TAB 2.1

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Commercial Law 2012:

The Latest Cases

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Commercial Law 2012: The Latest Cases

Overview

In reviewing some of the commercial cases that were released over the past year, one cannot help but notice that the Courts have carved out interesting precedents for highly competitive business behaviour. Conduct, which would have historically been viewed as aggressive and possibly even tortious, may now be viewed as acceptable and not compensable in damages. Another development is the Supreme Court of Canada's decision in *Southcott Estates* v. *Toronto Catholic District School Board*[1] where the majority refused to create a mitigation exception for a single purpose corporation. Every legal person has a duty to mitigate in the context of a failed real estate transaction and even more so for properties procured for investment of profit. The Court has made clear, once again, that specific performance will rarely, if ever, be available in those cases.

In this paper, I have summarized and commented on some of 2012's leading commercial cases. Among the trends is the increasing availability of sealing orders in commercial cases.

Southcott Estates* v. *Toronto Catholic District School Board

On October 17, 2012, the Supreme Court of Canada released this decision, which elaborates on mitigation of damages and restricts the availability of specific performance in a commercial real estate deal. In this case, the vendor ("TCDSB") failed to satisfy a condition by a deadline, and then refused to extend the closing. The condition related to the severance of the property. The purchaser Southcott Estates ("Southcott Estates") commenced the action against TCDSB claiming damages or alternatively specific performance. Southcott Estates was a single purpose corporation incorporated solely for this deal. Southcott Estates was part of a larger group of companies that acquired and developed land in the Toronto area ("the Ballantry Group").

After the deal fell through, Southcott Estates refused to mitigate. The argument was that this corporation was constituted only for the TCDSB land purchase. Other companies in the Ballantry Group purchased land in the Toronto area after the deal went sour. At trial, Justice Spiegel found that specific performance was not available because the land had been purchased for investment purposes. This finding was not disturbed by the Court of Appeal or the Supreme Court of Canada.

The lower Court then considered Southcott Estates' damages and whether Ballantry's purchase of other properties after the aborted sale constituted mitigation. The trial judge held that "these subsequent purchases were collateral, independent transactions that did not arise out of the consequences of the breach. In all the circumstances, I do not consider

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[1] 2012 SCC 51 at http://www.canlii.org/eliisa/highlight.do?text=southcott+estates&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/scc/doc/2012/2012scc51/2012scc51.html [*Southcott Estates* SCC].

these transactions as mitigatory."[2] Furthermore, Justice Spiegel found that TCDSB failed to demonstrate that Southcott Estates did not take advantage of a "reasonable opportunity" to mitigate its loss. In other words, TCDSB did not demonstrate that there were other properties available for sale that Southcott Estates should have purchased. Therefore, the trial judge awarded damages for lost profits without any deduction for failing to mitigate.[3]

On the issue of mitigation, the Court of Appeal reversed.[4] The Court found that Justice Spiegel should have accepted TCDSB's evidence that (1) there were other available properties for sale in the Greater Toronto area that Southcott Estates should have considered; and (2) the Ballantry Group's purchase of other lands was also acceptable evidence of available lands for sale. Southcott Estates either:

> [F]latly repudiated or, at the very least, sought to avoid the legal duty imposed upon [it] to mitigate its loss by purchasing property that would have mitigated Southcott's loss in the name of other newly corporate entities and to, thereby, isolate such property from the legal consequences arising from this action.[5]

As a result of its failure to mitigate, the Court of Appeal overturned the damages awarded at trial and granted nominal damages of $1 based solely on the breach of contract.

On appeal to the Supreme Court of Canada, the majority agreed with the Court of Appeal with Chief Justice McLachlin dissenting. The majority judgment written by Justice Karakatsanis considered the following three issues:

1. Is a single purpose corporation required to mitigate?
2. To what extent should a Plaintiff mitigate where there is a claim for specific performance?
3. Did Justice Spiegel err in concluding that there was no evidence of comparable properties available for mitigation?

On the first issue, the majority found that a single purpose corporation is not exempted from mitigating its losses. Although Southcott Estates argued that this shell corporation was without resources and therefore unable to mitigate without contribution from the parent company, the majority held that, without evidence of impecuniosity or findings that the losses could not be avoided, single purpose corporations are under the same obligation to mitigate.

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[2] *Southcott Estates Inc.* v. *Toronto Catholic District School Board*, 2009 CanLII 3567 (ONSC), http://www.canlii.org/en/on/onsc/doc/2009/2009canlii3567/2009canlii3567.html at para. 143.

