

SUPREME COURT OF NOVA SCOTIA

Citation: Little Island Fisheries Ltd. v. Royal Harbour Seafoods Inc.,
2009 NSSC 300

Date: 20091102

Docket: Hfx. No. 312627

Registry: Halifax

Between:

Little Island Fisheries Limited, Allot Fisheries Limited, Black Knight Fisheries Limited, Valley Princess Fisheries Limited, Lady Marielle Fisheries Limited, Steven P. Fisheries Limited, 1883811 Nova Scotia Limited (formerly known as Seaman's Toy Fisheries Limited), Kelly Lynn Fisheries Limited, Derek D'Ent Fisheries Limited and C&B Fisheries Limited, each being a body corporate with its head office at Lower West Pubnico, Yarmouth County, Nova Scotia (hereinafter referred to as "Little Island" or "Little Island Group")

Plaintiffs/Moving Party

- and -

Royal Harbour Seafoods Inc., a company established under the laws of Canada with head office in the Province of Quebec, Royal Harbour Seafoods LP, a limited partnership established under the laws of the Province of New Brunswick, and registered to carry on business pursuant to a Certificate of Registration issued by the Province of Nova Scotia on the 15th day of April, 2009, Royal Harbour Seafoods General Partner Inc., a corporation established under the laws of the Province of New Brunswick, in its capacity as the general partner of Royal Harbour Seafoods LP, (hereinafter collectively referred to as "Royal Harbour"),
Joel Comeau and Howard d'Entremont

Defendants/Respondents

- and -

Derek d'Entremont, Michael d'Entremont, Arnold d'Entremont, Roseanne Fiorello, Gilbert d'Entremont, Nova's Finest Fisheries Inc., Charlesville Fisheries Ltd., and Inshore Fisheries Limited

Third Parties

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Judge: The Honourable Justice Frank Edwards

Heard: September 30 and October 1, 2009, in Halifax, Nova Scotia

Subject: Motion to vacate *Lis Pendens* pursuant to Section 58(2)(b) of the

Land Registration Act.

Facts: An agreement of purchase and sale for the purchase of the Moving Party's property by the Respondent was rescinded by the Moving Party. The Respondent brought an action but, shortly afterward, abandoned its claim for specific performance of the sales agreement.

Issue: (a) Whether the Respondent claims any interest in Moving Party's property.

(b) Whether there is any evidence that damages might not be an adequate remedy.

Result: Motion granted. Although the Respondent asserted a constructive or resulting trust, it sought no title in the Moving Party's land, no declaration of an interest in that land, or any relief that would affect the Moving Party's ownership of its land. In the circumstances, damages would be an adequate remedy.

Cases Noted: *Dempsey v. Dempsey* (2008), 266 N.S.R. (2d) 196; *Saulnier Estate v. Keating* (1988), 89 N.S.R. (2d) 179 (S.C.T.D.); *Capital Builders Ltd. v. Woodbine Management Ltd.* (1983), 48 B.C.L.R. 84 (S.C.); *Soulos v. Korkontzilas*, [1997] S.C.J. No. 52; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574; *Murphy Oil Co. v. Predator Corp.* (2006), 67 Alta. L.R. (4th) 325 (Q.B.); *Valley v. McLeod Valley Casing Services Ltd.* (2004), 31 Alta. L.R. (4th) 80 (Q.B.); *Homebuilder Inc. v. Man-Sonic Industries Inc.* (1987), 28 C.L.R. 18 (Ont. S.C.); *931473 Ontario Ltd. v. Coldwell Banker Canada Inc.* (1991), 5 C.P.C. (3d) 238 (Ont. S.C.J.); *Cini v. 2030315 Ontario Ltd.*, 2007 CarswellOnt 3269 (Ont. S.C.J.); *Demers v Desrochers*, 2009 CarswellOnt 46001; *Matheson v. Gordon* (2004), 16 R.P.R. (4th) 299 (Ont S.C.J.); *Cannon v. Lange* (1998), 203 N.B.R. (2d) 121 (N.B. C.A.); *Alberta Court in Valley v. McLeod Valley Casing Services Ltd.* (2004), 31 Alta. L.R. (4th) 80 (Q.B.); *Goddard v. Hambleton* (2005), 237 N.S.R. (2d) 1 (C.A.); *Soulos v. Korkontzilas*, [1997] S.C.J. No. 52; *Michelin Tires (Canada) Ltd. v. R.*, 2001 FCA 145 (Federal Ct. Appeal), leave to appeal refused at 2001 CarswellNat 2734 (S.C.C.)

