Case Name:

Toronto Standard Condominium Corp. No 1703 v. 1 King West Inc.

Between
Toronto Standard Condominium Corporation No 1703, Plaintiff/ Appellant, and
1 King West Inc., King West Developments Inc., Ellisdon Corporation, Projectcore Inc., Stanford Downey Architect Inc., Yolles Partnership Inc., CBM Group Ltd., Raymond Kwok & Associates Engineering Ltd., and City of Toronto, Defendants/ Respondents

[2010] O.J. No. 1675

2010 ONSC 2129

Divisional Court File No. 531/09

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

H.E. Sachs J.

Heard: March 29, 2010.
Judgment: April 16, 2010.

(53 paras.)

Counsel:

Mark H. Arnold, for the Plaintiff/ Appellant.

Patricia M. Conway, for the Defendant/ Respondent, 1 King West Inc. and King West Developments Inc.

Richard A. Conway and *Andrew D. Gray*, for the Proposed Defendant, Honest Ed's Limited.

No one appearing, for the other Defendants.

H.E. SACHS J.:--

INTRODUCTION

1 The Plaintiff appeals from the order of Master Glustein refusing the Plaintiff's motion for leave to amend its Amended Statement of Claim to add Honest Ed's Limited ("HEL") as a Defendant and to assert a new claim that a mortgage granted by the Defendant, 1 King West Inc. (1KW), to HEL is a fraudulent conveyance and does not have priority over the Plaintiff's claim for damages against 1KW.

BACKGROUND

2 The Master wrote a thorough and detailed set of reasons in which he set out the facts surrounding the action and the proposed amendments. I do not propose to repeat that detail. What follows is a basic outline of the facts leading to the motion in question.

3 In March of 2007 the Plaintiff, a residential **condominium corporation,** issued a Statement of Claim alleging numerous deficiencies in the construction and reconstruction of the condominium complex located at 1 King Street West in Toronto, Ontario.

4 The Defendant, 1KW, was the "declarant" for the project. It is a single purpose company used to develop the project. The proposed defendant, HEL, is a company that is controlled by David Mirvish. In October of 2000, HEL incorporated 1KW, which is also controlled by Mr. Mirvish, to take title to the property at 1 King Street West.

5 Early on in the litigation the Statement of Claim was amended on consent. On December 5, 2008, the Plaintiff delivered the proposed amendments to its Amended Statement of Claim. By virtue of those proposed amendments the Plaintiff sought to have two mortgages that were registered in respect of the unsold units in the condominium complex declared void against the Plaintiff as fraudulent conveyances. Both mortgages were granted by 1KW to HEL. The total amount secured by the mortgages is $45 million. The proposed Amended Amended Statement of Claim sought to add HEL as a party to the litigation, since its interests would be affected by the new claim.

6 When they were served with the proposed amended pleading, HEL, 1KW and King West Developments Inc. advised the Plaintiff that they were not consenting to the amendments. As a result, a motion was scheduled before Master Glustein to consider whether he should grant leave to amend the claim as requested and to add HEL as a party.

THE MASTER'S DECISION

7 Master Glustein refused to grant leave to amend the Amended Statement of Claim and refused leave to add HEL as a party. In doing so he found that the claim under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 ("FCA") was statute-barred as against HEL and the King West Defendants. He found that this was a "claim" within the meaning of the *Limitations Act, 2002*, S.O. 2002, c. 24, and that this claim was discoverable more than two years prior to the delivery of the proposed amended pleading.

8 Master Glustein also denied the Plaintiff the right to amend its pleading to include a claim against the King West Defendants based on breach of fiduciary duty. He did allow the Plaintiff to amend to include a claim against the same Defendants based on constructive trust. These two findings are not the subject of the appeal. They are only relevant to the Master's findings on costs, which the Plaintiff is appealing.

