642947 Ontario Limited v. Fleischer et al.

Fleischer et al. v. 642947 Ontario Limited et al.; Sweet Dreams Delights Inc. et al., Third Parties

[Indexed as: 642947 Ontario Ltd. v. Fleischer]

56 O.R. (3d) 417
[2001] O.J. No. 4771
Docket Nos. C27257 and C27338

Court of Appeal for Ontario,
Abella, Laskin and Rosenberg JJ.A.
December 7, 2001

2001 CanLII 8623 (ON CA)

Corporations -- Piercing the corporate veil -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale of land to third party purchaser -- Corporation giving undertaking as to damages -- Corporation failing to disclose that it did not have assets to honour undertaking as to damages -- Shareholder alter ego for corporation -- Shareholder personally liable for corporation's undertaking as to damages.

Injunctions -- Interlocutory injunction -- Undertaking as to damages -- Party giving undertaking as to damages obliged to disclose whether its assets are adequate to honour undertaking.

Injunctions -- Interlocutory injunction -- Undertaking as to damages -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale to third party purchaser -- Corporation giving undertaking as to damages -- Third party purchaser enjoined on terms that closing of its agreement be extended until resolution of claim by corporation to enforce right of first refusal -- Corporation abandoning action and injunction dissolved -- Third party purchaser

refusing to complete its purchase and found liable to vendor for damages for breach of contract -- Corporation not liable under its undertaking as to damages to indemnify third party purchaser for damages it had to pay vendor -- Granting of injunction not causing damages suffered by third party purchaser.

Sale of land -- Breach of contract -- Damages -- Date of assessment -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale to third party purchaser -- Third party enjoined on terms that closing of its agreement be extended until resolution of claim by corporation to enforce right of first refusal -- Corporation abandoning action and injunction dissolved -- Market values for land having declined and third party refusing to complete its purchase -- Third party liable to vendor for damages for breach of contract -- Vendor retaining property in anticipation that value would return -- Damages to be assessed as at around time of failure to close.

F and N owned a property that they leased to S Inc., which was owned by H and K. The lease had a right of first refusal. In August 1989, 642947 Ontario Ltd. ("642947"), a nominee of B Corp. under a bare trust that required 642947 to act on the instructions of B Corp., offered to purchase the property. This offer triggered the right of first refusal, but S Inc. did not complete a purchase and, in September 1989, 642947 resubmitted its offer, which was to buy the property for $2 million. F and N accepted the resubmitted offer and took the position that the right of first refusal had been extinguished. S Inc., however, took the position that the right remained available.

S Inc. sued, and it moved for an interlocutory injunction to restrain the sale to 642947. In the motion for the injunction, B Corp., which previously had been an undisclosed principal, filed an affidavit stating it would suffer great harm if the injunction were granted. Isaac J. granted the injunction on terms, which were requested by 642947 and B Corp., that the closing of the sale to 642947 be extended. S Inc. gave an undertaking to pay any damages caused by the injunction in the language prescribed by rule 40.03 of the Rules of Civil

2001 CanLII 8623 (ON CA)

Procedure.

In 1990, the real estate market collapsed, and S Inc. abandoned its action. The injunction was dissolved, and December 7, 1990 was set for the closing of the sale to 642947, but it now refused to close because of the effect of the injunction and the market downturn. It sued for its deposit. F and N counterclaimed. The counterclaim was against 642947 and B Corp., which brought a third party claim against S Inc., H and K.

The trial was heard in July of 1995 and 1996 and, at the time of the trial, F and N still owned the property, which was still leased but not to S Inc. Greer J. held that 642947 was the agent of B Corp. and that it and B Corp. were liable for breach of contract or for inducing breach of contract. She held that the deposit was forfeit and damages were to be assessed as at December 7, 1990, when the property was worth $1,130,000, yielding a judgment of $870,000 (the difference between the purchase price and the value of the property) plus pre-judgment interest as provided by the Courts of Justice Act, R.S.O. 1990, c. C.43. She held that the right of first refusal had been extinguished and S Inc. was liable to indemnify 642947 and B Corp. under the undertaking as to damages. Greer J., piercing the corporate veil, held that H and K were jointly and severally liable because they were the alter ego of S Inc. and had defrauded the court by offering the undertaking when they knew that S Inc. had no assets to satisfy it. All parties appealed.

The following were the grounds for the appeal by 642947 and B Corp.: (1) B Corp. as an undisclosed principal was entitled to rely on the sealed contract rule; (2) F and N were precluded from suing B Corp., having elected to contract with 642947; (3) 642947 and B Corp. were not liable because F and N acted in bad faith; and (4) 642947 and B Corp. were not liable because F and N could not give vacant possession on closing. On their appeal, F and N contended that they had not been fully compensated for their loss and that damages should have been assessed at or near the date of the trial. (The evidence was that the value of the land had declined to only $410,000 as of November 1994.)

2001 CanLII 8623 (ON CA)

They also contended that pre-judgment and post-judgment interest should have been awarded at commercial rates of interest. On their appeal, S Inc., H and K submitted that S Inc. was not liable to indemnify 642947 and B Corp. under the undertaking as to damages because the injunction had not caused damages to them and that even if S Inc. was liable, there were no grounds to pierce the corporate veil.

Held, The appeals of F and N, and 642947 and B Corp. should be dismissed; the appeal of S Inc., H and K should be allowed.

There was no merit to any of the grounds of appeal advanced by 642947 and B Corp., and their appeal should be dismissed. The subject of the litigation was not a contract under seal and, therefore, the sealed contract rule, which holds that where a contract is made under seal, only the parties to the contract may sue or be sued on it, did not apply. There was no merit to the arguments that effect should be given to 642947's intention to execute the offer under seal and that the Land Registration Reform Act, R.S.O. 1990, c. L.4 made the contract under seal. Further, there was no bad faith and no basis to preclude F and N from suing B Corp. as the principal of the contract negotiated by its agent 642947, and the inability to give vacant possession on closing was never an impediment to closing the transaction.

The appeal of F and N should be dismissed. Greer J. did not err in selecting the date for the assessment of damages or in her award of interest on the judgment. As a general rule, in a falling market, the court should award an innocent vendor damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date. Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed as at the date of closing. In the immediate case, F and N decided to retain the property, speculating that the value would return. They alone had to assume the burden or the benefit of changes in the market after the closing date.

2001 CanLII 8623 (ON CA)

The appeal of S Inc. should be allowed. It was not liable under its undertaking as to damages. Under its undertaking, which tracked the wording of rule 40.03, S Inc. undertook "to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the applicant ought to compensate it". The trial judge erred by finding a causal connection between the injunction and any damages suffered by 642947 and B Corp. The injunction did not cause or materially contribute to the damages 642947 and B Corp. were obliged to pay F and N. Those damages were caused by the fall in the market and by B Corp.'s refusal to close after having asked the motions judge to extend the closing date to preserve its interest in the property.