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Third Parties

Judge: The Honourable Justice Frank Edwards

Heard: September 30 and October 1, 2009, in Halifax, Nova Scotia

Counsel: Peter Rogers, Q.C. & Ian Dunbar, for the moving party
R. Gary Faloon, Q.C., for the respondents

By the Court:

[1] This is a motion to vacate a *Lis Pendens*. The facts are conveniently summarized in the Moving Party's brief dated August 19, 2009.

[2] **Facts:** Little Island owns a fish processing facility in Lower West Pubnico, Nova Scotia, located on real property owned by Little Island. Little Island has owned the facility and the real property for twenty years or more. It purchased the real property from owners' relatives, and constructed the facility in 1983. Royal Harbour was not involved in those transactions in any way.

[3] Little Island and Royal Harbour started to do business together in the summer of 2005. They entered into several agreements between October, 2007 and March, 2009 (the "Agreements"). The Agreements consisted of the Processing Agreement, Management Agreement and Sales Agreements.

[4] The Processing Agreement created a reciprocal business arrangement between Little Island and Royal Harbour. Under the Processing Agreement, Little Island agreed to process fish exclusively for Royal Harbour in exchange for consideration from Royal Harbour, including marketing, sales, training and

information. Little Island also purchased a processing line from Royal Harbour, for an agreed price of \$89,750. The Processing Agreement was terminable on 60 days notice by either party. Royal Harbour did not acquire any interest in Little Island's real property or fixtures through this agreement.

[5] The Management Agreement gave managerial control of Little Island to Royal Harbour. It was contemplated to remain in place pending a planned sale of Little Island's assets to Royal Harbour. The Management Agreement would be terminated if Royal Harbour was unable to purchase Little Island's assets. Again, Royal Harbour did not acquire any interest in Little Island's real property or fixtures through this agreement.

[6] Little Island rescinded or terminated the Agreements on May 22, 2009 based on certain alleged fraudulent misrepresentations made by Royal Harbour. Royal Harbour immediately sought an injunction preventing the termination. That injunction was granted on June 26, 2009, provided Royal Harbour comply with certain conditions, largely regarding the payment of outstanding sums to Little Island. Royal Harbour had also filed a Notice of Application in Court on June 3,

2009 seeking specific performance of the agreements between the parties to compel Little Island to sell its assets to Royal Harbour.

[7] On June 30, 2009, Royal Harbour advised that it was discontinuing its Application in Court for specific performance and would consent to dissolution of the injunction.

[8] Little Island filed an action of its own against Royal Harbour on June 12, 2009, seeking damages. On August 6, 2009, Royal Harbour filed its defence and counterclaim. Royal Harbour did not counterclaim for specific performance of the Sales Agreements, nor did it ask for a declaration of any interest in Little Island's property. The only allegation Royal Harbour made of any interest in Little Island's property was as follows:

5. The Royal Harbour Defendants further say that, because of the effective integration of the parties' operations following the implementation of the Management Agreement, the Plaintiffs have acquired significant business and technological knowledge which they did not previously possess. As such, the Plaintiffs' Pubnico facility has effectively become a "turn-key" operation. As a result of their actions, the Plaintiffs now hold the Royal Harbour Defendants' trade secrets in trust for the benefit of the Royal Harbour Defendants. The Royal Harbour Defendants accordingly plead a constructive and/or resulting trust and assert an interest in the Plaintiffs' property, in particular the land and fixtures at and around 93 and 101

Dennis Point Road, Lower West Pubnico, Nova Scotia. The Plaintiffs are therefore not entitled to dispose of any assets until these proceedings are concluded.

...

16. The Royal Harbour Defendants repeat paragraph 5 herein and assert an interest in the Plaintiffs' land, and fixtures attached to the land, by virtue of a resulting and/or constructive trust.

[9] Royal Harbour has not provided any further detail as to how Little Island's alleged acquisition of "trade secrets" under the Management Agreement results in Royal Harbour having an interest in Little Island's real property or fixtures, whether by constructive or resulting trust or otherwise.

[10] Royal Harbour has never made any contribution to Little Island's facility or property. Little Island's real property and facility are as they were prior to its dealings with Royal Harbour. The only change to Little Island's processing facility was an expansion which took place in December, 2007, and was paid for entirely by Little Island.

[11] Royal Harbour filed a certificate of *lis pendens* against Little Island's property on August 6, 2009. Little Island learned of that filing on August 14, 2009.