9 After receiving submissions in writing from the parties on the question of costs, the Master awarded HEL its partial indemnity costs fixed in the amount of $64,000.00 and 1KW its partial indemnity costs, fixed in the amount of $14,000.00. All of the costs were awarded in relation to the proposed amendments relating to the fraudulent conveyance claim. No costs were awarded in relation to the other requests for amendments as the Master found that the costs for the amendment to plead a claim based on constructive trust (which was allowed) were offset by the costs for the amendment to plead a claim based on breach of fiduciary duty (which was not allowed).

THE APPEAL

10 On this appeal the Plaintiff raised six issues. They were:

1. What is the standard of review applicable to the Master's decision to dismiss the motion to amend pleadings?
2. Did the Master err when he held that the proposed amended pleading alleging a fraudulent conveyance under the FCA was a "claim" as defined in s. 1 of the *Limitations Act, 2002*?
3. Did the Master err by applying a "cause of action" analysis to the issue of "discoverability" under ss. 4 and 5 of the *Limitations Act, 2002*, rather than a "claim" analysis as required by that Act?
4. Did the Master err when he held that s. 16(1)(a) of the *Limitations Act, 2002* did not apply because the relief sought in the proposed amended pleading included a claim for consequential relief? Under s. 16(1)(a) of the *Limitations Act, 2002*"there is no limitation period in respect of ... a proceeding for a declaration if no consequential relief is sought."
5. Did the Master err when he held that the proposed fraudulent conveyance pleading was discoverable two years prior to the date the proposed Amended Amended Statement of Claim was delivered and was therefore statute barred?
6. Did the Master err or exercise his discretion on wrong principles when he awarded HEL and 1KW, two related companies, a total of $78,000.00 in costs for an add party/amend pleadings motion? The Plaintiff acknowledges that to argue this issue they need leave.

STANDARD OF REVIEW

11 The standard of review applicable to master's orders is the same standard of review applicable on the appeal of a judge's decision: "the decision will be interfered with only if the master made an error of law or exercised his or her discretion on the wrong principles or misapprehended the evidence such that there is a palpable and overriding error." (*Zeitoun v. Economical Insurance Group*, 91 O.R. (3d) 131, [2008] O.J. No. 1771 at paras 40 to 41 (Div. Ct.), aff'd 2009 ONCA 415).

12 With respect to the questions raised on the appeal, I find that the issues raised regarding the interpretation of the *Limitations Act, 2002* (the meaning of the word "claim," the differences between a "cause of action" and a "claim," and the question of whether the proposed amendments sought "consequential relief") are questions of law to which the standard of correctness applies. The issue of discoverability is a question of fact, which requires establishing a palpable and overriding error.

13 Decisions as to costs are highly discretionary decisions to which a very high degree of deference is owed. They are generally only interfered with in obvious cases, where it can be demonstrated that the decision maker has made an error in principle. For that reason leave to appeal a costs decision is granted sparingly (*McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.* (2008), 298 D.L.R. (4th) 86 (C.A.)).

DOES THE PROPOSED AMENDED PLEADING ALLEGE A "CLAIM" AS DEFINED BY THE *LIMITATIONS ACT, 2002*?

The *Limitations Act, 2002*

14 Section 1 of the *Limitations Act, 2002* defines a "claim" as follows:

> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

15 Section 4 states:

> Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

16 Section 5(1) of the *Limitations Act, 2002* provides:

> A claim is discovered on the earlier of,
>
> (a) The day on which the person with the claim first knew,
>
> (i) That the injury loss or damage had occurred,
> (ii) That the injury, loss or damage was caused by or contributed through an act or omission,
> (iii) That the act or omission was that of the person against whom the claim is made, and
> (iv) That, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) The day on which a reasonable person with the abilities and in the circumstances of a person with the claim first ought to have known of the matters referred to in clause (a).

