

**Most Negative Treatment:** Varied

**Most Recent Varied:** [Sheppard International Trading Inc. v. Baghai](#) | 2014 ONCA 381, 2014 CarswellOnt 5971, 240 A.C.W.S. (3d) 348 | (Ont. C.A., May 12, 2014)

2013 ONSC 5025  
Ontario Superior Court of Justice

Sheppard International Trading Inc. v. Baghai

2013 CarswellOnt 11044, 2013 ONSC 5025, 231 A.C.W.S. (3d) 652

**Sheppard International Trading Inc., Plaintiff and Shahab Baghai, also known as Shane Baghai, Manda Baghai, Shane Baghai Homes Inc., Baghai Development Ltd., BBT Devgroup Inc., Reza Banai, Banai Management Inc., Mitra Banai, also known as Movasagh Nekoonam Banai, TES Development Inc., Air Touch Inc., Siavash Taheri, Manouchehr Estifa and Bijan Shiekholeslami, Defendants**

A.J. O'Marra J.

Heard: July 11, 2013  
Judgment: July 29, 2013  
Docket: 06-CV-320067 PD2

Counsel: Douglas G. Christie, for Plaintiff / Responding Party  
Kevin Sherkin, for Defendants / Moving Parties

Subject: Civil Practice and Procedure; Corporate and Commercial; Contracts

#### Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Business associations --- Creation and organization of business associations — Partnerships — Evidence of partnership — Documentary evidence

#### Table of Authorities

##### Cases considered by *A.J. O'Marra J.*:

*Air Canada v. M & L Travel Ltd.* (1993), 1993 CarswellOnt 994, 1993 CarswellOnt 568, 15 O.R. (3d) 804 (note), 50 E.T.R. 225, 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 67 O.A.C. 1, 159 N.R. 1 (S.C.C.) — considered

*Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.) — considered

*Cuthbert v. TD Canada Trust* (2010), 88 C.P.C. (6th) 359, 2010 ONSC 830, 2010 CarswellOnt 867 (Ont. S.C.J.) — considered

*Montreal Trust Co. of Canada v. Hickman* (2001), 2001 NFCA 42, 2001 CarswellNfld 225, 204 Nfld. L.R. 58, 614 A.P.R. 58, 204 Nfld. & P.E.I.R. 58 (Nfld. C.A.) — considered

*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, 2 O.T.C. 146, 1996 CarswellOnt 1699 (Ont. Gen. Div.) — considered

#### Rules considered:

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 5.03 — considered

R. 20.04 — considered

R. 20.04(2)(a) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

#### *A.J. O'Marra J.:*

1 Several of the defendants in the plaintiff's action, captioned above, have brought a Motion for Summary Judgment under Rule 20.04 to dismiss the claim pleaded against them on the basis that there is no genuine issue requiring a trial.

2 The defendants seeking dismissal are Manda Baghai, BBT Devgroup Inc., Reza Banai, Banai Management Inc., Mitra Banai, TES Development Inc., Air Touch Inc., Siavash Taheri, Manouchehr Estifa and Bijan Shiekholeslami, hereinafter referred to collectively as "These Defendants". The other remaining defendants, Shahab Baghai, also known as Shane Baghai, Shane Baghai Homes Inc., and Baghai Development Ltd., hereinafter referred to as "Baghai" have not joined in this Motion to seek dismissal.

3 In essence, the plaintiff has brought an action against Baghai for a declaration that a partnership agreement entered into between them relating to the financing and profit sharing of Baghai's interest in a property development known as Avondale Development is a valid and subsisting agreement and was not lawfully terminated by the defendant Baghai. The plaintiff seeks damages in the amount of \$30 million plus \$2 million in punitive damages.

4 These Defendants, parties in the co-owners agreement with Baghai relating to the development property were not parties to the partnership agreement.

5 The plaintiff alleges in its Amended Statement of Claim, October 11, 2006 at p. 49, para. 123 that These Defendants "as parties to the co-owners agreement" knowingly assisted Baghai and knowingly received and applied trust property for their

own use and benefit, thereby enriching themselves at the expense of the plaintiff. They “were *trustees de son tort* and have the duty and responsibility to account to the plaintiff and to disgorge the plaintiff’s share of the profits from the Avondale Developments and to permit that share to be traced, where appropriate, into the subsequent investments and assets of These Defendants”.