[12] Little Island says that Royal Harbour does not claim any right to Little Island's real property in this proceeding and therefore seeks to have the *lis pendens* discharged.

[13] ***The Law:*** The applicable law and the Moving Party's argument is also set out in its August 19, 2009 brief and in a subsequent brief it filed on September 25, 2009. I accept Little Island's position as set out in both briefs, which I adopt and repeat as follows:

[14] ***Issues:*** Little Island submits that the following issues are raised on this motion:

- 1) Does Royal Harbour claim any right in Little Island's property?
- 2) If so, does that claim have a chance of success?

[15] ***Law and Analysis:*** Does Royal Harbour Claim any right in Little Island's property?

[16] The present motion is brought pursuant to Section 58(2)(b) of the *Land Registration Act*, S.N.S. 2001, c. 6:

58(1) A certificate of lis pendens in prescribed form may be recorded with respect to the parcel described in it.

(2) A certificate of lis pendens may be removed from the register on the earliest of

...

(b) the recording of an order of the court dismissing the action or discharging the lis pendens;

[17] The leading authority on the procedure to be followed in discharging a lis pendens is the decision of Justice Wright in *Dempsey v. Dempsey* (2008), 266 N.S.R. (2d) 196. In that case, Justice Wright said the following at para. 16:

16 In my interpretation of the Act, the legislative intent as it pertains to Certificates of Lis Pendens was designed as follows. As a safeguard against abuse of process, a Certificate of Lis Pendens must be signed by a prothonotary before it can be recorded under the Act. The role of the prothonotary therefore is to review the allegations pleaded in the Statement of Claim and if those allegations clearly call into question some title or interest in a specified parcel of land, the prothonotary should then sign the Certificate of Lis Pendens for recording under s. 58(1). It is then open to the defendant to make an application to the court under s. 58(2)(b) of the Act to discharge the lis pendens, using the legal test developed in the jurisprudence cited in Ch. 34:100 of the Anger and Honsburger text above mentioned. If a Certificate of Lis Pendens has been found by the court to have been recorded without reasonable cause, the

court may order compensation to any person who may have sustained damage as a result.

[18] As appears, in *Dempsey*, Justice Wright cites 34:100 of *Anger and Honsburger* as the guiding test on when a lis pendens will be discharged. That section says:

A certificate of *lis pendens* may be vacated upon application to the court. It must be clear that the plaintiff's claim can in no circumstances give any right in lands. ***It must be certain that the action will fail, or if successful, will not give the plaintiff any interest in the land.*** Once an interest in land is in dispute, only in the most special and unusual cases should the certificate be vacated. Apart from special and unusual circumstances, if the action is vexatious or frivolous, or if the plaintiff has been guilty of delay in pursuing the action, the certificate may be vacated. The certificate will not be vacated in a summary way when the existence of some interest in land is in dispute.
[emphasis added]

[19] In *Saulnier Estate v. Keating* (1988), 89 N.S.R. (2d) 179 (S.C.T.D.) the Court stated at para. 3:

3. Campbell, J., in *Sobeys Stores Ltd. v. Johnston* (1984), 52 Nfld. & P.E.I.R. 139, 153 A.P.R. 139 [TAB C]:

... I am of the opinion that the order sought by the defendants vacating the minute of lis pendens entered by the plaintiff on the 22nd of November 1983 ought to be granted. This opinion is based on my finding that the plaintiff does not have an interest in the defendants' land such as would give rise to the doctrine of lis pendens. Furthermore, although title to land has been placed

before the court, the questioning of title alone and without the required interest in land will not bring the doctrine into play.

4 In support of this conclusion Campbell, J. (supra), quoted with approval the following passage of Trainor, C.J., in *B.L. Construction & Tile Ltd. v. Waugh* (1973), 4 Nfld. & P.E.I.R. 490, 40 D.L.R. (3d) 139 (P.E.I. S.C.)

In that respect it is my opinion that the filing of a *lis pendens* is not authorized in cases other than those in which the title to land or an existing interest therein is before the court.

[20] Little Island says that no interest in land is raised in these proceedings. Even should Royal Harbour's Counterclaim succeed, Royal Harbour will not obtain any interest in its real property. Although Royal Harbour has asserted a claim of constructive or resulting trust, it seeks no title in Little Island's land, no declaration of an interest in its land, or any relief that would affect Little Island's ownership of its land.

