

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mahmoud v. South Street (Manitoba St)  
Limited Partnership,*  
2025 BCSC 1218

Date: 20250630  
Docket: S251263  
Registry: Vancouver

Between:

**Khaled Ayman Mahmoud**

Plaintiff

And

**South Street (Manitoba St) Limited Partnership, South Street (Manitoba St)  
GP Ltd., South Street (Manitoba St) Holdings Ltd., South Street (West 8th)  
Holdings Ltd., and Brent Taylor Hanson**

Defendants

Before: The Honourable Justice Underhill

## Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Attendees, Newport Sales  
Co. Ltd., Leibel Sales Co. Ltd. and Basha  
Sales Co. Ltd.:

C. Dayan

Representative for the defendants South  
Street (Manitoba St) Limited Partnership,  
South Street (Manitoba St) GP Ltd., South  
Street (Manitoba St) Holdings Ltd., and  
South Street (West 8th) Holdings Ltd.

S. Hanson

Place and Date of Hearing:

Vancouver, B.C.  
May 28, 2025

Place and Date of Judgment:

Vancouver, B.C.  
June 30, 2025

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**Introduction**

[1] Two applications have been brought to cancel certificates of pending litigation (“CPLs”) pursuant to s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA], filed in an action for breach of contract and negligent misrepresentation in respect of an investment in a property development opportunity in Vancouver.

[2] The circumstances are somewhat unusual in that the first application was brought by non-parties who hold a second ranking mortgage on title to the lands that are subject to the CPLs (the “Mortgagee applicants”). The second application, which is substantially similar to the first application, was force-filed by the corporate defendants in early May, seemingly in response to a standing challenge to the first application, and they were represented at the hearing by Sam Hanson, who I understand to be a director of the corporate defendants.

[3] For the reasons that follow, I have determined that the Mortgagee applicants do not have standing to bring their application in this proceeding, but I do grant leave to the corporate defendants to be represented by Sam Hanson on their application. I further find that their application should be granted, and the CPLs accordingly cancelled forthwith.

**Procedural History and Pleadings**

[4] The plaintiff commenced this action by way of notice of civil claim filed on February 19, 2025. On February 20, 2025, the plaintiff registered CPLs against the properties with the following legal descriptions, registered in the name of the defendants South Street (West 8<sup>th</sup>) Holdings Ltd. (“West 8<sup>th</sup> Holdings”) and South Street (Manitoba St) Holdings Ltd. (“Manitoba St. Holdings”) respectively:

- (a) PID: 015-547-515  
LOT 10, EXCEPT THE SOUTH 20 FEET NOW LANE, BLOCK 48  
DISTRICT LOT 200A PLAN 197
- (b) PID: 009-024-816

LOT 11, EXCEPT THE SOUTH 20 FEET NOW LANE, BLOCK 48  
DISTRICT LOT 200A PLAN 197

(collectively, the “Lands”).

[5] For purposes of these applications, the following is a summary of the material pleadings in the notice of civil claim:

- a) the defendants West 8<sup>th</sup> Holdings and Manitoba St. Holdings have at all times held the Lands as nominees of and in trust for the Defendant South Street (Manitoba St) Limited Partnership (“South Street LP”);
- b) the plaintiff is a limited partner in South Street LP, and the defendant South Street (Manitoba St) GP Ltd. (“Manitoba St GP”) is the general partner;
- c) the business and purpose of South Street LP was to acquire the Lands and construct, develop and sell a light industrial or commercial project;
- d) the plaintiff paid a capital contribution of \$3,000,000 on or about November 12, 2019, to purchase units in South Street LP pursuant to a subscription agreement entered into on or about November 8, 2019;
- e) the subscription agreement was governed by the limited partnership agreement which formed South Street LP;
- f) as a limited partner, the plaintiff was entitled to receive a preferred return of 15% per annum, not compounded, on his capital contribution, plus the return of his capital contribution;
- g) the plaintiff also entered into a side agreement with South Street LP and the defendant Brent Hanson, wherein they agreed to pay a quarterly return of 5% per annum, not compounded, until such time as his capital contribution was returned;

