IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Biggar v. Tran,*
2024 BCSC 50

Date: 20240111
Docket: S39934
Registry: Chilliwack

Between:

Dwight Biggar, 884227 Alberta Ltd., Jeffrey Edward Clement Biggar and Big R. Consulting Ltd.

Plaintiffs

And

Kim Van Tran, Sunshine Inn Estates Ltd., Sunshine Inn Executive Suites Inc., and Sunshine Inn Estates (Houston) Ltd.

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiffs:	B. Grootendorst
Counsel for the Defendants:	G.A. Wright
Place and Date of Trial/Hearing:	Port Coquitlam, B.C. November 22, 2023
Place and Date of Judgment:	Port Coquitlam, B.C. January 11, 2024

[1] This is an application by the defendants to cancel certificates of pending litigation ("CPL or CPLs") on a number of properties. The plaintiffs 884227 Alberta Ltd. ("884"), Jeffrey Biggar and Big R. Consulting Ltd. ("Big R") are all shareholders in one or more of the corporate defendants. The plaintiff Dwight Biggar is the principal of 884. Collectively, Dwight and 884 are herein referred to as the "Dwight Plaintiffs". Jeffrey is Dwight's brother. Jeffrey is the sole shareholder of Big R, together I will refer to them as the "Jeffrey Plaintiffs". As two of the plaintiffs share a surname, I will refer to them by their first names. I mean no disrespect by doing so.

[2] The three corporate defendants own and operate hotels along Highway 16 in northern British Columbia. The defendant Sunshine Inn Estates Ltd. owns a hotel in Smithers ("Sunshine Smithers"); Sunshine Inn Executive Suites Inc. owns a hotel in Terrace ("Sunshine Terrace"); and Sunshine Inn Estates (Houston) Ltd. owns a hotel in Houston, (collectively, the "Sunshine Companies"). There is a fourth hotel in the chain located in Burns Lake, but the plaintiffs have no interest in that property.

[3] The defendant Kim Van Tran is the sole director of all of the Sunshine Companies.

[4] It is common ground that 884 holds shares in all three Sunshine Companies, whereas Jeffrey has shares in Sunshine Smithers and Sunshine Terrace only.

[5] The plaintiffs claim that they invested in the Sunshine Companies starting in approximately 2007, pursuant to which they would receive an annual return based on a percentage of the revenues.

[6] Dwight invested in the Sunshine Companies first via 884. The Dwight Plaintiffs allege that they invested on the basis of Mr. Tran's representations to Dwight that they would receive an annual return on investment determined by taking 30% of revenue from each of the Sunshine Companies for that year. The Dwight Plaintiffs began investing in the Sunshine Companies in the spring of 2007. The Dwight Plaintiffs' initial investment totalled approximately $1,346,000 and was comprised of funds withdrawn from Dwight's RRSP (the "Invested Funds").

[7] Jeffrey's involvement came later, beginning in or around 2015. He and his wife invested a total of $332,000 into the Sunshine Terrace property which had not yet been constructed (the “Jeffrey Invested Funds”). He also invested through Big R.

[8] Sunshine Terrace is by far the largest of the hotels and is the most recently constructed. It opened in the fall of 2020 and, as a consequence of the COVID-19 pandemic, has struggled financially from the outset.

[9] In February 2023, the plaintiffs complained to the defendants about how the Sunshine Companies were operated and demanded that their interest be bought out by way of a share purchase. The ensuing negotiations proved unsuccessful, and this claim was filed on July 25, 2023. As part of their claim, the plaintiffs filed CPLs against various properties owned by the Sunshine Companies. These properties include but are not limited to the three hotel properties referred to earlier.

[10] Construction of Sunshine Terrace was funded by way of money borrowed from private lenders referred to in the materials as the “Jinnah Group”. The various loans attract interest at rates between 11 and 14%, which is well in excess of prevailing rates available at conventional financial institutions. The CPLs registered as against the Sunshine Companies properties are a breach of the loan agreements between the Sunshine Companies and the Jinnah Group.

