USE AND ABUSE OF CERTIFICATES OF PENDING LITIGATION (2021 UPDATE)

by Dan Parlow[1]

The courts have emphasized that a Certificate of Pending Litigation ("CPL") is an extraordinary pre-judgment mechanism. Most commonly, where a CPL is based on an alleged estate or interest in land, it is intended solely to protect a valid claim to such an interest until the dispute can be resolved[2].

It is often said to be improper to file a CPL as leverage to secure a financial claim[3].

Since CPLs are routinely and properly filed to protect *in rem* claims, I take such judicial comments to mean that CPLs must not be filed to obtain a juridical advantage where there is no valid basis for filing them.

I have spoken at a number of seminars over the use of CPLs as a pressure tactic.

I have also frequently been retained by parties asserting and opposing CPLs, often in emergency circumstances. In fact, the CPLs can be such a central feature in these cases that the outcome of a preliminary court hearing may effectively determine the entire course of the proceedings.

AUTHORITY TO FILE

Section 215(1) of the *Land Title Act*[4] provides:

> A person who has commenced or is a party to a proceeding, and who is
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> (a) claiming an estate or interest in land, or
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> (b) given by another enactment a right of action in respect of land, may register a certificate of pending litigation against the land.

The first question in proceedings involving a CPL is inevitably whether the plaintiff is claiming an interest in land or whether a right of action in respect of land is conferred by another enactment.[5] In my experience, the most commonly referenced statutes in this regard are the *Fraudulent Conveyance Act*[6], the *Fraudulent Preference Act*[7], the *Family Law Act*[8], the *Builders Lien Act* and the *Wills and Estates Succession Act*[9].

GROUNDS TO CANCEL A CPL

In this article, I address three grounds to cancel a CPL, as well as some strategic considerations for lawyers representing clients in such proceedings. I will apply personal experiences as case studies.

An application to the court to cancel a CPL may be made under one or more of the following circumstances:

- By applying to the court under section 215 of the *Act* where the plaintiff who filed the CPL (the "CPL filer") did not have the authority to register it. If the pleadings do not support it, the CPL can be ordered cancelled *with immediate effect.*

- By applying to the Registrar of Land Titles under section 254 of the *Act*, *30 days after the relevant claim has been dismissed*. The dismissal must first be ordered by the Court, normally under Rule 9-5, 9-6 or 9-7, or at trial. However, *if an appeal has been filed the CPL will not be cancelled until all appeals have been finally disposed of*. Section 254 is therefore of limited assistance in emergency proceedings.
- By applying to the court under section 256 of the *Act*, based on hardship and inconvenience. In this case, the CPL may be cancelled *with immediate effect*. In this case, the court may impose conditions on the cancellation, such as monetary security or an undertaking to pay damages in the event it turns out cancellation was improper. Alternatively, as a condition of allowing the CPL to continue, the court may impose conditions on the CPL filer[10].

The interplay between these grounds was addressed by Fenlon J.A. in *Berthin v. Berthin*[11]:

> [44] I conclude that a judge has jurisdiction to make an order immediately cancelling a CPL when the claim does not meet the threshold requirements of s. 215, or when the property owner affected by the CPL establishes hardship or inconvenience under s. 256. A judge does not have jurisdiction to make an order cancelling a CPL when a claim is dismissed under Rules 9-5, 9-6, 9-7, or following a full trial. In those circumstances, s. 254 of the *Act* governs and an order purporting to immediately cancel a CPL cannot be given effect and should not be made. In short, when a claim underpinning registration of a CPL is dismissed, the CPL must remain on title until the requirements of s. 254 are satisfied or a subsequent application under s. 256 establishes hardship or inconvenience.

In this article I have considered fact patterns which have given rise to applications under these various headings. The criteria for establishing hardship under section 256 are beyond the scope of this article.

ADDITIONAL COUNTER-MEASURES BY DEFENDANTS SEEKING CANCELLATION

In addition to the possibility of an order cancelling a CPL, a defendant may be in a position to legitimately exert pressure on the CPL filer which can, potentially, accomplish the same objective.

In an application under section 256, if the court declines to cancel the CPL but there is enough evidence of potential loss by the defendant, the court may impose conditions on the plaintiff to maintain its CPL which can be so onerous that the plaintiff may elect instead to allow the CPL to be discharged. The key is to ensure all relevant evidence is before the court on the application; this is something which, in my experience, is almost always overlooked in the rush to apply for discharge.

That said, counsel must be particularly cautious in gathering evidence to put before the court as affidavits filed in support of or in opposition to an application to cancel a CPL at the outset of a proceeding could be used later on at trial for the purpose of impeaching a party's credibility. *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739, in which earlier affidavit evidence was found to be replete with falsifications of fact, provides a

cautionary tale[12]. At this stage, which usually pre-dates document discovery and examinations for discovery, a lawyer is not intimately familiar with all of the relevant facts at issue.

