CITATION: *Saeed v. Gunarajah*, 2018 ONSC 4590
COURT FILE NO.: CV-16-554750
DATE: 20180727

2018 ONSC 4590 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
MUSAB SAEED	*J.J. Robinson,* for the Plaintiff
Plaintiff	
– and –	*S. Tock,* for the Defendants Nirmalarajah Gunarajah, Viveka Ramesh, Mohinder Sansoye and Surinder Sharma
NIRMALARAJAH GUNARAJAH, VIVEKA RAMESH, MOHINDER SANSOYE, SURINDER SHARMA, SHANTHI BALASINGHAM and NANTHAKUMARAN BALASINGHAM	*B.N. Radnoff and S.T. Shorey,* for the Defendants Shanthi Balasingham and Nanthakumaran Balasingham
Defendants	
	HEARD: June 21, 2018

REASONS FOR DECISION

SCHRECK J.:

[1] Musab Saeed entered into an agreement to purchase a property as part of a plan she and her father had to become involved in the development of an area in Markham. Because of a dispute she had with the vendors, the transaction did not close as scheduled and the vendors sold the property to other purchasers. Ms. Saeed then commenced an action against the vendors and the other purchasers. She seeks as a remedy certain declarations and specific performance of the agreement. She did not make a claim for damages.

[2] The vendors have brought a motion for partial summary judgment to have the claim for specific performance dismissed. They submit that the property was not unique and that any breach of the agreement could be compensable by damages. The purchasers have also moved for summary judgment to have the entire claim against them dismissed. The plaintiff resists both motions. She takes the position that the property, although purchased as an investment, was

unique and also claims, for the first time, that she intended to live there temporarily. She submits that the purchasers knew or ought to have known that she had an equitable claim on the property at the time they purchased it.

[3] For the reasons that follow, both motions are granted.

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I. FACTS

A. The First Offer

[4] The property at issue in this action ("the property") is located at 28 Carolwood Crescent, which is in an area of Markham known as Boxwood. Prior to the events giving rise to this litigation, it belonged to the defendants Nirmalarajah Gunarajah, Viveka Ramesh and Mohinder Sansoye ("the vendor defendants"), who had purchased it in 2014.

[5] In January 2016, the vendor defendants decided to sell the property. They were approached by a person named Robin Philamendra, who is the brother-in-law of the defendants Shanthi Balasingham and Nanthakumaran Balasingham ("the purchaser defendants"). Mr. Philamendra wished to purchase it in order to renovate it and then resell it. The purchase was to be made by the Balasinghams, who would hold the property for his benefit. Mr. Philamendra offered to buy the property for $1,600,000. The offer was declined. Prior to these discussions about the purchase of the property, the vendor defendants did not know the Balasinghams or Mr. Philamendra.

B. The First Agreement of Purchase and Sale

[6] In late January 2016, the vendor defendants entered into an agreement of purchase and sale ("APS") to sell the property to a corporation, 9383859 Canada Ltd., for $1,700,000. The APS was later assigned to the plaintiff, Musab Saeed. She wished to purchase it as part of a plan she and her father had together with a developer, Ideal Developments, to buy land in the Boxwood area of Markham. Like Mr. Philamendra, the plaintiff intended to renovate and then resell the property. However, she also gave evidence, discussed in more detail below, that she intended to live there temporarily.

[7] Prior to the closing date, a dispute arose between the plaintiff and the vendor defendants regarding the occupancy of the property by tenants and whether the vendor would be in a position to deliver vacant possession by the closing date of May 5, 2016. As a result of the dispute, the transaction did not close on May 5, 2016. The following day, the vendor defendants advised the plaintiff that they would be in a position to deliver vacant possession on May 16, 2016.

C. The Second Agreement of Purchase and Sale

[8] The vendor defendants had entered into an agreement to purchase a gas station and required the proceeds of the sale of the property to do so. As a result, on May 12, 2016, they contacted Mr. Philamendra to inquire whether he was still interested in purchasing the property.

He was. At the time, the vendor defendants did not know whether the transaction with the plaintiff would close on May 16, 2016.

[9] The purchaser defendants, who were to hold the property for Mr. Philamendra's benefit, entered into an APS with the vendor defendants to purchase the property for $1,600,000. The transaction was to close on May 17, 2016. The purchaser defendants were aware that there had been a prior APS. Their agreement with the vendor defendants was conditional on the other transaction not closing on May 16, 2017.

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D. The Vendor Takeback Mortgages

[10] On May 16, 2016, the lawyer for the vendor defendants sent closing documents and keys to the plaintiff's lawyer. However, the plaintiff did not deliver the purchase funds. As a result, the transaction did not close.

[11] The following day, the transaction with the purchaser defendants closed and they paid a deposit of $550,000. With respect to the remainder of the purchase price, they arranged a vendor takeback mortgage ("VTB") with the vendor defendants and an acquaintance of theirs, the defendant Surinder Sharma. The purchaser defendants gave evidence that the VTB was necessary because the transaction took place so quickly. It was intended to be a short term solution until they could arrange conventional financing through a bank.