- h) South Street LP and Manitoba St GP breached the limited partnership agreement by failing to pay the preferred returns to the plaintiff and return his capital contribution;
- i) South Street LP breached the side agreement by failing to pay the quarterly returns to the plaintiff;
- j) the plaintiff was induced to waive or forebear the enforcement of his rights under the limited partnership and side agreement because Brent Hanson had misrepresented that South Street LP was refinancing and/or had refinanced the Lands, and would use the refinancing funds to pay the plaintiff;
- k) the defendants failed to repay the plaintiff despite obtaining refinancing;
- l) the misrepresentations were false because they were made after refinancing had already been obtained and the defendants knew they had no intention of using the refinancing to pay the plaintiff;
- m) the plaintiff is entitled to a constructive trust over the Lands because:
  - i. funds from the plaintiff's capital contribution, which would have otherwise been used to pay the plaintiff his returns and to return his capital contribution, were used to "finance the purchase and/or the carrying of, to maintain, and/or to improve one or both" of the Lands; and
  - ii. a monetary award would be an inadequate, inappropriate or insufficient remedy because of the financial circumstances of the defendant; and
- n) the plaintiff seeks a tracing order for his capital contribution and the financing of the project.

[6] The defendants, through legal counsel, filed a response to civil claim on April 4, 2025, along with a counterclaim by two of the corporate defendants.

[7] On that same day, Basha Sales Co. Ltd., Leibel Sales Co. Ltd. and Newport Sales Co. Ltd. (the Mortgagee applicants) filed their s. 215 application. They claim an interest in the Lands pursuant to a second ranking mortgage on the respective land titles.

[8] The parties agreed that the application would be heard on May 7, 2025.

[9] On May 1, 2025, the plaintiff filed an application response in which he took the position that the Mortgagee applicants had no standing to bring their application.

[10] On May 5, 2025, Brent Hanson served a Notice of Intention to Act in Person on behalf of all of the defendants, along with the force-filed s. 215 notice of application on behalf of the corporate defendants.

[11] On May 7, 2025, the parties appeared in chambers, but due to time constraints, they ultimately agreed to argue only the issue of whether the Mortgagee applicants have standing. Justice Thomas determined that the two applications would need to be heard together, including the issue of standing.

[12] At the May 7 hearing, Sam Hanson, not Brent Hanson, appeared to speak to the application filed by the corporate defendants, to which the plaintiff objected. In a subsequent exchange with plaintiff's counsel inquiring about his status, Sam Hanson stated the following:

I am a director of the corporate entities and am acting as an agent/representative of the applicants. I believe Brent is not a party to this application as he is not an owner nor has any official capacity.

[13] As noted above, Brent Hanson did file a notice of intention to act in person for all of the defendants, but is not a named applicant on the s. 215 notice of application filed by the corporate defendants.

[14] At the hearing before me, where the standing issues were argued together with the merits of the s. 215 applications, Sam Hanson made limited oral

submissions, principally adopting the submissions of counsel for the Mortgagee applicants.

**Analysis**

**Statutory Framework**

[15] Before addressing the standing issue, it is helpful to situate these applications in their statutory context.

[16] Section 215 of the *LTA* sets out the requirements for registration of a CPL. Although s. 215 does not expressly address cancelling a CPL, if a CPL was issued in circumstances that do not meet the requirements of s. 215, then the CPL was not properly issued and must be cancelled: *Lam v. WS Scott Station Development Limited Partnership*, 2025 BCSC 149 at para. 13. Section 215 provides as follows:

**Registration of certificate of pending litigation in same manner as charge**

**215** (1) 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 in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the *Court Order Enforcement Act*, a copy of the notice of application or other document by which the claim is made.

[17] The standing issue also turns on Rule 8-1 of the *Supreme Court Civil Rules*, which sets out the process for bringing applications. For the purposes of the present applications, it is only necessary to note that Rule 8-1 consistently refers to “a party”. For example, Rule 8-1(3) provides:

**Notice of application**

(3) A party wishing to apply under this rule must file

- (a) a notice of application, and
- (b) the original of every affidavit, and of every other document, that

- (i) is to be referred to by the applicant at the hearing, and
- (ii) has not already been filed in the proceeding.

