

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Batth v. Sharma*,
2024 BCCA 29

Date: 20240126
Docket: CA48528

Between:

**Navdeep Singh Batth, Rupinder Singh Batth also known as Ron Batth,
Can-Asia Immigration Consultancy Services,
Can-Asia Immigration Consultants Canada Inc., and
Intercontinental Global Immigration Solutions Corporation**

Appellants
(Defendants)

And

Rakesh Sharma

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
September 6, 2022 (*Sharma v. Lifetec Construction Group Inc.*, 2022 BCSC 1569,
New Westminster Docket S236060).

Counsel for the Appellants: K. Rejminiak

Counsel for the Respondent: R.S. Atwal
G. Gautam, Articled Student

Place and Date of Hearing: Vancouver, British Columbia
December 15, 2023

Place and Date of Judgment: Vancouver, British Columbia
January 26, 2024

Written Reasons by:

The Honourable Justice Skolrood

Concurred in by:

The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Appeal from an order dismissing the appellants' application to cancel two certificates of pending litigation ("CPLs"). The appellants contend the chambers judge erred in refusing to cancel the CPLs because the respondent failed to plead a claim to an interest in the properties, a necessary pre-condition under s. 215(1) of the Land Title Act, R.S.B.C. 1996, c. 250. The appellants say the respondent's pleading simply claims damages, CPLs, and a tracing, but claims no interest in the subject properties.

Held: Appeal dismissed. Read as a whole, the notice of civil claim discloses a claim to an interest in the subject properties. The respondent pleads that he paid money based on fraudulent misrepresentation and that the money was wrongly used towards acquiring and/or increasing equity in the subject properties. These allegations support his pleaded claim for a substantive constructive trust which is sufficient to maintain the filing of the CPL's.

Reasons for Judgment of the Honourable Justice Skolrood:**Introduction**

[1] The appellants, Navdeep Singh Batth and Rupinder Singh Batth, appeal from the dismissal of their application seeking to cancel two certificates of pending litigation (“CPLs”).

[2] The respondent, Rakesh Sharma, filed a notice of civil claim (“NOCC”) on February 16, 2021 naming a number of parties as defendants including the Batths, Lifetec Construction Group Inc. (“Lifetec”), Can-Asia Immigration Consultancy Services (“Can-Asia Partnership”), Can-Asia Immigration Consultants Canada Inc. (Can-Asia Inc.) (together “Can-Asia”), and Intercontinental Global Immigration Solutions Corporation (“ICGS”).

[3] The NOCC claimed a CPL against two properties. One property is owned by the Batths (“the Batth Property”) and the other is owned by ICGS (the “ICGS Unit”) (together, the “Properties”). Mr. Batth is a beneficial shareholder and the operating mind of ICGS.

[4] The appellants brought an application dated July 26, 2021 seeking various orders, including to cancel the CPLs and to strike the claims against Can-Asia. The Chambers judge dismissed the application.

[5] The appellants submit that the judge erred in concluding that the NOCC advanced a claim to an interest in property, which is a precondition to the filing of a CPL pursuant to s. 215(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA]. In their factum, the appellants also allege that the judge erred in not striking the claim against Can-Asia for failure to disclose a cause of action.

[6] This appeal originally came on for hearing on October 10, 2023, however it was adjourned on the basis that the respondent had not served his factum on the appellants. At that time, the Court asked the respondent whether the NOCC could be amended to address the deficiencies alleged by the appellants, particularly since

the respondent raised the spectre of possible amendments to the NOCC in his factum. The Court suggested to counsel that if amendments were to be proposed, notice should be given to the appellants and appropriate steps taken to advise the division hearing the appeal and, if necessary, to file amended factums.

[7] On November 14, 2023, pursuant to a consent order executed by the parties, the respondent filed an amended appeal record that included a proposed amended NOCC (“ANOCC”). The parties did not file amended factums to address the ANOCC. However, at the outset of the hearing before us, counsel for the appellants acknowledged that the respondent was entitled to file the ANOCC pursuant to Rule 6-1(1) of the *Supreme Court Civil Rules*. However, counsel took the position that the adequacy of the ANOCC, at least as it relates to the claims against Can-Asia, should be dealt with in the Supreme Court once the pleading has been filed. Counsel therefore advised us that the appellants were not proceeding with their appeal of the dismissal of their application to strike the claims against Can-Asia.

