discovery.

The underlying action and related applications

[4] Save-A-Lot is in the business of selling, repairing, and cleaning vehicles. The respondent, Tom Christensen, is a former general manager and director of Save-A-Lot and the other respondents are Mr. Christensen's wife, Rebecca Christensen (now deceased) and two adult children.

[5] Save-A-Lot commenced the underlying action on November 27, 2018. It is alleged that Mr. Christensen misappropriated funds and converted them to his own use and for the benefit of the other respondents, who knowingly participated in the fraudulent conversion and knowingly received funds and other benefits. It is also alleged that some of the misappropriated funds were used to pay expenses and improvements for the family residence, a property in Chilliwack, B.C., which was registered jointly to Mr. Christensen and his wife (the Chilliwack Property).

[6] Save-A-Lot's claim to an interest in land is grounded on a remedial constructive trust. It seeks a declaration that the respondents "hold all real and personal property and assets obtained through the use of Save-A-Lot funds" and that Save-A-Lot is entitled to trace its funds to "all assets purchased, repaired, maintained or enhanced by the [respondents] with any of its funds, including the Chilliwack Property".

[7] Save-A-Lot registered two CPLs on the Chilliwack Property: the first on January 28, 2020 (CPL #1) and the second on March 4, 2022 (CPL #2).

[8] CPL #1 was cancelled by the order of Justice Fitzpatrick on December 3, 2021, on the basis that the Notice of Civil Claim did not adequately disclose a claim

for an interest in land founded on a remedial constructive trust: *Save-A-Lot Holdings Corp. v. Christensen*, 2021 BCSC 2540.

[9] Save-A-Lot filed an appeal of this order and the respondents filed a cross appeal. On January 17, 2022, Justice Newbury granted an application to stay the cancellation order pending determination of Save-A-Lot's appeal: *Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCCA 39.

[10] On February 17, 2022, Master Bilawich granted Save-A-Lot leave to amend its Notice of Civil Claim to cure the deficiency identified by Justice Fitzpatrick: *Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCSC 261. He dismissed an application by the respondents to strike the Notice of Civil Claim but ordered Save-A-Lot to provide particulars "to the extent they are currently known" of matters relating to the claims against Mrs. Christensen and the two children.

[11] On March 4, 2022, Save-A-Lot filed an Amended Notice of Civil Claim pursuant to the order of Master Bilawich, and filed CPL #2.

[12] On March 7, 2022, Save-A-Lot abandoned its appeal of the order of Justice Fitzpatrick. The respondents abandoned their cross appeal the following day, March 8, 2022.

[13] On March 10, 2022, Save-A-Lot provided particulars to the respondents in accordance with the order of Master Bilawich.

[14] On April 12, 2022, Master Vos dismissed an application by Save-A-Lot to cross-examine Mr. Christensen and Mrs. Christensen: *Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCSC 707. The respondents had filed an amended application to cancel CPL #1 that was scheduled to be heard on May 20, 2022. It is not clear why this was done given that the appeal of Justice Fitzpatrick's order had been abandoned. In any event, Save-A-Lot applied to adjourn that hearing and to cross-examine Mr. Christensen on four affidavits he had filed regarding the issue of hardship, and also to cross-examine Mrs. Christensen.

[15] Master Vos determined that the respondents were relying only on two affidavits made by Mr. Christensen and one by Mrs. Christensen in respect of their application. He dismissed Save-A-Lot's application because (1) Save-A-Lot did not establish that cross-examination would serve a useful purpose in eliciting evidence that would assist the court in determining a material fact in issue on the application; and (2) there was evidence that both Mr. and Mrs. Christensen were not mentally or physically capable of participating in a cross-examination in light of Mrs. Christensen's treatment for stage four cancer.

[16] Four days later, on April 16, 2022, Mrs. Christensen passed away.

[17] On May 5, 2022, Mr. Christensen applied for an order cancelling both CPL #1 and CPL #2 on the basis of hardship. In support of this application, he purported to rely on five of his affidavits (among others), the most recent having been sworn May 4, 2022.