The Appellant/Plaintiff's Submission

17 On this appeal, the Appellant submits that the proposed amended fraudulent conveyance pleading was not a "claim" as that term is defined in the *Limitations Act, 2002* because no injury, loss or damage had yet occurred. Such injury, loss or damage might occur if the Appellant/ Plaintiff is successful in their claim for damages, if to collect their judgment they must look to the assets of 1KW and if, when they do so, 1KW has no assets because of the mortgage that they granted to HEL. As of the date of the motion before the Master, the Plaintiff had suffered no injury, loss or damage at the hands of either 1KW or HEL.

18 In support of their position the Appellant relies on the decision of the Ontario Court of Appeal in *Perry, Farley & Onyschuk v. Outerbridge Management Ltd. et al*, 54 O.R. (3d) 131, [2001] O.J. No. 1698. In that case the Court addressed the question of which limitation period applies to an action brought by a creditor pursuant to the FCA to attack a conveyance of assets as void. The case was decided under the prior *Limitations Act.* Sharpe J.A., writing for the Court, concluded that a claim for relief under the FCA was neither a claim on a "simple contract" nor "an action on the case." Therefore, the *Limitations Act* had no application. The key passages that the Appellant relies on appear at paras. 20 and 30.

19 In para. 20 Sharpe J. considers the question of whether the claim under the FCA could be considered one grounded upon a simple contract. In finding that it could not he states:

> I respectfully disagree with the conclusion of the motions judge that the claim could be considered as being grounded upon a "simple contract". While the claim for relief under the Fraudulent Conveyances Act relates to a contract, it is an action to set aside and nullify the contract, the very opposite of asserting rights acquired by contract. The source of the legal right asserted is not the contract, but the statute. The object of the action is to void and defeat the rights and obligations the contract purports to confer.

20 Sharpe J.A. then went on to deal with the issue of whether a claim to void a conveyance under the FCA could be considered "an action on the case". First, he reviewed what the essential elements were of "an action on the case" under the prior Ontario *Limitations Act.* He concluded that "[t]o some extent, it serves as a catch-all or short-hand expression to embrace personal actions for damages based upon breach of a legal duty not otherwise caught by the Act"(para. 25). However, since the prior *Limitations Act* contained no residual provision, it could not be considered a residual category that was broad enough to capture all personal actions not otherwise specified under that Act. In para. 26 of his decision he notes that in *Robert Simpson Co. v. Foundation Co. of Canada* (1982), 36 O.R. (2d) 97 (C.A.), Cory J.A. considered the interpretation of the term under the Act and suggested that "three fundamental aspects" of an action on the case were:

> (a) Duty owed by the defendant to the plaintiffs;
> (b) A breach of that duty by the defendant; and
> (c) Damage suffered by the plaintiff as a result of the breach of the duty owed to him by the defendant. (*Perry, supra*, para. 26).

21 Given these essential elements of an action on the case, Sharpe J.A. concluded that an action brought pursuant to the FCA to set aside a conveyance could not be considered an action on the case. His reasoning is set out at para. 30:

> This provision (s. 2 of the FCA) neither creates a right of action that sounds in damages, nor does it create a legal duty, the breach of which gives rise to a cause of action. The plaintiff in a fraudulent conveyance action does not assert the breach of a legal duty, but rather asserts that the debtor has improperly placed assets beyond the reach of the ordinary legal process. Any entitlement to the payment of money or damages in favour of the plaintiff exists independently and apart from the action to set aside the fraudulent conveyance. The Act gives no right of damages nor compensation for loss. It provides for a declaratory type

> proceeding that has the effect of nullifying transfers and conveyances of the debtor's property so as to make possible execution of the creditor's debt. It follows, in my view, that the appellant's claim cannot be classified as an action on the case.

22 The Appellant argues that this reasoning applies to the claim set out in the proposed amended pleading. At this point there is no entitlement to the payment of money or damages for any loss. That will only arise if the claim for damages due to alleged construction deficiencies is successful.