Assuming, however, that S. Inc. was liable under the undertaking as to damages, H and K would have been jointly and severally liable. Contrary to their submission, there was ample evidence to support the finding that S Inc. did not have sufficient assets to honour the undertaking. Contrary to their submission, it was not necessary for B Corp. to raise the issue of the adequacy of the assets on the injunction application. S Inc. had the primary obligation to disclose that its assets were inadequate. Its undertaking was to the court. It implicitly represented that it had sufficient assets and both the court and B Corp. were entitled to rely on that representation without making inquiries. After disclosure, it could have asked to be relieved of its undertaking or could have been asked to post security. Finally, contrary to their submissions, the trial judge made no error in piercing the corporate veil. It was open on the evidence to find that H and K were the alter egos of S Inc. and it was appropriate to make them personally liable for trying to use S Inc. as a shield for improper conduct.

Cases referred to

100 Main Street Ltd. v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.) [leave to appeal to S.C.C. refused (1978), 20 O.R. (2d) 401n, 88 D.L.R.

2001 CanLII 8623 (ON CA)

(3d) 1n]; Air Express Ltd. v. Ansett Transportation
Industries (Operations) Pty Ltd. (1979 to 1981), 146 C.L.R.
249, 33 A.L.R. 578; Bitton v. Jakovljevic (1990), 75 O.R. (2d)
143, 13 R.P.R. (2d) 48 (H.C.J.); Brock v. Cole (1983), 40 O.R.
(2d) 97, 142 D.L.R. (3d) 461, 31 C.P.C. 184, 13 E.T.R. 235
(C.A.); Claiborne Industries Ltd. v. National Bank of Canada
(1989), 69 O.R. (2d) 65, 34 O.A.C. 241, 59 D.L.R. (4th) 533
(C.A.); Clarkson Co. v. Zhelka, [1967] 2 O.R. 565, 64 D.L.R.
(2d) 457 (H.C.J.); Constitution Insurance Co. of Canada v.
Kosmopoulos, [1987] 1 S.C.R. 2, 21 O.A.C. 4, 34 D.L.R. (4th)
208, 74 N.R. 360, 36 B.L.R. 233, [1987] I.L.R. 1-2147; F.
Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade
and Industry, [1975] A.C. 295, [1974] 2 All E.R. 1128, [1974]
3 W.L.R. 104, 118 Sol. Jo. 500 (H.L.); Friedmann Equity
Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 48
O.R. (3d) 800n, 188 D.L.R. (4th) 269, 255 N.R. 80, 34 R.P.R.
(3d) 159, 7 B.L.R. (3d) 153; Rice v. Rawluk (1992), 8 O.R.
(3d) 696 (Gen. Div.); Salomon v. Salomon & Co., [1897] A.C.
22, [1895-9] All E.R. Rep. 33, 66 L.J. Ch. 35, 75 L.T. 426, 45
W.R. 193, 13 T.L.R. 46, 41 Sol. Jo. 63, 4 Mans. 89 (H.L.);
Transamerica Life Insurance Co. of Canada v. Canada Life
Assurance Co. (1996), 28 O.R. (3d) 423 (Gen. Div.), affd [1997]
O.J. No. 3754 (C.A.); Trident Holdings Ltd. v. Danand
Investments Ltd. (1988), 64 O.R. (2d) 65, 25 O.A.C. 37, 49
D.L.R. (4th) 1, 39 B.L.R. 296, 30 E.T.R. 67 (C.A.); Vieweger
Construction Co. v. Rush Tompkins Construction Ltd. (1964),
[1965] S.C.R. 195, 48 D.L.R. (2d) 509; Village Gate Resorts
Ltd. v. Moore (1999), 71 B.C.L.R. (3d) 1, 37 C.P.C. (4th) 5
(C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
Land Registration Reform Act, R.S.O. 1990, c. L.4, s. 13(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 40.03

Authorities referred to

2001 CanLII 8623 (ON CA)

Spry, I.C.F., The Principles of Equitable Remedies, 5th ed.
(Toronto: Carswell, 1997)
Waddams, S.M., The Law of Contracts, 4th ed. (Toronto: Canada
Law Book, 1999)

APPEAL and CROSS-APPEALS of a judgment of Greer J. (1997), 9 R.P.R. (3d) 261 (Ont. Gen. Div.) (supplementary reasons reported 86 O.T.C. 390) in an action and third party proceeding for damages for breach of contract for the sale of land.

Ronald E. Carr, for 642947 Ontario Limited and Burnac Corporation.
Valerie A. Edwards and Duncan Embury, for Jules Fleischer and Melvin Newton.
Brian Morgan and Monica Creery, for George Halasi.
Robert L. Falby, Q.C., for Sweet Dreams Delights Inc. and Larry Krauss.

The judgment of the court was delivered by

LASKIN J.A.: --

INTRODUCTION

[1] These appeals raise three main questions:

1. On what date should damages for breach of an agreement to buy land be assessed?

2. When should a party who obtains an interlocutory injunction be liable on its undertaking to pay damages?

3. Where the party tendering the undertaking is a corporation, when should the corporation's principals be liable?

[2] The litigation arises out of a fight between two sophisticated developers -- Burnac Corporation and George Halasi -- to acquire a property in North York (the "Property")

2001 CanLII 8623 (ON CA)

considered key to the development of the North York corridor. The Property was owned by Jules Fleischer and Melvin Newton and leased to Sweet Dreams Delights Inc., a company controlled by Halasi and his partner Larry Krauss, a lawyer. Sweet Dreams' lease contained a right of first refusal on any offer to buy the Property.

[3] In August 1989, 642947 Ontario Limited ("642947"), a nominee of Burnac, agreed to buy the Property for $2,000,000. Sweet Dreams exercised its right of first refusal, but later terminated the agreement. Then, in late September 1989, 642947 resubmitted its original offer to Fleischer and Newton, who accepted it and took the position that Sweet Dreams' right of first refusal was spent. Sweet Dreams, however, obtained an interlocutory injunction restraining the sale. It gave the usual undertaking to pay any damages caused by the injunction. On the injunction application, 642947 and Burnac requested and were granted an extension of the closing date until after the injunction proceedings had concluded. In 1990, the real estate market in Metropolitan Toronto collapsed. The Property fell in value, and both Burnac and Halasi lost interest in it. Sweet Dreams' injunction was dissolved in November 1990 and a new closing date for the sale to 642947 was fixed for December 1990. But 642947 refused to close, citing th e downturn in the real estate market.

[4] 642947 sued for a declaration that its agreement with Fleischer and Newton had been terminated and for a return of its deposit. Fleischer and Newton counterclaimed for damages for breach of the agreement, and 642947 and Burnac sought to be indemnified by Sweet Dreams, Halasi and Krauss on the undertaking to pay damages.

[5] After a long trial heard in July of 1995 and 1996, Greer J. held 642947 and Burnac liable for breach of the agreement of purchase and sale. She assessed damages at the date of closing in December 1990, though the Property fell in value afterwards. She also held that Sweet Dreams' undertaking required it to indemnify 642947 and Burnac for their loss and she found Halasi and Krauss jointly and severally liable on the undertaking because Sweet Dreams had no assets and was simply their alter

2001 CanLII 8623 (ON CA)

ego.

