Certificates of Pending Litigation:
Obtaining and Retaining Security Against Land

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Introduction

Where an interest in land is in question in any proceeding, no pre-judgment remedy is more critical to the claimant than one which ensures that the land will still be available when the merits of the claim have been determined. The objective is to notify those who may deal with the land of the Plaintiff's claim. The Certificate of Pending Litigation ("CPL")[1] accomplishes this remedial objective very effectively. Until vacated, it virtually restrains all dealings with the land while the proceeding is pending.

There are other remedies to restrain dealings with land. Notable among these are the Caution and the Notice of Agreement of Purchase and Sale permitted under the Land Titles Act R.S.O. 1980 c. 230, ss. 129 and 74; Notice of Agreement permitted under the Registry Act, R.S.O. 1980, c. 445, s. 65. Both of these remedies are more transitory in nature. When title to or an interest in land is to be litigated, an order of the court is generally required. The Order takes the form of leave to issue a CPL or, rarely, an interlocutory injunction to restrain disposition. The interlocutory injunction is more difficult to obtain and exacts a more demanding standard from the claimant. Interlocutory injunctions and registrations under the Land Titles Act and Registry Act are beyond the scope of this discussion.

The Nature & Scope of the CPL

A CPL is a mundane document mandated by Form 42A of the Rules of Civil Procedure, prepared by the Plaintiff's counsel and issued by the local registrar of the Ontario Court of Justice on

[1] In this article, a CPL refers to a certificate of pending litigation under a order made pursuant to s.116(1) of the Courts of Justice Act. A lis pendens refers to the certificate issued under the authority of its predecessor, the Judicature Act, s.38, which was repealed by the Courts of Justice Act. For a review of the cases under the earlier legislation, see the article referred to under f.n. 2.

the strength of the Order of the master or a judge granting leave to do so. Once the CPL is registered against the title of the lands described in it, all persons who deal with the land after the date of registration are deemed to have notice of the Plaintiff's claim: Courts of Justice Act ("CJA") S.O. 1984, c. 11, s. 116(1)-(2).

The CPL is available in `a proceeding in which an interest in land is in question': CJA s.116(1).[2] A CPL is not required in foreclosure or construction lien actions: CJA s.116(3), because the claimant already has registered security.

The CPL does not confer proprietary rights. It does have the effect, however, of turning an action *in personam* into an action *in rem*: Leftley v. Moffat, [1925] 3 D.L.R. 825, 57 O.L.R. 260, (H.C.). Anyone who finds a CPL on title may look into the pending action, and if satisfied that the claim is completely devoid of merit, may deal with the land at their peril. A CPL is open to attack in the form of a motion to discharge. Perhaps the most significant shift in the case law in recent years is the increased difficulty of maintaining a CPL on a motion to discharge the CPL.

Every owner of land cherishes the right to sell or encumber the land without hindrance. Because of its immovable and valuable nature, security against real estate will give the plaintiff comfort while the claim is pending even where the security is not wholly justified by the facts of a particular case. For these reasons, the CPL is sometimes abused. Where wrongful registration of the CPL causes

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[2] For a review of the jurisprudence affecting the lis pendens under the Judicature Act and under the former Rules of Practice, both of which were repealed by the CJA in 1984, see the article by Igor Ellyn, "Security Against Land Pending Litigation in Ontario, (1985) 44 C.P.C. 113. See also C.J. Needham, "Pending Litigation Against Registered Land" (1983) 61 Can. Bar. Rev. 799. The authors were also assisted by a useful article by David Brown, "Obtaining and Vacating Certificates of Pending Litigation: The Impact of the New Rules" L.S.U.C. CLE 189 Civil Litigation Review, Program #701, May 31, 1989.

loss to the landowner, the claimant may be liable for damages: CJA s.116(4)-(5).[3] Because the registration of the CPL is sanctioned by the process of the court, an action for slander of title does not lie.[4]

Jurisdiction and Procedure for Obtaining a CPL

- **Claim Must Be Included in the Originating Process** - The claim for a CPL must be included in the prayer for relief of the Statement of Claim, Notice of Action, Petition for Divorce or Notice of Application together with a legal description of the land sufficient for registration in the proper Land Registry Office: Rule 42.01(2); Rule 1.02 ¶20. Reicher v. Reicher (1980), 19 C.P.C. 228, 20 R.F.L. (2d) 213 (Ont. Div. Ct.) stands for the proposition that a lis pendens may be claimed in divorce proceedings provided that the claim is set out in the Divorce Petition. The failure to include the claim for a CPL in the originating process is fatal to a motion for a CPL and the court does not have a discretion to grant the order: Dileo v. Ginell, [1968] 2 O.R. 32 (Ont. H.C.). However, the originating process may be amended and the order for a CPL granted on a new motion: Phippen v. Chapman Brick Co.; [1949] O.W.N. 716 (Ont. H.C.).

- **Motion Without Notice** - A CPL may be obtained on motion without notice in the jurisdiction where the proceeding was commenced, where any party resides or where the solicitor of record practices law: Rules 42.01(1)-(3); 37.03(1). The motion is brought after the originating process has been filed in the court office. However, in cases of urgency, with leave of the court, the CPL

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[3] There is no cause of action against the solicitor who registered the CPL: Micro Carpets Ltd. v. De Souza Dev. Ltd., (1980), 29 O.R. (2d) 77, 19 C.P.C. 118, 112 D.L.R. (3d) 178 (Ont. H.C.); MacIntyre v. Commerce Capital Mtge Corp., (1980), 28 O.R. (2d) 353, 14 R.P.R. 141, 110 D.L.R. (3d) 421 (Ont. H.C.), both of which were decided under the Judicature Act. CJA s.116(4) codifies the ratio of these cases by imposing the liability upon "a party..." rather than upon "any person".

[4] Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd., (1985), 5 C.P.C. (2d) 97 (Ont. H.C.); Tersigni v. Fagan, [1959] O.W.N. 94 (Ont. C.A.); Greenwood v. Magee (1977), 15 O.R. (2d) 685, 4 C.P.C. 67 (Ont. H.C.).

motion may be argued and the proceeding commenced immediately thereafter. The local registrar cannot issue the CPL until the proceeding has been instituted. In Toronto, Ottawa and London, the motion is brought before the Master. In county towns, where there are no masters, the motion is to a judge.