[18] On May 18, 2022, Save-A-Lot applied to adjourn the hearing of the application to cancel the CPLs and to cross-examine Mr. Christensen on his five affidavits, and on June 13, 2022 it applied for an order requiring Mr. Christensen and his children to attend for examination for discovery.

[19] All applications were heard by the chambers judge on June 20 and 21, 2022.

The decision of the chambers judge

[20] On June 28, 2022, the chambers judge allowed Mr. Christensen's application and ordered both CPL #1 and CPL #2 be cancelled upon the posting of security in the amount of $20,000, and dismissed Save-A-Lot's applications: *Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCSC 1361.

[21] The judge found that Mr. Christensen had established hardship on the basis that he had to refinance the Chilliwack Property at an "exorbitant interest rate" that was "directly linked" to the registration of the CPLs. He set the amount of security at $20,000, being the amount indicated in the particulars Save-A-Lot provided in

accordance with the order of Master Bilawich, which he considered to represent "the maximum" of Save-A-Lot's interest in land.

[22] The judge dismissed Save-A-Lot's applications. He was of the view that cross-examination on affidavits was not appropriate as there was little dispute about hardship and it would unnecessarily delay the matter at considerable expense. He did not consider an adjournment appropriate to enable further examinations for discovery "to see if further assets could be tied" to the Chilliwack Property.

On appeal

[23] Save-A-Lot submits that the chambers judge erred by (1) finding that hardship had been established on the evidence; (2) considering its claim to an interest in land only to the extent it was particularized rather than as pleaded; (3) failing to properly assess whether damages would provide an adequate remedy under s. 257(1)(a)(i) of the *LTA*; and (4) dismissing Save-A-Lot's applications to adjourn the s. 256 application to permit cross-examination or further examinations for discovery, which it says is a consequence of the first three errors. Save-A-Lot seeks an order from this Court dismissing the application to cancel the CPLs, or alternatively, setting aside all the orders and remitting these matters to the Supreme Court.

[24] The respondents submit that the chambers judge made no errors of law, principle or fact and exercised his discretion in a manner that is entitled to deference by this Court.

Application to cancel the CPLs

[25] Decisions cancelling a CPL and setting the amount of security under ss. 256 and 257 of the *LTA* are discretionary and attract deference on appeal. This Court may only interfere where the judge erred in principle, gave no or insufficient weight to relevant considerations, or made an order resulting in a clear injustice: *Wosnack v. Ficych*, 2022 BCCA 139 at para. 15; *Beach Estate v. Beach*, 2021 BCCA 238 at para. 53.

[26] Additionally, a person applying to cancel a CPL under s. 256 must show that hardship and inconvenience are experienced or likely to be experienced by the registration. The standard of palpable and overriding error applies to a judge's findings of fact on this question: see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43; *Liquor Barn Income Fund. v. Becker*, 2011 BCCA 141 at paras. 40–43.

[27] As a preliminary matter, I note that Mr. Christensen's application before the chambers judge sought cancellation of both CPL #1 and CPL #2. However, CPL #1 had already been cancelled pursuant to the December 3, 2021 order of Fitzpatrick J. This order was stayed pending the disposition of Save-A-Lot's appeal of that order. That appeal was disposed of when Save-A-Lot abandoned its appeal on March 7, 2022 and the respondents abandoned their cross appeal on March 8, 2022. There was therefore no need for Mr. Christensen to seek another order cancelling CPL #1 or for the judge to make that order.

[28] In my opinion, this appeal can be disposed of on the basis of the first two grounds of appeal. As I will explain, I accept Save-A-Lot's submission that the chambers judge erred in (1) finding that hardship had been established on the evidence; and (2) restricting the amount of Save-A-Lot's claim to an interest in the Chilliwack Property to what was set out in the particulars.

1. Hardship

[29] Section 256(1) of the *LTA* provides:

> 256(1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
>
> (a) particulars of the registration of the certificate of pending litigation,
>
> (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
>
> (c) the grounds for those statements,
>
> apply for an order that the registration of the certificate be cancelled.