[8] The appellants did proceed with their appeal of the judge’s dismissal of their application to cancel the CPLs. As counsel for the appellants noted, the adequacy of the pleadings alleged to support a CPL must be assessed on the date which the CPL was filed and any deficiencies in those pleadings cannot be salvaged by subsequent amendments: *Bilin v. Sidhu*, 2017 BCCA 429 at para. 62. The appellants’ submissions on the appeal therefore focussed on the original NOCC.

The NOCC

[9] The central allegations in the NOCC are that the Batths approached Mr. Sharma to make an investment in Lifetec in January 2020, and Mr. Sharma eventually agreed to provide a \$100,000 loan to Lifetec, which he provided by bank draft. He claims that the Batths told him they were directors and/or operating minds of Lifetec, and that they also personally guaranteed the loan. He claimed it was to be a six-month loan, and that it has not been repaid despite his demands on Lifetec and the Batths.

[10] Mr. Sharma advances a number of additional allegations: that the Batth's wrongfully converted and misappropriated the loan monies for their own personal use or for the use of ICGS, the particulars of which include ICGS wrongfully applying a portion of the loan monies to acquire or increase its equity in the ICGS Unit, and the Batths wrongfully applying a portion of the loan monies to acquire or increase their equity in the Batth Property. Mr. Sharma pleads that by reason of these actions, ICGS holds its interest in the ICGS Unit, and the Batths hold their interest in the Batth Property, in trust and for the benefit of Mr. Sharma (NOCC paras. 27–30).

[11] Mr. Sharma also pleads at para. 31 of the NOCC:

31. Further, the Plaintiff seeks a tracing of the Loan monies and any profit made by the Batths, ICGS, Can-Asia Partnership and/or Can-Asia Inc. through the use of the Loan Monies should be disgorged and paid to the Plaintiff.

[12] Mr. Sharma further pleads that the Batths and Lifetec have been unjustly enriched and that they do not have the ability to personally pay an award of damages (NOCC paras. 32–34).

[13] Part 2 of the NOCC sets out the "Relief Sought" in the claim, in accordance with the required forms for notices of civil claim. Mr. Sharma pleads at Part 2:

PART 2: RELIEF SOUGHT

1. Wherefore the Plaintiffs claim against the Defendants for:

- (a) judgment in the amount of \$100,000, including contractual interest at the rate of 10% compounded monthly from February 2020 to the date of the judgement, alternatively, pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*;
- (b) in the alternative, damages for breach of contract;
- (c) further and in the alternative, damages for fraudulent misrepresentation against the Batths;
- (d) in the alternative, damages for negligent misrepresentation against the Batths;
- (e) further, punitive and aggravated damages;
- (f) in the further alternative, damages for unjust enrichment;
- (g) a certificate of pending litigation against the [Batth Property];

- (h) a certificate of pending litigation against the ICGS Unit;
- (i) damages for wrongful conversion and misappropriation against the Batths;
- (j) tracing of the Loan Monies and disgorgement of any profits made from wrongful use of the Loan Monies;
- (k) costs of this action on a solicitor and own client basis; and
- (l) such further and other relief as to this Honourable Court may deem just.

[Emphasis added.]

[14] Part 3 of the NOCC sets out the “Legal Basis” for the claim. Mr. Sharma pleads the *Negligence Act*, R.S.B.C. 1996, c. 333 and general principles of contract law. He also pleads “further and in the alternative” that “the defendants have been unjustly enriched”. Lastly, he pleads generally that:

7. The Plaintiffs rely on the common law of conversion, trusts, tracing, debt, negligence, damages and costs.

Relevant Legislation

[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] Parties seeking to cancel a CPL on the basis it does not claim an interest in land have two options. They may bring the application pursuant to s. 215(1) based on the pleading, asserting that the pleading does not claim an interest in land, in which case the matter will be determined on the pleading alone. Or, where the applicants assert there is no merit to the claim of an interest in land, they may apply for summary dismissal of the claim, based on the evidence. If they succeed, the CPL will be cancelled pursuant to s. 254 of the *LTA*: see *Xiao v. Fan*, 2018 BCCA 143 at paras. 13, 22–27.