[18] A “party” is defined in Rule 1-1(1) as “a person named as a party in the style of proceeding.”

### **Standing of the Mortgagee Applicants**

[19] The plaintiff says that because the Mortgagee applicants are non-parties, they cannot bring an application in this proceeding under Rule 8-1, citing this Court’s decision in *Monaco v. Coquitlam (City)*, 2009 BCSC 248. The Mortgagee applicants say I have inherent jurisdiction to allow a non-party to bring an application in a proceeding in circumstances the Court deems appropriate, relying on *Ohlhauser v. Kasian*, 2021 BCSC 892 [*Ohlhauser*] and *Treasure Bay HK Limited v. 1115830 B.C. Ltd.*, 2024 BCSC 294 [*Treasure Bay*].

[20] In my view, both *Ohlhauser* and *Treasure Bay* are of limited assistance.

[21] In *Ohlhauser*, a proposed third party law firm brought an application regarding the protection of solicitor-client privilege. Justice Winteringham’s decision makes clear that her exercise of discretion to grant standing turned on the fact that the third party application was pending, and the parties chose to sequence the privilege application before it:

[41] For over seven months, the parties have tried to organize themselves for either a summary trial or for the trial proper. Back in September 2020, Mr. Kasian served the Third Party Notice Application on the proposed third party and they filed a response. For reasons unclear to me, the parties decided in their Case Plan Proposal that the Privilege Application would precede the Third Party Application. Based on the materials presented on the Privilege Application, Mr. Kasian intends to proceed with his Third Party Application and Owen Bird would have standing to oppose that application. Given the unfolding of events, including the Third Party Application presented on the first day of trial, in my view, it is in the interests of justice that the proposed third party is entitled to be heard on the Privilege Application. The parties chose to proceed separately on the two applications and this is reflected in the draft CPO to which all counsel made reference. It would be an extremely inefficient use of court time to dismiss the Privilege Application with leave to renew after Mr. Kasian has brought his application for leave to issue his third party notice. I say that particularly because of the procedural

challenges that have plagued this case for some time including the lost summary trial and trial dates. The second trial is fast-approaching.

[22] Here, there is no proposed third party application and the Mortgagee applicants do not seek to be added as defendants. There is, of course, no issue of the protection of solicitor-client privilege in play here, which was an important factor in the exercise of discretion in *Ohlhauser* (see also *888 Fort Street Holdings Ltd. v. Ross*, 2017 BCSC 579 at para. 7, cited in *Ohlhauser* at para. 43).

[23] In *Treasure Bay*, the plaintiff brought a common law derivative claim against a number of parties, including the registered owner of the lands in question (Harlow), which was said to hold the lands in trust for a limited partnership. The limited partnership was not named as a defendant. Harlow and the limited partnership, as co-applicants, filed an application to discharge the plaintiff's CPL under s. 215, and alternatively, s. 256, which allows any person who claims an interest in land and who alleges hardship from the CPL to seek its cancellation, even if it was validly issued, provided they are willing to post security in an amount satisfactory to the court.

[24] As the plaintiff correctly points out, the plaintiff in *Treasure Bay* did not object to the standing of the limited partnership because the application was also brought under s. 256. In the result, Justice Walker simply allowed the limited partnership "to make submissions as a joint applicant" (para. 6). Properly understood, there was no analysis of the standing issue in *Treasure Bay*, and it should not be read as authority for the proposition that an entity has standing to bring an interlocutory application, including an application for relief under s. 215 of the *LTA*, in a proceeding to which they are not a party.

[25] In my view, the Court's discretion to allow a non-party to bring an interlocutory application in a proceeding should be exercised sparingly, and as in *Ohlhauser*, only where the interests of justice require it. In light of my decision to grant leave to the corporate defendants to be represented by Sam Hanson (discussed below), the interests of justice do not require it in this case.

[26] I also note that the plaintiff and Mortgagee applicants made lengthy submissions on whether the Mortgagee applicants could seek to discharge the CPLs under s. 215 by way of a separate legal proceeding. In his written materials, I understood the plaintiff to take the position that the Mortgagee applicants could only bring an application under s. 256, as Rule 2-1 precluded seeking to discharge a CPL under s. 215 by way of a petition proceeding. However, during the course of oral submissions, the plaintiff acknowledged that the Mortgagee applicants could potentially bring a declaratory action seeking relief under s. 215.