[21] The relief Royal Harbour seeks is outlined in paragraph 17 of its

Counterclaim:

17 The Royal Harbour Defendants repeat the foregoing and counterclaim against the Plaintiffs as follows:

(a) an order that the Plaintiffs' entire business records for the relevant period be disclosed to Royal Harbour;

- (b) an order for the immediate return of the goods and equipment referred to at paragraph 8 herein;
- (c) an order for the immediate return of the \$950,000 held in the Trust account of Louis d'Entremont representing the Royal Harbour Defendants' deposits on the purchase price;
- (d) an order and judgment for immediate payment of \$1,004,438 plus interest and HST;
- (e) special damages, the particulars of which will be provided before trial;
- (f) general damages;
- (g) punitive damages;
- (h) costs; and
- (I) such other relief as this Honourable Court deems just.

[22] The relief sought is similar to that sought in *Capital Builders Ltd. v.*

Woodbine Management Ltd. (1983), 48 B.C.L.R. 84 (S.C.) where the Court said

the following at para. 18:

18 In action 83/1230, Woodbine, Margolese and Sicherman did not allege a proprietary claim with respect to the mortgage itself. They claimed for an assessment and determination of moneys owing by Capital to Woodbine under the indemnity agreement and for a declaration that there were no moneys owing by Woodbine to Capital under the mortgage. ... They are

not asserting a proprietary claim with respect to the mortgage itself.

19 Absent a proprietary claim against the mortgage itself, Woodbine, Margolese and Sicherman had no basis for "claiming an estate or interest in land" and no basis upon which they could validly register the *lis pendens*. Accordingly, I grant the relief claimed in action No. 1 and direct that the registration of the *lis pendens* against the land be cancelled forthwith.

[23] As appears, Royal Harbour does not seek specific performance or any declaration of title. Instead, it seeks only damages and various orders disclosing documents and returning property. Its *lis pendens* should therefore be vacated.

[24] ***Constructive or Resulting Trust:*** At paragraphs 5 & 16 of its Counterclaim, Royal Harbour has alleged a constructive or resulting trust over Little Island's real property. The trusts alleged by Royal Harbour would give rise to no claim against Little Island's property. Little Island therefore maintains that Royal Harbour's *lis pendens* should be vacated even should this Court determine that Royal Harbour has requested that the Court award it an interest in land in these proceedings.

[25] There are two kinds of constructive trusts: one type imposes on a party who comes into possession of property the status of trustee where it is clear that the

party holding the property was never intended to have beneficial title. In *Soulos v. Korkontzilas*, [1997] S.C.J. No. 52 Chief Justice McLachlin reviewed the constructive trust and said the following at para. 29:

29 Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts" ... Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (U.S. 1919), at p. 380:

A constructive trust is the formula through which the conscience of equity finds expression. *When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.* [emphasis added]

[26] This is not a situation where Little Island is alleged to have acquired its real property or fixtures against good conscience. This case is therefore unlike *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574. In that case, a mining company (LAC) received confidential information from International Corona about a gold deposit during negotiations, and LAC used that information to acquire the property and establish a mine there. The remedy sought by International Corona against LAC included a declaration that LAC held the

mine in trust for International Corona. International Corona was permitted to file *lis pendens* in that case.

[27] Here, Little Island owned its real property and facility long before it had any dealings with Royal Harbour. Little Island is alleged to have taken "trade secrets" from Royal Harbour. It is unreasonable to suggest that this allegation, if proven true, would result in a constructive trust over Little Island's real property. In *Murphy Oil Co. v. Predator Corp.* (2006), 67 Alta. L.R. (4th) 325 (Q.B.) the Court said at para. 121:

121 Generally, the cases about the misuse of confidential information, and breach of confidence, establish that *if the wrongdoer acquires actual property that would otherwise have been acquired by the plaintiff, an in rem remedy such as a constructive trust may be well suited to right the wrong*, especially if it directs the title of the property to the party in whose name it would have been "but for" the breach. On the other hand, where the nature of the detriment is that a competitor obtained a time advantage in getting into the market with a competitive product, then the best remedy may be damages for the loss of dominance of the market for that period of time.

[28] The second category of constructive trust is known as a "remedial" constructive trust, based on unjust enrichment. In *Soulos v. Korkontzilas, supra*, the Supreme Court of Canada discussed this type of constructive trust at para. 20:

... Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment...

