Use and Abuse of Certificates of Pending Litigation

by Daniel S. Parlow, Kornfeld LLP, Vancouver, B.C.

Nov. 18, 2016

Perhaps the most frequently used pressure tactic used throughout my commercial litigation practice is the filing of a Certificate of Pending Litigation. The opposing party then typically brings an application to discharge the CPL, often on an emergency basis.

Most litigation counsel are well familiar with the criteria set out in the *Land Title Act* and other statutes allowing for the filing of CPLs and their potential discharge.

However, in this author's view, masters and judges hearing applications to discharge CPL's are influenced primarily by their perception of whether the filer is misusing it as leverage to achieve a result which is abusive of the ordinarily applicable legal processes.

The litigator seeking to file a CPL should be keenly aware of the perception factor before commencing proceedings and take steps to avoid the hot buttons. It can be very tempting to seize on an opportunity to obtain a perceived advantage particularly in time-sensitive circumstances or where the client exerts pressure on counsel, without giving full consideration to the potential implications.

Recent example: Dhillon v. Reet Holdings Ltd. et al

A particularly egregious example of an abusive filing of a CPL arose in Sep. 2016 in *Dhillon v. Reet Holdings Ltd. and Gateway Travel Centre Inc., SCBC, Kamloops Registry No. 53399.* In this author's respectful view, the case bears all the hallmarks of steps a party should avoid taking.

On Aug. 31, 2016, the Plaintiff filed a Notice of Civil Claim in which he alleged that his holding company, SD100, owned 33.3% of the issued and outstanding shares of Gateway Travel and of related company, Gateway Diners. Gateway Travel owned property on the Trans Canada Highway in Kamloops and Gateway Diners ran a truck stop from that property.

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. It is of course not unusual for the principal of a private company (in this case, SD100) to guarantee loans granted to a (wholly or partially owned) subsidiary of that company (in this case Gateway Travel).

The Plaintiff continued that, in Jan. 2016, he and the Defendant, Reet Holdings, had entered into an agreement for the sale of the Plaintiff's shares in his holding company to Reet Holdings, the effect of which "would be that [Reet Holdings] would own 66.6% of [Gateway Travel and Gateway Diner] and thus become the controlling mind of the Business". In his NOCC, Mr. Dhillon named only Reet Holdings as defendant.

He pleaded that the agreement consisted of a written Share Purchase Agreement dated May 31, 2016 and a collateral oral agreement under which Reet Holdings was required to provide a

discharge of the Plaintiff's guarantee of Gateway's indebtedness to the bank promptly upon Reet Holdings securing a financing commitment from a new lender.

The Plaintiff pleaded that the share transfer occurred through counsel but that despite alleged oral assurances by Reet Holdings' shareholder and the securing of alternative financing the discharge was not provided to him. In his relief, he sought rescission of the purchase and sale agreement and a CPL over the property.

Most commercial litigators in British Columbia are familiar with s. 215(1) of the *Land Title Act* which provides:

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

The first question for CPL filers is always whether the plaintiff is claiming an interest in land or whether a right of action in respect of land is conferred by another enactment. (The most commonly referenced statutes in this regard are likely the *Fraudulent Conveyance Act*, *Fraudulent Preference Act*, *Family Law Act, Builders Lien Act* and *Wills and Estates Succession Act*).

Although there is "relatively low threshold" at this stage, CPL will be cancelled if the plaintiff raises no triable issue as to the claim for an interest in land: *De Cotiis v. De Cotiis,* 2004 BCSC 1658; *RodRozen Designs Inc. v. 0977168 B.C. Ltd.*, 2016 BCSC 834; *Marrello v. Okinshaw Water Company Ltd.*, 2016 BCSC 453.

Mr. Dhillon's Notice of Civil Claim clearly did not contain any basis for a claim of an interest in land. The best that could be asserted was that he 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 whatever to do with land. The land was owned by a company that was not named as a defendant.

Two days later, after apparently becoming aware of this defect (perhaps upon having his CPL rejected by the Registrar of Land Titles) an Amended Notice of Civil Claim was filed. The amended pleading was an obvious attempt to "shoehorn" a claim for an interest in land into one that does not exist.

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 Property was held in a resulting trust by the Defendant Gateway for the benefit of its shareholders, including the Plaintiff". This was a bald assertion unsupported by any facts - and was inconsistent with the allegation that Gateway'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 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 Property". A CPL was accepted by the Land Title Office.

Following correspondence between counsel, the CPL was voluntarily withdrawn.

Merits of the claim

Sigurdson J's decision in *De Cotiis*, and subsequent case law applying it, demonstrate the importance of the merits of the claim when applying the factors set out in s. 256-7 of the *Land Title 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);
- that damages will provide adequate relief to the party in whose name the CPL has been registered: s. 257(1)(b)(i).