[11] The defendants apply for cancellation of the CPLs. They argue:

a) the plaintiffs do not assert an interest in land as required under s. 215 of the *Land Title Act,* R.S.B.C. 1996, c. 250 [*LTA*], and that the court should therefore exercise its inherent jurisdiction to cancel those CPLs; and

b) in the alternative, that the CPLs are creating hardship and inconvenience and should therefore be cancelled, either with or without security.

[12] For the reasons that follow, the defendants’ application is granted and the CPLs are cancelled because the notice of civil claim does not assert an interest in land.

Legal Framework

[13] Section 215(1)(a) of the *LTA* allows a person who has commenced a proceeding to register a CPL against the land in issue if they are claiming an estate or interest in that land.

[14] The court retains inherent jurisdiction to cancel a CPL where the pleading does not meet the requirements of s. 215 of the *LTA.* This was discussed by Justice Hughes in the recent decision of *Wang v. Cai*, 2022 BCSC 1312:

> [8] The Court has inherent jurisdiction to cancel a CPL where a pleading fails to meet the pre-condition of a claim for an interest in land as required by s. 215: *Lipskaya v. Guo*, 2022 BCCA 118 at para. 64; *Xiao v. Fan*, 2018 BCCA 143, at paras. 19, 22. The relevant law was succinctly summarized in *Lipskaya* as follows:
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> > [64] The court has inherent jurisdiction to cancel a CPL that does not meet the preconditions for registration, that is, where no interest in land is claimed: *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at para. 7; *Bilin v. Sidhu*, 2017 BCCA 429. *An "interest in land" is claimed where title may change as a result of the proceedings*: *V.B. v. K.B*., 2013 SKQB 412 at para. 72. The court can cancel a CPL where damages would be adequate relief: *Wai v. Chung*, 2020 BCSC 34 at paras. 26–28. An application to cancel a CPL for non-compliance with s. 215 of the *LTA* does not involve a weighing of the evidence or an assessment of the strength of the claim—the court only considers whether such a claim is pleaded: *Yi Teng* at paras. 36–38.
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> [Emphasis in original.]

[15] An application to strike a CPL is based upon the pleadings, assuming the facts pleaded are true. The test to be applied on an application to cancel a CPL where it is alleged the requirements of s. 215 are not met is whether the facts pleaded, assuming them to be true, are capable of supporting a claim to an interest in land: *Wang* at para. 9, citing *Xiao v. Fan*, 2018 BCCA 143 at para. 27 and *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.*, 2019 BCCA 357 at para. 39.

[16] Unlike an application to strike pleadings for failing to disclose a cause of action, the court is not to consider the possibility of amendments to the pleadings. As Justice Holmes said in *Bajwa v. Singh*, 2016 BCSC 916 at para. 20, "[i]f the claim

could not give rise to an interest in land, the CPL will be ordered to be cancelled because, essentially, it was improperly registered from the start."

[17] The Court of Appeal confirmed in *Xiao* at para. 27 that if a defendant's challenge to the CPL is that the claim is without merit, the defendant must bring a summary judgment application. Absent such an application, the analysis is limited solely to the pleadings.

Discussion

[18] The essence of the plaintiffs' claims are that the defendant Mr. Tran promised a guaranteed rate of return as an inducement for their investment in the Sunshine Companies, but those guaranteed returns have never been paid ("Return on Investment"). Paragraph 22 of their notice of civil claim sets out:

> In multiple conversations in 2006 and 2007, Van Tran represented to Dwight that if the Plaintiff invested in the Sunshine Companies, he would receive an annual return on investment determined by taking 30% of the revenue from each of the Sunshine Companies for that year, leaving 70% of each of the Sunshine Companies' revenue for expenses and operations, and the 30% of revenue for each of the Sunshine Companies would then be split among the shareholders with the Numbered Company to receive a percentage of the 30% equal to its percentage of the voting shares the respective company of the Sunshine Companies. As such, the Numbered Company was to receive 23.20% of the 30% of revenue from Sunshine Houston, 24.27% of the 30% of revenue from Executive and 16.6% of the 30% of revenue from Sunshine (the "Return on Investment").