[27] I am not convinced that the Mortgagee applicants would be precluded by Rule 2-1 from bringing a petition proceeding. Rule 2-1(2)(g)(iii) provides as follows:

(2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:

...

(g) the relief sought relates to land and is for

...

(iii) an order that cancels a certificate of title or making a title subject to an interest or charge,

[28] While I am not aware of any authority on point, I observe that a generous interpretation of that subrule could include an order to cancel a CPL under s. 215 of the *LTA*, and that such an interpretation would be consistent with the object of the *Rules* to ensure the just, speedy and inexpensive determination of every proceeding on its merits, and the rationale for allowing petitions as summary proceedings: *Vanguard Mortgage Investment Corporation v. Dietterle*, 2023 BCSC 573 at para. 16; *Standard Group Projects Inc. v. 0972672 B.C. Ltd.*, 2023 BCCA 205 at para. 39. That question, however, can be left for another day.

### **Standing of Sam Hanson**

[29] The plaintiff submits that corporations have a limited right to be represented by a director or officer and that leave must be first obtained from the Court, relying on the following passage from Justice Esson's decision in *Atlantic Chemical Trading*

of *North America Inc. v. Morizon Holdings Ltd.*, 2005 BCCA 456 (Chambers)  
[*Atlantic Chemical*]:

[3] In my view, it is important to keep in mind that the right of a corporation to be represented by other than a member of the bar is very limited. It is a matter of discretion or indulgence by the court. The matter has been dealt with in authorities in this Court of which *Venrose Holdings Ltd. v. Pacific Press Ltd.* (1978), 7 B.C.L.R. 298, remains the most authoritative.

[4] In the reasons of McIntyre J.A. for the Court, three questions were considered, the second of which was (at 300):

(2) May a corporation be represented in proceedings in the Supreme Court by a duly authorized officer of the corporation, not a member of the Law Society of British Columbia, who acts therein as an advocate?

The answer to that question is at 304:

Question 2 does not admit of a simple yes or no answer. Yes, so far as the provisions of the Legal Professions Act are concerned, but I must, however, go further than that. For reasons that are indicated in *Tritonia Ltd. v. Equity & Law Life Assur. Society*, [1943] A.C. 584 at 586, [1943] 2 All E.R. 401, and in *Rondel v. Worsley*, [1967] 1 Q.B. 443, [1966] 3 All E.R. 657, affirmed [1969] 1 A.C. 191, [1967] 3 All E.R. 993 (H.L.), the courts as masters of their own proceedings must retain a discretion whether to hear from time to time in the course of the dispatch of their business such persons other than barristers as they may consider should be heard in the interests of justice. The court in its discretion may grant a privilege of audience to such persons in any case where it deems it necessary or proper and deny it in other cases. This, no doubt, is a power which should be exercised rarely and with caution, and it is one the courts will be zealous to preserve.

[Emphasis added in *Atlantic Chemical*.]

[5] Two decisions in which it was held that, in the circumstances, a corporation should not be represented by other than a member of the bar are *British Columbia Telephone Co. v. Rueben*, [1982] 5 W.W.R. 428 (B.C.S.C.), and *Great West Life Assurance Co. v. Royal Anne Hotel Co.* (1986), 6 B.C.L.R. (2d) 175.

[Underline emphasis in original, bolded emphasis removed]

[30] From a review of the jurisprudence since *Atlantic Chemical*, it appears that courts will exercise their discretion to grant leave to directors or officers to represent corporate parties where it is in the interests of justice to do so, provided there are no concerns about the unauthorized practice of law or the director being unable to provide effective representation: *Altiveris Developments Inc. v. Sussex Retirement*

*Living (2015) Inc.*, 2022 BCCA 209; *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd.*, 2017 BCCA 19; *Law Society of British Columbia v. Pyper*, 2017 BCSC 1197; *Louie v. Zhou*, 2019 BCSC 799.