Next, defendants should consider applying for security for costs as a condition of the plaintiff continuing with its claim. Frequently, the use of shell companies in these transactions will mean that the requisite criteria will be present (corporate plaintiff without substantial unencumbered assets; non-resident plaintiff where "special circumstances" are present; or both)[13].

Again, in my experience this possibility is almost always overlooked. Frequently, plaintiffs who are only too happy to rush to file a CPL will not be prepared to post security for costs, so the CPL may come off "through the back door". It is extremely common that plaintiffs make these claims through numbered or other impecunious companies whose main or only assets may be the alleged interest giving rise to the CPL; in such cases the availability of an order for security for costs under the governing principles set out by the British Columbia Court of Appeal[14] may be a virtual certainty.

Finally, defendants should consider whether a counterclaim is available to claim damages for abuse of process for the wrongful filing of a CPL. Again, where the facts allow, a counterclaim may help encourage a plaintiff to think twice about the wisdom of maintaining its CPL in the face of potential liability should the litigation continue. I will consider this tort further, below.

PERCEIVED MOTIVATION OF THE CPL FILER

In my experience, judges and masters hearing applications to cancel CPLs may be heavily influenced by their perception of whether the person filing the CPL has sought to take undue advantage of the process.

In *Drein v. Puleo*[15] Macintosh J. stated:

> [8] Ms. Drein's position causes me to **suspect that she is not really asserting an interest in land and is instead using the CPL only as leverage to secure her financial claim** against the Puleos. **That would not be a lawful purpose** for employing a CPL (see *Drucker, Inc. v. Hong*, 2011 BCSC 905 at para. 19; see, as well, *D.K. Investments Ltd. v. S.W.S. Investments Ltd.*, [1984] B.C.J. No. 3077 (S.C.) at paragraphs 107-111, affirmed (1986), 6 B.C.L.R. (2d) 291 (C.A.)).
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> …
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> [10] A reader will infer, from what is written above, the Court's concern about a party **seeking to use a CPL as a bargaining tool to extract prejudgment payment of a financial claim.** If the CPL was allowed to remain on the terms proposed by Ms. Drein, she would be obtaining a pre-trial enforcement of her monetary claim before she has established her case. As tempting a tactic as that might appear, that is not what CPLs are intended to protect. They are designed to preserve land claims pre-trial by preventing the land from passing to innocent third parties pre-trial, thereby undermining the claim. **If the claim in essence is not for an interest in land, CPLs are not intended to be one of the weapons in a claimant's war chest.** [emphasis added]

Litigation counsel advising their clients should, prior to filing a CPL, be keenly aware of the perception factor before crafting their pleading. It can be very tempting to seize on an

opportunity to obtain a perceived advantage in time-sensitive circumstances or where the client exerts pressure, without giving full consideration to the potential implications.

Counsel for the CPL filer should always bear in mind the prospect of the court being influenced by "hot buttons" arising from the first hearing.

DEALING WITH ABUSIVE FILINGS

I have seen CPLs employed many times in cases involving subdivisions, redevelopments or ongoing construction projects. It is commonly known that lenders will not advance funds against property encumbered by a CPL. Similarly, CPLs are frequently employed as leverage in an effort to frustrate a sale. Often, the facts suggest to me that the plaintiff is taking advantage of the landowner's vulnerability, in an effort to extract a quick and favourable settlement which it otherwise could not expect.

Where a CPL is filed for an improper purpose external to the litigation itself, in addition to an application to cancel the CPL (which may include, under R. 9-5(1)(d), that the pleading is an abuse of process) the injured party (normally the landowner) may be in a position to claim damages for the tort of abuse of process. As set out in *Oei v. Hui*, 2020 BCCA 214 ("*Oei")*, "…the tort of abuse of process [is] less broad than abuse of process under Rule 9-5(1)(d)", also referred to as "the *procedural* fault of abuse of process"[16].

In *Palmer v. Palmer*, 2015 BCCA 438 ("*Palmer*"), the Court of Appeal held that the tort of abuse of process could be made out in cases where "the purpose for filing a lien or CPL or similar instrument was completely collateral to the litigation. It served no purpose other than extraneous to the litigation and realistically was substantively unsupportable". The court, at para. 51, cited with approval the following *dicta* of Fenlon J. (as she then was) in *Hundal v. Border Carrier Ltd.*[17]:

> [104] In considering whether Mr. Hundal had an unlawful or malicious purpose in filing the CPL, I set aside the question of whether the constructive trust pleaded by Mr. Hundal is Border Carrier's claim rather than his personally, and further set aside the question of whether there was any real prospect of recovery of an interest in property rather than an award of damages if unjust enrichment could be established. The question I am left with is not whether the plaintiff properly framed and pleaded his cause of action in unjust enrichment, but whether he framed his case in this way knowing that there was no basis for a claim against Mr. Bains' home and for the improper purpose of filing a CPL to inconvenience Mr. Bains and obtain an advantage in the litigation: Seville Properties Ltd. v. Coutre, et al, 2005 BCSC 1105. [emphasis in original.]