[6] All parties appealed the trial judgment. Burnac and 642947 raised several technical grounds why they were not liable to Fleischer and Newton. In turn, Fleischer and Newton contended that the trial judge erred in assessing damages at the date of closing instead of at or near the date of trial and, alternatively, that she erred in failing to order pre-judgment interest and post-judgment interest at the commercial rate instead of the statutory rate. Sweet Dreams, Halasi and Krauss submitted that they were not liable on the undertaking because 642947 and Burnac's damages were not caused by the injunction. Finally, Halasi and Krauss submitted that even if Sweet Dreams was liable on the undertaking, the trial judge erred by piercing the corporate veil and making them liable as well.

[7] We found no merit in the appeal by 642947 and Burnac and did not call on Fleischer and Newton to respond to it. I would dismiss the appeal by Fleischer and Newton on damages. I would, however, allow the appeal by Sweet Dreams, Halasi and Krauss because, in my view, the damages awarded against 642947 and Burnac were not caused by the injunction but by the fall in the real estate market and by their deliberate refusal to close the transaction. Had I, however, found Sweet Dreams liable on its undertaking, I would have upheld the trial judge's conclusion that Sweet Dreams' principals, Halasi and Krauss, were also liable.

FACTUAL BACKGROUND

A. The Agreements of Purchase and Sale Between 642947 and Fleischer and Newton

[8] The Property that has been the subject of all this litigation is on a municipal block bounded by Yonge Street, Empress Avenue, Doris Avenue and Kingsdale Avenue in the former City of North York. It is next to a block of land owned by the City. Developers interested in assembling land in the North York corridor knew that the City would only sell its block to a party that owned neighbouring land. Therefore, acquiring the

2001 CanLII 8623 (ON CA)

Property was key to developing the corridor.

[9] The Property was bought by Fleischer, a lawyer and a developer, and Newton in 1985. In 1986 they leased it to Sweet Dreams, a company controlled by Halasi and Krauss, each of whom was a 40 [per cent] shareholder through corporations owned or controlled by them. Sweet Dream's lease was for five years with several renewal options to 2006. The lease also contained a right of first refusal, which provided that if the landlord received a bona fide offer to purchase the property, Sweet Dreams had the right to purchase it on the same terms:

> In the event any Landlord hereunder receives a bona fide offer (the "Offer") to purchase the building and land during the Term or the Renewal Periods from an arm's length third party purchaser as defined under the Income Tax Act, the Landlord shall send a copy of the Offer to the Tenant (the "Notice") and the Tenant shall have a first right of refusal to purchase the building and land at a purchase price and upon terms and conditions equal and similar to those contained in the Offer. Upon receipt of the Notice, the Tenant shall have seven (7) business days to reply to the Landlord in writing of its intent to exercise or not exercise its right of first refusal as the case may be. Should the Tenant elect to exercise its right of first refusal as set out hereunder, there shall be a binding agreement of purchase and sale of the Landlord's freehold estate in the building and the land upon which is situated the Leased Premises between the Landlord and Tenant and the parties agree to execute all additional documen tation to give effect thereto.
> . . .

This right of first refusal gave Sweet Dreams control over the development of the Property.

[10] In the late 1980s, the real estate market in Metropolitan Toronto was booming. Burnac became interested in the Property and used a nominee or shelf company, 642947, to try to buy it. 642947 was a bare trustee under a trust agreement with Burnac dated August 28, 1989. The sole shareholder, director and officer of 642947 was John Handiak, a

2001 CanLII 8623 (ON CA)

solicitor who had done work for Burnac for about 15 years. 642947, however, had no assets, no employees and no independent authority. Under the trust agreement, 642947 was to act "solely and entirely on the instructions" of Burnac. Burnac's Vice-Chairman Theodore Burnett testified that the company typically used trust agreements to acquire real property in order to hide the identity of the true purchaser and to limit Burnac's liability.

[11] On August 31, 1989, 642947 entered into an agreement with Fleischer and Newton (the "first agreement") to buy the Property for $2,000,000, made up of a $100,000 deposit and the balance due on closing, fixed for November 24, 1989. The agreement was conditional on Sweet Dreams' right of first refusal.

[12] Fleischer and Newton submitted the first agreement to Sweet Dreams and on September 13, 1989, Sweet Dreams exercised its right of first refusal. By doing so, Sweet Dreams took over 642947's position as purchaser. It then turned around and offered to sell the property to 642947 for $2,050,000, an increase of $50,000 over the original purchase price. 642947 declined the offer. Later, Sweet Dreams used an unrelated condition in the first agreement to get out of the deal.

[13] On September 25, 1989, 642947 made an identical offer of $2,000,000 to purchase the Property, which Fleischer and Newton accepted (the "second agreement"). Fleischer and Newton, and Handiak, representing 642947, then signed a waiver notice dispensing with the right of first refusal condition in the second agreement. They took the position that once Sweet Dreams had exercised its right of first refusal in connection with the first agreement that right was extinguished. The trial judge agreed. She found that 642947's first offer was a bona fide offer, and that "once Sweet Dreams exercised its option, even though it then declined to purchase prior to the inspection period being concluded, its right of first refusal was extinguished and it then no longer became necessary for Fleischer and Newton to submit 642[947]'s identical second Offer to Sweet Dreams": (1997), 9 R.P.R. (3d) 261 at p. 292 (Ont. Gen. Div.). In this court, neither Sweet Dreams nor

2001 CanLII 8623 (ON CA)

its principals Halasi and Krauss challenged thes e findings.

B. The Injunction Proceedings

[14] The second agreement was scheduled to close on Friday, November 24, 1989. In mid-November, Sweet Dreams sought to enjoin the closing on the ground that it had not been given an opportunity to exercise its right of first refusal. The application for the injunction was supported by the affidavit of Halasi, who gave an undertaking on behalf of Sweet Dreams in the standard form prescribed by rule 40.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194:

> The Applicant undertakes to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the Order has caused damage to the responding party for which the Applicant ought to compensate it.

Acting on Burnett's instructions, Andrew Federer, a lawyer and president of a Burnac subsidiary, filed a responding affidavit stating that Burnac would suffer great harm if the injunction were granted.

[15] The application for the injunction was argued on Thursday, November 23, the day before the scheduled closing date. Both Krauss and Fleischer attended the hearing. Krauss offered to buy the Property for $2,000,000 if the motions judge, Isaac J., restrained 642947 and Fleischer and Newton from closing the second agreement. Fleischer said that he was indifferent and would sell to whichever party the court found was entitled to buy. After a full day of argument, Isaac J. reserved his decision until Monday, November 27. To avoid being prejudiced while the decision was under reserve, 642947 and Burnac asked the motions judge to extend the closing date until Monday, which he did. On Monday the 27th, Isaac J. released his decision, in which he enjoined 642947 and Fleischer and Newton from completing their agreement of purchase and sale until trial or other order of the court. To preserve their interest in the Property while the injunction was outstanding, 642947 and Burnac again asked the motions judge to extend the closing date of the second agreement. In Federer's words, 642947 and

2001 CanLII 8623 (ON CA)

Burnac were "betting that the market would stay the same or go up". Isaac J. ordered an extension until the disposition of the action or further order of the court.