The Master's Decision

23 This argument was raised before the Master and dismissed. The relevant portions of his reasons in that regard appear at paras. 107 to 112 of his decision. In coming to the conclusion he did the Master pointed out that the Appellant/Plaintiff was not only seeking to nullify the mortgages from 1KW to HEL as against them, they were also requesting a declaration that "the claims made by [TSCC1703] and the damages that may be ordered against [1KW] take priority over the aforesaid mortgages."

24 The Master then went on as follows:

> [110] The allegations relating to HEL identify a separate loss, *i.e.* a loss of TSCC 1703's ability to obtain satisfaction of any award of damages against 1KW because assets have been put out of reach (or 1KW has been rendered judgment-proof) as a result of the alleged fraudulent conveyance of the Mortgages. The "priority" sought against HEL is a "claim", since it seeks a remedy against HEL for the damages TSCC 1703 allegedly suffered from the fraudulent conveyances of the Mortgages. TSCC 1703 will suffer a loss, as pleaded, if it does not obtain the "remedy" of priority over funds held by HEL.
>
> [111] TSCC 1703's argument fails to acknowledge the essence of the claim against HEL; *i.e.* TSCC 1703 seeks priority for its damages claims over HEL's Mortgages since HEL was a non-arm's length party controlled by the same individual (Mirvish) who controlled 1KW, and HEL received a benefit through a fraudulent conveyance which gave it an improper priority over TSCC 1703. TSCC 1703 seeks a "remedy" for HEL's alleged "act or omission", which constitutes a basis for a "claim" under s. 1 of the *Limitations Act.*

Analysis

25 The *Limitations Act, 2002* has effected a change in the law in Ontario regarding limitation periods. The former *Limitations Act* applied "only to a closed list of enumerated causes of action." (*M.(K) v. M.(H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.) at 329). Thus, as Sharpe J.A. reasoned in *Perry, supra*, "unless a claim for relief under the Fraudulent Conveyances Act can be identified as included within one of the causes of action enumerated in the Limitations Act, the appellant's action is not subject to any statutory limitation period" (para. 17). Limitation periods are creatures of statute. At common law they did not exist. Thus, certain claims for relief, such as those under the FCA, were not subject to any limitation period.

26 The *Limitations Act, 2002* is not phrased in terms of "causes of action." Rather, it applies to "claims." In s. 4 it sets out a basic limitation period of two years that begins to run from the day on

which a claim is discovered. In s. 15 it provides for an "ultimate limitation period" of 15 years. That is, regardless of whether the "claim" has been discovered, "no proceeding shall be commenced ... after the 15th anniversary of the day on which the act or omission on which the claim is based took place." Sections 16 and 17 of the Act set out some claims that are not subject to any limitation period, including a proceeding for a declaration if no consequential relief is sought and a proceeding to enforce a court order.

27 In *Perry, supra*, the Court of Appeal found that a claim for relief under the FCA was not one of the enumerated causes of action in the *Limitations Act* that governed at the time. Since the Act contained no "basket" or "residual" clause, such a claim was not subject to a limitation period. Much earlier, the Ontario Law Reform Commission had recommended the adoption of a provision that would catch all actions not specifically provided for in a limitations statute or in any other statute (Ontario Law Reform Commission, *Report on the Limitations of Actions* (1969). With s. 4 of the *Limitations Act, 2002*, the Ontario legislature adopted that recommendation. It is a "catch-all" or basket provision that applies generally to all claims not otherwise provided for in the statute or in another statute. Thus, if the proposed claim is a "claim to remedy an injury, loss or damage that occurred as a result of an act or omission," s. 4 would govern and the claim is subject to the two-year limitation period provided for in that section.

28 In my view, the Master was correct when he concluded that the proposed claim was a "claim" within the meaning of s. 1 of the *Limitations Act, 2002.* The decision of the Court of Appeal in *Perry, supra*, has been superseded by the *Limitations Act, 2002.* Unlike an "action on the case" it is not essential that a "claim" under s. 1 of the Act "sound in damages" or "create a legal duty, the breach of which gives rise to a cause of action."

