IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Oikon Developments Inc. v. Chris & Mando Ltd.,* 2024 BCSC 1333

Date: 20240724
Docket: S234665
Registry: Vancouver

Between:

Oikon Developments Inc. and William Economos

Plaintiffs

And

Chris & Mando Ltd. and Christos Christodoulou

Defendants

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiffs:	S. Batkin T.W. Clifford
Counsel for the Defendants:	H. Shapray, K.C. S.J. Foweraker
Place and Dates of Hearing:	Vancouver, B.C. June 19-20, 2024
Place and Date of Judgment:	Vancouver, B.C. July 24, 2024

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Overview

[1] The defendants, Chris & Mando Ltd. (“C&M”) and Christos Christodoulou, apply under s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] to cancel five certificates of pending litigation registered by the plaintiffs, Oikon Developments Inc. (“Oikon”) and William Economos, against two properties legally or beneficially owned by C&M.

[2] As a precondition to registration of a certificate of pending litigation (“CPL”) under s. 215, the filing party must claim an interest in land. The issue to be determined on this application is therefore whether the plaintiffs’ amended notice of civil claim filed September 21, 2023 (“Amended NOCC”) pleads a claim to an interest in the two properties against which the CPLs were registered. The defendants say that the Amended NOCC does not disclose a viable claim for an interest in land because at its core, the plaintiffs’ claim is an action for breach of two alleged oral joint venture agreements that seeks a monetary remedy.

[3] The defendants also applied to cancel the CPLs on the basis of hardship under s. 256 of the *LTA*, but there was insufficient hearing time to address that aspect of the application. The defendants’ application under s. 256 was therefore adjourned generally.

[4] For the reasons that follow, I conclude that the Amended NOCC adequately pleads a claim to an interest in land as required by s. 215 of the *LTA*.

Pleadings

[5] This action involves a dispute between family members and their corporate entities. Oikon is Mr. Economos’ company and provides construction, development, and property management services. Mr. Economos is married to Evelyn Economos, who is Mr. Christodoulou’s daughter.

[6] C&M is Mr. Christodoulou’s company. C&M is the legal or beneficial owner of the two properties in issue in this action:

a) a single lot in Vancouver with three rental properties having civic addresses 2452, 2473 and 2492 Balsam Street ("Balsam Property"); and

b) four lots in Burnaby containing retail and office buildings having civic addresses 5501 Kingsway and 6582 Denbigh Avenue ("Burnaby Property") owned by C&M;

(collectively the "Properties").

[7] The plaintiffs' primary claim is for breach of contract. In the Amended NOCC, they plead that they entered into two separate oral joint venture agreements with the defendants—one for each of the Properties. The material terms for each of the alleged oral joint venture agreements are substantively identical. The plaintiffs allege that they provided various services in respect of the Properties pursuant to the alleged oral joint venture agreements, including construction, development, renovations, tenant improvement and management services.

[8] In respect of the Balsam Property, the plaintiffs plead the following material facts:

a) in 2012, they entered into a joint venture with the defendants for the purpose of making improvements to, and managing the leasing of, the Balsam Property to maximize rental revenue and the property value (the "Balsam Joint Venture"): Amended NOCC at para. 13(a);

b) they provided services related to the improvement of the Balsam Property, including demolition, construction and renovation work (the "Improvement Services"), in exchange for compensation based on time and expense: Amended NOCC at paras. 13(b) and (c);

c) they performed the Improvement Services competently and to a good and workmanlike standard, which caused an increase in the value of the Balsam Property: Amended NOCC at paras. 16–17;

d) they provided services related to the management of leasing the Balsam Property, including coordinating tenant improvements (the "Leasing Services"), in exchange for compensation by way of sharing in the profits from leasing the units in the Balsam Property and any increase in the value of that property in the event it was sold: Amended NOCC at paras. 13(d) and (e);

e) Oikon issued an invoice in the amount of $22,257.50 for the Improvement Services (the "Balsam Invoice"): Amended NOCC at para. 18; and

f) in breach of the Balsam Joint Venture agreement, the defendants failed to pay the Balsam Invoice and purported to terminate the Balsam Joint Venture without compensating Oikon for the increase in value to and/or the profits from the Leasing Services in accordance with the joint venture agreement: Amended NOCC at paras. 19–20, 32.