[31] This is illustrated by *Atlantic Chemical* itself, where Justice Esson referred to the underlying facts of that case as set out by the chambers judge:

[1] This application before me today follows on from one which was before Mr. Justice Low in chambers on August 9 last. At that time, Mr. Ma, who is the principal of the appellant company, appeared on behalf of the company. In his reasons, Mr. Justice Low expressed some of the difficulties which were created thereby. In particular, he said in paras. 4 and 5 of those reasons:

I am not at this point going to make an order that the appellant company retain counsel to represent it in this appeal. I have advised Mr. Ma that it is in the best interest of his company that he have a lawyer represent him. English is his second language and he has limited command of it. He has difficulty expressing himself in the English language to make his points and I had difficulty following most of what he said. In addition, of even more concern, is the fact that a fairly large volume of material he has filed in connection with this matter is disorganized and largely unintelligible.

But from what I heard from Mr. Ma this morning he seems inclined to hire a lawyer to represent the company in this appeal and I will, without making an order at this time, simply give him the opportunity to do that. If he does not obtain a lawyer for the company, the respondent will have leave to apply again for an order requiring representation of the appellant by counsel.

[32] In this case, there are no concerns with the unauthorized practice of law or the ability of Sam Hanson to communicate with or present material to the Court. It is apparent that the corporate defendants have had legal assistance in the preparation of their notice of application, and there is some degree of cooperation with the Mortgagee applicants. It is not for this Court to inquire into the nature of that assistance, or the cooperation between the applicants, and I do not see anything inherently improper that would militate against granting leave in this case. I note in that regard that when pressed at the hearing on this issue, counsel for the plaintiff did not identify a specific ground on which leave should be denied. I therefore grant leave to the corporate defendants to be represented by Sam Hanson on this application.

### Should the CPLs be Cancelled?

[33] The principles governing the test under s. 215 of the *LTA* are well-established and have been articulated in a number of decisions of this Court. Most recently, Justice Douglas provided this summary in *Lam v. WS Scott Station Development Limited Partnership*, 2025 BCSC 149:

[13] Registration of a CPL under s. 215 must be grounded in a claim to an interest in land and a plaintiff's pleading must adequately assert the foundation for that interest: *Sonnenberg v. Sonnenberg*, 2023 BCSC 957 at para. 12; *Lipskaya v. Guo*, 2022 BCCA 118 at para. 64. When the pleading fails to disclose a claim to an interest in land, the CPL will be cancelled immediately because it was improperly registered from the outset: *Sonnenberg* at para. 13; *Bajwa v. Singh*, 2016 BCSC 916 at para. 20; *Wang* at paras. 9 – 12.

[14] As noted in *Sonnenberg* at para. 14, and *Wang* at paras. 9 – 11, the applicable legal test asks two questions:

- 1) Are the pleaded facts, assuming them to be true, capable of supporting a claim to an interest in land?
- 2) Is there a nexus or causal link between the pleaded facts and the interest in land to which they would give rise, if ultimately proved?

[15] Whether the facts pleaded, assuming them to be true, are capable of supporting a claim to an interest in land, is a threshold issue: *Yi Teng* at para. 39. If the pleadings are found to meet this threshold, it connotes a nexus or causative link between the facts alleged and the interest to which they would give rise if the facts were ultimately proved: *Yi Teng* at para. 39.

[16] The whole of the notice of civil claim must be considered in determining whether the plaintiff has pleaded a claim to an interest in land: *Batth v. Sharma*, 2024 BCCA 29 at para. 30. No evidence is considered on an application to cancel a CPL for non-compliance with s. 215 of the *LTA* and the court does not analyze the merits of the underlying claim: *Xiao v. Fan*, 2018 BCCA 143 at para. 27.

[34] It is also well-established that a CPL cannot be used as pre-judgment execution for a purely financial claim: *Zhao v. Jiao*, 2024 BCSC 2248 at para. 45; *Lipskaya v. Guo*, 2022 BCCA 118 at para. 65.