[29] Unjust enrichment will only lead to an interest in land if a person's land is improved by another who reasonably expects to obtain an interest in that land. In *Valley v. McLeod Valley Casing Services Ltd.* (2004), 31 Alta. L.R. (4th) 80

(Q.B.) the Court said the following:

... recent case law has extended the principles of unjust enrichment to situations in which one has improved another's land with the reasonable expectation of either compensation or a future property interest in the land: *Van Lierop v. Hollenbach*, [1999] O.J. No. 4225 (Ont. S.C.J.), var'd on other grounds (2001), 15 C.C.E.L. (3d) 8 (Ont. C.A.); *McLean v. Grandmont*, [1993] 5 W.W.R. 686 (B.C. C.A.); *Gill v. Grant* (1988), 30 E.T.R. 255 (B.C. S.C.).

[30] This is not a case involving tangible improvements to land or fixtures. Little Island's property and facility have not been affected by Royal Harbour's actions. Royal Harbour claims that Little Island has misappropriated Royal Harbour's knowledge and "trade secrets". This allegation is that Little Island has been unjustly enriched as a company. If Little Island abandoned its facility and real estate, any information communicated to it by Royal Harbour would leave with it.

Presumably if Little Island opened another facility, it could continue to use Royal Harbour's information, and presumably would still be subject to its claim.

[31] In *Homebuilder Inc. v. Man-Sonic Industries Inc.* (1987), 28 C.L.R. 18 (Ont. S.C.) the Plaintiff claimed that the Defendant used his intellectual property (sketches) to construct home designs, and claimed an interest in the homes created using his designs. The Court did not allow the Plaintiff to file a certificate of *lis pendens* against the homes constructed using his sketches.

[32] The proper remedy in this case is damages, not a constructive trust in property. At para. 78 of *Lac Minerals, supra*, Justice LaForest noted that in cases where damages is an adequate remedy there will be no reason to impose a constructive trust:

In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter, supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.

[33] The doctrine of resulting trust also plainly does not apply. Resulting trusts come about where a person holds title beneficially for another. For example, if Royal Harbour paid for Little Island's property, Little Island may be deemed to hold that property as trustee for the beneficial use of Royal Harbour. In this case, Little Island paid for its own property and fixtures many years before it ever did business with Royal Harbour.

[34] In **931473 Ontario Ltd. v. Coldwell Banker Canada Inc.** (1991), 5 C.P.C. (3d) 238 (Ont. S.C.J.) the Court said the following at para. 73 in allowing an application to discharge a certificate of *lis pendens*:

73 It is my opinion, with reference to subdivision 116(6)(a)(ii) of the *Courts of Justice Act*, 1984, that the plaintiff does not have a reasonable claim to an interest in the property. Taking the plaintiff's factual assertions at their highest, the plaintiff cannot show that the defendant vendors have been unjustly enriched. Their profit on the sale of the property will arise from their receipt of the market value of their asset, the property. It can be stated with certainty on this record that, unlike the situation in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574... the total benefit to the defendant vendors does not accrue through a single misuse of confidential information or from misuse of confidential information at all. The juridical reason for the enrichment of the vendors will be the sale of the property. The plaintiff may be entitled to damages against all or some of the defendants, that is not for me to decide, but even if the plaintiff is found to have a claim for damages those damages will not represent a detriment corresponding to an unjust enrichment, because if the sale to the

Bitove Corp., or to anyone else, goes through, the profit, if any, of the vendors will not be an enrichment corresponding to the detriment suffered by the plaintiff, let alone an unjust enrichment. The facts in the case are very different from those in LAC where the total benefit was found to have accrued to a wrongdoer through a single misuse of information. In LAC the misused information was the thing of value and it was found to have been wrongfully appropriated, all of it. ...

[35] Little Island says that the above quote is equally applicable to this case. If Little Island is liable to Royal Harbour, it will have to compensate Royal Harbour in damages. However, Royal Harbour is not entitled to any constructive trust over Little Island's real property or fixtures.

[36] *Is Royal Harbour's Claim Certain to Fail?* Per *Anger & Honsburger, supra*, on an application to vacate *lis pendens* the Court is entitled to examine a claim to determine whether it is "certain it will fail". If the portion of the claim which allegedly entitles a party to file *lis pendens* is "certain to fail", the Court can order that the *lis pendens* be vacated.

[37] Little Island says that Royal Harbour's claim that is entitled to a trust due to Little Island's alleged acquisition of its "business and technological knowledge" is certain to fail. Any such knowledge passed to Little Island under contracts it made

with Royal Harbour. Little Island was therefore not unjustly enriched by any such knowledge.