● **Material On the Motion** ● The motion should be supported by an affidavit setting out the facts which demonstrate that "an interest in land is in question": s 116(1) C.J.A. When the motion is without notice, there is heavy onus to make full and fair disclosure of all material facts: Rule 39.01(6). The Plaintiff's affidavit must set out all of the strengths and weaknesses of the case.

● **Full and Fair Disclosure** ● Where on the Defendant's motion to discharge the CPL the court finds that the Plaintiff has failed to completely disclose all material facts, the CPL may be vacated upon that ground alone, even if upon full disclosure of the material facts the CPL would still have been granted: J & P Goldfluss Ltd. v. 306539 Ont. Ltd., (1977), 4 C.P.C. 296 (Ont. H.C.).[5]

The court exercises its discretion in divergent ways, when blatant non-disclosure of material facts is discovered. In Strawrene Ltd. v. Kay et al. (unrep. Ont. H.C. Oct. 19/82, Montgomery J. varied Ont. C.A. Jan 27/83 unrep.), the Plaintiff was a mortgagor who commenced an action to set aside a completed power of sale and obtained a lis pendens. The affidavit failed to disclose that a month earlier, another judge had refused to grant an injunction restraining the mortgagee from proceeding with the power of sale. Montgomery J. vacated the lis pendens and dismissed the whole action as an abuse of process. The Court of Appeal reinstated the action but upheld the vacating of the lis pendens.

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[5] For cases which adopt the test in Goldfluss, see Hess v. Mandzuk, (1984), 44 C.P.C. 179 (Ont. H.C.), Tru-Style Designs Inc. v. Greymac Properties Inc., (1986), 56 O.R. (2d) 462, 11 C.P.C. (2d) 117, 31 D.L.R. (4th) 253 (Ont. H.C.), Passarelli v. Di Cienzo, (1989) 34 C.P.C. (2d) 54 (Ont. H.C.) and 358426 Ontario Ltd. v. Liappas, [1991] O.J. No. 1430 (Ont. M.C.)

In Giannotti et al. v. Wellington Enterprises Ltd. et al., (unrep. Ont. M.C. Nov. 2/89 Master Donkin), the Plaintiff were joint venturers with the Defendants in a commercial property. The Defendants caused the property to be transferred to another corporation controlled by them and sold it to a third party for a substantial profit without accounting. The transaction was about to close. The Plaintiffs had obtained a CPL upon an affidavit which failed to disclose that in proceedings between the same parties some time earlier, a judge had refused an interlocutory injunction restraining the Defendants from selling the property. Master Donkin vacated the CPL but directed that the cash proceeds of sale be paid into court to give the Plaintiffs an opportunity to show whether or not the circumstances justified the proceeds being held until trial.[6]

In Notarfonzo v. Goodman, (1981) 24 C.P.C. 127 (Ont. H.C.), Van Camp J. held that the test of non-disclosure is whether the facts omitted would have made the Order doubtful. This is a narrower test than the one Van Camp J. applied in Goldfluss, supra. In 401 Richmond Street West Ltd. v. K.G. Campbell Corp., [1987] O.J. No. 410 (Ont. M.C.) Master Donkin came to a similar conclusion when he said:

> ...[I]f there is non-disclosure, the certificate will go even if the disclosure and a consideration of all the facts...would have led to the granting of the certificate. However, it seems to me that the non-disclosure must be material in the sense of being of some moment in trying to decide whether to grant the certificate in the first place.[7]

If the non-disclosure is inadvertent, the court will not discharge the CPL on that basis alone:

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[6] A similar determination was made in Aztec Investments Ltd. v. Wynston (1988), 27 C.P.C. (2d) 238 (Ont. M.C.).

[7] See also 931473 Ontario Ltd. v. Coldwell Banker Canada Inc., [1991] O.J. No. 1150, where Sutherland J. applies the test in Notarfonzo but determines that the CPL should be vacated. In Baluster v. The Iona Corporation, (1988), 21 C.P.C. (2d) 114 (Ont. M.C.), affd 37 C.P.C. (2d) 235 (Ont. H.C.) Donkin asks whether the facts would have led the master to "at least question whether a certificate should have been granted".

Russell v. Burke, (1989), 33 C.P.C. (2d) 52 (Ont. M.C.), affd 34 C.P.C. (2d) xlii (Ont. H.C.).

● **Not Enough to Confirm the Claim** ● In 358426 Ontario Ltd. v. Liappas, [1991] O.J. No. 1430 (Ont. M.C.), Master Clark observes that many of the instances of non-disclosure are linked to the practice among counsel of having the Plaintiff swear a short affidavit which merely attests to confirm the truth of the contents of the statement of claim. In Master Clark's view:

> ...A statement of claim is not designed to fulfil the requirements of the rule requiring full and fair disclosure. A full affidavit which keeps in mind the obligation for disclosure is necessary.

● **Other Examples of Non-Disclosure** ● Many agreements of purchase and sale contain clauses restricting the purchaser's right to register the CPL. In Cimaroli v. Pugliese, (1988), 25 C.P.C. (2d) 10 (Ont. H.C.), the court held that on a motion without notice, the counsel is required to point out such a clause to the Master. It is not sufficient simply to annex the agreement to an affidavit. Failure to comply with this requirement may be non-disclosure sufficient to discharge the CPL.[8] Counsel's submissions on the motion without notice do not form part of the material served on the Defendant. Prudence requires that the affidavit set out the existence of the restricting clause.

● **Second Motion for CPL** ● Where a CPL has been discharged solely on the grounds of failure to disclose material facts, is it open to the Plaintiff to bring a fresh motion on new material? The jurisprudence is divided on the point. In 607722 Ontario Inc. v. Knott Hotels of Canada, [1989] O.J. No. 155 (Ont. M.C.). the court held that when an initial CPL had been vacated for non-disclosure, the Plaintiff could not succeed on a second motion for a CPL on the merits. In effect, the court applied the principle that "he who seeks equity must come with clean hands". However, in Gelakis v. Giououskos, (1989) 34 C.P.C. (2d) 223 (Ont. H.C.), affd 39 C.P.C. (2d) 96 (Ont. H.C.), the court held

[8] See also, Beaver Health Development Ltd. v. Niagara Medical Dental Office Service Ltd., [1991] O.J. No. 1057 (Ont. H.C.).

the Plaintiff was entitled to a second CPL on the merits on the basis that the CPL had not been discharged on the merits of the motion, there was no *res judicata* and it was not necessary to bring new and substantial evidence of an overwhelming nature.