[3] Justice Spiegel awarded Southcott damages for a 60% loss of the chance the transaction would have closed but for the breach.

[4] *Southcott Estates Inc*. v. *Toronto Catholic District School Board*, 2010 CanLII (ONCA) at http://www.canlii.org/en/on/onca/doc/2010/2010onca310/2010onca310.html. [*Southcott Estates* ONCA].

[5] *Southcott Estates* ONCA at para. 28.

Even though specific performance was not available in the circumstances, the majority examined the broader question about whether there were circumstances in which a Plaintiff would be justified in failing to mitigate. This goes back to *Asamera Oil Corporation Ltd.* v. *Sea Oil & General Corporation et al*.[6] where the Court carved out an exception to mitigation where circumstances reveal "some fair, real, and substantial justification" for the claim or "a substantial and legitimate interest" in seeking specific performance.[7]

However, with respect to commercial property purchased for investment purposes, the Supreme Court of Canada in *Southcott Estates* repeated past precedents by ruling that specific performance is not available: "A plaintiff deprived of an investment property does not have a 'fair, real and substantial justification' or a 'substantial and legitimate' interest in specific performance unless he can show that money is not a complete remedy".[8]

On the final issue of whether comparable properties were available to Southcott Estates for purchase, Southcott Estates argued that the Court of Appeal erred in shifting the onus to the Plaintiff based on the admission of Southcott Estates' principal that he had no intention to mitigate. Even with that admission, Southcott Estates argued that TCDSB was still required to bring evidence showing that there was comparable property available for Southcott Estates to purchase. The trial judge found as a fact that there were no comparable properties available for sale. The Court of Appeal disagreed with that approach and took Southcott Estates' admission as sufficient to shift the onus back to Southcott Estates to show that even if it had tried to mitigate, it could not have done so.

The majority of the Supreme Court outlined the steps that the parties are required to take once it is alleged that the plaintiff failed to mitigate. The defendant must prove on a balance of probabilities that: (1) the plaintiff failed to take reasonable efforts to substitute and; (2) a reasonable substitute could be found. Thus, Justice Karakatsanis wrote that "it would be an error to suggest that the defendant did not have the burden of showing that mitigation was possible even where the plaintiff made no attempt to do so."[9]

The Supreme Court agreed with the Court of Appeal that the trial judge erred in failing to consider purchases of land by other Ballantry Group companies as evidence of the existence of mitigation opportunities. Southcott Estates, even as a member of the Ballantry Group, could have purchased these properties to mitigate. Furthermore, the Court made a palpable and overriding error in failing to consider the other properties[10] available for sale at the time.

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[6] 1978 CanLII 16 (SCC) at http://www.canlii.org/en/ca/scc/doc/1978/1978canlii16/1978canlii16.html [*Asamera*].
[7] *Asamera* at pp 668-669.
[8] *Southcott Estates* SCC at para. 41.
[9] *Southcott Estates* SCC at para. 46.
[10] At trial, the Board led evidence that there were 81 comparable properties for purchase using a broad price range and comparable development timelines.

Chief Justice McLachlin's dissent dealt with whether the Board provided sufficient evidence that Southcott Estates had an opportunity to mitigate and whether Southcott Estates acted unreasonably in maintaining its right to specific performance. This is the two-part test outlined above whereby a Plaintiff who is unsuccessful in a claim for specific performance may still avoid mitigation if his actions are justifiable. Conversely, where a Defendant can establish that the Plaintiff had unreasonably failed to mitigate, the damages must be reduced to the extent that mitigation would have avoided the loss.

On the first issue, the Chief Justice accepted Justice Spiegel's findings of fact that the Board was unsuccessful in demonstrating that Southcott Estates had an opportunity to mitigate. At trial, the Board's expert admitted on cross examination that the available properties for sale offered by the Board as mitigation opportunities were actually not available for purchase. The evidence also demonstrated that these properties were neither comparable nor profitable to develop.

With respect to the Ballantry Group's purchases, the Chief Justice agreed with Justice Spiegel that these properties were not comparable: "It is not enough to show that development land may have been available to companies which may have had different development strategies."[11] The fact is that Southcott Estates and the other Ballantry Group companies had different mandates for development.