As the plaintiff had acted maliciously, damages for abuse of process were ordered.

The elements of this tort were recently considered in *Oei.* It was noted that the tort of abuse of process stands in tension with the public policy doctrine of absolute privilege (sometimes referred to as absolute immunity) which normally allows the assertion of claims without fear in litigation[18].

Although *Oei* did not involve a CPL, the court addressed the requisite elements of the tort, in part, in the context of a *lis pendens* (as a CPL was then called) in *D.K. Investments Ltd. v. S.W.S. Investments Ltd.*[19] [*D.K. Investments*], finding "the gravamen of the decision … to be that the

action was for a collateral and improper purpose because the plaintiff never held the purpose of enforcing the contract for sale of the land."

The court in *Oei* further held that the tort of abuse of process has a narrow scope, and that merely advancing a false claim, for wrongful motives, may be insufficient to establish the tort:

> [35] … The question before us is not whether intentionally false pleadings, if established, could attract opprobrium in the first action, but whether such pleadings can support a claim in tort for abuse of process by reason of the alleged knowing falsity of the allegations. **Such a claim in tort requires a pleaded purpose that is outside the ambit of the first action**, whereas procedural abuse of process is more widely discovered.
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> [36] The tort of abuse of process is narrow, **intentionally so to foreclose the spawn of litigation wherein one failed action begets another action**, which may beget another action, and so on. [emphasis added]

The court further cleared up any doubt over whether an "overt act" is a necessary constituent of the tort:

> [63] In the other named case that seems to have prompted the doubt, *D.K. Investments*, Justice Finch dealt with a **tale of deceit of a plaintiff who sued for specific performance of an agreement, registered a *lis pendens*, and filed a caveat based on the defendant owner's alleged failure to provide title to fixtures.** The defendant counterclaimed, alleging amongst other wrongs, the tort of abuse of process. Justice Finch observed that D.K. Investments' claim for specific performance alleged a failure to convey title to certain fixtures but that **the principal of D.K. Investments testified the claim for specific performance was intended to bring pressure on a *third party* to provide a release of a petroleum agreement it had with the defendant**. Although the details of all of this are not spelled out in what is a complicated narrative of shifting positions, on my understanding of the reasons and comparing this to the original formulation of the tort in *Grainger*, **this appears to be a case of steps taken to obtain a release from a third party outside the ambit of the litigation in issue**. It is true that Justice Finch did not recount the two elements described by Professor Fleming, and instead described the essence of the tort as "the misuse or perversion of the court's process for an extraneous or ulterior purpose", saying, and referring to *Guilford*, "[t]here must be a purpose other than that which the process was designed to serve" (at 339). He held, however:
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> > … The purposes behind the action were completely improper. **There has been ample overt conduct** by the plaintiff in its attempts to achieve its improper ends.
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> [emphasis added, except in indented quote in which the emphasis is in original]

The Court of Appeal in *Oei* summarized:

> [79] … I conclude that absent a reasoned basis to diverge from the law first stated in British Columbia, that the tort conceptually requires more than a collateral and improper purpose, and that the "more" is an overt act or threat.

In summary, the Court of Appeal in *Oei* , by approving the decision in *D.K. Investments*, made it clear that the filing of a CPL may, where accompanied by a collateral and improper purpose and resultant damages, give rise to the tort of abuse of process. As in *Palmer*, this will occur where "the purpose for filing a lien or CPL or similar instrument was completely collateral to the litigation. It served no purpose other than extraneous to the litigation and realistically was substantively unsupportable"[20].

This is precisely the type of scenario commented on by MacIntosh J. in *Drein*, *supra.*

In my experience, where the requisite facts may be present, an immediately filed Counterclaim can be an effective means of causing a bully plaintiff to rethink its strategy of maintaining a CPL and put the plaintiff on the defensive. It will be essential to plead the facts necessary to establish the requisite elements of the tort, namely, (a) a collateral and improper purpose, (b) an overt act in furtherance of that purpose, and (iii) damages resulting to the plaintiff from the wrongful use of the legal process.

CASE STUDIES

I will now discuss how I dealt with CPLs in two cases in 2016 and 2021. In both cases, we applied legitimate counter-pressure measures and the CPLs were discharged quickly and consensually.

2016 case study: Dhillon v. Reet Holdings Ltd[21]("Dhillon")

Dhillon was an example of a filing which might be considered abusive.

In 2016, the plaintiff filed a claim alleging that his company, SD100, owned 33.3% of the issued and outstanding shares of Gateway Travel and of a related company, Gateway Diners. Gateway Travel owned property (the "Gateway property") in Kamloops, B.C. from which Gateway Diners ran a truck stop.

