AUG 27 1992

D. HAGER

Court File No. 92-CQ-15328

ONTARIO COURT (GENERAL DIVISION)

B E T W E E N:

RE: ALBERT C. FINKELSTEIN and 283005 ONTARIO LTD. (Plaintiffs/Respondents) and SAMUEL H. STARKMAN, MURRAY STARKMAN and MAY CAPPELL (Defendants/Applicants)

BEFORE: JARVIS J.

COUNSEL: Moishe Reiter, Q.C.
for the Plaintiffs (Respondents)

David Hager
for the Defendants (Applicants)

HEARD: July 10, 1992

ENDORSEMENT

JARVIS J.:

This application involves property held by the parties in the City of Brampton. The property has been held for a number of years, and the parties have now fallen out. It is now apparent that the property must be sold and the proceeds divided. At the outset, I was advised by counsel that the parties were consenting to an order for judicial sale, and directing a reference to the Master in the usual form. The balance of the relief sought was opposed.

The property had been purchased and registered in the name of Samuel H. Starkman and Alfred C. Finkelstein, as Trustees. The property was developed as a strip mall and leased to tenants. Leases have been negotiated over the years with the landlord shown as Finkelstein and Starkman, in trust. The initial ownership of the land was allocated as follows:

(a) Samuel H. Starkman 15%

(b) Murray Starkman 15%

(c)	Gerald Starkman	15%
(d)	Mary Cappell	20%
(e)	Albert Finkelstein	25%
(f)	George Lane	10%

Before 1975 the 10% interest held by George Lane was sold to Albert Finkelstein. In 1991 Gerald Starkman sold his 15% interest to 283005 Ontario Ltd., a company controlled by Finkelstein. Finkelstein did not obtain the consent of all of the benenficial owners of the property to this purchase, and did not apply for or obtain a court order allowing him as trustee or 283005 Ontario Ltd. to purchase the interest from Starkman.

Finkelstein was responsible for the day-to-day requirements affecting the property. All significant decisions regarding the property were made by Finkelstein and Starkman together, after consulting with the beneficial owners.

All of these arrangements began to unravel when, in July 1991, it was discovered that one of Finkelstein's employees had defrauded the owners of the properties of approximately $65,000. In discussions following this discovery, it was admitted by Finkelstein that he had never reviewed cheques or invoices to determine their validity. He refused to accept any responsibility for the defalcation.

The defendants became disillusioned with Mr. Finkelstein's day-to-day management. They began to question the management fees he was charging.

By letter dated November 15, 1991, the defendants' solicitor advised Finkelstein that a professional property manager should be appointed. Mr. Finkelstein refused to consider this, and further refused to consider a sharing of his day-to-day management of the property with the defendants.

Banking arrangements were governed by an account agreement dated May 27, 1987 which was characterized by Finkelstein in his affidavit as an "ancient document". This document provided, inter alia, that every cheque be signed by two of Samuel Starkman, Albert Finkelstein or May Cappell.

By letter dated January 8, 1992, Starkman received a bank draft in the amount of $17,500 purporting to be 50% of a capital distribution. In the past no such distributions had been made without consultation and agreement, and always by cheque signed by two persons. No such request was made by Finkelstein on this occasion, and there was no consultation. Starkman reminded the bank of the account agreement and by letter dated January 29, 1992, Mr. Finkelstein was advised that no objection was being taken to a distribution of capital provided they not be unilateral.

On or about the 11th day of February, 1992, Finkelstein swore the affidavit filed by him in connection with this action. This action was commenced on February 14, 1992. On or about February 17, 1992, Mr. Finkelstein's solicitor, Mr. Reiter, wrote to Mr. Hager, solicitor for the defendants, asking him to confirm that he was acting for the Starkmans and May Cappell, and that he was prepared to accept service. On February 21, 1992, Mr. Hager responded confirming that he acted on behalf of the Starkmans and May Cappell and would

represent them in any litigation commenced by Mr. Finkelstein. Mr. Hager declined to accept service.

On March 13, 1992, Mr. Reiter appeared before the Honourable Mr. Justice Gibson, without notice to the defendants, and obtained the order of Mr. Justice Gibson bearing that date. The order specified that the motion be returnable before the court on March 13, 1992. This was in error and by order dated March 17, the Honourable Mr. Justice Gibson substituted the return date of March 19, 1992.

Mr. Finkelstein's affidavit failed to disclose that:

(a) the title to the property was registered in the name of "Samuel H. Starkman and Albert C. Finkelstein, both of the City of Toronto in the County of York, as Trustees";

(b) all leases with respect to the property have been held in the name of Finkelstein and Starkman, in trust, as landlords;

(c) distributions of capital with respect to the property had always occurred by way of cheque signed by two persons;

(d) Finkelstein had no authority under the existing bank account agreement to disburse funds from the account relating to the property, without the signature of himself and either Starkman or Cappell; and

(e) the "ancient banking document" was dated May 27, 1987, and a copy of that agreement was not produced.