Although unnecessary in light of her finding that there were no mitigation opportunities available to Southcott Estates, the Chief Justice also considered whether Southcott Estates acted unreasonably by failing to mitigate. Unlike the majority, the Chief Justice found that Southcott Estates had a "fair, real and substantial justification" for seeking performance. By implication, the Chief Justice does not automatically exclude commercial property from specific performance.

The Chief Justice recognized that a claimant "acting reasonably, cannot pursue specific performance and mitigate its loss at the same time."[12] Effectively, the Plaintiff is admitting defeat by purchasing a comparable property. One cannot claim that the uniqueness of the property demands specific performance if there was opportunity to mitigate. Furthermore, the trial judge did not find that Southcott Estates acted unreasonably in pursuing specific performance. The Chief Justice found that the property was "uniquely suited" for Southcott Estates' development needs.

As a single purpose corporation, the Chief Justice also noted that Southcott Estates had limited financial resources and probably would not have been able to obtain financing for another property. This is in contrast to the majority's finding that Southcott Estates led no evidence of impecuniosity in order to avoid mitigation. The Chief Justice accepted that Southcott Estates' only asset was the deposit from the failed transaction.

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[11] *Southcott Estates* SCC at para. 88.
[12] *Southcott Estates* SCC at para. 93.

Takeaway points

While it may have been easier for the Supreme Court of Canada to definitively restrict specific performance to residential or non-commercial transactions, this decision does not do that. There is arguably some room for specific performance for a unique commercial property with a narrow mandate. In light of that, every client/buyer on the receiving end of a failed commercial real estate transaction should be advised to mitigate even if specific performance is pursued. For your client this may be financially impossible *i.e.* purchasing another property and pursuing the subject property in the claim, but it is apparent that if the Plaintiff does not at least make reasonable efforts to mitigate where there are non-comparable properties available, the damages for breach of contract will be reduced. It is possible that *Southcott Estates* is unique in the sense that the principal admitted that the corporation made no attempts to purchase a comparable property. If your client had made reasonable attempts to mitigate but there were no comparable properties available, and the investment property was somehow unique, a pleading of specific performance may not be found to be unreasonable such that the damages would need to be reduced accordingly.

Agribrands Purina Canada Inc*. v. *Kasamekas[13]

In this case, the Court of Appeal defines and limits what is to be considered unlawful conduct in order to make out the tort of civil conspiracy.

Until 1990, Ren's Feed and Supplies Ltd. ("Ren's") was an authorized dealer of Purina livestock and pet food. Purina terminated the dealership agreement for reasons unrelated to the litigation. Raywalt ("Raywalt") sets up a Purina dealership in Ren's territory in 1991 where there is an exclusivity clause in the agreement for this territory. Notwithstanding this clause, Purina continued to supply Ren's with feed until about a month after Raywalt and Purina entered into the dealership agreement. After Purina stopped supplying feed, Ren's began purchasing feed at dealer prices from McGrath, another Purina dealer in a different territory, in order to continue supplying its customers. Purina was aware of Ren's arrangement with McGrath. As a result of Ren's continued unauthorized distribution in its territory, Raywalt was forced to close in January 1992.

At trial, Purina was found to be in breach of its contract with Raywalt. This ground was not appealed. On the issue of unlawful conduct conspiracy, the trial judge found that the Defendants had acted together and that it was reasonably foreseeable that serious, economic injury would result. With respect to the conduct, Justice Quigley found it to be unlawful and unauthorized in that: (1) Purina did not support Raywalt as its authorized dealer; (2) McGrath had no authority under its dealership agreement to sell to Ren's under the table; and (3) Ren's obtained feed from McGrath at dealer pricing.

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[13] *Agribrands Purina Canada Inc*. v. *Kasamekas*, 2011 ONCA 460 CanLII at http://www.canlii.org/en/on/onca/doc/2011/2011onca460/2011onca460.html [*Purina* ONCA].

Damages were calculated based on the assumption that Purina's contract with Raywalt would have continued indefinitely because Purina's dealership agreements typically had long durations. Although the dealership agreement had a specific clause allowing for termination on 60 days' notice, Justice Quigley found that Purina could not rely on it because it had breached the implied duty of good faith. Therefore, Raywalt's damages were the net profit of the business in the second year of operation had it continued beyond January 1992. The judge applied a three times earnings multiple.