The plaintiff alleged that, in 2012 and 2014, he had personally guaranteed loans from Canadian Western Bank advanced for the development of the Gateway property; and further, that in Jan. 2016, he had entered into an agreement to sell the shares of his personal holding company to defendant, Reet Holdings, the effect of which "would be that [Reet Holdings] would own 66.6% of [Gateway Travel and Gateway Diners] and thus become the controlling mind of the Business". Mr. Dhillon named only Reet Holdings as a defendant.

He pleaded that the agreement consisted of a written Share Purchase Agreement and collateral oral agreement under which Reet Holdings was to discharge the plaintiff's guarantee of Gateway Travel's bank debt upon Reet Holdings securing a financing commitment from a new lender.

The plaintiff further pleaded that the share transfer had occurred through counsel but that despite alternative financing having been secured, his guarantee had not been discharged. He sought rescission of the purchase and sale agreement and a CPL over the Gateway property.

It was our position that the plaintiff had not asserted a valid claim for an interest in land. At best, the plaintiff was a shareholder of a company that was a shareholder of another company that owned land at the time of a share sale. The sale was not even of the shares of the landowner

company but of the plaintiff's holding company. The allegation that a discharge of the plaintiff's guarantee was withheld had nothing to do with land.

In fact, the land was owned by a company that was not named as a defendant (this was sought to be rectified after his CPL was initially rejected by the Registrar). At this point, the landowner Gateway Travel was purportedly added as a defendant, but without the court order that is required by R. 6-2(7). An allegation was made that "at all material times the [Gateway property] was held in a resulting trust by the defendant Gateway for the benefit of its shareholders, including the Plaintiff".

In my view, the amended pleading (if allowed) was an attempt to "shoehorn" a claim for an interest in land into one that did not exist. This allegation of resulting trust was a bald assertion unsupported by facts, and it was inconsistent with the allegation that Gateway Travel's shareholder was the plaintiff's holding company rather than the plaintiff. Further allegations were added that the financing which had been the subject of the plaintiff's guarantee "was used to make improvements to the [Gateway property]" – without saying what those improvements might have been - and that the "intent and actual effect of the Defendant Reet Holdings' purchase of the Plaintiff's shares was to purchase the Plaintiff's beneficial interest in the [Gateway] property".

Although a CPL was accepted by the Land Title Office, the lack of specificity and inherent inconsistencies in the pleading led, ultimately, to the CPL being withdrawn.

2021 Case Study: B.C. Dream House Litigation

In spring 2021, I was counsel for the owners of a subdivision property in companion suits *1153148 B.C. Ltd. v. B.C. Dream House Builders Ltd.*[22] ("*115*") and *Valley Cliff Builders Ltd. v. B.C. Dream House Builders Ltd.*[23] ("*Valley Cliff*"). The suits were filed, nine days apart, by the same lawyer on behalf of different clients with very different claims. The two CPLs created havoc for continued development financing and construction.

In *Valley Cliff*, interests were asserted in land defined as "Property 1" and "Property 2". It was alleged that, in 2017, the parties had entered into a trust agreement under which the defendant was trustee of Property 1. The plaintiff alleged that the defendant had breached the trust agreement and claimed a declaration of its interest in Property 1.

The plaintiff then attempted to "shoehorn" an interest in Property 2 into its claim on Property 1. It alleged that "…it was the intention of the Parties that they will have the Property 1 and Property 2 subdivide (sic) into small lots and sell the subdivided lots to the prospective buyers for profit". No legal basis was pled under which this "intention" was translated into a cause of action giving rise to an interest in land, nor was any resulting *in rem* remedy alleged. Nevertheless, the Registrar accepted the filing of CPLs against both properties.

Almost contemporaneously, plaintiff's counsel also filed a second claim on behalf of 1153148 B.C. Ltd., asserting an interest in Property 2 (referred to therein as the "Parent Parcel"). The *115* action was based on a contract under which that plaintiff had allegedly agreed to purchase one intended lot of an intended plan of subdivision. The contract included an express condition precedent that three items be completed prior to the defined "Completion Date": the filing of the subdivision plan, a successful pre-construction meeting with the City of Coquitlam engineering department, and acceptance of building permit applications.

The *115* plaintiff claimed an interest in Property 2 on the basis of this contract and alleged that the defendant had "intentionally causing delay in getting [Property 2] approved by the authorities". By seeking to enforce an expired contract for the purchase of one lot from an intended subdivision, the plaintiff sought to tie up the entire development project.

Perhaps the most surprising element of the *Valley Cliff* and *115* claims – is that they did not name the second owner of Property 2 as a defendant. This bore a resemblance to *Dhillon* in which the landowner was not initially named as a defendant.

After demanding their discharge, we applied immediately to cancel the CPLs on various bases. We contemporaneously filed counterclaims in both proceedings claiming damages for abuse of process, conspiracy, slander of title and interference with economic relations. In the unusual circumstances of this case, as we had alleged a conspiracy between the plaintiffs in the two actions, both were named as defendants by counterclaim in each action. We also applied for security for costs.