If the Notarfonzo line of cases in non-disclosure situations is applied it may make it unnecessary to choose which of these alternatives is preferable. If the motions court concludes that a CPL or preservation of sale proceeds is appropriate notwithstanding the non-disclosure, an order will be made on the first motion. If the first motion is dismissed on disclosure grounds, it is probably a fair indication that the facts simply do not justify the granting of a CPL.

● **Motion for CPL on Notice** ● When plaintiff's counsel knows that the Defendant is represented or where there has been previous litigation between the parties relating to the same land, the Plaintiff may give notice of the motion for the CPL. On such a motion, the test is the same as the test for discharging the CPL: CJA s.116(6). In Homebuilder Inc. v. Mann-Sonic Industries Inc. (1987), 22 C.P.C. (2d) 39 (Ont. M.C.) Master Donkin holds that if a motion is made on notice "the court should consider all the elements which would be considered if the Defendant were moving to discharge a certificate already granted". See also G.F.W. Funding Corp. v. 673412 Ontario Ltd., [1988] O.J. No. 358 (Ont. M.C.) and Waxman v. Waxman, (1991) 2 W.D.C.P. (2d) 88 (Ont. Gen Div.)[9].

Sometimes, the court will require that the motion be adjourned to give notice to the Defendant. In Cimaroli v. Pugliese, (1988), 25 C.P.C. (2d) 10 (Ont M.C.) Master Sandler discharged a CPL on the basis of non-disclosure and stated in obiter that in a case where the legal significance of a clause in a

[9] This appears to be a change from the former practice under the Judicature Act. In GSG Consultants Inc. v. Huang & Danczkay Ltd., (Ont M.C.), Master Peppiatt, July 27, 1983 [summarized (1983), 21 A.C.W.S. (2d) 210], Master Peppiatt held that the motion would be held without reference to the criteria for discharging a lis pendens found in s. 39 (1)-(3) of the Judicature Act. None of the cases referred to in the text make reference to GSG Consultants.

contract which restricts a parties right to register a CPL is in issue, the Defendant should be given notice and allowed to argue the issue. When the motion is with notice, the Plaintiff's duty of complete disclosure is not as stringent. The Defendant has an opportunity to test the veracity and completeness of the Plaintiff's affidavit on cross-examination, and can deliver its own affidavit material.

● **Appeal from Refusal of a CPL** ● An order refusing leave to issue a CPL is an interlocutory order. An appeal from the Order of the Master lies to a judge in motions court: CJA s.16(a); Rule 62.01(1)(a). If the motion was heard at first instance by a judge, the appeal route is to the Divisional Court with leave: Rule 62.02(1)-(3).

● **Registration and Service Make CPL Effective** ● After the order granting leave to register a CPL has been obtained, the Plaintiff must have the order issued and entered, have the registrar sign and seal a certificate prepared by the solicitor in the proper form (Form 42A of the Rules of Civil Procedure) and have the certificate registered on title: C.J.A. s.116(1).

Rule 42.01(4) (which was recently amended) now states that the order, including all the material before the court that granted the order, must be served forthwith on all parties against whom an interest in land is claimed in the proceeding. The CPL itself need not be served. On a motion to discharge the CPL, any unexplained delay in serving the order will be a factor in assessing whether the CPL should be discharged.

Caution under the Land Titles Act

- **Application to Land Registrar** - Under the Judicature Act, a lis pendens could only be registered against Registry Act Land. If a Plaintiff wished to register against land under the Land Titles Act, an application for a caution to the Land Registrar of the appropriate Land Titles Office was required: Land Titles Act, s.129. Under the C.J.A., a CPL may be registered under the Registry Act or the Land Titles Act: C.J.A. s.116(2). This has greatly reduced the use of cautions. Section 116(2) of the C.J.A. does not affect the right of a claimant to apply directly to the Land Registrar of the Land Titles Office for the registration of a caution without a CPL before an action has been commenced: Aldo v. Dellelce (1977), 16 O.R. (2d) 490, 2 R.P.R. 41 (H.C.) and Re Ovington Invts Ltd. and Rexdale Hldgs., (Toronto) Ltd. (1974), 5 O.R. (2d) 320 (Ont. Co. Ct.).

The affidavit in support of a Caution does not differ much from that required on a motion for leave to issue a CPL but a little less detail may be acceptable. Land Registrars, unlike masters and judges, are not lawyers. Therefore, the affidavit should be less technical. The process is best used to protect the claimant's interest until the material for the CPL motion is ready. Sometimes, the Land Registrar will permit the registration of the Caution on the understanding that a CPL will follow in a very short time.

Obtaining the CPL - Particular Cases

Claims by Purchaser against Vendor

The typical case involves a purchaser's claim for specific performance under an unconsummated agreement of purchase and sale. In a simple case, leave to issue the CPL is granted as a matter of course, but there are complicating factors:

- **Limitation of Purchaser's Interest in the Land** - Some agreements of purchase and sale, especially for the purchase of a subdivision home from a developer, contain a clause

limiting the Plaintiff's interest in the land or right to register a CPL against the land[10]. In Reznik v. Coolmur Properties Ltd., (1982), 25 R.P.R. 43 (Ont. H.C.), a provision in the agreement of purchase and sale stated that it did not create an interest in land. Steele J. held that the provision was effective to disentitle the purchaser from registering a lis pendens and it was vacated without conditions. The case involved the purchase of a unit in a large condominium project. The vendor sought to avoid complicating the title by requiring purchasers to contract out of the right to register security against the land.[11]