On March 27, 1992, the application came on before the Honourable Mr. Justice Dilks, who adjourned the plaintiffs' motion to a date to be fixed by the registrar to prevent cross-examinations. He varied the order of the Honourable Mr. Justice Gibson by requiring that Finkelstein honour the account agreement dated May 27, 1987 and requiring payment to Finkelstein of the management fees without prejudice to the parties' positions on the return of the motion.

CONTINUATION OF INJUNCTION

Rule 39(6) provides "where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of material facts, and failure to do so is in itself sufficient ground for setting aside of any order obtained on the motion or application". In my view the non-disclosure set out above is sufficient in and of itself to justify my refusal to continue the order. (See: Chitel et al v. Rothbart et al (1982), 39 O.R. (2d) 513 (C.A.), Herman v. Klig et al [1938] O.W.N. 270 (Ont. H.C.), Launch Research & Development Inc. et al v. Essex Distributing Co. et al (1977), 4 C.P.C. 261 (Ont. S.C.))

There is also no evidence before me to justify an application for injunction in this case without notice. The identity of the defendants' solicitor was known and all of the defendants were available for service or would have soon been so. There have been substantial delays from the time of the swearing of Mr. Finkelstein's affidavit. A party should apply for an injunction

without notice only where it is genuinely impossible to give any notice to the defendant of the order sought without defeating the purpose of the order. (See: Launch Research & Development Inc. et al v. Essex Distributing Co., supra.)

The test for interlocutory injunction in an action such as this is that the party seeking the interlocutory injunction must establish:

(a) a strong prima facie case or a substantial issue to be tried, depending upon the nature of the action;

(b) irreparable injury, i.e. that damage would be sustained if the injunction is not granted which cannot be compensated adequately by way of damages; and

(c) that the balance of convenience favours the granting of the injunction.

(See: American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All. E.R. 504 (H.L.), Yule Inc. v. Atlantic Pizza Delight (1977), 17 O.R. (2d) 505 (Div. Ct.), Chitel et al v. Rothbart et al (1982), 39 O.R. (2d) 513 (C.A.) and C-Cure Chemicals Co. v. Olympia & York (1983), 33 C.P.C. 192 (Div. Ct.))

Here no strong prima facie case was established by the material. There is no evidence of true irreparable harm. The claim is for monetary relief, and by definition such losses can be compensated for in money. Further, the defendant Samuel Starkman deposes that the defendants have no intention or desire to withhold capital payments, provided that expenses are met and proper reserves can be maintained. I am satisfied on the material before me that the defendants' interest in this property is worth a substantial sum, which should prove more than adequate to cover any damages the plaintiffs might be awarded.

For all of these reasons I find that the injunction of Mr. Justice Gibson ought not to be continued.

CONTINUATION OF FINKELSTEIN AS MANAGER

From the material before me it appears that the parties have had a complete falling out. The defendants have lost faith in the plaintiff on account of the fraud perpertrated by his employee. They have demanded reimbursement for the monies taken, and the plaintiff has refused to accede to their request. The plaintiffs' failure to adhere to the bank account agreement has also contributed to this loss of faith. I find that it would be counter-productive to the interest of all the parties for Mr. Finkelstein to carry on as manager of the property pending the sale, and I hereby restrain him from doing so.

The defendants propose the appointment of Victoria & York Limited as manager of the property pending the sale. This is appropriate and I so order.

MR. FINKELSTEIN'S STATUS AS TRUSTEE

I must be concerned to protect the welfare of the beneficiaries of the trust. (See: Letterstedt v. Broers Brown (1984), 9 App. Cas. 371 at 387)

The materials disclose that Mr. Finkelstein is in conflict with the interest of the beneficial owners by reason of his refusal to share in the management of the company, and by reason of his refusal to consider the appointment of a professional management company when it appears in material before me that this might well be less expensive than the management fees

currently being charged to the property by him. His refusal to accept responsibility for the fraud of his employee is a matter of concern and placed him in further conflict with the other owners regardless of the eventual disposition of this issue. A trustee can be removed on the basis of a conflict of interest and duty. (See: Re Walter v. Shaw Co., [1922] 3 W.W.R. 119 (Sask.K.B.)). I am of the view that it is in the welfare of the beneficiaries that Mr. Finkelstein be removed as trustee of the property and I so order. In addition, I order Mr. Finkelstein to provide to the defendants, access to all records and documents relating to the property, including leases, lease information and banking records, and to require copies of any such documents requested by the defendants, at the expense of the defendants.

I award costs of this application to the defendants in any event of the cause, to be payable when the issues between the parties are finally determined.

August 25, 1992