[17] Here the application was based on the pleading, i.e., s. 215, and so the only question was whether the pleading disclosed a claim to an interest in the Properties.

Chambers Judgment

[18] The chambers judge reviewed the claims as pleaded by Mr. Sharma in the NOCC relating to the alleged misuse of the funds provided by Mr. Sharma. The judge concluded that the NOCC pleads:

- a) a fraud claim against the Batths, alleging that through their fraud they caused Mr. Sharma to provide \$100,000 to Lifetec (RFJ at para. 16);
- b) a claim in conversion against ICGS based on ICGS using all or some of the \$100,000 fraudulently obtained by the Batths to acquire or increase its equity in the ICGS Unit, knowing that the funds would have come from the Batths' wrongdoing (RFJ at paras. 17, 19);

[19] On the question of whether the NOCC advances a claim to an interest in land, as required to support the two CPLs, the judge held:

[27] The plaintiff in the NOCC does not specifically describe the defendants' actions as giving rise to a "substantive constructive trust". That said, I am satisfied that the NOCC gives rise to a substantive constructive trust: NOCC, paras. 21 to 25 and 27 to 30.

[28] I read the NOCC as pleading that the Batths through fraud obtained \$100,000 from the plaintiff, which they then used to acquire or increase their equity in the Batth [Property]. Through ICGS (a corporation they controlled), the Batths also used the \$100,000 to acquire or increase the equity in the ICGS Unit. Lifetec and ICGS were no more than the Batths' instruments of subterfuge.

[20] The judge concluded:

[34] In the case at bar, the pleaded trust (a substantive constructive trust) arose immediately upon the pleaded fraud by the Batths. Through the Batths, ICGS would have known of the fraud. I find that the NOCC meets the threshold criterion of serving to plead an interest in land with respect to each of the subject properties and supports, without more, the two CPLs.

Issue on Appeal

[21] The sole issue on appeal is whether the judge erred in concluding that the NOCC disclosed a claim to an interest in each of the Properties sufficient to support the filing of the CPLs.

[22] This issue involves a question of law. Specifically, it is a question of law whether the pleadings disclosed a claim to an interest in the Properties, as required by s. 215(1) of the *LTA: Xiao* at para. 31. As such, the judge’s decision is reviewable on a standard of correctness: *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172 at para. 51.

Analysis

[23] The question on the application challenging the CPLs is not whether Mr. Sharma has evidence to support his claim. There are other procedures by which the appellants can challenge the merits of his claim and put Mr. Sharma to the burden of proving his claim.

[24] Rather, the question that was before the judge was whether Mr. Sharma has pleaded a claim to an interest in each of the two Properties against which he filed a CPL.

[25] On appeal, the appellants focus on the “Part 2: Relief Sought” portion of the NOCC, which is set out above at para. 13 of these reasons. Nowhere in that portion of the NOCC does Mr. Sharma actually plead that he is entitled to an interest in the Properties. Rather, he claims damages, CPLs, and a tracing.

[26] I agree that a claim for damages for wrongful conversion is not a claim to an interest in property.

[27] Equally, a claim to a CPL is not itself a claim to an interest in property.

[28] That leaves, in Part 2, para. 1(j), the claim to a “tracing” of the loan monies and disgorgement of any profits made from wrongful use of the loan monies. The question is whether that pleading amounts to a claim to an interest in the Properties.

[29] The judge considered that the tracing claim could be read in combination with other aspects of the pleading. He relied on the allegations in Part 1 of the pleading, namely that the Batths made fraudulent misrepresentations which Mr. Sharma relied upon to make the loan and that the Batths wrongfully used a portion of the loan

monies to acquire or increase the equity in the two Properties (either their own property or the property owned by ICGS of which Mr. Batth is the operating mind), and therefore ICGS and the Batths hold their interests in the Properties in trust for the benefit of Mr. Sharma. The judge reasoned that this was a pleading of a “substantive constructive trust”, sufficient to constitute a pleading of an interest in land with respect to each of the Properties: RFJ at para. 34.

[30] I agree with the proposition that a NOCC has to be read as a whole.

[31] The law is well established that a constructive trust in respect of property, also sometimes described as an institutional or substantive constructive trust, can arise when a party fraudulently uses money provided by the plaintiff towards the payment or maintenance of the property.