[19] The Dwight Plaintiffs further assert that they invested funds in reliance on those representations made by Mr. Tran. The Jeffrey Plaintiffs make similar allegations.

[20] The Dwight Plaintiffs allege that there were several instances where the parties agreed that funds would be reinvested in subsequent hotel developments, but those too were accompanied with guaranteed returns from those new properties. At paras. 27 and 30 of the notice of civil claim, the Dwight Plaintiffs plead that it was agreed that their Return on Investment would be reinvested into subsequent projects. At para. 37, the plaintiffs allege the following:

> At various times from 2009 onwards, the Return on Investment due to the Dwight Plaintiffs was delayed in being paid out and left in the Sunshine Companies by agreement of Van Tran and the Dwight Plaintiffs on the basis that this would enable the Sunshine Companies to grow, but at all times, it was understood that the Return on Investment would be paid to the Dwight Plaintiffs in the future.

[21] The first part of para. 37 suggests reinvestment, whereas the latter alleges that the payments would be made in full at a later date. It is not clear from the pleading as to whether the funds left in for growth took the form of additional shares, a loan, or were simply unpaid dividends.

[22] Prior to commencing this claim, the plaintiffs demanded that their shares be purchased by the defendants. I am satisfied that the plaintiffs' claim in its essence is an oppression claim.

[23] In response to the defendants' suggestion that this is simply a share dispute, the plaintiffs refer to portions of their notice of civil claim that do not reference share purchases, but rather reference the word "invest":

> 23. Based on this representation with respect to the Return on Investment, Dwight removed money from his RRSP and invested approximately $1,346,000 CAD into the Sunshine Companies (the "Invested Funds") via the Numbered Company, the first of which purchases occurred in or around the spring of 2007 and continued thereafter.
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> . . .
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> 29. In or around 2012, Van Tran and Dwight discussed opening a third hotel in Terrace and began looking at available lots. At this time, the Dwight Plaintiffs invested $100,000 in Sunshine Executive Terrace to go toward the purchase of lots which would eventually become the Terrace Hotel.
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> . . .
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> 32. In or around 2018, the Dwight Plaintiffs invested a further $20,000 into Sunshine Executive Terrace.

[24] The plaintiffs argue—based on the pleadings—that these may not only be shares, but may also include loans or other forms of investment.

[25] I have difficulty with this submission. First, the plaintiffs claim as follows:

> 24. In or around July 2008, the Dwight Plaintiffs purchased 20 additional shares from a previous shareholder of Sunshine Smithers after Van Tran propositioned them to do so. The particulars of the conversation between Dwight and Van Tran at that time are as follows:
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> a. Van Tran approached Dwight with the idea to buy a previous shareholder's shares;
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> b. Dwight again inquired about the return on investment, as he had done when he purchased the initial shares in 2007; and
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> c. Van Tran confirmed the Return on Investment and stated that he would not be willing to sell more than 20% of the total shares in Sunshine Smithers to Dwight.

[26] Presumably, if the shares purchased were additional shares, the Dwight Plaintiffs must already have owned shares.

[27] More importantly, the plaintiffs' pleadings are entirely within the plaintiffs' control. The plaintiffs cannot rely on their own lack of specificity and clarity in order to justify the CPLs.

[28] The onus is on the plaintiffs to plead their claim and to allege all of the material facts. If the funds invested by the plaintiffs included loans, one would have anticipated that they would have pleaded the amounts, dates, and the terms of repayment, including that demand was issued if the loans were demand loans. There is no reference in the notice of civil claim to any loans having been made by the Dwight Plaintiffs to any of the Sunshine Companies, or to any other form of investment. The pleading at para. 87, pertaining to the Jeffrey Plaintiffs, is similarly cryptic because it does not contain material facts in support of a claim that the funds advanced were a loan or other form of investment.