[30] As a threshold requirement for obtaining an order under s. 257(1), a person applying to cancel a CPL under s. 256(1) must show hardship and inconvenience that is causally connected solely to the registration of the CPL. The evidence of hardship must include particulars that demonstrate real hardship; general allegations of inconvenience are not sufficient: *Liquor Barn* at para. 37. The degree of hardship must be more than "trifling" or "insignificant" but a court is not required to be exacting in its analysis: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2014 BCCA 388 at para. 28.

[31] The chambers judge found that Mr. Christensen "had to refinance his home after the [CPLs] had been placed on the property" and the "exorbitant interest rate" charged in the refinancing was directly linked to the CPLs: at para. 11. He found it "plain and obvious" that Mr. Christensen had experienced hardship and considered that there was little dispute over his findings: at paras. 18, 20.

[32] However, the question of hardship was in dispute and Mr. Christensen's own evidence does not support the judge's finding that the "exorbitant" interest rate was "directly linked" to the CPLs.[1]

[33] The record shows that the respondents were having financial difficulties prior to the commencement of these proceedings, which resulted in a need to refinance the Chilliwack Property at higher than average interest rates. In an affidavit sworn July 16, 2021, Mr. Christensen deposed that he and his wife purchased the Chilliwack Property in July 2016 and refinanced it twice in 2018: first on May 25, 2018 with a mortgage at an interest rate of prime plus 10%, to pay loans "related to his mother's affairs"; and second on November 2, 2018, adding a second mortgage of $58,000 at an interest rate of 15%, "to be able to continue paying our counsel to defend us in this matter".

[1] Although CPL #1 had already been cancelled by the order of Fitzpatrick J., it remained registered and the stay order lapsed on March 7 or 8, 2022, when the appeal and cross appeal were abandoned, by which time CPL #2 had been registered. Thus, both CPLs were relevant to an assessment of the evidence of hardship.

[34] All of this was done, however, *before* Save-A-Lot commenced this action, on November 27, 2018, and long before CPL #1 was registered against the Chilliwack Property, on January 28, 2020.

[35] The respondents' financial difficulties continued. On December 23, 2020, they filed consumer proposals under s. 66.13 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 which resulted in a stay of these proceedings. Save-A-Lot succeeded in obtaining an order lifting the stay on November 29, 2021: *Save-A-Lot Holdings Corp. v. Christensen*, 2021 BCSC 2546 per Fitzpatrick J., and as noted above, the respondents succeeded in obtaining an order cancelling CPL #1 on December 3, 2021.

[36] The second mortgage matured on November 1, 2021. At about this time, the Christensens requested a renewal for a further term of one year on the same terms and conditions.

[37] On December 6, 2021, Mr. and Mrs. Christensen entered into a modification of the second mortgage on the Chilliwack Property and received an additional advance of $330,000. The terms included a lender fee, a performance guarantee and a processing fee that increased the total principal amount to $335,000, payable at an interest rate of 16%. In an affidavit sworn May 2, 2022, Mr. Christensen deposed:

> 25. When Rebecca and I found out that it was ordered that the [CPL] be cancelled, Rebecca and I modified our 2nd Mortgage Terms in order to borrow enough funds to pay back friends that we have borrowed money from and to catch up on months of delinquent mortgage payments, consumer proposal payments, utility payments, Rebecca's monthly dietary supplement need and a round of treatment …which [she] never got to attend.

[38] Mr. Christensen also deposed that he used $25,000 of the proceeds of the increased second mortgage to pay counsel, but he did not provide particulars of the manner in which the balance of the funds ($330,000 less $25,000 paid to counsel) was used.

[39] Save-A-Lot does not dispute that the registration of the CPL prevents Mr. Christensen from obtaining a new mortgage on the Chilliwack Property but contends that this does not by itself establish hardship. It submits the evidence demonstrates that any hardship experienced by Mr. Christensen was caused by the decision to borrow $330,000 while CPL #1 was registered and therefore not solely by the registration of the CPL. Thus, it contends, the judge erred in finding hardship under s. 256.