[9] With respect to the Burnaby Property, the plaintiffs plead that in January 2019, they entered into a second joint venture with the defendants on essentially the same terms as the Balsam Joint Venture for the purpose of making improvements to and managing leasing of that property (the "Burnaby Joint Venture"): Amended NOCC at paras. 24–25. The plaintiffs plead that they provided the same Improvement Services and Leasing Services for the Burnaby Property as they did for the Balsam Property in exchange for compensation based on time and expense and a share in the increase in value of the Burnaby Property, respectively: Amended NOCC at paras. 25, 28, 30.

[10] The plaintiffs plead that Oikon issued two invoices totalling $122,713.50 for the Improvement Services provided for the Burnaby Property (the "Burnaby Invoices"): Amended NOCC at para. 29. In breach of the Burnaby Joint Venture agreement, the defendants allegedly failed to pay the Burnaby Invoices and purported to terminate the Burnaby Joint Venture: Amended NOCC at paras. 31, 33.

[11] Finally, the plaintiffs plead that it was an express or implied term of both joint venture agreements that "if C&M terminated [the Burnaby or Balsam Joint Ventures] it would pay out to Oikon its share of the increased value and the profits from the leasing of [the Balsam or Burnaby Properties]": Amended NOCC at paras. 14, 26.

[12] In addition to the contractual claim, the plaintiffs also advance a claim in unjust enrichment, pleading as follows in Part 1 of the Amended NOCC:

> 34. In the alternative, C&M was enriched by Oikon's and Economos's provision of the Balsam Improvement Oikon Services, the Balsam Leasing Oikon Services, the Burnaby Improvement Oikon Services, and the Burnaby Leasing Oikon Services, and Oikon and Economos suffered a corresponding deprivation for which there is no juristic reason.
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> 35. Damages would be an inadequate remedy for the breach of the Balsam Joint Venture and the Burnaby Joint Venture and so Economos and Oikon are entitled to a constructive trust over the Balsam Property and the Burnaby Property.

[13] In terms of remedy, the plaintiffs seek, at first instance, judgement for the Invoices and damages for breach of the alleged joint venture agreements: Amended NOCC at paras. 36–37. Alternatively, they seek damages for unjust enrichment, CPLs against the Properties, and a constructive trust over the Properties: at paras. 39-41. Accordingly, contemporaneously with the filing of the Amended NOCC, on September 21, 2023, the plaintiffs filed the five CPLs against the Properties.

[14] The defendants deny entering into joint venture agreements with the plaintiffs for either of the Properties. They say that from time to time, they would request that Mr. and Ms. Economos provide certain real estate and construction related services for the Properties, but not pursuant to any joint venture or other contractual arrangement. The defendants plead that the plaintiffs have been compensated, excessively so, for the work they performed.

Analysis

Legal Framework: *LTA,* s. 215

[15] Section 215(1) of the *LTA* provides that "[a] person who has commenced ... a proceeding, and who is (a) claiming an estate or interest in land ... may register a certificate of pending litigation against the land ...".

[16] The issue to be determined on this application is thus whether the Amended NOCC discloses a claim to an interest in the Properties, as required by s. 215(1) of the *LTA*: *Batth v. Sharma,* 2024 BCCA 29 at para. 22, citing *Xiao v. Fan*, 2018 BCCA 143 at para. 31.

[17] A party's entitlement to a CPL must be founded on the state of the pleadings when it was registered. A CPL cannot be maintained when the pleadings were inadequate to disclose a claim to an interest in land at the time the certificate was filed: *Batth* at para. 8, citing *Bilin v. Sidhu,* 2017 BCCA 429 at para. 62. Where the pleadings are incapable of supporting a claim to an interest in land, the CPL is cancelled by exercise of the court's inherent jurisdiction with immediate effect, because it was improperly registered from the start: *GMC Properties Inc. v. Rampart Estates Ltd*., 2023 BCCA 172 at para. 40 [*GMC*].