### Background to the action

6 In August 2001 the defendants, Baghai Homes Inc., TES Development and Banai Management Inc. agreed to be co-owners of lands at Avondale Avenue in Toronto for the purpose of developing a condominium project. Pursuant to the agreement the defendants, Reza Banai, his wife Mitra Banai, Shane Baghai, his wife Manda Baghai, Air Touch Inc., the principals of TES Development, Siavash Taheri, Manouchehr Estifa and Bijan Shiekholeslami agreed to indemnify the obligations of their respective co-owners as set out in the co-owners agreement. The co-owners agreed to proportion the cost of the development and shares of profits as follows: Baghai Homes Inc. 50%, Banai Management 35%, and TES Development 15%. The plaintiff, Sheppard International and its principal Gholamreza Shafie was not a participant in the co-owners agreement.

7 In September 2001 Shane Baghai, through Baghai Homes entered into the aforementioned partnership agreement, entitled “Advance of Funds and Profit Sharing Agreement” with the plaintiff, whereby the plaintiff was required to contribute 50% of Baghai Homes’ 50% share of costs under the co-owners agreement, for which the plaintiff would be entitled to 50% of Baghai Homes profit from the development and construction project. The plaintiff’s interest under the partnership agreement was 50% of Baghai’s interest for its financing contribution. However, the plaintiff had no interest in the lands or project of the co-owners agreement. As noted under acknowledgements of the partnership agreement between Sheppard and Baghai:

- a) Shafie is to have no interest in or claim to the lands, or project or any asset of the co-ownership of SBHI (Shane Baghai Homes Inc.) including with limitation any security interests,
- b) the parties are not partners or co-owners.

8 Under the terms of the partnership agreement, Shafie (Sheppard International Trading Inc.) was to make a primary advance of funds on or before October 15, 2001 to Baghai and then secondary advances from time to time on at least 30 days notice that an advance was required. It further stated that “If Shafie does not make some or all of the secondary advance within 90 days after demand, Shafie shall have no further right, title, interest or claim to or in Baghai’s profit”.

9 In the fall of 2002 the defendant Baghai Homes Inc. notified the plaintiff that as a result of non-payment of several advance notices the defendant was not waiving the plaintiff’s default or its rights under the participation agreement. For the purpose of this motion, the specifics of the termination of the partnership agreement as between the plaintiff and the non-moving defendant (Baghai) are not necessary in considering whether there is an issue requiring a trial with respect to the moving defendants. Whether the partnership agreement as between the plaintiff and Baghai was terminated did not involve the co-owners under the Co-owners Agreement in the Avondale Development.

10 In 2004, Baghai bought out Banai’s interest prior to the completion of the development project.

11 The project continued to its completion and the profits were shared proportionate to the interest of the remaining co-owners, defendants Baghai and TES Development.

12 The uncontroverted evidence of Mr. Niall Finnegan, the construction project cost consultant from Altus Helyar retained to certify “costs in place and the adequacy of ongoing funding” to the construction lenders for the development project stated in his examination for discovery testimony, June 2, 2011, that the remaining project partners, Baghai and TES received profit proportionate to their percentage interest, including an equity interest in a remaining parcel of land proportionate to their percentage of ownership .

13 Dr. Siavash Taheri, former principal of Air Touch Inc. and TES Development stated in his affidavit, dated March 18, 2011 that each party under the co-ownership agreement received only what they were entitled to, “their share of profits and nothing more”.

14 The plaintiff asserts in its Amended Statement of Claim that These Defendants “knowingly assisted Baghai and were knowingly in receipt of trust funds”, and as such were *trustees de son tort* with a duty and responsibility to account to the plaintiff and to disgorge the plaintiff’s share of the profits from the Avondale development. Although, in the plaintiffs’ factum and in oral submissions of counsel, based on the affidavit evidence of Gholamreza Shafie, no wrongdoing is alleged on their part. The plaintiff now asserts that The Defendants are necessary parties to the proceeding as considered under Rule 5.03. They may have profited from the improper actions of Baghai and as such the plaintiff seeks only an accounting from them, and if appropriate, disgorgement of profits improperly apportioned to These Defendants.

### The Law

15 In *Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42 (Nfld. C.A.), it was noted at para. 42 that:

*A trustee de son tort* is a person who intermeddles in the administration of a trust. As a result of the intermeddling he or she is treated, constructively, as if he or she were an express trustee and is thereby made subject to the obligations of the trustee with respect to preservation of the trust property and becomes liable to compensate, and to account to, the beneficiaries for any losses resulting from the dealing with the trust property. The *trustee de son tort* is also sometimes referred to as a species of constructive trustee because he or she becomes a trustee by imposition of law.