[40] I agree with Save-A-Lot that in the context of this rather complicated chronology, the chambers judge failed to consider whether the "exorbitant" interest rate of 16% charged in Mr. Christensen's refinancing was caused solely by the registration of the CPL. Long before CPL #1 had been registered, Mr. Christensen's evidence shows that he and his wife were paying high interest rates (prime plus 10% on the first mortgage and 15% on the second mortgage), presumably due to their poor financial circumstances. The addition of one percentage point on a second mortgage that was already in place was not significant in that context.

[41] The only evidence that Mr. Christensen was not able to secure more conventional financing was an assertion in his affidavit that he and his wife wanted to re-finance their first and second mortgages "through a conventional financial institution" but were unable to do so "because of the CPLs", and an unsworn statement from Steve Lucas, a mortgage broker, contained in an email dated May 3, 2022, attached to Mr. Christensen's affidavit. This email, which Mr. Christensen referred to as a "Pre-Approval Letter", is not from a lender and is not in the form of a commitment letter:

> This email is to confirm Tom and Rebecca Christensen, based off the current interest rates as of April 1, 2022 along with the past 3yrs of annual income documents provided by both parties (2018/19/20)
>
> (NOA- Notice Of Assessment) which supports the pre qualification of the refinance/mortgage renewal application on the subject property located at:
>
> […] Chilliwack, BC V2R OL3
>
> After discussing the needs of the clients we have secured a current mortgage based off the appraisal provided by the applicants. The new mortgage balance will be $1,080,000.00 this will clear all current charges against the

> subject property and greatly reduce the monthly payments and annual interest rates combined.
>
> - 1st charges against the property Scotia Bank @ 3.64% and mortgage amount of $648,000.00
>
> - 2nd Charge is with 43337 Investments for $388,000.00 @ 16%
>
> The combined mortgage amount of $1,036,000.00 and 9.82% annual rate.
>
> All this can not happen without the (CPL) certificate of pending litigation being removed from the subject […] property.
>
> If this does not happen within a timely manner this could put the applicants and the subject property into an uncomfortable position. This could lead to the subject property ultimately being put into foreclosure status and a forced sale of the subject […] Property. The CPL being removed is a crucial part of this refinance/mortgage renewal being completed, and must happen as soon as possible.

[42] The chambers judge considered this to be "uncontradicted evidence from a mortgage broker" indicating that significantly more favourable terms could be provided if the CPLs were cancelled within a reasonable time: at paras. 11, 18. That evidence may have been uncontradicted, but the basis on which a new mortgage would be secured was vague, unverified and inconsistent with some of the evidence. The principal amount of the mortgage was based on an appraisal provided by Mr. Christensen that is not in the record and it is unclear how Mr. Lucas calculated an effective annual rate of 9.82% on a combined mortgage amount of $1,036,000.00. Mr. Lucas does not identify the lender or any other terms of the refinancing, and Mr. Christensen's evidence was that the interest rate on the existing first mortgage was prime plus 10%, not 3.65% as indicated in the email.

[43] Being unable to finance a high interest debt as a result of the registration of a CPL may constitute hardship sufficient to justify an order cancelling the CPL. The applicant bears the onus of adducing evidence that the CPL is the obstacle to obtaining new financing that is both available and demonstrably more favourable. Generalizations, unsupported by specific proof of hardship and inconvenience are not sufficient: *Liquor Barn* at para. 37; see also *Kaur v. Chandler*, 2018 BCSC 1283 at para. 47.

[44] The chambers judge failed to conduct any assessment as to whether the evidence adduced by Mr. Christensen provided sufficient particulars of real hardship caused solely by the registration of the CPL. While the judge was not required to conduct an "exacting" analysis, he was required to assess the weight to give to this unsworn evidence, particularly in light of the record of the Christensens' financial difficulties. Had he done so, he would have had to conclude that this evidence was wholly inadequate.

[45] In my view, the chambers judge erred in principle by giving no weight to relevant considerations on the question of hardship, which resulted in a palpable and overriding error in his finding that the "exorbitant" interest rate" of 16% charged in Mr. Christensen's refinancing was "directly linked" to the CPL.