[18] A party seeking to cancel a CPL on the basis that the opposing party does not claim an interest in land has two options. First, they can bring the application pursuant to s. 215(1) asserting that the pleading does not claim an interest in land. An application to cancel a CPL under s. 215 is based on the pleadings; the court does not analyze the merits of the claim. The question is whether the facts pleaded, assuming they are true, are capable of supporting a claim to an interest in land: *GMC* at para. 41. In addition or alternatively, where a party asserts that there is no merit to the claim of an interest in land, they can apply for summary dismissal under Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009: *Batth* at para. 16, citing *Xiao* at paras. 13, 22–27.

[19] The defendants opted to pursue the first of these two options. They seek to have the CPLs cancelled under s. 215 of the *LTA*. There is no application for summary judgment before me. Accordingly, while the defendants at times directed their submissions to the merits of the plaintiffs' claim, the merits are not relevant for present purposes and I make no findings in that respect.

[20] Evidence is not considered on an application to cancel a CPL for non-compliance with s. 215 of the *LTA*: *GMC* at para. 41. An interest in land must be established through the pleadings. The notice of civil claim is considered as a whole, assuming the pleaded facts are true, to determine whether it pleads facts capable of supporting an interest in land: *Batth* at para. 30; *GMC* at para. 41. If the facts pleaded, if true, would not give rise to an interest in land, then they are incapable of supporting such a claim and the pleading will not meet the threshold criterion under s. 215: *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd*., 2019 BCCA 357 at para. 39 [*Yi Teng*].

[21] The defendants assert that I am not required to "blind myself" to the uncontroverted facts that go to the root of the claim and should, therefore, consider the evidence which they say establishes that the corporate plaintiff did not exist at the material times and therefore could not have entered the joint venture agreements as and when alleged. I am not persuaded that this is the proper approach under s. 215. The weight of the recent jurisprudence is clear that the court does not analyze the merits of the claim or consider evidence on an application under s. 215: *GMC* at para. 41; *Xiao* at para. 27; *Yi Teng* at para. 36; *Batth* at para. 17; *Wu v. Xiao*, 2021 BCSC 1692 at paras. 29–30.

[22] Nor am I persuaded that an exception arises where the facts are uncontroverted. In *Porter v. Porter*, 2023 BCSC 2181, the Court set out certain background facts to provide context, but made clear that in determining the application, any facts that were not set out in the pleadings were disregarded: para. 8. Considering evidence on an application under s. 215—even if uncontroverted—would be contrary to the binding authorities outlined above confirming that an

application under s. 215 proceeds on the basis of the pleadings alone. If there are uncontroverted facts that reveal that there is no genuine issue for trial in respect of the plaintiffs' claim for an interest in land, then that evidence can be properly put before the court on an application for summary judgment under Rule 9-6.

Does the Amended NOCC plead a claim to an interest in land?

[23] The defendants characterize the plaintiffs' claim as being purely monetary in nature because they seek damages for breach of the alleged joint venture agreements—in other words, a monetary claim for the plaintiffs' share of leasing revenues and future profits in the event that the Properties are sold. However, the defendants' position ignores the fact that the plaintiffs also plead a claim in unjust enrichment. That is the cause of action they rely on to support their claim for a remedial constructive trust over the Properties.

[24] The whole of the Amended NOCC must be considered to determine whether the plaintiffs plead a claim to an interest in land: *Batth* at para. 30. Accordingly, I decline to limit my analysis to the plaintiffs' claim for breach of the alleged joint venture agreements as the defendants suggest. I also disagree that the plaintiffs' entitlement to a constructive trust must arise from the alleged terms of the alleged joint venture agreements for the CPLs to be properly registered.

[25] A constructive trust is sufficient to sustain the registration of a CPL: *Memphis Blues BBQ International Ltd. v. P.K. Jonson Inc*., 2024 BCSC 497 at para. 29 [*Memphis Blues*]; citing *Nouhi v. Pourtaghi,* 2019 BCSC 794 at para. 20. Where an interest in land is claimed based on a constructive trust, the question on an application to cancel a CPL is whether a constructive trust is a possible remedy: *Memphis Blues* at para. 30. A remedial constructive trust is available to remedy unjust enrichment: *Memphis Blues* at para. 34, citing *BNSF Railway Company v. Teck Metals Ltd.,* 2016 BCCA 350 at paras. 55–56 [*BNSF*].