In both *Valley Cliff* and *115*, arguments to cancel under s. 215 were available. In *Valley Cliff,* we asserted that the pleading did not disclose a cause of action which could form the basis of an *in rem* claim in respect of Property 2.

In *115*, the plaintiff's claim of an interest in Property 2 may have been supportable, at least at the interlocutory stage, having claimed specific performance of the contract to purchase and that the defendant had deliberately delayed the subdivision. However, had the matter come to hearing I would have argued that the failure to sue both landowners was fatal to the plaintiff's chances of success. We took the position that the failure to name the defendant's co-owner – named on the very contract sued on – precluded 115 absolutely from any opportunity to support a CPL since specific performance was thereby an unavailable remedy.[24]

To avoid the waiting period, our primary alternative ground for cancelling the CPLs in *Valley Cliff* and *115* was hardship and inconvenience under s. 256(1)(b) of the *Act*. We filed substantial evidence that the CPLs were impeding the release of construction financing and causing unnecessary delay and cost. That evidence also supported a requirement for substantial security in the event the CPL was not cancelled.

As a final alternative, we would have applied for dismissal under R. 9-6 on the basis that there was no triable issue which could have supported a CPL against Property 2 based on the pleadings filed in the *115* action. In *Valley Cliff*, our primary position was that the pleading failed to show an interest in land as required by s. 215 of the *Act*[25]. In the alternative, it would have been necessary to have the court consider whether or not there was a *bona fide* triable issue with respect to the plaintiff's claim for an interest in land[26]. The alternative claims for dismissal would have been subject to the waiting period.

Ultimately, after applications to cancel, applications for security for costs, and counterclaims were filed, both CPLs were voluntarily withdrawn. The claim in *115* was discontinued[27]; the claim in *Valley Cliff* remains extant but with a court order[28] preventing the plaintiff from filing any further charges against Property 2 without leave of the court.

MERITS OF THE UNDERLYING CLAIM

In this section, I consider the importance of the merits of the underlying claim in a number of different scenarios. I refer only to the merits of those elements of a claim which may give rise to the entitlement to file a CPL under s. 215 of the *Act*.

In addition to the merits being central to an application under s. 215 of the *Act*, and potentially to other proceedings for dismissal of the whole or a portion of the claim under Rules 9-5, 9-6 or 9-7, they are often critical in applications under s. 256.

Sigurdson J.'s decision in *De Cotiis v. De Cotiis*[29], and subsequent case law applying it, demonstrate the importance of the merits of the claim when applying the factors set out in ss. 256-7 of the *Act*.

The criteria are as follows:

- that hardship and inconvenience are experienced or are likely to be experienced by the registration of the CPL: s. 256(1)(b);
- that an order requiring security to be given is proper in the circumstances: s. 257(1)(b)(i); and
- that damages will provide adequate relief to the party in whose name the CPL has been registered: s. 257(1)(b)(i).

The court noted that s. 257 provides the court with a series of options. These include cancellation of the CPL upon posting of security "in an amount satisfactory to the court" by the party seeking its discharge, or refusing to order its cancellation which refusal may be conditional upon an undertaking and security from the party having registered the CPL.

Section 257(3) further provides that the court *may* take into account the probability of the plaintiff succeeding in the action in determining the amount of security, if any, to be posted. The analysis concerning the probability of success is with respect to the action in its entirety and not simply with respect to the plaintiff's claim for an interest in land.

Prior to *De Cotiis*, "hard" security was normally required upon an order to discharge a CPL unless it was evident that there was no merit to the claim or no triable issue which could sustain a claim against land. For example, Mr. Dhillon's original Notice of Civil Claim, *supra*, would have raised no triable issue, since there was no interest in land (or right to file under another statute) alleged. On the other hand, some form of cash or in-kind security would have been required for the allegations in his Amended NOCC since there was a claim disclosed for an interest in land, however specious.

In *De Cotiis*, the applicants sought to re-file a CPL against 86 properties. The defendants contended that the plaintiffs' amended claim and the affidavit material filed did not raise an arguable claim or triable issue that they have a claim to an interest in land. Alternatively, they said that they would suffer hardship and inconvenience if the CPL were re-filed. They argued that the plaintiffs' demonstrably weak claim dictated that the CPL should be cancelled upon adequate security being given but that the security in the circumstances ought to be limited to an undertaking in damages.

After reviewing the evidence of the merits in some detail, Sigurdson J. agreed:

> [77] Although I have not concluded that the plaintiffs' claim is not arguable, my assessment, for the purposes of this application, is that it is weak.

> [78] I have concluded that damages are an adequate remedy. In deciding what order to make I may take into account the strength of the plaintiffs' case. In this respect the statutory provisions dealing with the discharge of certificates of pending litigation are similar to the considerations on an interlocutory injunction application.
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> [79] Given my assessment of the strength of the plaintiffs' case, I have concluded that the security that the defendants are prepared to provide, i.e. the undertaking required by Gerow J., is sufficient. Provided it remains in place, I order that the certificate not be allowed to be re-filed.