[29] The plaintiffs' concern appears to be that they have not received their Return on Investment in accordance with their respective ownership percentages in the various Sunshine Companies. However, the plaintiffs are minority shareholders and therefore may have limited ability to influence corporate decision-making. Such does not preclude an oppression claim depending on the circumstances of the case. However, it does not assist in determining whether the claim is proprietary. There is no claim in the notice of civil claim that there are any specific rights associated with

their shares that would entitle them to a formulaic payout by way of a preferred payment, nor any plea that the plaintiffs hold different classes of shares than other shareholders.

[30] I turn now to the question of whether the notice of civil claim asserts an interest in land such that the CPLs were validly obtained.

[31] The plaintiffs did not buy fractional interests in pieces of real estate, but rather purchased shares in the various Sunshine Companies. Absent some express term, and none is pleaded, the seller of the interest is entitled to make use of the money as they see fit, subject of course to limitations that may be imposed by either statute or common law.

[32] A shareholder does not have a proprietary interest in the assets of the company. In *Saadatmandi v. 1252988 B.C. Ltd.*, 2020 BCSC 1469, Justice Mayer summarized the relevant case law as follows:

> [15] As set out by the Supreme Court of Canada in *Hercules Management v. Ernst & Young,* [1997] 2 S.C.R. 165 at para. 59:
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> > [59] The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action …
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> . . .
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> [19] As set out in the decision of Justice Ball in *Shi v. Duan,* 2017 BCSC 2002, at para. 23:
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> > [23] A shareholder may seek a remedy when the corporation is injured by commencing a derivative action, but only with leave of the court under s. 232 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*Act*]; in the circumstances of this case the “assets and profits” of DHS are the property of DHS, and not the property of a shareholder. The shareholder holds an interest in the shares which have been issued to the shareholder, but not in the assets, profits or property of a company.
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> [20] As was stated by Justice Choi in *Schmidt v. Balcom,* 2016 BCSC 2438:
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> > [26] The law in British Columbia is well settled that a shareholder of a corporation has no proprietary interest in land owned by the

> corporation: *Rohani v. Rohani,* 2004 BCCA 605; *Sherk v. Smith,* 2007 BCSC 1309; *Blackwell v. Stewart,* 2015 BCSC 1716.
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> [21] Justice Choi summarized a portion of the findings of Justice Ehrcke in *Blackwell* at para. 27 of *Schmidt*:
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> > [27] … the fact that a shareholder is entitled to a proportionate share of the assets of a corporation on winding up, does not mean that the shareholder has a claim against the underlying assets of the corporation *in specie*, nor a proprietary claim to the land owned by the corporation prior to winding up. Rather, the proportionate share of the assets to which a shareholder is entitled on winding up, means a proportionate sale of the value of the assets.

[33] One of the potential remedies for a claim of unjust enrichment is a remedial constructive trust. As a result, a remedial constructive trust can form the basis for a CPL and a corresponding interest in land if a monetary judgment would not suffice.

[34] In *Xiao*, the Court of Appeal confirmed that absent an application for summary judgment, the analysis with regard to whether a CPL ought to be permitted to remain against a property is limited to a review of the pleadings; the court should not engage in a review of the claim on its merits. As such, an analysis of whether a monetary judgment would adequately compensate the plaintiffs cannot be undertaken at this stage, because the application is to be considered only with regard to the pleadings because the defendants did not engage the summary judgment rule.

[35] The plaintiffs say their claim includes one for unjust enrichment, and that they will be seeking a remedial constructive trust by way of alternative remedy at trial.