[35] As I understand the plaintiff's position, he claims an interest in the Lands through his pleading of a constructive trust, as opposed to an interest through his direct capital contributions to the limited partnership. Where such a claim is asserted, the central question is whether the constructive trust is a possible remedy:

*Zhao* at para. 37; *Oikon Developments Inc. v. Chris & Mando Ltd.*, 2024 BCSC 1333 at para. 25.

[36] In my view, the answer to that question in this case is “no”. The starting point in the analysis are the two essential elements of a constructive trust claim, which were summarized in *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 [BNSF]:

[57] We have seen that it was on the basis of the requirement for a “proprietary nexus” and on the basis that BNSF had not shown that a monetary award would be inadequate (a longstanding rule of equity, which generally prefers to act in *personam*), that the chambers judge ruled that BNSF’s claim for a constructive trust was ‘bound to fail’. These two conditions were re-affirmed in 2011 in what is now the leading Canadian case, *Kerr v. Baranow*, *supra*, [2011 SCC 10] from which the chambers judge quoted:

The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. ... Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). ...

As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a “sufficiently substantial and direct” link, a “causal connection” or a “nexus” between the plaintiff’s contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a “clear proprietary relationship” (p. 50, citing Professor McLeod’s annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff’s deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

[Italic emphasis in original; underline emphasis added.]

[37] It is the first element that is in issue here; namely, whether there is a “substantial and direct link” or “proprietary nexus” between the plaintiff’s funds and the acquisition, preservation, maintenance, or improvement of the Lands. In *BNSF*,

the Court confirmed that a constructive trust can be imposed “where good conscience so requires” (para. 55). But this does not mean, as the emphasized passages above make clear, that a plaintiff is excused from demonstrating that critical link or nexus between their contribution of funds and the property. This was reinforced by the Court in the more recent decision in *Batth v. Sharma*, 2024 BCCA 29:

[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.

[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.

[Italic emphasis in original, underline emphasis added]

[38] The fatal flaw to the plaintiff's constructive trust claim is that it is grounded in the pleading of negligent misrepresentation, which is not about the use of the plaintiff's funds, but rather a broken promise to use refinancing funds to repay the monies owing to the plaintiff, including the preferred and quarterly returns, and the return of his capital contribution. Instead of being used to pay him back, the plaintiff says those funds were used to finance the purchase, carrying and/or improvement of one or more of the Lands (notice of civil claim at paras. 22, 32). Simply put, it is not the plaintiff's money at issue; it is the funds of others raised through refinancing, such that there is no direct link or proprietary nexus established on these pleadings.

[39] As above, the plaintiff did not press an argument that his direct contributions to the limited partnership were at issue. To the extent that the constructive claim pleading does reference his initial capital contribution (see the notice of civil claim at para. 32), the law is relatively clear that a limited partner cannot advance a personal proprietary claim to an interest in land through the limited partnership: *Lam* at para. 33.

[40] This also distinguishes a case like *Treasure Bay*, relied on by the plaintiff, which was a common law derivative claim on behalf of the defendant GM International Holding Limited (GMIH). At their core, the allegations concerned the use of GMIH's approximately \$25 million loan to the other defendant companies, which the plaintiff said was improperly co-mingled with other funds to purchase a property in breach of a fiduciary duty owed by the personal defendant, alleged to be the *de facto* director of GMIH. Thus, it was GMIH's funds that were said to have

been invested into the property, as opposed to the refinancing funds at issue in this case.

[41] In light of this conclusion, it is not necessary to address the further argument that a proprietary nexus is not established because the pleading is too vague or imprecise: see *Wai v. Chung*, 2020 BCSC 34 at para. 29. I will say, however, that more recent authority, including *Batth*, casts some doubt on whether that argument could succeed on these pleadings.

**Conclusion**

[42] In sum, I have concluded that:

- (a) the Mortgagee applicants do not have standing to bring an interlocutory application for relief under s. 215 of the *LTA* in this proceeding;
- (b) leave should be granted to Sam Hanson to represent the corporate defendants on their application; and
- (c) the CPLs registered by the plaintiff on title of the Lands should be cancelled forthwith.

[43] Unless there is something about which I am not aware, the corporate defendants will have their costs of this application at Scale B, payable forthwith in any event of the cause.

Underhill, J.