On the other hand, in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 ("*Youyi*"), the Court of Appeal addressed the inclination of courts to jump to conclusions on the merits at an interlocutory stage. In *Youyi* it was the merits of the claim for the desired remedy of specific performance that was at issue, rather than the merits of the case on liability.

On an application to discharge the CPL, the owner resisting specific performance filed expert evidence on the availability of alternative development property. The chambers judge ordered the CPL discharged on the basis that the subject property "is not unique and therefore it does not warrant the protection of specific performance."[30]

The CPL was ordered discharged upon the owner posting $1.5m security in the context of an allegedly concluded agreement for the sale of a 4.5-acre parcel of commercial property in Burnaby by the defendant Brentwood Lanes to the plaintiff Youyi for $28.8 million.

The Court of Appeal ordered the CPL reinstated. Newbury J.A. addressed the difficulties inherent in assessing merits on an interlocutory basis, citing with approval the decision of Garson J. (as she then was) in *Aviawest Resorts Inc. v. Memory Lane Developments Inc.*[31] that:

> ... the court should consider the merits of the plaintiff's claim but only so far as doing so enables the court to determine that the plaintiffs' claim may be <u>frivolous, a nuisance, an abuse of process, or, I would add, has no chance of success</u>…

Garson J. had rejected the proposition that the application should be decided as if on a summary trial, and she described the "test" required to be met by the defendants as "requiring [the court] to find that it is clear the plaintiffs cannot succeed on the claim for specific performance."

Since the allegation of uniqueness could not be said to have "no chance of success", the Court of Appeal ruled that it ought not to have been discharged:

> In my respectful view, this formulation of "the test", which I equate with the "plain and obvious" standard, is consistent with the interim nature of the application under s.256 and properly reflects the caution that should be exercised by a court in depriving a plaintiff of a possible remedy at this pre-trial stage."[32]
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> 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 <u>plain and obvious</u> the person seeking specific performance <u>would not succeed on that claim at trial</u>. 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...[33]

In *Youyi*, the court put to rest the traditional notion that commercial properties, by their nature, investment opportunities, do not lend themselves to claims for specific performance. Newbury J.A. continued:

> [49] … In terms of the modern concept of access to justice, the remedy has much to be said for it, at least in the context of contracts for the sale and purchase of land. Certainly it is likely to be less expensive and time-consuming than the assessment of damages, which requires the parties to martial expert evidence concerning the value of the land as at a particular date (which may be in issue) in what may be an unstable market and to establish what its investment profit would have been had the contract been performed.… As noted by Robert J. Sharpe (now Mr. Justice Sharpe) in *Injunctions and Specific Performance* (2013, loose leaf):
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> > ... where a practical choice between damages and specific performance remains, the latter has certain distinct advantages. The assessment of damages the innocent party has suffered can be a difficult, expensive and time-consuming task. Specific performance has the advantage of avoiding the problems and costs the parties and the judicial system must incur if damages are to be assessed. Perhaps more significant is the very real element of risk that the translation into money terms of the effect of the breach on the plaintiff may be inaccurate. Some cases will present more risk than others but it cannot be denied that the element of risk of error is virtually swept away if the court is able to make an order of specific performance…
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> > [emphasis is that of Newbury J.A.]
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> All of these difficulties – together with the complexity of mitigation and the risk that ultimately the defendant might not have the funds with which to pay a large award of damages – are avoided by an order of specific performance.

The court further held that "the determination of whether damages will provide an adequate or appropriate remedy is largely fact-dependent and should not be determined by the application of a "presumption of replaceability" of the property in question.". Finally, the court held:

> …that *Semelhago* 'asks us to examine in each case, the plaintiff and the property.' If the parties were at the trial stage, the onus would have been on the plaintiff, but at this interlocutory stage, the onus was on Brentwood to show that it was plain and obvious damages would provide an adequate (or appropriate) remedy, considering both the property and the Purchaser.

Despite the court of appeal's admonition against jumping to conclusions on the merits of a claim in a CPL discharge application, in my view this is done routinely.

In an earlier 2011 decision in *0915406 B.C. Ltd. v. Vancouver Punjab Cloth House Inc. et al*[34], the plaintiff had sought to enforce its rights to an allegedly unique commercial property under a

contract with the defendant vendor pre-dating that of the defendant Vancouver Punjab Cloth House Inc. ("Cloth House"). To defeat the protection normally afforded to purchasers by s. 23 of the *Act*, it would be necessary for the plaintiff to prove that the transferee accepted the transfer of title with actual notice of the plaintiff's equitable interest, amounting to fraud[35]. The plaintiff argued that the circumstances were highly suspect in that the defendant Cloth House had signed and completed its contract within 3 days suggesting it must have been aware of the prior contract.