[36] The test for unjust enrichment was set out in the Supreme Court of Canada's decision in *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 987:

a) a benefit has been conferred on the defendant;

b) the plaintiff has suffered a corresponding deprivation; and

c) there is no juristic reason for the benefit or deprivation as the case may be.

[37] The defendants argue that the notice of civil claim is bereft of a specific plea of unjust enrichment, even though they acknowledge the plaintiffs use the term. The term 'unjust enrichment' appears in a heading between paras. 74 and 75, and is also referred to in para. 83:

> Conversion (Dwight Plaintiffs' interest) / Unjust Enrichment
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> 75. The Numbered Company was entitled to immediate possession of the Invested Funds and Return on Investment at the time of its conversion by Van Tran as described above in this notice of civil claim.
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> 76. Van Tran, on behalf of the Sunshine Companies, has used the Invested Funds to repair, maintain, and improve the Smithers Hotel, the Houston Hotel, the Terrace Hotel, the Sunshine Executive Terrace Properties and the Sunshine Properties.
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> 77. The Invested Funds contributed to the preservation of the Smithers Hotel, the Houston Hotel, the Terrace Hotel, the Sunshine Executive Terrace Properties and the Sunshine Properties, the acquisition of additional properties which, in whole or in part, are owned by Van Tran personally.
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> 78. The Invested Funds enabled the accumulation of assets by Van Tran.
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> 79. In a letter dated February 22, 2023, Dwight, on behalf of the Numbered Company, demanded the Invested Funds and the Return on Investment from Van Tran in the form of a purchase of the Numbered Company's shares in the Sunshine Companies. Van Tran refused and continues to refuse the Dwight Plaintiffs' demand.
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> 80. Van Tran, by his actions, has converted the Invested Funds to his own use and has wrongfully deprived the Dwight Plaintiffs of them.
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> 81. Additionally, or in the alternative, Van Tran's personal use of the Invested Funds represents a wrongful benefit for which there is no juristic reason or lawful justification.
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> 82. By reason of Van Tran's acts, the Dwight Plaintiffs have been deprived of the Invested Funds and Return on Investment and have suffered loss and damages, the particulars of which are as follows:
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> a. Denial and/or reduction of the Numbered Company's entitlement pursuant to its share allocation;
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> b. Loss of the Invested Funds;
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> c. Loss of the Return on Investment; and
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> d. Loss of the use of the Invested Funds.
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> 83. A monetary award for unjust enrichment would be an insufficient remedy, as funds for a payment order would not be possible without liquidating the assets of either Van Tran or the Sunshine Companies.

> 84. A monetary award would be inadequate in this case as the Defendants, Kim Van Tran and the Sunshine Companies, do not have adequate means to pay what is owed to the Dwight Plaintiffs.

[38] Paragraph 63 is similar to para. 77, with the exception of the reference in para. 77 to Mr. Tran and properties owned by him in his personal name. However, no CPLs have been filed against any properties owned by Mr. Tran. Paragraph 63 states as follows:

> Van Tran, on behalf of the Sunshine Companies, has used the Invested Funds and the Return on Investment to repair, maintain, and improve the Smithers Hotel, the Houston Hotel, the Terrace Hotel, the Sunshine Executive Terrace Properties and the Sunshine Properties.

[39] Similar allegations are made with regard to the Jeffrey Plaintiffs at paras. 107–116.

[40] I accept that the phrase ‘unjust enrichment’ does not need to be repeated throughout a pleading for the claim to have been advanced; rather, the test is whether the material facts that give rise to a claim for unjust enrichment have been pleaded.

[41] Of critical importance on this application is whether the plaintiffs have pleaded a claim of unjust enrichment as against the Sunshine Companies, as opposed to Mr. Tran. The defendant Mr. Tran is not an applicant as the CPLs have been filed against properties owned by the Sunshine Companies, but not against properties owned by Mr. Tran personally.