2. The claim to an interest in land

[46] In setting the amount of security at $20,000, the chambers judge accepted the position of Mr. Christensen that only a small portion of Save-A-Lot's claim pertained to an interest in land, and considered this Court's decision in *Wosnack* to be consistent with that position. He relied on the particulars in determining that $20,000 represented the "maximum" of Save-A-Lot's interest. In my view, he erred in doing so.

[47] In *Wosnack*, the Court was tasked with interpreting s. 257(3) of the *LTA* in the context of ss. 215 (entitlement to register a CPL), 256 and 257(1). Section 257(3) provides:

> (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

[48] The Court held that the amount of security should be "tied to the claim to the interest in land that grounds the CPL, whether that claim forms all or part of an action" (at para. 28). This should not be interpreted as *requiring* that the amount of security be limited to an amount known to a plaintiff in relation to its claim to an interest in land at the time of an application under s. 256. Importantly, the Court in

Wosnack went on to confirm that the determination of the amount of security remained a discretionary exercise:

> [30] … I would not go so far as to say that the amount of security must never exceed a party's asserted interest in the land in issue. I see this determination as one requiring a proper exercise of discretion. The court must only consider factors that are relevant when setting the amount of security. What is relevant includes the probability of a party's success and the possible range of damages to which the party may be entitled, *in relation to the claim involving an interest in land*. What is not generally relevant are other claims within an action that do not involve, or are unrelated to, an interest in land. …
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> [Italic emphasis in original; underline emphasis added.]

[49] In that case, the plaintiffs claimed an interest in land as beneficiaries of an estate in which they were each entitled to a 25% interest. The land was the primary asset of the estate and focus of the claim and there was no dispute as to its value. The respondent applied to cancel CPLs filed by the plaintiffs after he had received an offer to purchase the property in issue. The plaintiffs agreed to cancel the CPLs but disagreed on the amount of security. The chambers judge approved the sale on the condition that all of the net proceeds be held in trust, without recognizing the limitations of the plaintiffs' potential interests to the property as beneficiaries. The amount exceeded the collective interest of the two plaintiffs, assuming they were successful in their actions.

[50] In this case, the judge made no assessment of the probability of success of Save-A-Lot's claim to the Chilliwack Property or to the possible range of damages to which it may be entitled in relation to that claim. Instead, he simply relied on the particulars provided to set the amount at $20,000. However, those particulars did not address, nor were they intended to address, the potential amount of damages that could be traced to the Chilliwack Property.

[51] As noted, Save-A-Lot's claim against the Chilliwack Property is grounded on a remedial constructive trust arising from Mr. Christensen's alleged misappropriation of funds. The Amended Notice of Civil Claim provides some, but not full, particulars of his use of company assets for personal use, including:

- Cash advances on the company's credit cards resulting in untraceable spending of approximately $123,501;

- Cash withdrawals from company bank accounts of approximately $162,627; and

- Expenses that were personal or could not be verified as having any company-related purpose of over $950,000.

[52] Save-A-Lot further pleads:

> 20. At all times Save-A-Lot has retained legal title to and property in all funds and assets misappropriated by Tom from Save-A-Lot as a result of the acts of fraud, conversion and breach of duty described herein, and any of the funds or property received by the defendants were received subject to an express, constructive or resulting trust in favour of Save-A-Lot.
>
> 21. Further Tom converted funds of Save-A-Lot for the benefit of some or all of Becky, Allie and Tommy Jr. [*the other respondents*] by using funds to:
>
> (a) Pay the mortgage, maintain or repair the Chilliwack Property;
>
> (b) purchase, maintain, repair or enhance other real property owned by the defendants;
>
> (c) purchase personal property; and
>
> (d for other purposes, full particulars of which are unavailable at this time and which will be provided as they are discovered.
>
> 22. Becky, Allie and Tommy Jr. knowingly participated in Tom's fraudulent conversion of Save-A-Lot funds, or were wilfully blind to it, because as the spouse and children of Tom, they knew or ought to have known that the amount of money Tom was spending or contributing to their family income and expenses each month was many times greater than the actual income Save-A-Lot agreed Tom would earn and that they were earning income many times greater than the services they were performing.
>
> 23. Becky, Allie and Tommy Jr. further participated in Tom's fraudulent conversion of Save-A-Lot funds, or were wilfully blind to it by:
>
> (a) receiving funds, salaries and vehicles from Save-A-Lot; and
>
> (b) allowing personal or personal property related expenses to be paid for using company funds and never personally paying these expenses or investigating why these expenses were not paid by anyone in the family.
>
> 24. As a result of all of the defendants' participation in Tom's conversion of Save-A-Lot funds as described herein, Save-A-Lot has acquired an interest in the Chilliwack Property and other real and personal property owned by the