On appeal, Goudge J.A. on behalf of the Court explained the requirements for the tort of civil conspiracy:

1) The parties must act in combination, by agreement or with a common design;
2) There must be unlawful conduct;
3) Which is directed toward the Plaintiff;
4) The Defendants should know that injury to the Plaintiff is likely to result; and
5) The conduct causes injury.[14]

On the unlawful conduct ground, the Appellants argued that their conduct was not unlawful and that Ren's and McGrath did not act in concert. The Court agreed. Ren's and McGrath's conduct was not actionable at law so therefore it was not "unlawful" for the purpose of establishing the tort of civil conspiracy. Specifically, Ren's purchase of the feed at dealer cost from McGrath was allowed. It was free to obtain the best price it could from the dealer's agent. Furthermore, McGrath's conduct in selling feed to Ren's at cost was also not prohibited by any agreement. The lower Court was incorrect in broadening "unlawful conduct" to that which the defendant is "not at liberty or not authorized to engage in, whether as a result of law, a contract, a convention or an understanding."[15]

Unlawful conduct for the purpose of this tort includes quasi-criminal conduct, inducing breach of contract, nuisance and intimidation among others. "Highly competitive activity", a term used by the Goudge J.A., is not to be considered unlawful.

The Court also specifically differentiated between tortious interference with contractual relations and the tort of civil conspiracy. Goudge J.A. cautioned against using the line of jurisprudence from the former tort to lay the groundwork for civil conspiracy. Raywalt also argued that Ren's induced Purina to breach its contract. This was a new ground not advanced at trial. The Court dismissed this argument finding that inducing breach of contract tort is inconsistent with the trial judge's finding that Purina was aware of, and condoned Ren's and McGrath's arrangement.

On the issue of damages, the trial judge ordered $30,000 in punitive damages and this finding was not disturbed. For the breach of contract damages, the Court of Appeal re-examined the dealer agreement and found that Purina had an unconditional right to

[14] *Purina* ONCA at para. 26.
[15] *Purina* ONCA at para. 31.

terminate the contract at any time on 60 days' notice. Using that clause, the trial judge should have calculated damages needed to restore Raywalt to the position had the contract been performed using the least burdensome method to Purina. In other words, the duration of the damages period would be from the commencement of the agreement (March 1991) to 60 days after Raywalt's closed its doors (March 1992). Recall that the trial judge awarded damages based on the net profits of the business in the second year of business applying a three times earnings multiple. At trial, the Plaintiffs were awarded $954, 213, which was reduced to $198,665.83 on appeal.

The Court of Appeal also specifically rejected the lower Court's rationale that Purina was unable to terminate the dealership agreement on 60 days' notice because it failed to act in good faith. The Supreme Court of Canada in *Hamilton* v. *Open Window*[16] did not rule that "good faith conduct" is a pre-requisite for the least burdensome principle to apply."[17]

At trial, the judge calculated prejudgment interest based on the average rate in the year that the cause of action arose. This amounted to 6.65% or roughly $1.1 million dollars. The Court reversed the interest rate as well finding that the starting date for the prejudgment interest rate is the quarter when the action was commenced. The average rate was adjusted to 5.1%.

Takeaway points

For franchise and distribution agreements, solicitors should ensure that there is a specific clause allowing either side to terminate with a certain amount of notice.

Unlawful conduct has become increasingly difficult to establish for the tort of civil conspiracy since the Court of Appeal has expressly sanctioned highly competitive commercial activity. This is again apparent in *Density* v. *HK Hotels*,[18] discussed below, which is one of the first cases post-*Purina* in which conduct that appears to be inducing breach of contract is not considered to be unlawful.

Density Group* v. *HK Hotels

Density Group ("Density") commenced an action against HK Hotels ("HK Hotels") and Henry Kallan ("Kallan") after HK Hotels terminated its agency relationship with Density. In the action, Density sought a declaration that HK Hotels held in trust for Density a 50% interest in a joint venture agreement to construct a luxury hotel at Exhibition Place in Toronto. Density alleges that Kallan, as the directing mind of HK Hotels, breached the terms of the trust and breached fiduciary duties owed to Density.

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[16] *Hamilton* v. *Open Window Bakery Ltd.* 2004 SCC 9, CanLII at http://www.canlii.org/eliisa/highlight.do?text=hamilton+v.+open+window&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/scc/doc/2004/2004scc9/2004scc9.html. [*Open Window*].

[17] *Open Window* at para. 47.

[18] *Density Group Ltd*. v. *HK Hotels LLC* 2012 ONSC 3294, at http://www.canlii.org/eliisa/highlight.do?text=density+v.+hk+hotels&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onsc/doc/2012/2012onsc3294/2012onsc3294.html. [*Density*].