29 The Plaintiff is alleging an injury, namely that assets that should be available to satisfy its claim against the Defendants have been put beyond its reach. According to the Plaintiff, that injury occurred as a result of the act of 1KW in granting two mortgages on its assets to HEL. Finally, the Plaintiff is seeking a remedy for its injury - first, a declaration that the transaction that put the assets out of its reach is void and, second, a declaration that its claims have priority over any claims that HEL might make against 1KW.

DID THE MASTER ERR IN APPLYING A "CAUSE OF ACTION" ANALYSIS TO THE ISSUE OF DISCOVERABILITY?

30 The Appellant submits that the Master applied the wrong test in considering the issue of discoverability in relation to the claim under the FCA because, in his reasons, he sometimes refers to a "cause of action" as well as a "claim."

31 It is true that in his analysis on the issue of discoverability the Master sometimes used the term "cause of action" instead of "claim." For example, he did so when stating the principles that have emerged from the case law on the issue of discoverability. The Master adopted a set of general principles that he found applied when a party seeks to amend a claim after the expiry of a statutory limitation period and relies on the doctrine of discoverability to do so. For example, if there is an issue of fact or credibility on the discoverability allegation, the defendant should be added with leave to plead the limitation defence. These principles were developed under the old regime, when limitation periods ran from the date a cause of action arose. Consequently, in referring to them in his reasons, the Master uses the terminology in the case law, a terminology that included the phrase "cause of action."

32 However, it is clear from the Master's reasons that he was aware of the distinction between a "claim" and a "cause of action." To the extent the distinction was important to his analysis he focused on and applied it. At para. 122 of his reasons, the Master states "[t]he current legislation [i.e. the *Limitations Act, 2002*] does not distinguish between the basis for a cause of action, but rather whether there is a "claim" against a party." At para. 136, he sets out the issue he must consider as follows: "the issue on this Motion is whether the claim was 'discoverable' more than two years prior to the December 5, 2008 first version of the Proposed Claim." He concludes on the issue of discoverability by stating, "[f]or the above reasons, I find that TSCC 1703 has not discharged its evidentiary burden to establish any genuine issue as to discoverability with respect to its claim that the Mortgages were a fraudulent conveyance. I dismiss the Motion to add HEL as a party on this basis."

33 I find that there is no basis for concluding that the Master applied the wrong test in considering the Appellant's motion to add a claim and a party under the FCA. Whether or not there is a difference between a "claim" analysis and a "cause of action" analysis in respect of discoverability under the *Limitations Act, 2002,* the Master applied a "claim" analysis in dismissing the Appellant's amendment motion.

DID THE MASTER ERR IN NOT APPLYING SECTION 16(1)(a) OF THE LIMITATIONS ACT, 2002?

34 Section 16(1)(a) states that there is no limitation period in "a proceeding for a declaration if no consequential relief is sought." The Appellant submits that it is only seeking a declaration and no consequential relief.

35 The Master considered this argument and found that based on the plain language in the proposed pleading the Appellant was seeking consequential relief, namely an order voiding the Mortgages and an order giving any judgment that may be obtained in the Plaintiff's alleged construction deficiency claim priority over the Mortgages. With respect to this claim for priority the Master stated:

> In the present case, TSCC 1703 seeks more than just a declaration that the Mortgages were fraudulently conveyed. At paragraph 1(a)c. of its Proposed Claim, TSCC 1703 "claims on its own behalf and on behalf of its unit owners as against [HEL]:
>
> > a declaration that the claims made by the plaintiff and the damages that may be ordered against the defendant, 1 King West Inc., take priority over the aforesaid mortgages. ...
>
> A court order for priority over a mortgage is more than declaratory relief. It is a claim for consequential relief, *i.e.*, relief that has consequences for the proposed defendant HEL. (paras. 115 and 117).