> defendants. Further, any interest the defendants purported to receive in the Chilliwack Property or other real and personal property is void or voidable.

[53] Importantly, the particulars that were ordered by Master Bilawich related to the claims against Mrs. Christensen and the two children (defined as Family Members) that did not involve the Chilliwack Property. Save-A-Lot was ordered to provide particulars of:

> a) [Save-A-Lot's] inventory that was transferred to Family Members without receiving market value;
> b) Property transfers and payments which give rise to the knowing receipt claim; and
> c) Other real property and personal property of the Family Members which is the subject of the remedial constructive trust claim.

[54] In accordance with this order, Save-A-Lot's Reply to the Request for Particulars was expressly related to the knowing receipt claim set out in para. 23 of the Amended Notice of Civil Claim. It included three paragraphs about the unauthorized use of company funds in relation to the Chilliwack Property:

- $27,661 to pay for home utilities and telephones of all respondents;
- $17,850 for renovations, repairs and improvements, including the purchase of materials and labour; and
- $2,568 for mortgage payments.

[55] One of the functions of particulars is to limit the generality of the pleadings: *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369, 1982 CarswellBC 836 (C.A.) at para. 15. However, these particulars were not intended to limit Save-A-Lot's constructive trust claim against the Chilliwack Property in light of Master Bilawich's order. Moreover, the record includes a forensic accounting investigative report obtained by Save-A-Lot in May 2021. This report, prepared by MNP LLP, disclosed questionable withdrawals of funds of $2,449,586 that included some transactions allegedly connected to the Chilliwack Property of approximately $134,870:

- $15,684 for utilities, telephone and waste management services;

- $3,850 for purchases from hardware stores;
- $101,530 in payments to construction vendors made after renovations for Save-A-Lot had been completed;
- $2,568 for mortgage payments; and
- $11,238 on expenses that appeared to relate to home repairs and maintenance.

[56] The chambers judge did not refer to these details in the MNP report, noting that the factual foundations and conclusions in the report were contentious. No doubt that is so, but it is nevertheless evidence in the record that is relevant to an assessment of the probability of Save-A-Lot's success and the possible range of damages to which it may be entitled in relation to its constructive trust claim to the Chilliwack Property. While such an assessment is not a comprehensive one in applications under s. 256, a judge must at least endeavour to consider this in the context of the available record.

[57] In these circumstances, it is my view that the chambers judge erred in principle by failing to conduct any assessment of the probability of Save-A-Lot's success and the possible range of damages in respect of its claim to the Chilliwack Property as pleaded and relying only on the particulars to limit that claim to $20,000.

3. Whether damages will provide adequate relief

[58] Save-A-Lot advances a novel proposition that the insolvency of the registered owner of the land is determinative when assessing the adequacy of damages under s. 257(1)(a). It contends that Mr. Christensen, who bears the onus, failed to establish "no triable issue" as to whether damages would provide adequate relief, citing *Youyi* at para. 39, but concedes that there is no other authority to support this rather broad proposition.

[59] *Youyi* concerned cases where a plaintiff seeks specific performance in the underlying litigation and the cancellation of a CPL would effectively determine that

cause of action. In this context, Justice Newbury canvassed numerous authorities and held:

> [39] In my respectful opinion, these cases confirm the principle that where specific performance is being sought and the court is considering an application to order the cancellation of a CPL under s. 256 of the *Land Title Act*, it is for the applicant (here, the Vendor) to satisfy the court that it is plain and obvious the person seeking specific performance would not succeed on that claim at trial. If there is a triable issue as to whether damages would provide an adequate (or appropriate) remedy, the application should be dismissed and the matter proceed to trial. The chambers judge does not, then, decide on the merits whether damages will be adequate – only whether specific performance can be eliminated as having no reasonable chance of success. …
>
> [Emphasis added.]