[26] The first question is therefore whether the plaintiffs' clause of action in unjust enrichment is properly pleaded. If so, then I must also consider whether the plaintiffs have pleaded the additional criterion necessary to claim a remedial constructive trust

over the Properties, namely: (a) a causal connection or nexus to the subject property; and (b) that damages would be inadequate: *Nouhi* at para. 26. However, recent jurisprudence suggests pleading the inadequacy of damages may no longer be an immutable requirement: see e.g. *Batth* at paras. 34–35; *Treasure Bay HK Limited v. 1115830 B.C. Ltd*., 2024 BCSC 294 [*Treasure Bay*].

(a) Does the Amended NOCC plead a claim in unjust enrichment?

[27] The elements of an unjust enrichment claim are well-settled. The plaintiffs must establish the following three elements: (a) the defendant was enriched; (b) the plaintiff suffered a corresponding deprivation; and (c) the absence of a juristic reason for the enrichment: *Kerr v. Baranow,* 2011 SCC 10 at para. 32; *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 85.

[28] The plaintiffs plead that they performed the Improvement and Leasing Services for each of the Properties and were not compensated for their work. On that basis, the plaintiffs say that the defendants were enriched and they suffered a corresponding deprivation for which there is no juristic reason: Amended NOCC at para. 34. The plaintiffs' cause of action in unjust enrichment thus arises from the work they provided at and in relation to the Properties. Assuming the facts pleaded to be true, I am satisfied that the plaintiffs have adequately pleaded a claim in unjust enrichment: see e.g. *Nouhi* at paras. 44–46.

[29] In so concluding, I reject the defendants' submission that the use of the words "pay out" in para. 14 of the Amended NOCC shows that the plaintiffs' claim is solely monetary in nature and therefore a monetary remedy is sufficient. The allegation that the defendants would "pay out" Oikon's share of the increase in value in the Properties is pleaded as an express or implied term of the alleged joint venture agreements. It has no bearing on the plaintiffs' claim for unjust enrichment resulting from them having provided the Improvement and Leasing Services for the Properties.

(b) Does the Amended NOCC plead a nexus to the Properties?

[30] The Amended NOCC pleads that the defendants were unjustly enriched by the construction, demolition, renovation and tenant improvement work that the plaintiffs performed at the Properties, for which they have not been paid: Amended NOCC at paras. 13(b), 17, 25(b), 28, 34.

[31] In this respect, the plaintiffs' pleadings are akin to those which have been found sufficient to establish the necessary nexus in other instances. For example, in *Nouhi*, the Court found that a pleading that the defendants used the plaintiff's funds to purchase, service and maintain the subject properties satisfied the causal connection or nexus criteria for a remedial constructive trust: at para. 48. Here, the Amended NOCC expressly pleads that the plaintiffs performed work for both Properties that caused the value of the Properties to increase. Assuming these pleaded facts to be true, I find that these allegations satisfy the requirement to plead a sufficient causal connection or nexus between the plaintiffs' contributions and the properties that they seek to have impressed with a remedial constructive trust.

[32] The defendants advanced multiple grounds on which they say the plaintiffs' pleadings are insufficient, none of which I find persuasive. First, the defendants say the required nexus is lacking because the plaintiffs do not plead that the Leasing Services generally, or the work reflected in the Balsam and Burnaby Invoices specifically, caused an increase in the value of the Properties. I do not accept that submission because it is based on an overly narrow construction of the Amended NOCC that ignores the express pleading that the Improvement Services were "related to improvement of" the Properties and caused them to "significantly increase in value": Amended NOCC at paras. 13(b), 17, 25(b), 28. Such an approach is similarly inconsistent with the jurisprudence: see e.g. *Batth* at para. 30.

[33] Regardless, the contributions to a property that may result in it being impressed with a constructive trust are not limited to those which "improve" a property. As noted in *Kerr,* a constructive trust may be impressed on a property where a plaintiff can "demonstrate a link or causal connection between their

contributions and the acquisition, preservation, maintenance or improvement of the disputed property": para. 50. The focus is on whether the contributions have a "clear proprietary relationship" to the property, including through direct contributions of labour. If so, a constructive trust can be impressed on that share of the property proportionate to the unjust enrichment: *Kerr* at paras. 50–51.