We brought an emergency application on behalf of the defendant supported by an affidavit from its principal deposing to no knowledge of the earlier contract and explaining the reasons for the quick closing. He was cross-examined on his affidavit. At this early stage of the proceeding, the plaintiff was unable to obtain the evidence supporting such a conclusion. In her reasons for judgment, Kloegman, J. ordered the CPL discharged without any security since based on the evidence to date there was no chance the plaintiff could prove fraud against Cloth House.

1064418 BC Ltd. v. 1062111 BC Ltd. and Raav Homes Ltd. et al, 2016 BCSC 741 ("*Raav Homes*") was a post-*Youyi* case involving competing purchasers. The plaintiff filed a CPL to protect an alleged assignment to it of a contract to purchase property intended for subdivision and development. An application was brought to discharge the CPL so as to permit another contract to proceed.

In *Raav Homes*, the defendant took the position that the CPL could not stand because the plaintiff could not possibly prove that it had accepted the assignment offer, and because there was no possibility of proving uniqueness.

On the merits of the specific performance claim, Brown J. considered *dicta* from *Youyi* to the effect that "[t]he more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties".

Having regard to the early stage of the proceeding, his Lordship reasoned carefully:

> [102] I note in passing that where the cases I have mentioned refer to the burden of proof being on the plaintiff to prove the uniqueness of the property at trial, I am mindful it may be the burden of proof at trial that is being addressed, which is not the same on an interlocutory application, where the applicant must satisfy the judge it is plain and obvious that the person seeking specific performance will not succeed on that claim at trial, and damages will provide an adequate or appropriate remedy. Accordingly, I have considered the plaintiff's trial burden only as part of my determination as to whether the applicants have shown it is plain and obvious that the plaintiff will not succeed on its claim for special damages and that damages will provide an adequate or appropriate remedy.

The court concluded based on affidavit and discovery evidence – in which the plaintiff's representative confirmed that he had not been to view the bare land - that "it is plain and obvious that ... damages [would] provide an adequate ... remedy", considering the property and the purchaser... The plaintiff's evidence makes it abundantly clear that its real interest was in making a profit from the development of the property."

Brown J.'s conclusion amounted to his view of the plaintiff's true objective. This can be seen at para. 109 of the judgment:

> [109] An implicit representation of the plaintiff's underlying purpose for filing the CPL can be found in paras. 4-5 of the Part 5 of the plaintiff's application response: being left without an effective remedy because "1062111 has no assets" and to address that concern, to obtain an order requiring 111 to post security of $3,100,000 for the plaintiff's anticipated profit.

Brown J. also held that it was plain and obvious that the plaintiff could not succeed on liability since the realtor had not communicated written acceptance of the assignment offer by the relevant 12:00 pm deadline.

In concluding that the plaintiff's case had little chance of success, the court ordered that the applicants provide only an undertaking to pay damages. The case was later dismissed upon the plaintiff's failure to post security for costs.

Counsel for the applicant in *Raav Homes* also brought a successful application to cancel a CPL in *Aulakh v. Nahal*[36], this time in the context of a contract for the purchase and sale of a large residential property. Again, prior to the application coming to the court, counsel conducted an examination of the plaintiff for the purpose of disproving the *Youyi* criteria that the "particular property " must be unique to the "particular plaintiff" and "suitable for the proposed use ... cannot be reasonably duplicated elsewhere" .

The plaintiff himself, who was the sole named buyer under the contract, had not sworn an affidavit attesting to the property being unique or particularly suited to his needs; instead, the evidence was sworn by his brother who was not a party to the contract, a fact that the plaintiff referred to as a "technicality".

The seller was also able to prove that the plaintiff had already found an alternative suitable property three lots away from the subject property on the same side of the street. Drawings were obtained showing that they were proceeding to construct residential buildings there. The court considered the two properties to be remarkably similar and the subject property not to be special to the plaintiff, based on the characteristics of the two properties, the residence drawings and admissions on discovery as to the contents and intended use of the house.

After reviewing the facts, Burke J. concluded:

> [43] As noted, though the applicants carry the burden at this stage, I must consider the burden shifts to the plaintiff at trial. The evidence presented at the application shows there is no reasonable chance of success of specific performance at trial and the plaintiff will be unable to show the purpose for which he seeks the property cannot reasonably be duplicated. Indeed, the only evidence before me in support of the validity of specific performance is Inderjit's statement: "My family and I want to reside in the property." This, in conjunction with all the above, establishes it is plain and obvious they would not succeed at trial.

Her Ladyship ordered due to the weakness of the case that the CPL be discharged upon the posting of $2,000 security.

CONCLUSIONS

1. Despite admonitions against courts jumping to conclusions at an interlocutory stage, judges and masters hearing applications to cancel CPLs may be heavily influenced by the

perceived merits of a claim and by their perception of whether the CPL was filed to obtain a tactical advantage. This perception may influence decisions on all of the bases upon which a CPL may be cancelled.