[16] Before the injunction proceedings, Burnac had been an undisclosed principal but during the injunction it participated openly and actively and thus became a disclosed principal. Burnac was later added as a defendant in the action.

C. Subsequent Events

[17] In 1990, the real estate market in Metropolitan Toronto collapsed. Property values in the North York area fell dramatically, by as much as 50 to 70 per cent. Halasi and Krauss lost interest in buying the property. Therefore, in November 1990, Sweet Dreams moved to discontinue the action. On November 22, 1990, Dunnet J. granted Sweet Dreams leave to discontinue, dissolved the injunction and fixed December 7, 1990 for closing the second agreement. She also ordered that the question whether the undertaking of Sweet Dreams could be imposed on Halasi and Krauss could be considered on an inquiry into damages or in another proceeding.

[18] Burnac, too, lost interest in buying the Property. The day after Dunnet J.'s order, 642947 wrote to Fleischer and Newton waiving tender and stating that it would not close the second agreement because of "the effect of the injunction granted by Mr. Justice Isaac dated November 27, 1989 and the downturn in the real estate market since that date". As Burnett testified at trial, Burnac did not complete the transaction because "I didn't think I was getting what I had bargaining for".

[19] After the injunction was dissolved, Fleischer and Newton let it be known that the Property was back on the market, though they did not list it for sale. When Sweet Dreams' lease expired in 1991, Fleischer and Newton leased the Property to a new tenant, Sonic Temple Music Store. The litigation began in April 1991. When the trial ended in July 1996, Fleischer and Newton still owned the Property and the music store remained a tenant with an option to renew its lease until 2006.

2001 CanLII 8623 (ON CA)

D. The Reasons of the Trial Judge

[20] The trial judge gave detailed reasons [reported at 9 R.P.R. (3d) 261] in what turned out to be a difficult case. She held that both 642947 and Burnac were liable to Fleischer and Newton for breaching the second agreement. And because it had repudiated the agreement, 642947 was not entitled to the return of its deposit.

[21] The trial judge dismissed the "technical" real property issues raised by 642947 and Burnac -- for example, the inability of the vendors to give vacant possession on closing -- by concluding that these issues did not impede the closing. She found that the trust agreement between 642947 and Burnac applied to the second agreement, that 642947 acted as agent on the transaction, and that, therefore, Burnac was liable as an undisclosed principal. Alternatively, she held that Burnac was liable for inducing breach of contract.

[22] The trial judge then turned to assess Fleischer and Newton's damages. She made findings of fact on the value of the Property and on mitigation, which are not challenged on this appeal. She found that the Property was worth $1,130,000 on the date scheduled for closing, December 7, 1990, and that by November 1994, the last time it was appraised before trial, it had a value of only $410,000. She also found that the vendors had mitigated their loss by re-leasing the Property at a reasonable rate and by advising the developer community it was back on the market. As well, in her view, 642947 and Burnac had not shown that the vendors had breached their duty to mitigate. Having made these factual findings, the trial judge chose the date of closing to assess Fleischer and Newton's damages. She therefore awarded them $870,000 (the difference between the purchase price and the value of the Property on December 7, 1990) plus pre-judgment interest on that amount at 8.8 per cent, the rate provided by the Courts of Justice Act, R.S.O. 1990, c. C.43. She rejected Fleischer and Newton's request for compound interest, holding that they did not satisfy the requirements in Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.) or

2001 CanLII 8623 (ON CA)

Brock v. Cole (1983), 40 O.R. (2d) 97, 142 D.L.R. (3d) 461 (C.A.).

[23] Finally, the trial judge dealt with 642947 and Burnac's third party claim for indemnity based on Sweet Dream's undertaking. She held that the undertaking should be enforced because its non-performance is a contempt of court. She concluded, at p. 297 R.P.R., that the damages she assessed, $870,000, "flow from the undertaking given by Sweet Dreams". She also concluded that Halasi and Krauss were liable on Sweet Dreams' undertaking because they "were the alter ego of Sweet Dreams and knew when the undertaking was given that Sweet Dreams had no assets from which to pay damages". In her view, the undertaking was fraudulent and Halasi and Krauss misconducted themselves by offering it to the court. She thus considered it appropriate to pierce the corporate veil and hold Halasi, Krauss and Sweet Dreams jointly and severally liable both to 642947 and to Burnac, which she found was a party to the injunction. She fixed their liability at $770,000 (the amount of damages awarded to Fleischer and Newton less the deposit) together with pre-judgment interest.

[ANALYSIS]

[24] I turn now to the three sets of appeals.

I. The Appeal by 642947 and Burnac

[25] On their appeal, 642947 and Burnac sought to avoid their liability to the vendors Fleischer and Newton. Their counsel, Mr. Carr, advanced two arguments why Burnac should not be liable and two arguments why neither Burnac nor 642947 should be liable. These arguments were:

1. Burnac was entitled to rely on the sealed contract rule that an undisclosed principal cannot be sued on a contract made under seal.

2. Fleischer and Newton elected to contract with the agent 642947 and are therefore precluded from suing the principal Burnac;

2001 CanLII 8623 (ON CA)

3. 642947 and Burnac are not liable because Fleischer and Newton acted in bad faith; and

4. 642947 and Burnac are not liable because Fleischer and Newton could not give vacant possession on closing, as required by the second agreement.

2001 CanLII 8623 (ON CA)

[26] We found no merit in any of these arguments and therefore did not ask counsel for Fleischer and Newton to respond to them. I will briefly give my reasons for dismissing 642947 and Burnac's appeal.

1. The sealed contract argument

[27] In Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 188 D.L.R. (4th) 269, the Supreme Court of Canada affirmed the continuing validity of the sealed contract rule. This rule holds that where a contract is made under seal, only the parties to the contract may sue or be sued on it. Therefore, an undisclosed principal is not liable on a sealed contract. This rule is an exception to the general rule that a principal, whether disclosed or not, may sue or be sued on a contract made on its behalf by the principal's agent.

[28] The trial judge found that when it entered into both agreements with Fleischer and Newton, 642947 acted as Burnac's agent. And Burnac was an undisclosed principal when the agreements were signed. Although the first agreement was made under seal, the second agreement was not. Yet the second agreement was the subject of the litigation.

[29] Burnac still contends that it is entitled to invoke the sealed contract rule for the second agreement for two reasons: 642947 intended to execute it under seal and the court should give effect to that intention; and s. 13(1) of the Land Registration Reform Act, R.S.O. 1990, c. L.4. Neither contention has merit.