● **Oral agreements** ● Where the case involves an oral agreement of purchase and sale, the test is whether the evidence of the oral agreement is strong enough to satisfy the court that there is a question as to an interest in land. In Petrela v. Denney, (1989), 38 C.P.C. (2d) 107 (Ont. H.C.), the Plaintiff brought a motion for a CPL on notice to the Defendant. The Plaintiff had submitted a written offer, was told by the vendor he had a deal, and then performed certain acts on that basis. The court held, that a written offer, accepted orally could fulfil the requirements of s. 4 of the Statute of Frauds, R.S.O. 1980, c.481, and that there were sufficient acts of part performance for the court to issue a CPL.[12]

In Paquette v. Smith, (1990), 70 O.R. (2d) 449 (Ont. H.C.) the Plaintiff submitted a written

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[10] A fuller treatment of this topic is found in Arnie Herschorn, "Contracting Out of the Right to Claim a Certificate of Pending Litigation" (1989) 31 C.P.C. (2d) 15

[11] *See also St. Thomas Subdividers v. 639373 Ontario Ltd., (1988), 29 C.P.C. (2d) 1 (Ont. H.C.); and Bay Towers v. St. Andrews Land, Doc. No. 19147/97, May 1, 1987, Unreported, Master Sandler, for cases that follow Reznick, and see also Greenbaum v. 619908 Ontario Ltd., (1986), 11 C.P.C. (2d) 26 (Ont. H.C.); and for cases involving Planning act, requirements see Orangeville Raceway (Ontario) Inc. v. Frieberg, (1989) 34 C.P.C. (2d) 75 (Ont. H.C.), leave to appeal granted (1989), 16 A.C.W.S. (3d) 308 (Ont. H.C.); 683794 Ontario Ltd. v. Sorrento Developments Ltd., (1990) 71 O.R. (2d) 571 (Ont. H.C.); Queen's Court Developments Ltd v. Duquette, (1989), 36 C.P.C. (2d) 296 (Ont. H.C.)*

[12] See also Tru-Style Designs Inc. v. Greymac Properties Inc., (1986), 11 C.P.C. (2d) 117 (Ont. H.C.).

offer to a real estate broker who called to tell him it was accepted and wrote a memorandum so indicating. The court held that for the purposes of granting a CPL s. 4 of the Statute of Frauds was satisfied by the broker's memo.

● **Specific Performance with Abatement** ● In determining whether a claim for specific performance with an abatement justifies leave to issue a CPL, the court may consider whether there is a dollar value attached to the abatement. In Kingsbridge Devs. Ltd. v. K Mart Can. Ltd., (1982) 40 O.R. (2d) 348, 27 R.P.R. 184 (Ont. H.C.), White J. held if the abatement amount was not identified a CPL should not issue, but more recent cases have not necessarily followed this decision In Capital Ventures Group Inc. v. Vulcan Packaging Inc., (1989), 71 O.R. (2d) 48 (Ont. H.C.), revd 71 O.R. (2d) 554 (Ont. C.A.), the court considered whether to vacate the registration of a Notice of Agreement where the purchaser had not specified the amount of the abatement it sought. Lacourcière J.A., delivering the judgment of the Court, held that the absence of a quantified sum is only of the factors to be considered in determining whether a CPL or an agreement should be vacated. Further, if the deficiency which gives rise to claim for abatement is one of quality (in the instant case, it dealt with soil conditions), the purchaser's right to seek an equitable remedy should not be precluded.[13]

● **Rescission** ● The most common situation in which the vendor seeks a CPL is on a claim for rescission. In 401 Richmond Street West Ltd. v. K.G. Campbell Corp., supra. the vendor sought rescission of the agreement because title had been transferred to the Plaintiff, but the Plaintiff had not paid. There was a pending sale to a third party and the Plaintiff obtained a CPL. The court held that the claim for rescission gave rise to an interest in land sufficient to justify a CPL and refused

[13] See also 608853 Ontario Inc. v. Tiveron, (1986), 9 C.P.C. (2d) 75 (Ont. M.C.), G.F.W. Funding Corp. v. 673412 Ontario Ltd., [1988] O.J. No. 358 (Ont. M.C.), Bronte Lanes of Oakville v. B.G. Schickendanz Investments Ltd., [1987] O.J. No. 474 (Ont. M.C.)

to discharge it.[14]

Claims in Mortgage Actions

A CPL is available where an interest in a mortgage is being asserted: Hirji v. Khimani, (1978) 19 O.R. (2d) 750, 6 C.P.C. 29 (Ont. H.C.) and 515924 Ont. Ltd. v. Greymac Trust, (1984), 45 C.P.C. 80, 33 R.P.R. 89 (Ont. H.C.).

In 358426 Ontario Ltd. v. Liappas, supra.[f.n.14], on consent the court held that an interest in land sufficient to obtain a CPL was called into question in an action to reinstate five mortgages on title. The mortgages had been discharged as part of the consideration of a transaction. In 515924 Ont. Ltd., supra. the court refused a lis pendens where the Plaintiff sought to prevent its land from being sold by power of sale under a valid mortgage. The court held that the Plaintiff, even if successful, could not obtain an interest in the land any higher than their ownership interest and so the action did not call into question an interest in land. In Eilpro Hldgs Inc. v. Shenkman, (1975), 8 O.R. (2d) 433, 58 D.L.R. (3d) 209 (Ont. C.A.), the court held that it was an abuse of the court's process for a mortgagor to commence a redemption action and register a lis pendens to prevent a power of sale.

Claims in Family Law Actions

- **Exclusive Possession of Matrimonial Home** - The Family Law Act, 1986, S.O. 1986, c.4, s.19(2) provides for a claim for exclusive possession of the matrimonial home. In McMurdo v. McMurdo Estate, (1988) 26 C.P.C. (2d) 20, 13 R.F.L. (3d) 317 (Ont. M.C.), the wife sought a declaration that she had a half-interest in the matrimonial home after her husband died. Master Peppiatt held that a spouses' right to possession of the matrimonial home is a personal right against the other

[14] See also Waxman v. Waxman, supra. and 358426 Ontario Ltd. v Liappas, supra.

spouse and not a claim for an interest in land.[15]

● **Constructive Trust Claims** ● An important use of the CPL in family law is where a spouse or a common law spouse seeks an interest in land under the equitable doctrine of a constructive or resulting trust. In Bajada v. Bajada, supra., a CPL was granted in an action for a declaration based on unjust enrichment and constructive trust. The wife commenced an action for a declaration that her husband held half of the matrimonial home in trust for her. The CPL had the effect of suspending a sale of the home under a writ of seizure and sale. The court held that the wife's claim for a constructive trust was a claim for ownership in land and a proprietary interest under CJA s.116.[16]

Indirect Interest in Land

● **Fraudulent Conveyances** ● When a creditor believes that a debtor has made a non-arms length transfer of an interest in land to defeat his creditors, the appropriate remedy is an action under the Fraudulent Conveyances Act, R.S.O. 1980, c. 176. The creditor will seek a declaration, on behalf of all creditors of the debtor, that the transfer was fraudulent and that the defendant-debtor be reinstated as owner of the land. Often, the conveyance involves the transfer of the debtor's interest in a matrimonial home to his spouse.