Kallan brought a motion for summary judgment on the grounds that there was no genuine issue requiring a trial as to his personal liability. The motions judge, Justice J. Wilson, considered whether Density's framing of the claim *i.e.* as a breach of trust was a thinly veiled attempt to personally involve Kallan.

The key facts are, as follows:

- In April and May 2007, the parties entered into two agreements: (i) a Letter of Understanding ("LOU"), which outlined the framework to explore the hotel project; and (ii) an Agency Agreement authorizing Density to bind HK Hotels for the purpose of the LOU.
- The LOU required that, in order to formalize the relationship, the parties needed to execute certain other contracts within three months of the LOU. These agreements would dictate how the hotel would be developed, constructed, managed and owned.
- The parties never entered into these subsequent agreements.
- The Agency Agreement provided, among other things, that the Agreement did not create a fiduciary relationship between Density and HK Hotels; Density was not liable for any losses or damages to HK Hotels in connection with the agency unless such losses or damages results from Density's fraudulent conduct.
- The motion judge preferred the Defendants' evidence that the relationship deteriorated when they discovered that Density had been paying itself unauthorized management fees from its payments to the project. The LOU did not provide for Density to receive such fees.
- The LOU provided that the parties would split the costs and expenses for the project. The motions judge found that Density had failed to contribute its fair portion of the expenses and took unauthorized management fees even though there were unpaid accounts to third party consultants.
- Three letters of intent with the City of Toronto were executed with respect to the development. For all intents and purposes, Density was a party to the first two letters of intent, and not a party to the third letter of intent.
- When Kallan discovered that Density was taking the management fees in or about February 2009, he contacted and met with City of Toronto officials to advise that HK Hotels wanted to continue with the hotel project without Density's involvement.
- In September 2009, Toronto entered into the third letter of intent with HK Hotels. It was substantially identical to the second letter of intent except that this version deleted all references to Density.

According to Density, Kallan owed a fiduciary duty to Density, and Kallan's direction to remove Density from the third letter of intent was a misappropriation of a trust asset giving rise to a genuine issue for trial on the issue of Kallan's personal liability. In

support of its position, Density argued that the following were triable issues as against Kallan:

- There was a close, personal relationship between Kallan and the principals of Density giving rise to a fiduciary duty.
- As Density and HK Hotels were co-venturers, there was a fiduciary duty between the two corporations.
- The letters of intent with the City was a trust asset owned by the corporations.
- Even if Kallan was not in a fiduciary relationship with Density, Kallan induced a breach of contract and breach of fiduciary duty, which was owed by HK Hotels, by having Density removed from the third letter of intent.

Justice J. Wilson granted summary judgment finding that there was no genuine issue for trial on the issue of Kallan's personal liability.

Close personal relationship

On the issue of the personal relationship between Kallan and Density's principals, the motions judge deferred to *BCE Inc.* v. *1976 Debentureholders*,[19] which confirmed that a director's fiduciary duty is to the corporation and not third party stakeholders. In this case, Kallan could not have a fiduciary duty to Density unless it could demonstrate that the three requirements from *Frame* v. *Smith*[20] are satisfied as well as the additional requirements recently established by the Supreme Court of Canada in *Alberta* v. *Elder Advocates of Alberta Society*.[21] From *Frame*:

1. Scope for the exercise of some discretion or power;
2. That power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and
3. Peculiar vulnerability to the exercise of that discretion or power.[22]

And from *Elder Advocates*, they are:

1. An undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary;
2. A defined person or class of person; and

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[19] 2008 SCC 69 at http://www.canlii.org/eliisa/highlight.do?text=BCE+Inc.+v.+1976+Debentureholders&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/2008/2008scc69/2008scc69.html. [*BCE Inc*.].

[20] 1987 CanLII 74 (SCC) at http://www.canlii.org/eliisa/highlight.do?text=frame+v.+smith&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/1987/1987canlii74/1987canlii74.html. [*Frame*].

[21] 2011 SCC 24 at http://www.canlii.org/eliisa/highlight.do?text=Alberta+v.+Elder+Advocated+of+Alberta+Society&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/scc/doc/2011/2011scc24/2011scc24.html [*Elder Advocates of Alberta Society*].

[22] *Frame* at para. 97.

3. A legal or substantial practical interest of the beneficiary that will be adversely affected by the alleged fiduciary's exercise of discretion or control.