[34] Nor do I find the defendant's submission that the nexus between the Properties and the plaintiffs' contributions is insufficient because the value of the plaintiffs' work, as reflected by the dollar value of the Invoices, is *de minimis*. In this respect, the defendants rely on *BNSF* to assert that a minor or indirect link will not suffice; the plaintiffs must demonstrate a "sufficiently substantial and direct" link between their contributions and the Properties.

[35] The defendants' submission is misdirected because the issue on this application is whether an interest in land has been claimed, not whether it can be proved: *Memphis Blues* at para. 25. Moreover, neither *Kerr* or *BNSF* suggest that a plaintiff is required to demonstrate a substantial and direct link on the evidence at this stage of the proceeding, or that on an application under s. 215 of the *LTA*, the Court ought to engage in an analysis of whether the plaintiffs' contributions in comparison to the value of the subject property are *de minimis*. This would require recourse to the evidence to quantify and compare the value of a plaintiff's alleged deprivation to that of the subject property to determine whether their contribution is *de minimis* or not. The practical effect of this submission is to invite the Court to embark on a merits-based analysis that is not permitted under s. 215.

[36] I am therefore satisfied that the plaintiffs have pleaded a sufficiently substantial and direct causal connection or nexus between their contributions and the Properties.

(c) Does the Amended NOCC plead inadequacy of damages?

[37] The second criterion outlined in *Nouhi* for the imposition of a remedial constructive trust is that damages would be inadequate. Paragraph 35 of the

Amended NOCC pleads that damages are inadequate for breach of the joint venture agreements, but does not plead why that is alleged to be the case.

[38] *Nouhi* has been frequently cited as authority for the proposition that inadequacy of damages must be pleaded. However, recent decisions call into question the immutability of the requirement that inadequacy of damages must be pleaded, failing which a CPL will be cancelled.

[39] First, in *Batth*, the Court of Appeal questioned the mandatory nature of the requirement to plead inadequacy of damages. The appellants relied on *BNSF* to assert that the inadequacy of damages must be pleaded; however, Justice Skolrood was not convinced that this was required:

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

[40] In *Treasure Bay*, this Court considered *BNSF* and *Batth,* among other decisions*,* and concluded that there is no absolute rule that a plaintiff must plead the inadequacy of damages to sustain a CPL under s. 215: at para. 111. In *Treasure Bay*, the plaintiffs did not plead that damages were an inadequate remedy, but Justice Walker concluded that this failure was not fatal, reasoning as follows:

> [111] Do these cases [*Nouhi*, *1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP,* 2020 BCSC 1435, and *NRI Solutions Ltd. v. Chohan*, 2022 BCSC 2485, among others] establish an absolute pleadings rule currently exists in the common law in this province? In my opinion, guided by the decisions in *Batth*, *Save-A-Lot 39*, *BNSF*, and the Supreme Court of Canada's decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013

> SCC 57 (discussed, e.g., in *Save-A-Lot 39*), they do not. Much depends on the specific pleading in issue when looked at as a whole.
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> …
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> [114] In the case at bar, the nexus between the use of GMIH's funds constituting the Haro Loans and the Haro Property is pleaded in the NOCC. So is the claim for a remedial constructive trust in respect of those loan proceeds on the basis that they were used to acquire the Haro Property. The nexus and referential property requirements discussed in *Pro-Sys*, *BNSF*, and *Batth* are met. It must also not be overlooked that damages are not sought in the NOCC against the Limited Partnership, Haro GP or Harlow.
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> …
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> [116] Accordingly, I reject the applicants' submission that the CPL must be discharged on the basis that the NOCC does not plead that damages are an insufficient or inappropriate remedy.