An action for a declaration that a fraudulent conveyance has been made is sufficient to support

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[15] Master Peppiatt's decision followed the jurisprudence preceding the Family Law Act and the Family Law Reform Act: Re Smyth and Smyth [1969] 1 O.R. 617, 3 D.L.R. (3d) 409 (Ont. H.C.). See also Bajada v. Bajada, [1991] O.J. No. 515. (Ont. Gen. Div.).

[16] See also Hlobilek v. Hlobilek, [1990] O.J. No. 198 (Ont. M.C.); and Hansen v. Skene, [1989] O.J. No. 1166 (Ont. H.C.).

a CPL: Keeton v. Cain, (1987) 57 O.R. (2d) 380 (Ont. H.C.).[17] The effect of the jurisprudence is that s.116(1) is interpreted to mean only that "an interest in land is in question", not necessarily the Plaintiff's interest. In Royal Bank of Canada v. Muzzi, (1987), 27 C.P.C. (2d) 66 (Ont M.C.), the court permitted a CPL to issue even where the fraudulent conveyance occurred in respect of a property already disposed of by the alleged `fraudulent conveyer' and the proceeds were used to purchase the subject property.[18]

- **Shares in Corporations** - In many commercial transactions, a corporation is incorporated as an investment vehicle in respect of a joint venture concerning a specific parcel of land. The partners in the venture are characterized as shareholders in the corporation and are issued shares in proportion to their ownership in the real estate. In these types of transactions, the corporation and business venture are intimately connected with the property. It is the main, if not the only, undertaking of the corporation. Where a dispute arises among shareholders of such a corporate vehicle, is one of the shareholders entitled to a CPL? The case law is unclear on this issue in light of conflicting decisions of the High Court and a recent decision of the Court of Appeal.

In Moehring v. Ivankovic, (1981), 20 C.P.C. 285 (Ont. H.C.) Trainor J. the court allowed a certificate of lis pendens in a contest between shareholders as to the ownership of the shares of the corporation. The court stated a lis pendens was justified as the land was the corporation's only asset, and so the corporate veil should be pierced, and the Plaintiff found to have an interest in land sufficient

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[17] Under s. 38 of the Judicature Act,the cases were clear that a non-judgment creditor could obtain a certificate of lis pendens within an action under the Fraudulent Conveyances Act, notwithstanding that the Plaintiff thereby obtained a lis pendens which was tantamount to a Mareva injunction without having to meet the same stringent criteria: Bank of Montreal v. Ewing, (1982), 35 O.R. (2d) 225 (Div. Ct.). The statutory provision is interpreted to mean that any title or interest in the land is sufficient to justify a lis pendens (provided the claim is not frivolous). See also T.D. Bank v. Zukerman, (1983), 40 O.R. (2d) 724, 33 C.P.C. 300 (Ont. H.C.).

[18] See also Connetta v. Connetta, [1990] O.J. No. 1112; Allen v. Hennessey, (1988), 29 C.P.C. (2d) 209; and CIBC v. Langer, [1988] O.J. No. 444 (Ont. H.C.).

to justify a lis pendens. However, in Davidson v. Horvat, (1984) 45 C.P.C. 203 (Ont H.C.) Potts J. refused to follow Moehring, on similar facts and discharged the certificate of lis pendens. In Passarelli v. Di Cienzo, (1989) 34 C.P.C. (2d) 54 (Ont. H.C.), the Plaintiff alleged an oral agreement with the Defendant which provided for equal partnership in the subject land. The Defendant had transferred the land to a corporation he controlled and refused to recognize the Plaintiff's interest. Sutherland J. adopted the reasoning in Moehring, but discharged the CPL on other grounds.

In the recent decision of Chilian v. Augdome Corp., (1991) 2 O.R. (3d) 696 (Ont.C.A.), Morden J.A. reinforces the notion that a Plaintiff need not have a direct interest for itself. All that is required is that an "interest in land" be "in question" in the proceeding. The plaintiff in that case owned common shares in a company which held an interest in 26 patented mining claims. The company granted another company an option and working rights in 18 of the mines and assigned the company it's interests in the other 8 mines. The plaintiff brought an application to hold that the agreements were of no force and effect and to effect the return of the mining claims to the company in which it owned shares and obtained a Certificate against the title to the mining claims.

Morden J.A. distinguishes both Moehring, supra. and Davidson, supra. on the basis that in neither proceeding was an interest in land in question. The dispute in those two cases concerned the shares of a corporation whose only asset was land. Both Plaintiffs were seeking to prevent the Defendants from disposing before trial of the corporation's only asset. In Chilian, the land was the very issue of the law suit, but the plaintiff was not seeking an interest in it for himself.

It is submitted that Chilian stands for the proposition that a shareholder can get a CPL notwithstanding that they do not seek a personal interest in the land. However, the case has left undetermined the question of whether a Plaintiff can obtain a CPL against land owned by a corporation where the claim concerns ownership of shares of the corporation and the land is the corporation's only

asset.[19]

- **Breach of Fiduciary Duty** -

In Davidson v. Hyundai Auto Canada Inc. (1987), 59 O.R. (2d) 789 (Ont. M.C.) the court held that the Plaintiff was entitled to a CPL where there was a breach of fiduciary duty giving rise to an equitable interest and an order for restitution. But see 931473 Ontario Ltd. v. Coldwell Banker Canada Inc., [1991] O.J. No. 1150 (Ont. H.C.) Sutherland J., where a claim for breach of fiduciary duty concerning a commercial transaction was held not to call an interest in land in question.