Density must prove that the three part test in *Frame*, as amplified in *Elder Advocates of Alberta Society*, has been met to successfully demonstrate a fiduciary duty owed by Kallan to Density.[23]

Based on the evidence, the judge found that Kallan was always acting on behalf of HK Hotels in accordance with his obligations as a director of the corporation. There was no evidence presented to suggest that "one party relinquished its own self-interest and agreed to act solely on behalf of the other party."[24] Furthermore, Justice J. Wilson rejected Density's argument that a fiduciary relationship as between Kallan and Density was created by virtue of HK Hotels' established reputation as a hotel developer or as a result of the parties' prior business dealings. It is important to note that these finding do not foreclose the possibility of a fiduciary relationship between Density and HK Hotels in which Kallan as director acting on behalf of the corporation, acted improperly. As an individual, however, no fiduciary duty existed.

Trust assets

In rejecting the second argument that the letters of intent were trust assets, Justice J. Wilson reviewed the law (or lack thereof) on joint ventures. A joint venture is a business arrangement under which two or more persons combine their efforts for a specific venture. Such an arrangement is another form of contractual relationship, and does not automatically create a fiduciary relationship. As with all other commercial relationships, a party alleging that a fiduciary duty exists in the context of a contractual arrangement must demonstrate that the *Frame* criteria are satisfied.

Similarly, a joint venture does not automatically create a trust asset with respect to the joint venturers' assets. For Density to assert that the letters of intent were trust assets, it must establish that the elements of a trust are present *i.e.* the intention to create one expressly or by implication. Justice J. Wilson found none present within the LOU or Agency Agreement. Furthermore, there were no discussions between the parties regarding the creation of a trust or "that the nature of the relationship between Density and HK Hotels was other than a commercial contract."[25]

As to whether Kallan induced a breach of contract or a breach of fiduciary duty, Density would be required to establish that there was a genuine issue for trial as to whether he knowingly assisted HK in breaching its obligations to it. In *Air Canada* v. *M.L. Travel*

[23] *Elder Advocates of Alberta Society* at para. 100.
[24] *Density* at para. 114.
[25] *Density* at para. 162.

Ltd.,[26] the Supreme Court provided two requirements for knowing assistance: (1) degree of knowledge of the stranger; and (2) nature of the breach of trust.

The motions judge found that the first requirement was met because Kallan knew the position of HK Hotels as he was the one who met with City officials to revise the letters of intent. With respect to the second prerequisite, the conduct of HK Hotels (as trustee) had to be fraudulent or dishonest in its dealings with Density and that Kallan was nevertheless responsible. This has to be considered with *Said* v. *Butt*,[27] which grants a director, acting in good faith, immunity from breach of contract claims against the corporation. Citing *Purina,* where the Court of Appeal clearly broadened "unlawful conduct" to that which is actionable and wrong in law, Justice J. Wilson found that Kallan's meeting with city officials was not unlawful. The motions judge accepted that Kallan's actions were in response to discovering that Density had been paying itself unauthorized management fees. On that basis, the judge found that there was no genuine issue for trial on all issues as against Kallan.

Takeaway points

This decision dealt only with Kallan's personal liability leaving HK Hotels' responsibility to another day. However, the Court at paragraph 190 seems to suggest that Kallan acting on behalf HK Hotels may also be immune. This is one of the first cases to test drive unlawful conduct post-*Purina* and particularly in a competitive, commercial environment. Of course, this was not a civil conspiracy case, but related to inducing breach of contract. Not surprisingly, in circumstances where the party alleging unlawful conduct has been found to behave unscrupulously itself, the party accused of unlawful conduct will be allowed to protect itself. To what extent has yet to be defined. In this case, the evidence of impropriety against Density was so overwhelming that the Court was willing to exempt Kallan (but maybe not HK Hotels) from interfering with the development plan.

SEALING ORDERS IN COMMERCIAL CASES

The Supreme Court of Canada in *Sierra Club of Canada* v. *Minister of Finance* created a two-part test for the availability of a sealing order and notably recognized that a "commercial interest" may also be protected in limited circumstances. While the law is that court files should only be sealed in exceptional cases, in 2012, Toronto's Commercial List has routinely granted them in the reported decisions. Although the sample size is small, there would appear to be a trend, which may offer some helpful precedents on protecting client information which would have previously been in the public domain.

