

## Court File No. 04 - CV - 277412 CP

Solly Lewis and Hersl Kalif - Plaintiffs - and - Cantertrot Investments Ltd et al - Defendants

Heard: October 23, 2007

Counsel: A. Irvin Shein - for the moving parties/defendants

Samuel S. Marr and Vadim Kats- for the respondents/plaintiffs

## ENDORSEMENT

Plaintiffs' counsel have on their website information relating to this proceeding under the CPA. They propose to update the website to provide links to the transcripts of cross-examinations of the plaintiffs and the defendants that were conducted for the purpose of a successful motion to certify the proceeding, and transcripts of the examinations for discovery of the plaintiffs and five of the defendants. Their stated purpose in doing this is both to make information available to the class members and to ensure that the litigation is conducted openly and in public. As the website is not protected by a password, any member of the public will have access to the contents of the above documents.

On September 25, 2007, plaintiffs' counsel wrote to counsel for the defendants to inquire whether they would object to the proposed update of the website. In a letter of September 27, 2007, defendants' counsel objected that the proposal would breach the deemed undertaking rule in rule 30.1.01 of the Rules of Civil Procedure if access was not confined to class members. When plaintiffs' counsel disagreed that there would be such a breach, the defendants moved for an order

...prohibiting the the Plaintiffs from posting on any internet website available to the public at large without password protection, or otherwise publicly disseminating the currently existing or any future transcripts of evidence in this proceeding .

At the conclusion of the hearing I held that the publication of the transcripts of cross-examination of the plaintiffs and defendants would not breach the implied undertaking as they did not consist of evidence obtained under any of the five rules referred to specifically in rule 30.1.01 (1), and there was no suggestion that they contained information obtained from such evidence. I held, further, that publication of the transcripts of the examinations for discovery of the plaintiffs would fall within the exception in rule 30.1.01 (4) as they had consented to its public dissemination. I indicated that I had considerable sympathy for the defendants' position with respect to the

transcripts of their examinations for discovery, and I reserved my decision on this question.

Having given the matter careful consideration, I see no answer to Mr Marr's submission that, as the transcripts have been filed with the court as required by rules 34.18 and 37.10, they fall within a further exception to the implied undertaking in rule 30.1.01 (5) (a).

The transcripts were filed for the purpose of the plaintiffs' motions on refusals and undertaking. These are currently proceeding before Master Brott who, on April 11, 2007, had ordered that all motions materials were to be filed with the court by September 4, 2007.

Rules 37.10 (5) and 34.18 (2) provide as follows:

37.10 (5). A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by rule 34.18.

34.18 (2) Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of a court shall be filed in the court office where the motion or application is to be heard, at least two days before the hearing.

As rule 34.18 (3) states that a copy of a portion of the transcript may be filed if the other parties' consent, it is, I believe, clear that rule 34.18 (2) refers to the entire transcript, and not just the part on which the party filing it intends to rely.

Rule 30.1.01 (5) (a) provides that the implied undertaking ruled does not prohibit the use, for any purpose, of "evidence that is filed with the court". As Mr Marr submitted, the words of the exception are not ambiguous and do not suggest that it is limited to the part of the evidence that would be relevant to issues to be decided in the motion for which it was filed.

As Mr Shein pointed out, it seems remarkable that the contents of an entire transcript may be removed from the ambit of the implied undertaking simply because it contains, for example, a single refusal that is subsequently challenged on a motion. If this is the effect of the rule in its present form, the rationale must, I think, be that, as section 137 (1) of the *Courts of Justice Act* provides that the public shall have access to "any document filed in a civil proceeding in a court", the contents of transcripts filed pursuant to rules 37.10 (5) and 34.18 (2) are *ipso facto* on the public record and within public knowledge. Once filing has occurred, the onus would appear to be on the examinee to seek a sealing order pursuant to section 137 (2) of the *Courts of Justice Act* with respect to anything in the transcript that it considers should be treated as confidential. Such orders are, of course, granted very sparingly.

As I have indicated, I see no escape from the plain meaning of the above rules and, in consequence, this part of the defendants' motion will also be dismissed. I am not particularly happy with this conclusion and I share the concerns expressed by Molloy J. in *Noble China v. Lei Kat Cheong*. [1999] O. J. No. 5030, at para 21, to which Mr Shein referred.

For the above reasons, the motion is dismissed with costs payable to the plaintiff within 30 days of the release of this endorsement. These are fixed at \$3,000 as a partial indemnity for fees, plus disbursements of \$300, and GST, as applicable, on such amounts.

Released:

October 24, 2007



CULLITY J.