[41] *Batth* and *Treasure Bay* are also consistent with *BNSF*, where the Court of Appeal rejected the proposition that an “immutable rule” exists that requires a plaintiff to demonstrate in its pleadings—without the advantage of evidence or findings of fact—that a monetary award would be inadequate or inappropriate to maintain a claim for a constructive trust: *BNSF* at para. 14; see also *Save-A-Lot Holdings Corp. v. Christensen,* 2022 BCCA 39 at para. 14. As Justice Newbury reasoned in *BNSF*:

> [3] The defendants' success in having portions of the plaintiff's Amended Notice of Civil Claim struck out in this case depended on the drawing of absolute lines and the adoption of unequivocal rules of law by the chambers judge - a rule that the substantive constructive trust has been wholly superseded in Canada by the remedial constructive trust developed here in the 1980s and 1990s; a rule that constructive trust may be imposed only in two situations and not otherwise; a rule that every constructive trust takes effect on the date of judicial pronouncement; and a rule that a plaintiff must in its pleadings, and without the advantage of evidence or findings of fact, demonstrate that a monetary award would be inadequate or inappropriate and point to "identifiable property" to which it contributed, before it may seek a declaration of constructive trust founded on a valid cause of action.
>
> [4] As will be explained below, it is my view that none of these generalities is an immutable rule and that, as suggested by the majority in *Soulos v. Korkontzilas* [1997] 2 S.C.R. 217, the existence of constructive trust as a remedy in two types of situations does not negate the availability of the substantive constructive trust in other circumstances. Notwithstanding the prevalence in Canada of the remedial constructive trust, it is open to a Canadian court to recognize a substantive constructive trust; to do so outside the categories of breach of fiduciary duty and unjust enrichment; and to declare a constructive trust retrospectively. Further, there are circumstances

> in which a plaintiff may satisfy the two criteria for the finding of a constructive trust - i.e., demonstrate that a monetary award would be inadequate and identify property to which the plaintiff contributed in some manner - in the course of discoveries or trial, or be able to trace its funds into a mixed account or elsewhere, once the defendant's liability has been established. Thus it may be incorrect to rule, before any facts have been found, that a constructive trust is "bound to fail" on the basis that the two criteria have not been satisfied in the plaintiff's pleading.
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> [Emphasis added.]

[42] In so concluding, Newbury J.A. referred to the fact that a constructive trust arises once a right to relief has been established as supportive of the suggestion that it may therefore be inappropriate to strike a claim to proprietary relief at the pleadings stage:

> [66] La Forest J.'s reference to the fact that a right to a constructive trust "can only arise once a right to relief has been established" is important for our purposes. It suggests that it may be inappropriate to strike out a claim to proprietary relief prior to the determination of the cause of action itself. The same may be true in respect of the requirement that damages provide an inadequate remedy: why should this question be decided before the exact parameters of the claim (and, perhaps, the defendant's liability) have been determined?
>
> [Emphasis added.]

[43] *BNSF* also highlights the difficulties that may arise in attempting to plead the material facts in support of an assertion that damages are inadequate at the early stages of an action, when all the facts are not yet known and may change over the course of the litigation:

> [68] I know of no reason why the same approach would not be taken to the question of whether a monetary remedy would be adequate where a constructive trust is also pleaded. Aside from the consideration that all the facts are not known until the evidence is in, the facts may change during the litigation. A defendant may find itself in bankruptcy or insolvent, making a monetary award against it much less "appropriate" than a proprietary one. (This, of course, depends on the interpretation of the word "trust" in s. 67(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.) The defendants in the case at bar purported to forestall any argument that a monetary remedy would be inadequate by reminding the chambers judge that CN is a large company, but it does not follow that CN will be perpetually solvent. In any event, it is arguable that the court should not be required to reach a determination as to whether the conditions for constructive trust have been met at the early stages of the proceeding in this case. Put another way, it is not "plain and obvious" that the plaintiff would as a matter of law be unable to

> satisfy the two prerequisites for a constructive trust should it succeed in establishing unjust enrichment. These conditions require evidence and factual findings. They cannot at this stage be said to be bound to fail as a matter of law.

[44] I am cognizant that the recent jurisprudence is not unanimous in on this issue. For example, in *Memphis Blues*, the Court followed *Nouhi* and concluded that the claim did not disclose an interest in land because it did not state that monetary damages were inadequate: paras. 46–47. However, neither *Batth* nor *Treasure Bay* appear to have been brought to the Court's attention. Regardless, *Memphis Blues* is distinguishable because unlike here, there was no pleading that damages were inadequate. *Nouhi* is likewise distinguishable on this basis.