16 In *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.) at p. 809-810, a case where defendants were alleged to be *trustees de son tort* and liable as constructive trustees for breach of trust, Iacobucci J. writing for the majority, observed that where a defendant does not assume control or possession over the property in question so that liability as a *trustee de son tort* could not be imposed:

...strangers to the trust can also be personally liable for the breach of trust if they knowingly participate in a breach of trust...

In addition to a *trustee de son tort*, there were traditionally therefore two ways in which a *stranger* to the trust could be held personally liable to the beneficiaries as a participant in the breach of trust: as one in receipt and chargeable with trust property and as one who knowingly assisted in a dishonest and fraudulent design on the part of the trustees. The former category of constructive trusteeship has been termed “knowingly receipt” or “knowingly receipt and dealing”, while the latter category has been termed “knowingly assistance.

17 Counsel for the plaintiff submits that because the plaintiff and These Defendants do not enjoy privity of contract under the co-owners agreement, they stand in law as “strangers” to the trust as beneficiaries who knowingly assisted Baghai and were knowingly in receipt of trust funds.

18 In addition, the plaintiff through counsel now asserts that the individual defendants as indemnifiers in the ownership agreement may be affected by its claim against Baghai and as such are necessary parties, a reason not cited in the amended statement of claim.

### Rule 20.04

19 Rule 20.04 states:

(2) The court shall grant summary judgment if,

a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence...

20 Under Rule 20.04 (2.1)

In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

21 In considering whether there is a genuine issue requiring a trial, the motion court judge must consider whether a full appreciation of the evidence and issues required to make dispositive findings can be achieved using the powers cited in Rule 20.04 (2.1), or are the “attributes and advantages of the trial process necessary to enable a full appreciation of the evidence and issues of the case”. (See *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.) at paras. 51-54.)

22 In this instance, I am satisfied that the materials provided by the parties inclusive of affidavits of the principals and transcripts of examinations for discovery provide an adequate basis to enable a full appreciation as to whether there is a genuine issue requiring a trial involving These Defendants.

23 On a Summary Judgment Motion each side must “put its best foot forward” with respect to the existence or non-existence of material issues to be tried. As noted in *Combined Air Mechanical Services Inc.*, *supra*, at para. 56 referring to *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.) at p.434 a party is not “entitled to sit back and rely on the possibility that more favourable facts may develop at trial”. In *Cuthbert v. TD Canada Trust*, [2010] O.J. No. 630 (Ont. S.C.J.) it was held that the court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial. In this instance, the undisputed evidence put forward with respect to These Defendants is:

- a) They were not parties to the participation agreement.
- b) The plaintiff was not a party to the co-owners agreement.
- c) The unchallenged evidence is that at the completion of the project each remaining party to the co-owners agreement received only the proportionate share of the profit to which they were entitled.
- d) Defendant Reza Banai and Banai Management Inc. were bought out of the co-owners agreement by Baghai in April 2004 and as a result received no profit under the co-owners agreement on completion of the project.
- e) The plaintiff under the terms of the participation agreement had no interest in the co-owners agreement.
- f) The defendants Banai, Mitra Banai, Air Touch Inc., Dr. Siavash Taheri, Manouchehr Estifa, Bijan Shiekholeslami and Manda Baghai did not receive any profit under the co-owners agreement. Their roles were limited to guaranteeing obligations of the respective co-owners.
- g) The defendant Manda Baghai is not an officer, director, employee or shareholder of Baghai Homes Inc. and did not receive any profit under the co-owners agreement.

h) There is no evidence of these defendants knowingly assisting and/or knowingly receiving any profit that came at the expense of the plaintiff.

24 On the one hand, the plaintiff alleges in its pleading that These Defendants knowingly assisted and received trust funds as *trustees de son tort*, and thereby enriched themselves at the expense of the plaintiff, but on the other hand, in argument and through the affidavit of Gholamreza Shafie alleged no wrongdoing on their part. By definition a *trustee de son tort* knowingly participates in a breach of trust. The plaintiff has put forward no evidence upon which any of “these defendants could be considered a *trustee de son tort*”. There is no evidence that the remaining co-owners amongst These Defendants received anything more than their proportionate share of the profits from the development.

25 This is an instance in which the plaintiff has cast a wide net to include parties to an action without an evidentiary basis. The plaintiff has no privity of contract with These Defendants and as such the indemnifier argument put forward appears more as a recent contrivance, in the absence of any evidentiary basis to seek “an accounting and disgorgement of profits” by alleging them to be *trustees de son tort*.

26 There being no genuine issue requiring a trial as against These Defendants Summary Judgment is granted dismissing the proceeding against them. Costs are awarded to the moving parties on a substantial indemnity basis.