[12] On May 30, 2016, the purchaser defendants and the vendor defendants agreed that $250,000 of the VTB would be converted into a personal loan. The same day, they obtained a mortgage for the remaining amount, $800,000, from a bank. On May 31, 2016, the VTB mortgage was discharged from title. The personal loan has since been repaid.

E. The Commencement of the Plaintiff's Action

[13] The plaintiff issued her Statement of Claim on June 14, 2016. However, it was not served on the purchaser defendants within six months. An Amended Statement of Claim was eventually served on May 23, 2017 after the defendants, through their counsel, consented to an extension of time. In her claim, the plaintiff alleged that the sale of the property to the purchaser defendants was a fraudulent conveyance. She sought various declarations in relation to the APS as well as specific performance of the agreement. She did not claim damages. A Statement of Defence was served on August 1, 2017.

F. The Certificate of Pending Litigation

[14] On August 24, 2017, the plaintiff brought an *ex parte* motion without notice for a Certificate of Pending Litigation ("CPL") on the property. The motion was granted on the same day by Master Sugunasiri.

II. ANALYSIS

A. General Principles on Motions for Summary Judgment

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[15] The vendor defendants, joined by the defendant Surinder Sharma, move for partial summary judgment seeking to have the plaintiff's claim for specific performance dismissed. The purchaser defendants seek summary judgment dismissing the claim against them or, in the alternative, to have the CPL discharged.

[16] The approach the court must take on a motion for summary judgment was set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. The summary judgment rule should be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication of claims. The court must determine whether there is a genuine issue requiring a trial based only on the evidence presented. If there is no genuine issue, then the motion shall be granted. Where there is a genuine issue, the motion judge should consider whether the need for a trial can be avoided by relying on the fact finding powers in Rule 20.04(2.1), namely:

1.Weighing the evidence;

2.Evaluating the credibility of a deponent; and

3.Drawing any reasonable inference from the evidence.

These powers can only be exercised where doing so would not be against the interests of justice, that is, where "they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole": *Hryniak,* at para. 66.

[17] While the vendor defendants do not admit that they breached the APS with the plaintiff, for the purposes of both motions I have been invited to assume that the plaintiff will be able to establish that there was such a breach.

B. The Vendor Defendants' Motion

(i) The Remedy of Specific Performance – General Principles

[18] Damages are the usual remedy for a breach of contract. However, where the breach related to the sale of property, specific performance was at one time the remedy to which the aggrieved party was usually entitled. That changed following the Supreme Court of Canada's judgment in *Semelhago v. Paramadevan,* [1996] 2 S.C.R. 415, where the Court held (at para. 22) that "[s]pecific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available."

[19] Whether or not a substitute is readily available will depend on the facts of the particular case. In *Landmark of Thornhill Ltd. v. Jacobsen* (1995), 25 O.R. (3d) 628 (C.A.), at para. 37, the Ontario Court of Appeal identified three factors which should be considered in making that determination: (i) the nature of the property involved; (ii) the related question of the inadequacy of damages as a remedy; and, (iii) the behaviour of the parties, having regard to the equitable nature of the remedy. See also *Matthew Brady Self Storage Corp. v. InStorage Limited Partnership,* 2014 ONCA 858, 124 O.R. (3d) 121, at para. 32.

(ii) The Property in This Case

(a) Uniqueness

[20] A consideration of the nature of the property requires an assessment of its uniqueness. The concept of uniqueness was explained in *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2003), 63 O.R. (3d) 304 (C.A.), at paras. 38-39:

> In *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1 at para. 22, Sopinka J. observed that specific performance will only be granted if the plaintiff can demonstrate that the subject property is unique in the sense that, "its substitute would not be readily available". Although Sopinka J. did not elaborate further on this definition, in 1*252668 Ontario Inc. v. Wyndham Street Investments Inc*., [1999] O.J. No. 3188 (Quicklaw), 27 R.P.R. (3d) 58 (S.C.J.) at para. 23, Justice Lamek stated that he
>
> > [does] not consider that the plaintiff has to demonstrate that the Premises are unique in a strict dictionary sense that they are entirely different from any other piece of property. It is enough, in my view, for the plaintiff to demonstrate that the Premises have a quality that makes them especially suitable for the proposed use and that they cannot be reasonably duplicated elsewhere.
>
> I agree that in order to establish that a property is unique the person seeking the remedy of specific performance must show that the property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended.

[21] The plaintiff submits that the property in this case is unique for two reasons. The first relates to its suitability in relation to a plan she and her father have to work with a developer to acquire land in the "prestigious Boxwood area". According to the plaintiff, Carolwood Crescent, the street on which the property is located, is "particularly coveted". The second reason relates to the plaintiff's claim that she intends to live in the house prior to selling it because of its proximity to her parents' home.