[30] Mr. Handiak, the sole director and shareholder of 642947, testified that his standard practice was to seal all

agreements of purchase and sale. He did seal the first agreement and, though he intended to seal the second, he failed to do so. In my view, Mr. Handiak's mere intention, unaccompanied by any act of sealing, is insufficient to bring the sealed contract rule into play. The rule, at once historical and technical, should not be given any wider effect than necessary. To invoke it, more than an agent's intention is required. That intention must be accompanied by the deliberate application of the seal. See Friedmann Equity at p. 867 S.C.R.

[31] Section 13(1) of the Land Registration Reform Act treats all conveyances and charges (or mortgages) as sealed documents for all purposes, including the application of the sealed contract rule. Section 13(1) reads:

> 13(1) Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.

Burnac submits that the second agreement of purchase and sale is a "charge" under s. 13(1) because 642947 was entitled to a purchaser's lien to the extent of the $100,000 deposit. To come under s. 13(1), however, the charge must be created by a document. That is consistent with the wording of the subsection and its purpose, which "is to preserve the common law substantive consequences associated with traditional forms of conveyancing and mortgages". See Friedmann Equity at p. 869 S.C.R. The purchaser's lien for deposit money is not a charge created by a document but a charge created by equity. It is an equitable charge on land, not included in s. 13(1). And even if it was, in this case any existing purchaser's lien ended when 642947 and Burnac wrongfully repudiated the agreement. For these reasons, the second agreement was not made or deemed to be made under seal and Burnac could be sued on it. This first ground of appeal fails.

2. Fleischer and Newton's election

[32] Assuming the second agreement of purchase and sale was

2001 CanLII 8623 (ON CA)

not sealed, Burnac advanced an alternative reason why it was not liable. It submitted that Fleischer and Newton chose to contract with 642947 knowing that it was a nominee for an undisclosed principal. Having elected to so contract, Fleischer and Newton cannot now look to hold the principal Burnac liable.

[33] This submission has an air of unreality to it. At trial, Burnac's main contention was that the trust agreement between it and 642947 applied only to the first agreement but not the second and, therefore, 642947 entered into the second agreement as principal, not agent. The trial judge rejected that contention, finding that the trust agreement applied to both agreements of purchase and sale. That finding is not challenged on appeal.

[34] Instead, Burnac now tries to mount an estoppel or election argument. But I see no basis for precluding Fleischer and Newton from suing Burnac simply because they contracted with 642947. To the contrary, had Burnac wished to limit its liability it could have insisted on a clause to that effect in the agreements of purchase and sale.

[35] 642947 was a bare trustee under its trust agreement with Burnac. But as Morden J.A. pointed out in Trident Holdings Ltd. v. Danand Investments Ltd. (1988), 64 O.R. (2d) 65, 49 D.L.R. (4th) 1 (C.A.), in many cases, a bare trustee will also be an agent, and when it contracts on behalf of a principal, the principal may be liable for breach of the contract. Here, 642947 was undoubtedly an agent for Burnac in executing the second agreement of purchase and sale. Under the trust agreement, 642947 had no independent power, responsibility or discretion; it acted only on the instructions of Burnac. It was not so much carrying out the terms of the trust as it was doing Burnac's bidding. In short, 642947 was an agent for Burnac and the agency relationship predominated over the trust relationship. Because the agency relationship predominated, the agent's principal Burnac, though not disclosed and not a party to the second agreement, is still liable for the agreement's breach. Holding Burnac liable simply gives effect to the proposition that though an agent negotiates and signs a contract with a third party, the contract remains one between

2001 CanLII 8623 (ON CA)

the principal and the third party. Fleischer and Newton were therefore not estopped from suing Burnac for breach of the second agreement of purchase and sale.

3. Bad faith

[36] 642947 and Burnac argued that the vendors Fleischer and Newton should not be allowed to enforce the second agreement because they acted in bad faith. 642947 and Burnac gave two examples of the vendors' alleged bad faith: failing to submit the second agreement to Sweet Dreams under its right of first refusal, and then negotiating to sell the Property to Sweet Dreams while contractually obligated to 642947. Neither example evidences bad faith.

[37] The trial judge held correctly that Sweet Dreams' right of first refusal was spent once it was exercised in connection with the first agreement. Therefore, Fleischer and Newton were not obliged to give Sweet Dreams an opportunity to exercise the right of first refusal in connection with the second agreement. Moreover, it hardly lies in the mouth of 642947 or Burnac to complain about the vendors' failure to submit the right of first refusal to Sweet Dreams, because 642947 signed the waiver notice.

[38] Burnac and 642947 argued that Fleischer and Newton exhibited bad faith at the injunction proceedings by offering to sell the Property to Sweet Dreams despite their agreement with 642947. Both the motions judge and the trial judge implicitly rejected this argument by concluding that Fleischer and Newton took a neutral position. The vendors were willing to sell the Property to whichever party was entitled to buy it. Their stance does not show bad faith.

4. Inability to give vacant possession on closing

[39] 642947 and Burnac also claimed that Fleischer and Newton could not give vacant possession on closing because of Sweet Dreams' lease. Two obvious answers to this claim are: first, 642947 waived tender, thus making it unnecessary for the vendors to show their ability to complete the transaction in

2001 CanLII 8623 (ON CA)

accordance with its terms; and second, on the injunction application Burnac, though aware of the lease, represented that it was ready, willing and able to close and asked for an extension of time to do so. The existence of the lease was never an impediment to closing the transaction.

2001 CanLII 8623 (ON CA)

II. The Cross-Appeal by Fleischer and Newton

[40] On their cross-appeal, Fleischer and Newton contended that the trial judge's damages award did not fully compensate them for their loss. Their main submission was that the trial judge erred by assessing damages in a falling market at the date of closing instead of at or near the date of trial. Their other submission was that the trial judge erred in awarding pre-judgment interest and post-judgment interest at the statutory rate instead of at the commercial rate.

1. The date for assessment of damages

[41] The judgment of Morden J.A. in 100 Main Street Ltd. v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.) is the principal authority in this court on the assessment of damages for breach of an agreement of purchase and sale. In that case, the purchaser agreed to buy an apartment building but repudiated the contract before closing. The vendor sued for damages and both the trial judge and this court held the purchaser liable. The main issue in this court was when the damages should have been assessed. At the risk of doing a disservice to the thorough and thoughtful reasons of my colleague, I summarize what he wrote about the choice of the date for assessing damages for breach of an agreement to buy land in the following six propositions, which are relevant to this appeal:

(1) The basic principle for assessing damages for breach of contract applies: the award of damages should put the injured party as nearly as possible in the position it would have been in had the contract been performed.

(2) Ordinarily courts give effect to this principle by assessing damages at the date the contract was to be

performed, the date of closing. [See Note 1 at end of document]

(3) The court, however, may choose a date different from the date of closing depending on the context. Three important contextual considerations are the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.

(4) Assessing damages at the date of closing may not fairly compensate an innocent vendor who makes reasonable efforts to resell in a falling market. In some cases, the nature of the property -- for example an apartment building -- hampers the vendor's ability to resell quickly. Thus, if the vendor takes reasonable steps to sell from the date of breach and resells the property in some reasonable time after the breach, the court may award the vendor damages equal to the difference between the contract price and the resale price, instead of the difference between the contract price and the fair market value on the date of closing.