Other Interests in Land

- **Leasehold Interest** - A CPL may be available where the Plaintiff claims a leasehold interest in land. In Peppe's Pizza Factory v. Stacey, (1979) 27 O.R. (2d) 41, 14 C.P.C. 235, 11 R.P.R. 246, 105 D.L.R. (3d) 120 (Ont. H.C.), DuPont J. held a leasehold interest, while somewhat similar to personalty, also has a sufficient number of the characteristics of an interest in land to justify a lis pendens. However, where the Plaintiff claimed a leasehold interest in certain chattels on the defendants land, Lerner J. vacated the lis pendens on the grounds that a leasehold interest claim to chattels cannot amount to an interest in land. If the Plaintiffs personal property becomes permanently fixtures to the property, title to them passes to the landowner. If the chattels are not affixed or only temporarily, the Plaintiff can remove them and they are therefore not connected with the land: White Hldgs. Ltd. v. Bolus-Revelas-Bolus Ltd., (1980), 14 R.P.R. 145 (Ont. H.C.)[20]

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[19] See also Waxman v. Waxman, supra. and Aztec Investments v. Wynston, (1988), 27 C.P.C. (2d) 238 (Ont. M.C.).

[20] The principles in these cases were followed in Namasco Ltd. v. Globe Equipment Sales & Rentals (1983) Ltd., (1985), 2 C.P.C. (2d) 242 (Ont. H.C.), which was decided under the CJA. See also Memphis Holdings v. Plastics Land Partnership, (1989) 35 C.P.C. (2d) 177 (Ont. H.C.) Callaghan J., which holds that a CPL was not available to support an equitable lien for improvements alleged to have been made by the Plaintiff to the Defendant's land.

Discharging the CPL

The jurisdiction to discharge the CPL is set out in CJA s.116(6), which provides that the CPL may be discharged:

> (a) where the party at whose instance it was issued,
>
> (i) claims a sum of money in place of or as an alternative to the interest in the land claimed,
>
> (ii) does not have a reasonable claim to the interest in the land claimed, or
>
> (iii) does not prosecute the proceeding with reasonable diligence;
>
> (b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or
>
> (c) on any other ground that is considered just, and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

Jurisdiction

The motion to discharge may be brought before a master: Young v. 503708 Ontario Ltd. (1987) 56 O.R. (2d) 411 (Ont. H.C.); Tru-Style Designs v. Greymac Properties (1986), 11 C.P.C. (2d) 117, 56 O.R. (2d) 462 (Ont. H.C.). This represents a change from the jurisprudence under the former Rules of Practice.

Grounds for Discharging the CPL

● **The Applicable Test** ● The test has undergone some modification since the enactment of the CJA s.116(6). The court will first determine whether there is an interest in land in question which raises a triable issue for trial and then examine the equities between the parties, particularly whether some provision for security

ought to be made.[21] In Sandhu v. Braebury Homes Corp. et al., (1986), 8 C.P.C. (2d) 222 (Ont. H.C.), Rosenberg J. emphasized the necessity of considering all of the factors in the case in weighing the equities as to whether the CPL should be vacated or not.[22]

It is submitted that this change has come about not as a result of a change of wording in s. 116 but rather a realization by the bench that the CPL is a type of injunctive remedy and should only be available in special circumstances.

- **Factors in Determining Whether to Discharge** - In 572383 Ontario Inc. v. Dhunna, (1987) 25 C.P.C. (2d) 1 (Ont. M.C.), Master Clark sets out eight equitable factors which the court should consider in determining whether to discharge a CPL:

1) whether the Plaintiff is a shell corporation: Pete & Martys, supra [f.n.22];

2) whether the land is unique, but bearing in mind that in a sense any parcel of land has some special value to the owner: Clock, supra.[f.n.22];

3) The intent of the parties in acquiring the land: Tru-Style Designs, supra.[f.n.5];

4) Whether the Plaintiff has an alternative claim for damages;

5) The ease or difficulty in calculating damages: Holden, supra.[f.n.22];

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[21] Under the Judicature Act, the Plaintiff was entitled to maintain the lis pendens unless it was shown that there was no triable issue: Re Willoughby and Knight, (1973), 1 O.R. (2d) 184 at 195, 39 D.L.R. (3d) 656 (Ont. H.C.). In Galinski v. Jurashek, (1976), 1 C.P.C. 68 (Ont. H.C.) Lerner J. even suggested that the Plaintiff was entitled to maintain the lis pendens unless the claim was an abuse of process.

[22] In Clock Invts. Ltd. v. Hardwood Estates Ltd., (1977), 16, O.R. (2d) 671, 79 D.L.R. (3d) 129, the court began to move away from the old test and stated that in determining whether to vacate the lis pendens, the court must exercise its discretion in equity and look at all relevant matters between the parties. Many decisions have adopted the new test including Sandhu v. Braebury Homes Corp. et al.,: see Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd., (1985), 5 C.P.C. (2d) 97 (Ont. H.C.), Graywood Developments Ltd. et al. v. Campeau Corp., (1985), 8 C.P.C. (2d) 58 (Ont. M.C.), Holden Corp. v. Gingerfield Properties Ltd., (1987), 59 O.R. (2d) 304, 25 C.P.C. (2d) 225 (Ont. H.C.), and 572383 Ontario Inc. v. Dhunna, (1987), 25 C.P.C. (2d) 1 (Ont. M.C.).

6) Whether damages would be a satisfactory remedy: Pete & Martys, supra.[f.n.22];

7) Whether there is a willing purchaser: Holden,supra. [f.n.22]; and

8) The harm to each party if the certificate is or is not removed with or without security: Heron Bay Investments Ltd. v. Peel-Elder Developments Ltd. (1976), 2 C.P.C. 338 at 339 (Ont. H.C.).

While recent cases have followed Dhunna, supra. and applied these eight factors, the list has been held not to be exhaustive or mandatory: 931473 Ontario Ltd. v. Coldwell Banker Canada Inc., supra.[23]

● **No Reasonable Claim for an Interest in Land** ● On a motion to discharge the CPL, the test as to whether there is no "reasonable claim" to an interest in land, the test is that the Defendant must demonstrate that there is no triable issue for trial: see Sandhu v. Braebury Homes Corp. et al., supra. Graywood Developments Ltd. et al. v. Campeau Corp., supra., Holden Corp. v. Gingerfield Properties Ltd., supra.[f.n.23].