[32] In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 1997 CanLII 346, the Supreme Court of Canada explained the history of the constructive trust as a proprietary remedy to correct fraudulent conduct, among other things. The Court affirmed that this remedy continues to exist in a wide variety of circumstances “where good conscience so requires”, and is not limited to unjust enrichment: see paras. 19–25, 29. See also *Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCCA 39 (Chambers) at para. 3; *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 24; *Vidcom Communications Ltd. v. Rattan*, 2022 BCSC 562 [*Vidcom*] at para. 26.

[33] *BNSF Railway* at para. 20 endorsed the description of a substantive constructive trust from *Atlas Cabinets and Furniture Ltd. v. National Trust Co.* (1990), 45 B.C.L.R. (2d) 99 (C.A.), 1990 CanLII 1312 (B.C. C.A.), where this Court said this:

A substantive constructive trust must 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.

[Emphasis added.]

[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.

[36] The appellants also assert that a plaintiff claiming a "substantive" constructive trust, must expressly used the words "substantive constructive trust" in their pleading. In this case, Mr. Sharma did not expressly include the word "substantive" in his pleadings. He simply alleged that based on the facts, the Properties were held in trust for him.

[37] The court in *Vidcom* found the fact that the word "substantive" was not expressly pleaded was *not* determinative of whether the NOCC included a claim for substantive constructive trust (at para. 28). I agree with the analysis in *Vidcom* and find that the judge in the present case did not err in relying on it.

[38] The appellants further submit that the NOCC does not adequately plead a direct link between the money provided by Mr. Sharma and the Properties over which the CPL's have been registered. Specifically, the appellants argue that the NOCC only contains bald assertions that the monies were used to acquire or increase the appellants' equity in the Properties.

[39] The appellants cite *1077708 BC Ltd. v. Agri-Grow Farm Services Ltd.*, 2019 BCSC 977 [*Agri-Grow*] where Justice Murray held:

[39] An interest in land cannot be based solely on unsubstantiated assertions with no factual- whether they ultimately are proved to be true or not- underpinning. Such an extraordinary and powerful pre-trial tool must be grounded on more than mere conjecture.

[40] *Agri-Grow* was cited with approval by Justice D. MacDonald in *Wai v. Chung*, 2020 BCSC 34 [*Wai*], at para. 21, where she similarly found that the pleadings lacked a factual foundation sufficient to support a CPL. MacDonald J. noted that the plaintiff there did not plead an interest in the subject property or any direct link between the allegedly misappropriated funds and the purchase of the property (at para. 27).

[41] *Agri-Grow* and *Wai* are distinguishable. *Agri-Grow* involved a lease dispute in which the defendants allegedly breached the lease by failing to pay the contractually required rent. The plaintiff alleged that the principal of the defendant misappropriated an unstated amount of funds from the defendant that would otherwise have gone to paying the rent and used those funds to maintain a wholly unrelated property. Justice Murray quite properly held that the pleadings lacked the factual foundation to support a CPL. There was no pleaded allegation that the defendants even held an interest in that unrelated property.

[42] The facts of *Wai* are closer to this case in that the claim alleged misappropriation of investment funds that were improperly used by the defendants to purchase personal property. However, as MacDonald J. found, the pleadings were manifestly deficient for the purpose of supporting a CPL given that no interest in the property was pleaded.

[43] In my view, the NOCC here does not suffer from the same defects. Read as a whole, the NOCC discloses a claim to an interest in the Properties. Mr. Sharma pleads that he paid money based on fraudulent misrepresentation and that money was then wrongly used towards the acquisition of, or increasing the equity in, the Properties. Mr. Sharma seeks a tracing of the loan funds and any profits made from

wrongful use of those funds. He also pleads that the Batths and ICGS would be unable to pay monetary damages. If his facts as pleaded are assumed true, they support the substantive constructive trust claim.

[44] It follows that I find no error in the judge’s conclusion that the NOCC pleads an interest in the Properties sufficient to support the filing of the CPL’s.

Disposition

[45] I would therefore dismiss the appeal.

“The Honourable Justice Skolrood”

I AGREE:

“The Honourable Mr. Justice Fitch”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”