[38] The Processing Agreement was made between Little Island and Royal Harbour in October, 2007. Under the agreement, Little Island agreed to purchase a processing line from Royal Harbour. It also agreed to process exclusively for Royal Harbour in exchange for certain consideration from Royal Harbour, including the following, at clause 4:

RHS will train and pass on its knowledge and processing practices to LIF during the first after transfer of the equipment. This training will take place prior to and during production, when the plant is operational. The specifics of the processing practices/training will be:

- Techniques on keeping the fish firm through the production flow
- Setting and operating all machines
- Packaging of product processes
- Processing practices
- Maximizing yield and recovery

[39] The Processing Agreement could be terminated by either party on 60 days written notice. There was no agreement that Little Island would be unable to use the knowledge obtained from Royal Harbour should their relationship come to an

end. In the circumstances, there is no trust over that knowledge, which was obtained for valuable consideration.

[40] The Management Agreement contemplated a close working relationship between Little Island and Royal Harbour. Royal Harbour has also received consideration for any information exchanged in that relationship. It had control over Little Island from November 24, 2008 to July 2, 2009 and profited from Little Island's operations during that time. The Management Agreement also specifically contemplated that the parties may not be able to conclude an asset sale. It contains no provision requiring Little Island to compensate Royal Harbour for its knowledge in the event the sale did not take place.

[41] Although the Processing and Management Agreements contracts were terminated, Royal Harbour has retained the benefits it received from those agreements. It cannot now say that any knowledge Little Island received during the tenure of those agreements constitutes unjust enrichment.

[42] Based on the agreements between the parties, Little Island says that Royal Harbour cannot succeed in its claim that a trust exists between the parties for Royal

Harbour's "trade secrets", giving Royal Harbour an interest in Little Island's real property and fixtures.

[43] ***Test to Vacate Lis Pendens:*** In considering whether to discharge a certificate of *lis pendens* the Court should examine the claim to determine if it will fail. That is not the only consideration for the Court facing a motion to discharge a certificate of *lis pendens*. Per Eberhard J. in *Cini v. 2030315 Ontario Ltd.*, 2007 CarswellOnt 3269 (Ont. S.C.J.) at para. 14:

Vacating a Certificate of Pending Litigation

14 The defendant relies on the Courts of Justice Act section 103. I accept that the test is properly stated and summarized in the headnote of *Sandhu v. Braebury Homes Corp.*. Rosenberg, J.:

A discretion must be exercised in equity and all of the relevant matters between the parties must be looked at in determining whether the Certificate should be vacated. Any other interpretation would completely negate the words in section 116 (now 103) of the Act. If the legislature had intended to have the Certificate removed only when there was no triable issue with regard to an interest in land, they could have so provided. ... (Emphasis added)

[44] The applicability of the above test was confirmed in *Demers v Desrochers*, 2009 CarswellOnt 4600. The equitable factors that may guide the Court's discretion are also discussed in *Matheson v. Gordon* (2004), 16 R.P.R. (4th) 299 (Ont S.C.J.). At para. 22:

22 This a motion to discharge a Certificate. While it is not the trial, the discharge of a Certificate is not a matter to be taken lightly. It is a discretionary remedy. ... At page 141 of the publication, *The Ontario Superior Court Practice 2003/2004*, Killeen, Morton, and James, note the case of *G.P.I. Greenfield Pioneer Inc. v. Moore* (2002), 58 O.R. (3d) 87 (Ont. C.A.) Court of Appeal stands for the proposition that *a judge in a motion to discharge a Certificate must exercise his or her discretion in equity and look at all of the relative matters between the parties in determining whether or not the Certificate should be vacated* - 'the role of the motion judge is

not to find as a fact whether the respondent had, or did not have, a reasonable interest in the land.’

23 572383 *Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 (Ont. Master) lists equitable factors to be taken into account. I am certain that the list found there is not exhaustive but some of those mentioned are applicable here, i.e., the land is unique to this plaintiff; there is ample evidence of her intent to acquire the property; ***there is no evidence that damages might not be an adequate remedy***; there is another willing purchaser; there will be harm done if the Certificate is allowed to remain or is removed, with or without the requirement of alternative security. ... [emphasis added]

[45] Little Island says that there is no genuine issue for trial regarding Royal Harbour's claimed *lis pendens*. However, even if there were, the equities favour a discharge.

No Genuine Issue for Trial

[46] ***No Material Dispute of Fact:*** In its brief of law, Royal Harbour argues that several disputes of fact are before this Honourable Court, and therefore the certificate of *lis pendens* cannot be discharged.