36 The Master also considered the case law relied upon by the Appellant, particularly *Ontario v. Wills*, [2008] O.J. No. 4672 (S.C.), and found that it did not assist the Appellant. In *Wills* the Ontario Legal Aid Plan had been obliged to pay out thousands of dollars to defend Mr. Wills who had been charged with murder. Mr. Wills had conveyed an asset to his wife in order to render himself impecunious and eligible for state-funded counsel. The Province commenced an action

against Mrs. Wills, asking for a declaration that the conveyance to her was void under the FCA. Mrs. Wills submitted that the action against her was statute barred. The Province resisted her motion, arguing that it was seeking no consequential relief from Mrs. Wills. All they wanted was a declaration of the status under law of the conveyance in issue. The Court agreed and found that under s. 16(1)(a) there was no limitation period.

37 The Master distinguished *Wills* on the basis that, unlike in *Wills*, the Appellant is seeking relief that will have consequences for HEL. In particular, they are seeking priority for its damages claims over HEL's mortgages. In other words, any money that HEL may have advanced to 1KW and had secured by the mortgages would be paid out after any amounts that may found to be due and owing to the Appellant. In my view, the Master was correct when he found that this is a claim for "consequential relief."

38 For these reasons I find that there is no merit to the Appellant's submission that the Master erred when he found that s. 16(1)(a) of the *Limitations Act, 2002* did not apply.

DID THE MASTER ERR WITH RESPECT TO HIS FINDINGS ON DISCOVERABILITY?

39 On this appeal the Appellant challenges the Master's finding that the proposed claim against HEL and the King West Defendants was discoverable more than two years before the proposed Amended Amended Statement of Claim was first delivered to counsel for 1KW. This finding is a finding of fact. To set it aside the Appellant must demonstrate a palpable and overriding error.

40 The first issue raised by the Appellant is that the pleading makes no allegation as against HEL and, therefore, the Master's analysis in respect of the limitation period and HEL "serves no purpose" because no allegation is made against HEL that it conveyed property fraudulently. The Appellant only sought to add HEL as a party because they recognized that HEL's interests would be affected by the litigation.

41 In my view, this submission does not really advance the appeal since it is quite clear that the Master found that the Appellant had not satisfied their onus of establishing that there was a genuine issue as to whether the FCA claims were only discoverable by them more than two years after the Mortgages had been made. The Appellant agreed that it could have discovered the Mortgages had it searched title on or about the time that the Mortgages were made. Thus, whether the allegation is conceived as one "against" HEL or simply one as against 1KW, the effect of the finding would have been the same.

42 The second submission advanced by the Appellant is that they required evidence of intent to defraud before they could assert the fraudulent conveyances claim. They argued that they did not have that evidence until they cross-examined 1KW's Director of Finance in connection with a motion for an injunction that they brought in August 2008 and then, using the information gleaned from the cross-examination, obtained an opinion from a forensic accountant wherein the accountant reported that he had "little confidence at this time on the reported total balances of funds advanced. I do have a concern that funds could be paid out under the security that may not be covered under the security".

43 With respect to this submission, the Master found that the opinion of the forensic accountant that the Appellant said they needed before advancing a fraudulent conveyance claim was delivered to the Appellant by an email that was sent on December 19, 2008, after the date of the proposed

amendments alleging a fraudulent conveyance. A copy of this email was produced before me and there can be no issue with the Master's finding in this regard.

44 The Master also found that:

> From the outset, the position of TSCC 1703 was that if 1KW entered into a mortgage with a related company, this in itself would demonstrate a presumed fraudulent intent and be the subject of a fraudulent conveyance action. (Master's Reasons, para. 163)

45 He made this finding based on a letter that was sent by the Appellant's solicitors to 1KW on July 28, 2006. That letter stated:

> Please be advised that in the event any proceeds arising from the mortgage or sale of any of the remaining units are paid to any related or associated company or any director, officer, shareholder, employee (or their spouses), or the proceeds of any other assets of 1KW are or are otherwise paid or conveyed to any other creditor or person, TSCC 1703 has instructed us to commence appropriate proceedings to set aside those transactions as a fraudulent conveyance and/or an unjust preference.