(5) Therefore, as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date" (at p. 421 O.R.).

(6) Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed at the date of closing.

[42] Underlying these propositions is the simple notion of fairness. As Professor S.M. Waddams wrote in his text, The Law of Contracts, 4th ed. (Toronto: Canada Law Book, 1999), at p. 518, "[i]t is on general considerations of justice, therefore, that the choice of date must depend." The date for the assessment of damages is determined by what is fair on the facts of each case. See Rice v. Rawluk (1992), 8 O.R. (3d) 696

2001 CanLII 8623 (ON CA)

(Gen. Div.); Bitton v. Jakovljevic (1990), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.).

[43] With these propositions in mind, I turn to Fleischer and Newton's submission that on the trial judge's factual findings, she should have chosen November 1994 instead of December 7, 1990, the date of closing, to assess the vendors' damages. The trial judge found that the Property was worth $1,130,000 on December 7, 1990 but only $410,000 in November 1994. She also found that Fleischer and Newton had fulfilled their duty to mitigate by re-leasing the Property and by letting the development community know that it was again on the market. Having made these findings, the trial judge still chose the date of closing to assess the vendors' damages. In my view, she was correct to do so.

[44] The vendors led no evidence about the "highest price obtainable in a reasonable time" after the closing date. They cannot pick a date at random, nearly four years after the closing date, when the market was likely at its lowest, and reasonably expect the court to choose that date to measure their loss. Even the trial judge's finding that Fleischer and Newton initially met their duty to mitigate must be viewed in the context of what occurred subsequently. The trial was ongoing in July 1996, five and one-half years after the scheduled closing date, yet Fleischer and Newton still owned the Property. Although they may not have been able to sell the Property immediately after 642947 repudiated the second agreement, one might reasonably have expected them to have sold it by the time of trial if they seriously intended to do so. Indeed, they leased the Property to a new tenant for a period that could extend to 2006, a period that even they acknowledged was an impediment to a resale. I think the irresistible i nference is that, at some point after the fall of the market in 1990, Fleischer and Newton decided to retain the Property, speculating that eventually the real estate market would go back up. Having decided to do so, they alone must assume the burden or the benefit of changes in the market after the closing date. Fairness dictated that the vendors' damages be assessed at December 1990. I therefore do not accept Fleischer and Newton's main submission that the trial judge erred by

2001 CanLII 8623 (ON CA)

failing to assess damages as of November 1994.

[45] Their alternative submission that the trial judge should have awarded both pre-judgment interest and post-judgment interest at the commercial rate of interest instead of the rate under the Courts of Justice Act was not pressed in oral argument. I see no error in the trial judge's award of interest. Indeed, the pre-judgment interest rate of 8.8 per cent awarded by the trial judge seems reasonable. For these reasons, I would dismiss the cross-appeal of Fleischer and Newton.

III. The Appeal by Sweet Dreams, Halasi and Krauss

[46] The trial judge found that Sweet Dreams was liable on its undertaking for the loss sustained by 642947 and Burnac, and she then found that Sweet Dreams' principals, Halasi and Krauss, were jointly and severally liable for the loss because Sweet Dreams had no assets and was simply their alter ego. Sweet Dreams, Halasi and Krauss each appealed these findings. Sweet Dreams argued that it cannot be held responsible principally because the injunction did not cause 642947 and Burnac's loss. Halasi and Krauss argued that even if Sweet Dreams is held responsible, they cannot be held liable personally because no grounds existed to pierce the corporate veil.

1. Is Sweet Dreams liable on its undertaking?

[47] The trial judge conducted an inquiry into the liability of Sweet Dreams and its principals Halasi and Krauss under paras. 3 and 4 of Dunnet J.'s order, which provided:

> 3. THIS COURT ORDERS that the inquiry as to the entitlement of the Defendants, 642947 Ontario Limited, Jules Fleischer and Melvin Newton to damages pursuant to the undertaking of the Plaintiff, Sweet Dreams Delights Inc., made in the Order of The Honourable Mr. Justice Isaac is adjourned sine die.
>
> 4. THIS COURT ORDERS that the issue as to whether or not the undertaking of the Plaintiff Sweet Dreams Delights Inc.

2001 CanLII 8623 (ON CA)

may be imposed on the Plaintiff Paradox Developments Inc. and the principals of Sweet Dreams Delights Inc. may be considered on the inquiry as to damages, if any, or other proceedings. The issue as to whether or not the undertaking can be extended to the Defendants, Andrew Federer, Lakeburn Land Capital Corporation and Burnac Corporation was not raised when the motion was argued on November 22, 1990. This issue may also be considered on the inquiry as to damages, if any, or other proceedings.

An inquiry was unquestionably called for. The basis for Sweet Dreams' injunction -- that it was denied an opportunity to exercise its right of first refusal under the second agreement -- was, as the trial judge found, devoid of merit. Having obtained the injunction, Sweet Dreams sought its dissolution only when the market fell and the Property was no longer attractive.

[48] Sweet Dreams, however, argued two grounds why it should not be liable on its undertaking. First, it submitted that it can be liable only if the injunction caused 642947 and Burnac's loss and it contended that the injunction did not do so. Second, Sweet Dreams submitted that 642947 and Burnac cannot look to the undertaking when they voluntarily relinquished a valid ground not to complete the transaction, the inability of the vendors to give vacant possession on closing.

[49] This latter submission has no merit. Admittedly, one of the conditions of closing required Fleischer and Newton to give vacant possession. But no party to the dispute ever took this condition seriously, and the trial judge rightly found that the failure to satisfy this condition would not have prevented the closing.

[50] I therefore turn to the question whether the damages that 642947 and Burnac have to pay Fleischer and Newton flow from the injunction. Many cases have stated the principle that damages for an injunction wrongly granted should be assessed on the same basis as damages for breach of contract. This principle was affirmed by the House of Lords in F. Hoffmann-LaRoche & Co. A.G. v. Secretary of State for Trade and

2001 CanLII 8623 (ON CA)

Industry, [1975] A.C. 295 at p. 361, [1974] 2 All E.R. 1128 (H.L.), where Lord Diplock said:

> The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contra ct between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v. Day (1882), 21 Ch.D. 421, per Brett L.J., at p. 427.

(Emphasis added)

See also Village Gate Resorts Ltd. v. Moore (1999), 71 B.C.L.R. (3d) 1, 37 C.P.C. (4th) 5 (C.A.) and Vieweger Construction Co. v. Rush Tompkins Construction Ltd. (1964), [1965] S.C.R. 195, 48 D.L.R. (2d) 509.

[51] I accept that contract principles apply to the assessment of damages, but it seems to me that, in Ontario, the wording of rule 40.03 focuses more precisely on causation. Rule 40.03 provides:

> 40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning

2001 CanLII 8623 (ON CA)

damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

The undertaking by Halasi for Sweet Dreams tracks the wording of rule 40.03. Thus, Sweet Dreams undertook "to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the Order has caused damage to the responding party for which the Applicant ought to compensate it".