● **Failure to Prosecute with Reasonable Diligence** ● S. 116 (6) (a) (iii) states that the court may discharge where the party who obtained it does not prosecute the action with reasonable diligence. Rule 42.01(4) requires that all of the material on the motion to obtain the CPL must be served on the Defendant forthwith. Prompt service of the material is not the only measure of diligent prosecution of the action.

● **Delay before CPL is Obtained** ● There is conflicting case law as to whether delay

[23] see also Beaver Health Development Ltd. v. Niagara Medical Dental Office Service Ltd., supra. and Waxman v. Waxman, (1991) 2 W.D.C.P. (2d) 88 (Ont. Ct. Gen Div.). In Waxman, Lane J. states that the test on a motion to discharge is to first determine if there is a reasonable claim to an interest in land, then to examine the equities including the factors in Dhunna, supra., and then to exercise the court's discretion.

prior to commencing the action and obtaining the CPL falls within the ambit of CJA s.116(6)(a)(iii). In 640612 Ontario Inc. v. 253547 Ontario Ltd., (1987) 9 W.D.C.P. 12 (Ont M.C.) and Russell v. Burke, [1989] O.J. No. 45 (Ont. M.C.) Masters Clark and Donkin respectively hold that delay that occurs prior to the commencement of an action does not fall with the scope of the section. However, in Getz v. Barnes (1990) 71 O.R. (2d) 450, Farley J. discharges the CPL under s.116(6)(a)(iii) on the basis that the Plaintiff did not start their action or obtain their CPL for 10 months after the transaction aborted. Farley J. makes no mention of the decisions of Masters Clark and Donkin.

It is submitted, however, that Farley J.'s approach is preferable. A strict reading of s.116(6)(a)(iii) appears to support the decisions in 640612 Ontario Inc. , supra. and Russell, supra. and while the purpose of the section is to prevent a permanent cloud on title being maintained, Master Clark's and Donkin's interpretation of the section do not discourage a claimant from waiting until the vendor intends to deal with the property to take proceedings. Moreover, Farley J.'s view is consistent with the principle applied in interlocutory injunction cases, namely, that delay may tip the balance of convenience in favour of the Defendant.

- **Service of the Order** - Several recent decisions stand for the proposition that a failure to serve a CPL Order due to the advertence of the Plaintiff's solicitors will not give rise to the discharge of the CPL under s.116(6)(a)(iii): Gordon v. Lawrence Avenue Group Ltd., (1988), 65 O.R. (2d) 545, 1 R.P.R. (2d) 48 (Ont. H.C.); and Passarelli v. Di Cienzo, (1984), 34 C.P.C. (2d) 54 (Ont. H.C.)

CPL's have been removed for delays in serving the order or statement of claim ranging from two months in Lai Kim Tsai v. Kwong Hei Wong (1976) 1 C.P.C. 71 (Ont. H.C.), eight months in Cedarville Scrap Iron & Metals (1968) Ltd. v. Deeks (1981) 25 C.P.C. 190 (Ont. H.C.), to almost five years in Arnett v. Menke (1979), 11 C.P.C. 263 (Ont. H.C.). In Tru-Style, supra. the court discharged

a caution registered under the Land Titles Act due to a delay of two years from registration to commencement of proceedings. If the Plaintiff is dilatory in proceeding with the claim, the Defendant should move to discharge and may succeed if the delay is lengthy and unexplained.[24]

● **Prosecuting the Proceeding** ● CPLs have also been removed for delay in not prosecuting the action diligently. In Deveney v. Vanton Construction Inc., (1991) 2 W.D.C.P. (2d) 254 (Ont. Gen. Div.), the CPL was discharged where the Plaintiff failed to answer undertakings for five months. Mossop J. stated the test in these matters is "a Plaintiff must proceed with reasonable dispatch to bring the matter on for trial". In Romano v. Ciraco, supra.[f.n.23], the Plaintiff took nearly two years to deliver an affidavit of documents and another year to set down for trial. However, where the parties were engaged in settlement negotiations, or there were several procedural motions, the court refused to discharge the CPL on the basis of delay: McEwen v. 341595 Ontario Ltd., (1984) 34 R.P.R. 258 (Ont. H.C.) and Kowalski v. Spylo,(1984), 45 O.R. (2d) 587.

● **Claim for Money Damages or Restitution** ● If the Plaintiff is claiming damages in lieu of specific performance, no CPL will be granted: Rocovitis v. Argerys Estate (1986), 9 C.P.C. (2d) 62 (Ont. M.C.), aff'd (1988), 63 O.R. (2d) 755 (Ont. Div. Ct.). If a purchaser claiming for the return of her deposit as an alternative to specific performance, she may be entitled to a CPL: Sandhu v. Braebury Homes Corp. et al. supra. If a purchaser claims for the return of his deposit, alone, or as part of a claim for damages for breach of contract, the purchaser is entitled to a purchaser's lien, which brings an interest in the land in question to the extent of the amount of the deposit sufficient to justify the granting of a CPL. Once the vendor has paid the deposit into court or has provided alternative security for it, the purchaser no longer has an interest in the land and the CPL should be discharged: J & P Goldfluss Ltd. v. 306569 Ontario Ltd., (1977), 4 C.P.C. 296 (Ont. H.C.). *Quaere,* whether a purchaser, who

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[24] See also Romano v. Ciraco, (1986) 4 C.P.C. (2d) 291 (Ont. H.C.).

seeks a return of his deposit from a developer registered under the Ontario New Home Warranty Plan Act, R.S.O. 1980, c.350, under which deposits up to $20,000 are insured, is entitled to a CPL if the deposit does not exceed the insured amount.