[26] 1993 CanLII 33 (SCC) at http://www.canlii.org/en/ca/scc/doc/1993/1993canlii33/1993canlii33.html.
[27] [1920] 3 K.B. 497.

The *Sierra Club* test for granting a sealing order is, as follows:

1. Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

2. The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[28]
   [My emphasis]

This passage of *Sierra Club* is broadly cited in the commercial cases listed below in support of granting such an order to protect the confidentiality of commercial paper. For an excellent review of the case law on the law of sealing orders pre- and post-*Sierra Club*, see John B. Laskin and Dan W. Puchniak's article "Sealing Orders after Sierra Club".[29]

Latvian House Toronto Limited* v. *Fraternity "Lidums"[30]

This was a motion for directions on several issues relating to the wind up of the Latvian House Toronto Limited. Of relevance to this paper, the Applicant sought a sealing order with respect to a shareholders list that was filed with the Court.

In granting the Order, Justice D.M. Brown evaluated whether there was a "serious threat to the commercial interest in question"[31] as per *Sierra Club*. Because a shareholder list is not public and access to information on those lists would normally be the dominion of the corporation itself, Justice D.M. Brown concluded that a sealing order was necessary "to preserve the important public principle that access to the shareholder lists of private corporations remain through the channels specified by Ontario corporate law, unless a person can demonstrate, on application to the Court, some legitimate reason why it should be granted access".[32]

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[28] *Sierra Club* at para. 53.
[29] *The Advocates Quarterly*, Volume 27 at http://www.torys.com/Publications/Documents/Publication%20PDFs/AR2003-15T.pdf
[30] 2012 ONSC 2237 at http://www.canlii.org/eliisa/highlight.do?text=latvian+house+toronto+v.+fraternity&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onsc/doc/2012/2012onsc2237/2012onsc2237.html [*Latvian House*].
[31] *Latvian House* at para. 14.
[32] *Latvian House* at para. 16.

Babra* v. *Acquisition SL LLC[33]

This was a motion for production of a non-disclosure agreement and associated documents ("NDA documents") and financial statements. The responding party sought a sealing order if the production was granted.

Justice Quigley granted production of all documents as well as the sealing order. With reference to the *Sierra Club* criteria, the Court found that:

1. The risk in question with respect to the confidential information is a serious risk well-grounded in the evidence;
2. The information that is to be concealed only relates to the NDA documents. There is a multitude of other documentation that will not be subject to the sealing order; and
3. The sealing order will be restricted. In order to ensure that the sealing order does not interfere with the public interest of an open and accessible trial it will remain open to the trial judge to reconsider the issue of whether or not the order ought to remain in place at the opening of the trial of the action.[34]

Cle Leasing Enterprises Ltd. (Re)[35]

This was an application on Toronto's Commercial List that primarily dealt with a technical issue on the modern interpretation of the *Bulk Sales Tax Act*. The applicants, corporate entities that lease equipment to small and medium sized businesses, sought a sealing order over their 2011 financial statements, which they needed to file in support of the application.

Justice D.M. Brown citing *Sierra Club* granted the sealing order finding that "the financial statements are confidential documents not otherwise available to the public and their placement in the public court record would make available sensitive information about important commercial interests."[36]

Timminco Limited (Re)[37]

This was an application for relief under the *Companies' Creditors Arrangement Act*. The applicants sought a sealing Order over certain documents, which contain employee retention plans detailing compensation. The argument was that "the disclosure of such

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[33] 2012 ONSC 609 at http://www.canlii.org/eliisa/highlight.do?text=babra+v.+acquisition+sl+llc&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onsc/doc/2012/2012onsc609/2012onsc609.html [*Babra*].
[34] *Babra* at para. 26.
[35] 2012 ONSC 1301 at http://www.canlii.org/eliisa/highlight.do?text=cle+leasing+enterprise&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onsc/doc/2012/2012onsc1301/2012onsc1301.html [*CLE Leasing*].
[36] *CLE Leasing* at para. 25.
[37] 2012 ONSC 506 at http://www.canlii.org/en/on/onsc/doc/2012/2012onsc506/2012onsc506.html [*Timminico*].

information would compromise the commercial interests of the Timminco Entities and harm [employees]. Further, the [employees] have a reasonable expectation that their names and salary information will be kept confidential."[38] The union opposed the sealing order stating that the CCAA process should be open and transparent. Justice Morawetz granted the sealing order because he felt that the commercial interests of applicants would be comprised, and the employees would be harmed by the release of this information. Furthermore, the applications judge found that the release of this information may "side track" the parties from proceeding with the arrangement in the most expeditious fashion.