[42] In *Wai v. Chung*, 2020 BCSC 34 at para. 27, Justice MacDonald set out the flaws in the pleadings in that case:

> [27] In the case before me, there is no factual foundation in the plaintiff’s pleadings that gives rise to a CPL. My concerns are:
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> a) The plaintiff did not plead an interest in the Property. She simply asserts the Investment Funds were used to purchase the Property. The last injection of Investment Funds was in December 2017. The purchase of the Property was December 2018. This was a whole year later.

b) The primary relief sought in the plaintiff's pleadings is in para. 1 of Part 2, judgment in favour of the plaintiff in the amount of $282,341.81. This is a financial claim by the plaintiff for repayment of her Investment Funds. The trust and fraud claims are sought in the alternative.

c) Paragraph 7 of the plaintiff's pleadings sets out the basis for the relief with respect to the Property, constructive trust, resulting trust, and unjust enrichment. Not only are they alternative claims, no specific facts were pleaded to support these claims, including unjust enrichment.

d) The plaintiff did not claim anything to support a constructive trust or a resulting trust such as the holding of land or holding property beneficially for another. As set out in the jurisprudence, there must be more than broad statements and bald assertions.

e) More importantly, no funds were directly linked to the purchase of the defendants' Property. There must be *some* basis set out in the pleadings establishing a connection or nexus between the misappropriated funds and an interest in land.

[43] Many of the concerns identified in *Wai* apply here.

[44] I conclude from my review of paras. 75–84 and 107–116 of the notice of civil claim that the plaintiffs do not properly plead a claim for unjust enrichment as against the Sunshine Companies. I reach this conclusion for a number of reasons:

a) the plaintiffs do not assert an interest in any specific property or properties. Rather, they simply assert wrongs—without detail, specificity or material facts—and seek a broad remedy;

b) there are no material facts pleaded as to either the amounts or dates of the alleged wrongful conduct;

c) there are no facts pleaded that would connect any particular amount to any of the defendants individually, nor to any specific piece of property;

d) the claim in its essence is an oppression claim, as evidenced by para. 79 where the Dwight Plaintiffs plead that they demanded that Mr. Tran purchase their shares;

e) the allegations in paras. 75 and 108 are that funds were converted by Mr. Tran, not by one or more of the Sunshine Companies;

f) a number of the allegations refer solely to the Invested Funds (paras. 76, 77, 80, and 81). The Dwight Plaintiffs invested the Invested Funds in 2007, predating construction of Sunshine Houston by two years, and Sunshine Terrace by five years or more. The same observations apply to the Jeffrey Invested Funds, which are the basis of the claims at paras. 108–112;

g) the allegations in paras. 76 and 108 is that the Invested Funds were used by Mr. Tran and not by one or more of the Sunshine Companies;

h) the plaintiffs' claims are that Mr. Tran converted the Invested Funds to his own use (paras. 80 and 110);

i) the plaintiffs assert the party whom has received the benefit is Mr. Tran (paras. 78, 80–82, 110, and 111–113);

j) there are no specific allegations about specific benefits derived by each of the Sunshine Companies;

k) the plaintiffs do not draw any distinction between the various properties owned by the Sunshine Companies, even though some are hotel properties and others are not; and

l) the plaintiffs all seek the same relief against all of the same properties, even though their interests differ.

[45] In all of the circumstances, the pleadings are insufficient generally because they do not contain sufficient material facts to support a claim in unjust enrichment. The pleadings also cannot support the CPLs because to the extent that a claim of unjust enrichment is made, the claim is against Mr. Tran personally and not against any of the Sunshine Companies.

[46] I conclude the CPLs are nothing more than an attempt by the plaintiffs to tie up the defendants' properties pending determination of their claims.

[47] It follows that I conclude that the CPLs must be struck.

[48] In the circumstances, it is not necessary to consider the defendants' alternative submission relating to hardship under ss. 256 and 257 of the *LTA*.

[49] The defendants are entitled to their costs.

"Wilson J."