[47] The Court must examine the evidence introduced by both sides to determine whether there is a dispute of fact relevant to whether Royal Harbour has an interest

in Little Island's land and fixtures. The Court is permitted to critically assess the evidence to determine if the alleged dispute of fact is legitimate or a "sham".

[48] The permitted degree of scrutiny is akin to that raised on a motion for summary judgment. In *Cannon v. Lange* (1998), 203 N.B.R. (2d) 121 (N.B. C.A.) the New Brunswick Court of Appeal said that on summary judgment, a Court must take a "hard" look at the pleading and the evidence before finding a dispute of fact.

At para. 24:

It is up to the moving party to satisfy the court that an apparent factual controversy or credibility conflict is a sham. If material facts remain genuinely in dispute after the court has taken a hard look at the evidence and the pleadings, it is not appropriate to grant summary judgment (see RCL Operators Ltd.)....

[49] The material disputes of fact alleged by Royal Harbour are either not material to its alleged interest in Little Island's property, or a "sham". At paras. 24 – 28 of its brief, Royal Harbour alleges that the following are material disputes of fact:

- Whether Little Island rescinded agreements due to fraudulent misrepresentations by Royal Harbour

- Whether Royal Harbour changed or made tangible improvements to Little Island's real property or fixtures

- Whether there was an increase in the value of Little Island's facility due to Royal Harbour's alleged improvements

[50] The first question is irrelevant to whether Royal Harbour has an interest in Little Island's real property. Who will ultimately be successful in the case does not affect whether Royal Harbour is permitted to file a *lis pendens*. Royal Harbour does not claim for specific performance.

[51] The third question is similarly irrelevant to whether Royal Harbour has an interest in Little Island's land. There is also no evidence to suggest an increase in value, apart from one statement in Joel Comeau's affidavit stating his belief that it has, without providing any reasonable basis for that belief.

[52] With respect to the second question, Little Island says that any apparent factual dispute regarding physical improvements by Royal Harbour is a "sham".

There is no evidence before this Court to suggest that Royal Harbour has physically changed or improved Little Island's real property in any way.

Although Mr. Comeau testifies that he "redesigned" the floor layout of the Little Island facility and "redesigned" the flow of product, those designs were never implemented, nor does Mr. Comeau say that they were.

Equities Favour a Discharge of Lis Pendens

[53] ***No Enrichment of Little Island:*** As set out above, unjust enrichment requires (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment.

[54] Even if Royal Harbour improved Little Island's facility and property as it alleged, Royal Harbour made such improvements for its own benefit and they do not enrich Little Island. In its brief, Royal Harbour relies on the decision of the *Alberta Court in Valley v. McLeod Valley Casing Services Ltd.* (2004), 31 Alta. L.R. (4th) 80 (Q.B.). In that case the Court said the following:

145 In *The Law of Restitution*, at 3-9, P. D. Maddaugh and J.D. McCamus also indicate that the first element of the unjust enrichment test is generally not difficult. ... However, issues arise when the services provided to the defendant are unrequested:

Where the plaintiff has provided services to the defendant which have not been requested, there is a danger that the granting of relief will force the defendant to invest resources in the acquisition of an unwanted service for which the defendant may have no use.

Understandably, there is a reluctance to grant recovery in such circumstances and thereby constrain the freedom that the defendant would otherwise have to invest the resources as the defendant sees fit. In such circumstances, it might be held that whatever value the services in question might have in the marketplace, they hold no value for the defendant and do not constitute a "benefit" in the defendant's hands. Birks has usefully coined the phrase "subjective devaluation" to refer to the defendant's position in such a case . . . (The Law of Restitution at 3-9-3-10).

146 The authors further applied the concept of 'subjective devaluation' to the context of improvements to land:

If an improvement which has been made without the knowledge or consent of the owner is of no subjective value to the owner, the granting of restitutionary relief in favor of the improver would have the effect of forcing the owner to invest in an unwanted and useless asset. . . . [emphasis added]

[55] Little Island says that the plans to redesign its facility were prepared by Royal Harbour acting on its own initiative. Little Island will not be implementing those plans, and they do not enrich Little Island.