Out-Of-Home Marketing Association of Canada* v. *Toronto (City)[39]

The City of Toronto passed a bylaw imposing a tax on signs outside of businesses, which advertised goods or services not available at the premises. This bylaw was challenged on various grounds[40] by an advertising firm and marketing association. The applications judge dismissed the application, but granted a sealing order over certain financial information filed by the advertising firm in support of its arguments.

This decision was appealed with a cross appeal by the City on two issues including the sealing order. With respect to the sealing order, the Court of Appeal found that the applications judge erred because there was no greater public interest in keeping the information private. Referring to *R.* v. *Mentuck*,[41] a publications ban case, the Supreme Court of Canada required that there be a "serious risk to the proper administration of justice."[42] In the circumstances, the advertising firm sought the sealing order over this information because it would jeopardize its commercial interests. In support of that position, it filed an affidavit stating that the information was "highly sensitive and confidential and can be used by Pattison Outdoor's competitors, advertisers and land owners to Pattison Outdoor's disadvantage."[43] Epstein J.A. found that evidence fell short of demonstrating a serious risk to the administration of justice.

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[38] 2012 ONSC 506 *Timminico* at para. 76.
[39] 2012 ONCA 212 at http://www.canlii.org/eliisa/highlight.do?text=outdoor+advertising+and+sealing+order&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onca/doc/2012/2012onca212/2012onca212.html [*Outdoor Advertising*].
[40] At paragraph 1 of *Outdoor Advertising*: Pattison Outdoor Advertising ("Pattison") and Out-of-Home Marketing Association of Canada ("OMAC") challenged the Sign Tax by-law on various grounds, principally, that it imposes an indirect tax and therefore is ultra vires the City as contravening the *City of Toronto Act*, 2006, S.O. 2006, c. 11 and the *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3. Pattison also argues that the Sign Tax by-law should be quashed on the ground that it is discriminatory. OMAC submits that the even if the Sign Tax by-law is valid, it does not apply to signs that existed at the time of its enactment on account of a provision in the City of Toronto Act exempting existing lawfully erected signs from the reach of by-laws "respecting signs".
[41] 2001 SCC 76 (CanLII) at http://www.canlii.org/eliisa/highlight.do?text=%22r.+v.+mentuck%22&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/scc/doc/2001/2001scc76/2001scc76.html [*Mentuck*].
[42] 2001 SCC 76 *Mentuck* SCC at para. 55.
[43] *Outdoor Advertising* at para. 57.

Takeaway points

Justice D.M. Brown who regularly sits on Toronto's Commercial List has, in at least two reported decisions in 2012, granted sealing orders in cases partially based on the fact that this information would not otherwise be available publicly. With respect, it would appear that this reasoning may not conform to the strict test from *Sierra Club*. It is unclear whether the Court of Appeal would support this rationale in light of the decision in *Outdoor Advertising* where the Court took a dim view of affidavit evidence declaring that a commercial interest was in jeopardy without substantiating that risk

BONUS CASE

Pintar* v. *Consolidated Wholesale Group and Hinn[44]

The Plaintiff brought a motion for summary judgment on a debt against a corporation and personal guarantor. The guarantor wrote an e-mail stating that he personally guaranteed the Plaintiff's debt in full however that e-mail did not address the time period, consideration and when the debt was due. Another e-mail in the string between the parties suggested that the guarantee would be negotiated at a later date.

The motion was granted, and upheld on appeal. At the motion, Justice Conway found the elements to create a guarantee were present over the e-mail correspondence and were understood from the surrounding circumstances. In other words, the amount of the debt was clear, the debt had crystallized, the guarantor knew the terms of the contract giving rise to the debt, there was an e-mail signature and consideration for forbearance in collecting the debt.

On appeal, in a brief endorsement, the Court found that "it was open to the motion judge to consider the exchange of emails that preceded [the e-mail specifically guaranteeing the debt] as part of the factual matrix within which that email was sent."

The guarantor sought leave to appeal to the Supreme Court of Canada, but the motion was ultimately discontinued.

[44] 2011 ONCA 805 (CanLII) at http://www.canlii.org/eliisa/highlight.do?text=pintar&language=en&searchTitle=Ontario+-+Court+of+Appeal+for+Ontario&path=/en/on/onca/doc/2011/2011onca805/2011onca805.html