46 The Master correctly found that, based on this letter, the Appellant intended to commence a fraudulent conveyance proceeding if 1KW entered into a mortgage with a related company. This was their intention as of July 28, 2006. The Mortgages were registered on December 23, 2005 and November 24, 2006. The Appellant admitted that they could have discovered that the Mortgages had been made at or shortly after they were made. The first version of the proposed fraudulent conveyance claim was delivered on December 5, 2008. The Master reviewed the evidence before him and found that the Appellant learned nothing that spoke to actual fraudulent intent before they made their fraudulent conveyance claim. At all times their position was based on a presumed fraudulent intent, a position that they had taken in their letter of July 28, 2006. He also found that there was no evidence on the motion before him of actual fraudulent intent.

47 The Master then reviewed the Appellant's allegations in all their proposed amended pleadings and found that the Appellants position did not change in its pleadings. In the Proposed Claim that was served on December 5, 2008 the Appellant alleged that by "granting and registering the aforesaid mortgages, it was the intention of the defendants, 1 King West Inc. and Honest Ed's Limited, to defeat, hinder or delay the plaintiff's claims" and that the "aforesaid mortgages in the amount of $45,000,000 exceed the value of the assets of 1 King West Inc. and were registered when the defendant was insolvent or unable to pay its debts in full, or, alternatively, when that defendant knew it was on the eve of insolvency." The Master correctly found that these allegations do not require or assert evidence of actual fraudulent intent and that the claim was discoverable as soon as the Mortgages could have been discovered, which the Appellant has admitted could have happened on or about the time that they were registered.

48 In other words, there was nothing that changed between the sending of the July 28, 2006 letter and the delivery of the proposed amended pleading other than the registration of the November 24, 2006 Mortgage. At all times the Appellant was relying on presumed fraudulent intent, an assertion it made based upon the circumstances under which the Mortgages were granted (1KW had no assets other than the condominiums) and the fact that the Mortgages were granted to a related party.

49 The Master found that all of these circumstances ought to have been known to the Appellant when the Mortgages were registered. In doing so he made no palpable or overriding error. On the contrary, this finding was supported by the evidence before him.

DID THE MASTER ERR WITH RESPECT TO HIS DISPOSITION ON COSTS?

50 The Appellant submits that the amount of costs that were awarded to HEL ($64,000.00) were "grossly disproportionate." They also argue that there should have been no award of costs to 1KW since 1KW and HEL are affiliated corporations and have a common director in David Mirvish. The Appellant agreed that it needed leave to appeal the Master's costs decision.

51 In my view, this is not the kind of obvious case where leave to appeal the decision would be justified. I also find that there is no reason to doubt the correctness of the Master's decision. The award of $64,000.00 was a large one, but was justified on the basis of the fact that, as the Master found, "the motion was complex, requiring detailed factums and briefs of authorities, as well as critical cross-examinations. Further, the issues on the motion were of high importance to HEL. HEL reasonably incurred significant costs to avoid unnecessary legal costs of being involved in protracted litigation and risk having its security attacked." One need only review the Master's 45-page reasons to appreciate the complexity of the issues that had to be considered.

52 With respect to the costs that were granted to 1KW, they were significantly lower than those that were granted to HEL. This was in recognition of the fact that the parties, while distinct legal entities, had a common director and shared the same interests. Again, I find that there is no reason to doubt the correctness of this decision. There is also no reason to doubt the correctness of the Master's decision to offset the costs of the two other requests for leave to amend the Amended Statement of Claim. Thus, even if I had granted leave to appeal on the question of costs, I would have dismissed the appeal.

CONCLUSION

53 For these reasons the appeal is dismissed. The parties may forward to me their written submissions on costs within 10 days of the date of the release of these reasons.

H.E. SACHS J.

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