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.

S. 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.

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' claim in the amended statement of 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; or alternatively that they would suffer hardship and inconvenience if the CPL were allowed to be re-filed. They argued that the demonstrably weak claim of the plaintiffs, dictate that the CPL should be removed 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.

> [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.

In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 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 claim 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." He explained:

> As I read the above authorities the general trend since 1966 [sic 1996] is not to consider a commercial property unique. What used to be the factors in determining uniqueness are now considered market factors capable of being compensated by money damages rather than specific performance. In my view the Brentwood property is in this category and is subject to this general trend. The evidence of the Maple Ridge property is certainly in that category.
>
> The Brentwood property has some significant attractions, including closeness to a SkyTrain station and part of a growing high density neighborhood. However, I conclude those locational issues go to profitability and are reflected in the sale price.

The CPL was 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. in *Aviawest Resorts Inc. v. Memory Lane Developments Inc.* 2004 BCSC 999, 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. At para. 35:

> "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."

And at para. 39:

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

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] It is worth emphasizing that the Supreme Court did not in either *Semelhago* or *Southcott* suggest that specific performance is a remedy that is somehow outmoded or undesirable. In fact there is much to be said for the retention of specific performance in the courts' arsenal of remedies as a means of doing justice and doing justice efficiently. (For an account of the development of specific performance by courts of Equity for this purpose, see G. Jones and W. Goodhart, *Specific Performance* (1986) at 3-7; *Halsbury's Laws of England* (4th ed, Vol. 44(1)) at 801.) 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. In the case at bar, for example, the court would have to make findings regarding Youyi's costs in erecting the three towers on the Brentwood Property and concerning what profits Youyi would have realized on the sale of units at some time or times in the future. Obviously, inquiries like this are difficult and largely speculative. As noted by Robert J. Sharpe (now Mr. Justice Sharpe) in *Injunctions and Specific Performance* (2013, loose leaf):
>
> > ... 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. The innocent party receives the very thing bargained for rather than a monetary estimate of its worth. If the matter were to be viewed from the perspective of protecting the innocent party, it might even

> be argued that the very fact that the plaintiff is seeking specific performance indicates that damages will be inadequate. If an adequate substitute were available, and if damages would make the plaintiff whole for any loss caused by the defendant's breach, few plaintiffs would proceed with an action for specific performance. Willing performance from another will ordinarily be much preferable to grudging performance from one who has refused until forced to perform by order of the court. [At §7.50; emphasis added.]

> 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.

In allowing the appeal, the court felt that the chambers judge had jumped the gun, at para. 53:

> In my opinion, the chambers judge did fail to appreciate that an order under s.256 should not be granted if there was a triable issue as to whether the Purchaser would be entitled to the remedy of specific performance at trial. Instead, he embarked on the task of determining finally whether the Brentwood Property was in fact "unique" – without the benefit of the Purchaser's evidence, discovery, or cross-examination of witnesses. On this basis alone, I find that the appeal must be allowed.

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."; and at para. 57 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.

Conclusions on the Merits

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

For example, in pre-Youyi *0915406 B.C. Ltd. v. Vancouver Punjab Cloth House Inc. et al*, SCBC Vancouver Registry No. S115129, the plaintiff 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. To defeat the protection normally afforded to purchasers by s. 23 of the *Land Title 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: at para. 20, relying upon *Woodwest Developments Ltd. v. Met-Tec Installations Ltd.* [1982] 6 W.W.R. 624 (BCSC). 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.

An emergency application was brought by Cloth House 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 is another 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.

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.

He 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 should be his view of the plaintiff's true objective. This can be seen at para. 109 of the judgment:

> 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 discharge a CPL in *Aulakh v. Nahal*, 2016 BCSC 1362, this time in the context of a contract for the purchase and sale of a very large residential property in Richmond, BC. 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. It is apparent to this author that despite admonitions in *Youyi*, judges tend to apply to the "plain and obvious" test liberally.
2. It is critical to avoid the appearance that the CPL was filed for tactical purposes unrelated to cherished characteristics relating to the land. Judges who "smell blood" are quick to discharge CPLs.
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 (eg is there a good claim for an interest in land?) and on the availability of a *in rem* remedy (usually specific performance).

4. It is important not to underestimate the complexity of these elements which may, at first brush, seem quite simple.

5. Despite the interlocutory nature of the application, counsel for the respondent should give serious consideration to conducting discoveries and obtaining comprehensive document discovery. The more admissions can be obtained the better the chances of convincing the chambers judge to apply the "plain and obvious" test.

6. For all the above reasons it is very easy to underestimate the cost of applications to discharge CPLs. Counsel should always advise clients before filing a CPL of what they may be getting themselves into.