[60] *Youyi* demonstrates that the adequacy of damages is generally concerned with the nature of the underlying proceedings. Decisions at the trial level have taken into account the solvency of the party called upon to post security when fixing the amount of security, not when determining whether damages are an adequate remedy: see, for example *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379 at paras. 29 and 30; *Froese v. Sharif*, 2017 BCSC 635 at para. 38.

[61] In light of the errors I have discussed above as well as the absence of authority, I do not consider it necessary to determine whether the “no triable issue” test is applicable more broadly to matters of insolvency when assessing the adequacy of damages.

4. Adjournment, cross-examination and discovery

[62] Discretionary decisions on adjournments, cross-examination and examinations for discovery are entitled to considerable deference and this Court rarely interferes with such decisions: see the cases cited at paras. 25–26 above, as well as *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2019 BCCA 60 at para. 46.

[63] The chambers judge referred to the factors relevant to determining whether to permit cross-examination on affidavits described in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd*., 2015 BCSC 1995 at paras. 27–28, and concluded that cross-examination "would produce both unnecessary delay and considerable expense": at para. 20.

[64] However, the judge dismissed Save-A-Lot's application to cross-examine Mr. Christensen in large part on the erroneous basis that he found little dispute over his findings of hardship. I agree with his conclusion that cross-examination in the circumstances of this case would produce unnecessary delay and considerable expense, but I do so on the basis that Mr. Christensen failed to adduce sufficient evidence establishing hardship under s. 256(1) of the *LTA*. Although I do not defer to the chambers judge's exercise of discretion, I would not interfere with the decision to dismiss Save-A-Lot's application to adjourn for the purpose of cross-examination.

[65] With respect to Save-A-Lot's application to conduct examinations for discovery of the respondents, the chambers judge was not prepared to allow Save-A-Lot "to go on a fishing expedition to see if further assets could be tied to the family home": at para. 21. Further:

> [22] This is not a case where the defendants purchased property with alleged fraudulent funds. This is a case where less than one percent of the alleged fraudulent assets were allegedly used to make mortgage payments on or purchases for the family home. The alleged fraudulent awe [*sic*] sets an amount to perhaps two percent of the total value of the property.

[66] Although the judge's dismissal of this application appears to have been influenced by his assessment of the amount of the claim to an interest in the Chilliwack Property, I would not interfere with his refusal to adjourn Mr. Christensen's application to permit Save-A-Lot to conduct examinations for discovery. These are matters distinct from the issue of hardship and as discussed above, an assessment of the value of the claim could and should have been made on the record available at the time of the application.

Disposition and remedy

[67] For these reasons, I would allow the appeal of the order of the chambers judge cancelling CPL #1 and CPL #2 and I would dismiss the appeal of the orders dismissing Save-A-Lot's applications to adjourn for the purpose of conducting cross-examination and examinations for discovery.

[68] The final issue is whether this Court should remit the respondent's application to cancel CPL #2 to the Supreme Court or dismiss the application. This Court has the authority, under s. 24(1)(a) of the *Court of Appeal Act*, S.B.C. 2021 c. 6, to "make any order that the court appealed from could have made" and under s. 24(2)(c), to "exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal".

[69] Although a decision to cancel a CPL under s. 257(1) of the *LTA* is a discretionary one, a finding of hardship and inconvenience that is causally connected solely to the registration of a CPL is a threshold requirement. If the evidence is insufficient to establish hardship, the court is not required to conduct the discretionary assessment under s. 257(1). In my opinion, this Court is in as good a position as the chambers judge to determine that the evidence in the record is insufficient to establish the hardship requirement. Moreover, these proceedings have been ongoing for over four years and I consider it in the interests of justice to make the order dismissing the application to cancel CPL #2.

[70] I would therefore set aside the order cancelling CPL #1 and CPL #2 and dismiss the application to cancel CPL#2.

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Marchand"