[56] ***Juristic Reason for Any Enrichment:*** An agreement is a complete answer to a claim for unjust enrichment. In the case of *Goddard v. Hambleton* (2005), 237 N.S.R. (2d) 1 (C.A.), Fichaud J.A. said at para. 12:

... There was a contract between Mr. Goddard and Ms. Hambleton, with consideration moving from each party. Contract is an established juristic reason under the third element in the cause of action for unjust enrichment: *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.), at 44, per Iacobucci, J. for the Court.

[57] All training and instruction provided by Royal Harbour to Little Island was conducted under the Processing Agreement. Therefore even if training and instruction could somehow result in a constructive trust in land (which is denied) no trust would arise here. The Processing Agreement provides:

RHS will train and pass on its knowledge and processing practices to LIF during the first after transfer of the equipment. This training will take place prior to and during production, when the plant is operational. The specifics of the processing practices/training will be:

- Techniques on keeping the fish firm through the production flow
- Setting and operating all machines
- Packaging of product processes
- Processing practices
- Maximizing yield and recovery

[58] Royal Harbour has alleged that the Processing Agreement did not include "Icelandic technology" as it was not familiar with that technology in 2007. As noted in the Affidavit of Derek d'Entremont, that allegation is demonstrably false and contradictory to a business plan filed by Royal Harbour in 2007.

[59] Royal Harbour has also argued that the Processing Agreement concluded in 2007. In hearings conducted before the Honourable Justice LeBlanc in June, 2009, he found that the Processing Agreement was a continuing obligation and ordered Royal Harbour to continue to comply with it as a condition of his injunction Order. I am also satisfied that the Processing Agreement continued into June 2009.

[60] ***Constructive Trust:*** Unjust enrichment will not in itself give rise to a constructive trust. The pre-requisites to a claim of constructive trust based on unjust enrichment were provided by the Supreme Court of Canada in the case of ***Soulos v. Korkontzilas***, [1997] S.C.J. No. 52 at para. 45:

I would identify four conditions which generally should be satisfied:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[61] ***Constructive Trust does not attach to Little Island's Property:*** Per the second factor of *Soulos*, supra, Royal Harbour must establish a connection between Little Island's property and facility and Little Island's alleged wrongdoing. Per *Michelin Tires (Canada) Ltd. v. R.*, 2001 FCA 145 (Federal Ct. Appeal), leave to appeal refused at 2001 CarswellNat 2734 (S.C.C.) at para. 19:

In particular, a constructive trust will not be imposed unless the plaintiff can point to property in the hands of the defendant that is identifiable as the property, or its proceeds, that was transferred by or obtained from the plaintiff without a juristic reason, or that the defendant could not otherwise retain in good conscience. That is, the constructive trust attaches to specific assets of the defendant that represent the enrichment; it is not a charge on the defendant's general assets for the amount of the plaintiff's claim.

[62] In essence, if the specific assets over which a constructive trust is claimed cannot be traced to a breach of duty, such a claim will fail even if other wrongful conduct can be shown.

[63] As set out above, Royal Harbour did not modify or improve Little Island's facility or property. Therefore even should Royal Harbour succeed in the primary

action, it will not be entitled to a constructive trust over Little Island's facility or property. It will be entitled to damages.

[64] It is true that Royal Harbour instructed Stal-Tech to prepare designs of a new facility layout. Those designs were never used. Royal Harbour appears to have conceded that it does not know whether its designs were ever used by Little Island.

It says at paragraph 28 of its brief:

"Other necessary factual determinations include whether this information was used to make physical alterations to the Plant..."

[65] Furthermore, Saevar Matthiasson from Stal-Tech, the company alleged to have changed the Little Island facility, denies having implemented any physical changes to the facility.

[66] It is true that Little Island purchased new equipment for its plant. Even if equipment could be considered an improvement, it would not unjustly enrich Little Island. All equipment in the plant was paid for by Little Island, and purchased prior to any agreement to sell Royal Harbour its assets.

[67] Little Island's property and facility were not improved by Royal Harbour and therefore Royal Harbour is not entitled to file a *lis pendens* over that property and facility based on a constructive trust.

[68] **Conclusion:** Accordingly, I am ordering that the *lis pendens* be vacated. In particular, I am satisfied that there is no evidence that the Respondent made physical improvements to the Moving Party's property. Significantly, the Respondent has abandoned its claim for specific performance of the agreement of purchase and sale. Although the Respondent has asserted a claim of constructive or resulting trust, the Respondent seeks no title in the Moving Party's land, no declaration of an interest in its land, or any relief that would affect the Moving Party's ownership of its land. There is no evidence that damages might not be an adequate remedy. Costs of this motion shall be in the cause.

J.