[45] *Cape Group Management Ltd. v 0793231 B.C. Ltd.,* 2024 BCSC 493 [*Cape Group*], recognizes the recent trend in the jurisprudence, noting both the frequency with which *Nouhi* has been cited on this point, and the conclusion in *Treasure Bay* that the suggestion that a plaintiff must specifically plead inadequacy of damages in order to sustain a CPL had been subsequently rejected by the Court of Appeal: *Cape Group* at paras. 39–41. The Court interpreted *Treasure Bay* as requiring the pleadings to be read as a whole to determine if the plaintiff is truly claiming an interest in land. This interpretation is, in my view, consistent with *Batth*.

[46] While the CPL was cancelled in *Cape Group*, it was because the pleading did not allege a sufficient connection between the plaintiffs' contributions and the subject property, not because the plaintiffs had not pleaded that damages were inadequate. The Court found that pre-construction work done to facilitate a development project on the subject property that never went ahead did not give rise to a claim to an interest in land: para. 42. *Cape Group* is therefore also distinguishable from the case at bar because here, the plaintiffs claim that they did in fact perform demolition, construction, renovation and tenant improvement work at the Properties.

[47] Considering the foregoing and following *Batth* and *Treasure Bay*, there is no absolute or immutable rule that inadequacy of damages must be pleaded. The failure to plead the inadequacy of damages will not necessarily result in cancellation

of a CPL in circumstances where a plaintiff has pleaded a link between their contribution and the subject property said to be impressed with a constructive trust. The pleadings must be considered as a whole to determine whether they are sufficient to sustain a claim to an interest in land, as required by s. 215 of the *LTA*.

[48] As noted above and considering the Amended NOCC as a whole, I conclude that it pleads a claim to an interest in the Properties because it pleads that the defendants have been unjustly enriched on account of the services in the nature of construction and other work that the plaintiffs provided at the Properties. The plaintiffs have thus pleaded a link between their contributions and the specific properties said to be impressed with a constructive trust, as contemplated in *Batth*.

[49] Alternatively, in the event that a pleading that damages are inadequate is required, the plaintiffs have met this requirement by way of para. 35 of the Amended NOCC, which expressly pleads that damages would be an inadequate remedy for breach of the joint venture agreements. This type of pleading has been found sufficient on an application under s. 215: see e.g. *Wu* at para. 29.

[50] While the plaintiffs do not also expressly plead that damages would be an inadequate remedy for unjust enrichment, this is not, in my view, fatal. This is because that requirement is not an immutable rule, and, in any event, the unjust enrichment claim arises from the same material facts that are alleged to give rise to a breach of the joint venture agreements: the plaintiffs contributed to the Properties by performing work for which they have not been compensated.

[51] Nor does the fact that the plaintiffs seek both damages and a constructive trust as remedies for unjust enrichment negate the plea that damages are inadequate. The plaintiffs are entitled to elect between these two remedies, and are not required to do so until they are able to make an informed choice prior to the pronouncement of final judgment: *BNSF* at paras. 66–68.

[52] Finally, I reject the defendants' proposition that the plaintiffs are required to demonstrate why damages are inadequate to defeat an application to cancel a CPL

under s. 215 of the *LTA*. As noted in *Memphis Blues*, the question is whether an interest in land has been claimed, not whether it can be proved: at para. 25. *Nouhi* is to similar effect in noting that the pleading and *eventual proof* of the inadequacy of damages is a precondition to the *impression* of a remedial constructive trust: at para. 49. Moreover, as noted in *BNSF*, the reason why damages are inadequate may not be known at the early stages of litigation.

[53] To the extent that the defendants rely on *Drein v. Puleo*, 2016 BCSC 593 at para. 9, to suggest that the plaintiffs must establish on the evidence that a monetary award is insufficient, that decision has, in my view, been overtaken by more recent authority to the contrary, including *Memphis Blues* and *Nouhi*.

[54] In the result, I find that the Amended NOCC pleads a claim to an interest in land. The plaintiffs have therefore established the necessary precondition to registration of the CPLs under s. 215 of the *LTA*.

Conclusion

[55] For the foregoing reasons, the defendants' application to cancel the CPLs under s. 215 of the *LTA* is dismissed.

[56] The plaintiffs are entitled to their costs of this application as costs in the cause, at Scale B.

"Hughes J."