[52] Sweet Dreams is liable on its undertaking if the injunction caused the damages that 642947 and Burnac must pay to the vendors, or, assuming more than one cause, if the injunction materially contributed to these damages. In my view, the trial judge erred in finding a causal connection. Although I think little of the conduct of Sweet Dreams and its principals, I cannot see how the injunction caused or materially contributed to the damages 642947 and Burnac must pay to Fleischer and Newton. These damages were caused by the fall in the real estate market and by Burnac's deliberate refusal to close the transaction, after having asked the motions judge to extend the closing date to preserve its interest in the Property.

[53] The injunction and its later dissolution gave rise to at least three possible scenarios. First, whether asked to or not, the motions judge could have refused to extend the closing date. On this scenario, the injunction would have caused the loss of 642947's bargain with Fleischer and Newton, and Sweet Dreams could have been liable on its undertaking for that loss. A second possibility is that the motions judge could have extended the closing date as requested by Burnac, and 642947 could then have closed the transaction on the extended date. On this scenario, Fleischer and Newton would not have suffered any damages and Burnac would have acquired the Property it agreed to buy at the price it agreed to pay. But the injunction would have caused an approximately one-year delay in the closing (from November 24, 1989 to December 7, 1990). Sweet Dreams would therefore be liable to 642947 and Burnac for any damages

2001 CanLII 8623 (ON CA)

attributable to the delay. These damages could have included increased carrying costs, loss of re ntal income or even loss of profits.

[54] The third scenario is the one that occurred. The motions judge extended the closing as requested by Burnac but then 642947 refused to close. On this scenario, the injunction caused none of the damages that 642947 and Burnac have been ordered to pay. Instead, these damages were caused by the combination of the fall in the real estate market and 642947's refusal to close. That this must be so can be seen by considering the position of 642947 and Burnac had the injunction not been granted. In that case, 642947 would have paid Fleischer and Newton $2,000,000 for the Property in 1989 and a year later would have been left with a Property worth only $1,130,000. Although Fleischer and Newton would have been paid the contract price, Burnac would still have suffered the same loss, a loss caused solely by the fall in the market.

[55] I therefore conclude that, on causation principles, 642947 and Burnac's claim to be indemnified by Sweet Dreams must fail. Some authorities, however, have suggested that in assessing damages for the wrongful granting of an injunction, a court is not limited by contract law principles but has a wider equitable discretion to do what is "fair and reasonable" or what is "just" in all the circumstances. See Air Express Ltd. v. Ansett Transportation Industries (Operations) Pty Ltd. (1979 to 1981), 146 C.L.R. 249, 33 A.L.R. 578; Village Gate Resorts, supra; I.C.F. Spry, The Principles of Equitable Remedies, 5th ed. (Toronto: Carswell, 1997) at p. 660.

[56] These other authorities address the extent to which damages under an undertaking must conform to the general law applicable to contract damages. They suggest that a judge awarding damages under an undertaking has some discretion to depart from contract damages principles, particularly on the issue of remoteness. None of these authorities states that damages may be awarded when a causal link between the undertaking and the loss is entirely absent. Indeed, each affirms the necessity of establishing factual causation to obtain damages under an undertaking.

2001 CanLII 8623 (ON CA)

[57] Even assuming that a wide discretion to order damages in the absence of a causal connection does exist in some jurisdictions, I doubt that an Ontario court could invoke it in the face of the wording of rule 40.03, which focuses the inquiry on causation. And even if an Ontario court could award damages that seem fair or just, I am not persuaded that this is the right case to do so. In asking for an extension of the closing date, Burnac gambled that the value of the Property would stay the same or go up. When its gamble did not pay off, Burnac reneged on its bargain. It cannot now look to Sweet Dreams to relieve it from the consequences of its own default. That would not be a just result. Therefore, I would set aside the trial judge's order that Sweet Dreams indemnify 642947 and Burnac for their loss.

2. Are Halasi and Krauss personally liable?

[58] Halasi and Krauss' liability depended on finding Sweet Dreams liable on its undertaking. Because 642947 and Burnac's claim against Sweet Dreams failed, so must their claim against the two principals of Sweet Dreams. Nonetheless, I propose to discuss the liability of Halasi and Krauss on the footing that Sweet Dreams was responsible for Burnac's loss. I do so because the issue was fully argued before us and because I consider it relevant to the question of costs.

[59] Halasi and Krauss put forward three reasons why they should not have been held jointly and severally responsible for the damages Burnac and 642947 were ordered to pay Fleischer and Newton. First, they submitted that the trial judge erred in finding Sweet Dreams had insufficient assets to honour its undertaking if called on to pay. Second, they submitted that the adequacy of Sweet Dreams' assets should have been raised by 642947 and Burnac on the injunction application. And, third, they submitted that the trial judge erred in piercing the corporate veil to hold them responsible.

[60] The trial judge found that, when its undertaking was given, Sweet Dreams had no assets from which to pay damages. Halasi and Krauss submitted that this finding cannot be

2001 CanLII 8623 (ON CA)

supported on the evidence. I disagree. Sweet Dreams was used by Halasi and Krauss solely to hold their interest and their investors' interest in the property. It had no other purpose. It had no income other than the rent it received on a sublease, a rent that was insufficient to pay its own rent to Fleischer and Newton. It had no assets other than the lease itself. Some evidence of the value of the lease, including the right of first refusal, is found in the offer made by Halasi and Krauss to sell the Property to Burnac for $50,000 more than the contract price. Even if that figure is not an accurate estimate of the lease's value, the lease alone was inadequate to protect 642947 and Burnac from any damages they may have sustained because of the injunction. Sweet Deams simply had no cash or liquid assets to honour its undertaking.

[61] Thus, the trial judge's finding that Sweet Dreams did not have sufficient assets to pay a damages award is amply supported by the evidence. Indeed, Halasi admitted as much when cross-examined on his affidavit in support of the injunction. Hard cases may arise where the ability of a party to pay damages for an injunction wrongly granted may not be obvious. This is not one of those cases.

[62] Even if Sweet Dreams did not have any assets to pay a damages award, Halasi and Krauss contended that the adequacy of its assets should have been raised by Burnac on the injunction application, and that Burnac cannot, after the fact, extract what amounted to personal guarantees. Halasi and Krauss say that the adequacy of Sweet Dreams' assets was relevant to the balance of convenience. If [it was] raised during the hearing, Sweet Dreams could have decided whether to proceed with its injunction application and, if it did, the court could have decided whether to require security or personal guarantees as a condition of granting the injunction. In substance, Halasi and Krauss' submission puts the onus on the party seeking the undertaking -- here 642947 and Burnac -- to raise the adequacy of the assets of the party giving the undertaking.