Where a Plaintiff claims specific performance with damages in the alternative, the court has a discretion whether or not to discharge the CPL, which will be exercised according to the following criteria:[25]

1) the seriousness of the purchaser's claim for specific performance, taking into account the purchaser's desire for it, the unique qualities thereof, what the Plaintiff intends to do with the land and its suitability to the purchaser's needs: 572383 Ontario Inc. v. Dhunna, supra., Holden Corp v. Gingerfield, supra., 931473 Ontario Ltd. v. Coldwell Banker Canada Inc., supra., and Getz v. Barnes, supra. Whether these criteria are to be determimed by an objective or a subjective has been the subject of judicial debate;[26]

2) the ease or difficulty of calculating damages - 931473 Ontario Ltd. v. Coldwell Banker Canada Inc., supra., and Holden Corp v. Gingerfield, supra.;

3) the ability of the Defendant to post appropriate security; and

4) the ability of the Defendant to pay damages - Passarelli v. Di Cienzo, supra., and Hansen v. Skene, supra..

- **Security** - The court may make an order under CJA s.116(6) discharging a certificate where the interests of the party at whose instance it was issued can be adequately protected

[25] These criteria were enunciated by Anderson J. in Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd., (1985), 5 C.P.C. (2d) 97 (Ont. H.C.)

[26] See Clock Invts. Ltd. v. Hardwood Estates Ltd. supra, Beaver Health Development Ltd. v. Niagara Medical Dental Office Service Ltd., supra. focused on the suitability of the property to the purchaser's needs; and see also 931473 Ontario Ltd. v. Coldwell Banker Canada Inc., supra., (a sports bar); and Great Canadian Adventure Game Inc. v. Durish [1987] O.J. No. 422 (Ont. M.C.),(adult war games field). But see Waxman v. Waxman, supra to the effect that uniqueness is to be judged objectively.

by another form of security, or the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just. This area of the law of CPLs seems to have become much more important than under the previous legislation.

Recent decisions show a judicial tendency to discharge the CPL if other security is available to adequately protect the Plaintiff. The uniqueness of a property seems to be the major determinative on whether security will be adequate protection for the Plaintiff. This trend is particularly applicable in cases where the CPL is preventing the completion of a pending sale to a third party: Sandhu, Braebury, supra. and Baluster v. The Iona Corporation, supra. and 401 Richmond Street West Ltd. v. K.G. Campbell Corp., supra.[27] However, the court has sometimes directed the CPL to be vacated even when there is no pending sale.[28]

When security is ordered, the court will often be responsive to the vendor's request to post a letter of credit instead of money. Where the CPL is being removed to allow a pending sale to proceed the court in many instances will order the sale proceeds to be paid into court: Aztec Investments v. Wynston, supra.

- **On any Other Ground Considered Just** - When a court exercise its discretion to discharge under CJA s.116(6)(c), it is usually on the basis of the test in 572383 Ontario Inc. v. Dhunna,

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[27] In Aztec Investments v. Wynston, supra., security was ordered despite the court holding that the CPL could have been discharged for other reasons. See also Herskovitz v. Old Park Holdings Ltd., [1988] O.J. No. 588 (Ont. H.C.)

[28] Getz v. Barnes (1990) 71 O.R.(2d)450 (Ont. Ct. G.D.); For other cases where security was ordered without a pending sale see Royal Bank of Canada v. Muzzi, supra., 777829 Ontario Ltd. v. 616070 Ontario Inc., (1988), 65 O.R. (2d) 621 Ont. M.C.), revd 67 O.R. (2d) 72, 32 C.P.C. (2d) 38 (Ont. H.C.), Strauss v. Ledoux, [1991] O.J. No. 1052 (Ont. Gen. Div.) West J., and Beaver Health Development Ltd. v. Niagara Medical Dental Office Service Ltd., supra.

supra. and Waxman v. Waxman, supra.[f.n. 22]. This part of s.116 has been used to discharge where the court have decided not to discharge the CPL solely on grounds set out in CJA s.116(6)(a) or (b) but on the basis of a combination of the Dhunna factors or on the balance of convenience.[29]

Improper Registration

In Ribic v. Weinstein, (1982) 140 D.L.R.(3d)258 (Ont. H.C.), the court holds that a Plaintiff's failure at trial to win his claim for an interest in land is not determinative of the question of whether he has wrongfully registered his lien. Nor is the fact that the Defendant failed in his motion to discharge the CPL.

Conclusion

No commercial litigator can afford to ignore the remedies for obtaining, retaining and discharging security against land. Developments in the law and procedure affecting the CPL abound. The current trend is to grant the CPL with relative ease where the Plaintiff can make out a case in which an interest is in land in question, even where that interest is not the Plaintiff's interest. On motions to discharge the CPL, judges and masters tend to exercise discretion in favour of removal of CPLs where other security will suffice. In summary, the judicial tendency is to permit a CPL to cloud the owner's title for the shortest possible time.

There have also been new developments in the treatment of non-disclosures. Courts are more inclined to look at the nature of the non-disclosure to determine whether the case would have been a proper one for a CPL. The court will be more vigilant than previously that a Plaintiff is not dilatory in the pursuit of the claim and is more likely to vacate a CPL which appears calculated to "tie up" the Defendant's land than to preserve it. The Rules of Civil Procedure have been amended to require

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[29] See 931473 Ontario Ltd. v. Coldwell Banker Canada Inc., supra., Beaver Health Development Ltd. v. Niagara Medical Dental Office Service Ltd., supra. and. Strauss v. Ledoux, supra.

service of all the material used on the motion without notice promptly.

It is submitted that CJA s.116 ought to be amended to permit the Defendant to move for a review every 12 months, without having to show any specific change in circumstances, to determine whether the CPL should continue to cloud its title. The current jurisprudence holds that if the Defendant's motion to discharge fails, the CPL will remain on title until trial unless there is a compelling change in circumstances or the Plaintiff is dilatory in prosecuting the action. Litigation affecting real estate, especially where commercial interests are involved, usually takes several years to resolve even if the Plaintiff is reasonably diligent in prosecuting the case.

It is submitted that restricting the Defendant to a single motion to discharge the CPL runs contrary to the current judicial trend, namely, that the CPL should not be permitted to cloud the Defendant's property any longer than absolutely necessary. The Plaintiff's legal and financial position, its desire for the property, the availability of alternative security and market conditions may well have changed since the institution of the proceedings. The Defendant may not be privy to many of these changes and may have no reasonable means to learn about them. The right to an annual review as to whether the CPL is still required will serve to avoid the use of the CPL by the Plaintiff as a mechanism to extract a settlement advantage in the action.