2. It is critical for plaintiffs to avoid the appearance that the CPL is being filed for tactical purposes unrelated to the underlying legal grounds giving rise to the alleged entitlement.

3. This means that counsel should take great care before filing a CPL to work closely with the client to assess the merits of their claim both on liability (e.g. is there a good claim for an interest in land?) and on the availability of an *in rem* remedy (usually specific performance or a trust claim).

4. It is important not to underestimate the complexity of these elements which may, at first brush, seem straightforward. An imprecisely pleaded case may prove fatal to protecting the asset which can ultimately prove critical to achieving the result intended.

5. Counsel seeking to cancel a CPL should carefully consider the three potentially available bases for such an Order, and the implications of each option.

6. Document discovery and an early examination for discovery may assist in disproving the merits of the plaintiff's position at an early stage which may prove essential. By obtaining critical admissions, the the defendant may increase the prospects of convincing the court to apply s. 215 of the *Act* or the tests under Rules 9-5 or 9-6; or of minimizing the conditions which may be attached by the court to a potential cancellation of the CPL.

7. Counsel should give serious consideration to combining an application to cancel a CPL with other steps such as a security for costs application, a counterclaim for abuse of process, or an application to compel the plaintiff to post security if it is to maintain the CPL.

For all the above reasons, it is very easy to underestimate the cost of interlocutory proceedings relating to CPLs. Counsel for both sides should anticipate the potential costs and advise clients from the outset of what they may be getting themselves into in asserting or opposing a CPL.

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[1] Partner, Kornfeld LLP, Vancouver, BC. The assistance of my colleague Devin Lucas is gratefully acknowledged.

[2] *1077708 BC Ltd. v. Agri-Grow Farm Services Ltd.*, 2019 BCSC 977 ("*Agri-Grow*")

[3] see, for example, *Drein, v. Puleo,* 2016 BCSC 593 ("*Drein*") at paras. 8-10; and *Agri-Grow*, at para. 20

[4] R.S.B.C. 1996, c. 215 (the *"Act"*)

[5] The most commonly referenced statutes in this regard are the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164, the *Family Law Act*, S.B.C. 2011, c. 25, the *Builders Lien Act* and the *Wills and Estates Succession Act*, S.B.C. 2009, c. 13.

[6] R.S.B.C. 1996, c. 163

[7] R.S.B.C. 1996, c. 164

[8] S.B.C. 2011, c. 25

[9] S.B.C. 2009, c. 13

[10] The options and criteria are set out in ss. 256-7 of the *Act*.

[11] 2018 BCCA 57

[12] At paras. 340-347, 358, 362, 408, 413. Appeal dismissed 2020 BCCA 130; leave to appeal to SCC refused Jan. 21, 2021.

[13] *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12; *Business Corporations Act*, S.B.C. 2002, c. 57, s. 236.

[14] Ibid

[15] *Supra*, note 3

[16] *Oei*, at para. 18,

[17] 2012 BCSC 447

[18] *Oie*, at p. 5

[19] (1984), 1984 CanLII 398 (BC SC), 59 B.C.L.R. 333 (S.C.), aff'd (1986), 1986 CanLII 920 (BC CA), 6 B.C.L.R. (2d) 291 (C.A.), leave to appeal ref'd [1986] 2 S.C.R

[20] Palmer, at para. 51

[21] S.C.B.C., Kamloops Registry No. 53399

[22] S.C.B.C., New Westminster Registry No. 236424

[23] S.C.B.C., New Westminster Registry No. 236570

[24] In *Herron v. Hunting Chase Inc.*, 2003 ABCA 219, the court held that specific performance was unavailable, *inter alia*, since the plaintiff had not sued all parties to the sale agreement.

[25] *Gill v. Gill*, 2021 BCSC 143 at para. 25

[26] In *Xiao v. Fan*, 2018 BCCA 143, Dickson J.A. set out the test to be applied in similar circumstances:

> [27] Accordingly, **the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the *Land Title Act* is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered**. If the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4), where evidence may be considered, and the test to be applied is whether there is a *bona fide* triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.

In applying *Xiao*, Mayer J., in *Gill, supra*, said this is the "proper approach where an application does not suggest that the pleading is deficient but rather that there is no merit to the claim for an interest (that is no triable issue)."

[27] Notice of Discontinuance dated May 3, 2021

[28] Order entered May 6, 2021

[29] [2004] B.C.T.C. 1658 (S.C.)

[30] Youyi, at para. 25

[31] 2004 BCSC 999

[32] Youyi, at para. 35

[33] Youyi , at para. 39

[34] SCBC Vancouver Registry No. S115129

[35] Ibid, at para. 20, relying upon *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.* [1982] 6 W.W.R. 624 (B.C.S.C.)

[36] 2016 BCSC 1362