[63] I do not accept this submission. I agree that on the injunction application Burnac could have questioned the sufficiency of Sweet Dreams' assets. But Sweet Dreams itself

2001 CanLII 8623 (ON CA)

had the primary obligation to disclose that its assets were inadequate to satisfy its undertaking if called on to pay. The undertaking was not given to 642947 and Burnac. It was given to the court. By undertaking to "abide by any Order concerning damages that the Court may make", Sweet Dreams implicitly represented that it had sufficient assets to honour that undertaking. Both the court and Burnac were entitled to rely on that representation without making inquiries into its accuracy. If, as was the case here, Sweet Dreams did not have sufficient assets to honour its undertaking, it had an obligation to disclose that fact to the court. Sweet Dreams could then have asked to be relieved of its undertaking, or could have been asked to post security.

2001 CanLII 8623 (ON CA)

[64] Even so, Halasi and Krauss argued that the trial judge erred in law in going behind Sweet Dreams to hold them personally liable. In piercing the corporate veil and imposing personal liability, the trial judge held that Halasi and Krauss used Sweet Dreams as their alter ego and knew when the undertaking was given that Sweet Dreams had no assets from which to pay damages. She therefore concluded, at p. 297 R.P.R., that "the undertaking was fraudulent and it was misconduct on the part of Krauss and Halasi as officers of Sweet Dreams to offer it to the Court."

[65] Halasi and Krauss argued that the trial judge's reasoning reflects two errors: Sweet Dreams was not their alter ego, indeed, they were not even shareholders of Sweet Dreams; and the corporate veil should not have been pierced because Halasi and Krauss incorporated Sweet Dreams for a valid purpose -- to hold property -- and did not use the company as a sham to perpetrate a fraud.

[66] The first argument is specious. Halasi and Krauss, through companies they owned or controlled, each held 40 per cent of the shares of Sweet Dreams. They described themselves as "partners" in trying to assemble land in the North York corridor. Whatever the legal form, they controlled Sweet Dreams and the interest it held in the property. The trial judge's finding (at p. 298 R.P.R.) that "Sweet Dreams was merely the alter ego of both Halasi and Krauss" was open to her on this

evidence and I would not interfere with it.

[67] Halasi and Krauss' second argument is that the trial judge disregarded well-known principles of corporate law in holding them personally liable. In my opinion, however, the trial judge took the correct view in concluding (at p. 298 R.P.R.) that "Krauss and Halasi cannot hide behind the corporate veil." To pierce the corporate veil is to disregard the separate legal personality of a corporation, a fundamental principle of corporate law recognized in Salomon v. Salomon & Co., [1897] A.C. 22, [1895-9] All E.R. Rep. 33. Only exceptional cases -- cases where applying the Salomon principle would be "flagrantly" unjust -- warrant going behind the company and imposing personal liability. Thus, in Clarkson Co. v. Zhelka, [1967] 2 O.R. 565 at p. 578, 64 D.L.R. (2d) 457 (H.C.J.), Thompson J. held that instances in which the corporate veil has been pierced "represent refusals to apply the logic of the Salomon case where it would be flagrantly opposed to justice". Similar ly, Wilson J. observed in Kosmopoulos v. Constitution Insurance Co., [1987] 1 S.C.R. 2 at p. 10, 34 D.L.R. (4th) 208, that the law on when the corporate veil can be pierced "follows no consistent principle. The best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the intersts of the Revenue': L.C.B. Gower, Modern Company Law (4th ed. 1979), at p. 112".

[68] Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done": Clarkson Co. v. Zhelka at p. 578. Sharpe J. set out a useful statement of the guiding principle in Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."

2001 CanLII 8623 (ON CA)

[69] These authorities indicate that the decision to pierce the corporate veil will depend on the context. They also indicate that the separate legal personality of the corporation cannot be lightly set aside. Yet, however restrictive corporate law principles for piercing the corporate veil may be, in the context of an undertaking to the court, the trial judge's findings support going behind Sweet Dreams and imposing personal liability.

2001 CanLII 8623 (ON CA)

[70] She found that Sweet Dreams had no assets to honour its undertaking, that Halasi and Krauss controlled Sweet Dreams and that when Halasi and Krauss tendered the undertaking for Sweet Dreams they knew it had no assets. All of these findings are reasonably supported by the evidence. Moreover, Halasi was a sophisticated developer and Krauss was a lawyer. They tendered an undertaking to the court, which they knew was worthless, to gain an advantage. When called on to honour the undertaking, they tried to hide behind a shell company, which they controlled, to escape liability. In the words of Sharpe J. in Transamerica Life, Sweet Dreams was "completely dominated and controlled" by Halasi and Krauss, and used by them "as a shield for . . . improper conduct". The trial judge put it this way (at p. 298 R.P.R.), in a passage that I endorse:

> Undertakings cannot be lightly given to the Court to selfishly protect the self-interest of the parties giving the undertaking. It would be a mockery of injunction proceedings if that were so. It would effectively mean that worthless hollow undertakings could be given to the Court, leaving the Court powerless to grant effective sanctions by way of damages which, in the final analysis, could never be collected by the injured party.

Had I upheld the trial judge's finding that Sweet Dreams was liable on its undertaking, I would have also upheld her finding that Halasi and Krauss were liable.

[71] But as I said at the outset of this discussion, Halasi and Krauss could be held liable only if Sweet Dreams were liable. Because Burnac and 642947 could not show a causal connection between the injunction and the damages they

suffered, they cannot look to Sweet Dreams and therefore to Halasi and Krauss for indemnification. I would therefore allow the appeal by Sweet Dreams, Halasi and Krauss and dismiss the third party claim against them.

[72] I would, however, deprive them of their costs both at trial and on appeal. The trial judge took a dim view of their conduct and so do I. Indeed, in the dispute between 642947 and Burnac on the one side, and Sweet Dreams, Halasi and Krauss on the other, neither occupies the moral high ground. 642947 and Burnac refused to honour their bargain; Sweet Dreams, Halasi and Krauss exercised a right -- the right of first refusal -- that was spent after the first agreement in order to obtain the injunction. At the hearing of the injunction, they told the motions judge that they were willing to buy the Property for $2,000,000. Then they too abandoned the Property and the injunction when the market fell. Burnac and 642947 must bear full responsibility for the vendors' loss. Although Sweet Dreams, Halasi and Krauss have been successful, because of their conduct I would not award them any costs.

DISPOSITION

[73] For the reasons I have given, I would dismiss both the appeal by Burnac and 642947 and the cross-appeal by Fleischer and Newton with costs. I would allow the appeal by Sweet Dreams, Halasi and Krauss without costs. I would therefore set aside paras. 5 and 6 of the judgment of Greer J. and in their place would order that the claim of 642947 and Burnac against Sweet Dreams, Halasi and Krauss be dismissed but without costs. I am grateful to all counsel for their assistance on these appeals.

Order accordingly.

Notes

Note 1: These damages may be reduced in a case where the plaintiff accepts the defendant's repudiation before closing and the defendant shows that the plaintiff failed to mitigate its loss in the period between the acceptance of the repudiation and

2001 CanLII 8623 (ON CA)

the scheduled closing date.

2001 CanLII 8623 (ON CA)