(b) The Location of the Property

[22] I accept that the property may have some degree of uniqueness because of its location in the Boxwood area. However, that uniqueness is important only because of its relationship to the plaintiff's potential return on her investment, which is relevant to the second *Landmark of*

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Thornhill factor, the adequacy of damages. The fact that the plaintiff wished to purchase the property as an investment strongly suggests that damages would an adequate remedy. Indeed, there is a significant body of caselaw holding that specific performance is not an appropriate remedy in relation to an agreement to purchase an investment property: *Shaun Developments Inc. v. Shamsipour,* 2018 ONSC 440, at para. 88; *1954294 Ontario Ltd. v. Gracegreen Real Estate Development Ltd.,* 2017 ONSC 6369, at paras. 153-154; *2144688 Ontario Ltd. v. 1482241 Ontario Ltd.,* 2016 ONSC 1475, at para. 31; *Reserve Properties Ltd. v. 2174689 Ontario Inc.,* 2015 ONSC 3469, 56 R.P.R. (5th) 131, at para. 32; *Mutual Apartments Inc. v. Lam Estate* (2009), 85 R.P.R. (4th) 114 (Ont. S.C.J.), at paras. 68-69; *Edelstein v. Snowview Bancorp Inc.,* [2009] O.J. No. 4563 (S.C.J.), at para. 9; *Hunter's Square Developments Inc. v. 351658 Ontario Ltd.* (2000), 60 O.R. (3d) 264 (S.C.J.), 1 R.P.R. (4th) 245, at paras. 45-46, aff'd (2002) 62 O.R. (3d) 302 (C.A.), 8 R.P.R. (4th) 29.

(c) The Suitability of Damages

[23] In this case, I see no reason why any loss incurred by the plaintiff could not be compensated for by damages. The fact that the property is in the Boxwood area or on a "coveted street" are simply factors which, according to the plaintiff, would make the return on her investment greater. Ultimately, however, all she stands to lose is money.

[24] I note that there is evidence in the record that three other properties in the area came on the market in 2016 and 2017, at least two of which were on Carolwood Crescent. This fact alone is a complete answer to the plaintiff's argument, as uniqueness requires evidence that there is no readily available substitute: *Semelhago,* at para. 22; *Multani Custom Homes Ltd. v. 1426435 Ontario Ltd.,* 2013 ONSC 4712, 33 R.P.R. (5th) 163, at para. 27. While these houses sold for considerably more than was paid for the property in this case, the fact remains that any loss suffered by the plaintiff is pecuniary and measurable.

(d) The Plaintiff's Intention to Reside on the Property

[25] As noted, the plaintiff also claims that she intends to live on the property. In her affidavit filed on this motion, she stated:

> However, when we learned that 28 Carolwood was for sale, I informed my father that I would like to live at 28 Carolwood. I was aware that the development and approvals process would take some time. I was of the opinion that in the meantime, it would be an ideal location for me to live as it was in very close proximity to where my family lived but I would have my own place and independence. Further, if possible after the development I continue to live there for some time, prior to it being sold for investment reasons.

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[26] As noted earlier, Rule 20.04(2.1) gives me fact-finding powers, including the power to evaluate the credibility of a deponent. I do not find the plaintiff's claim that she intends to live on the property to be credible. I draw this conclusion for two reasons.

[27] First, the first time the plaintiff claimed an intention to live on the property was in her affidavit of March 29, 2018, which was prepared in response to the vendor defendants' summary judgment motion. She made no mention of any intention to reside on the property before that, including in any of the material filed in support of her *ex parte* motion for a CPL. The self-serving nature of this new claim is obvious.

[28] Second, living on the property is inconsistent with the plaintiff's plan to develop the property, as described in the evidence filed on the CPL motion. On that motion, the plaintiff adopted the contents of an affidavit sworn by her father, Mian Imran Saeed, which stated:

> In collaboration with Ideal Developments, I intended to demolish the single-storey bungalow on 28 Carolwood and to construct a two-storey custom home in its place, which would then be put on the market for sale. *I expected that this development would require about 12 months to complete ….* [Emphasis added].

[29] According to the plaintiff, she intended to live on the property while awaiting "development and approvals". The plaintiff's father, who had experience developing another property in the area, anticipated that the demolition, construction of the new house and sale would all occur within 12 months. Given that it would take at least several months to demolish and build a house, it can be inferred that the time in which the plaintiff would be able to reside there would be very limited.

(iii) The Behaviour of the Parties

[30] The plaintiff initially took the position that the sale of the property to the purchaser defendants was a fraudulent conveyance. However, counsel for the plaintiff abandoned this claim during the argument of this motion. He was wise to do so. The record in this case overwhelmingly supports the defendants' assertion that this was a genuine, arm's length transaction.

[31] The plaintiff nonetheless maintains that the defendants, and in particular the vendor defendants, do not have "clean hands" because of the manner in which the APS was breached. For the purposes of this motion, I need not decide if there was a breach of the APS because even if there was, there is nothing in the record to suggest that the defendants acted in bad faith or in such a manner as to support the granting of specific performance as an equitable remedy: *Gracegreen Real Estate,* at para. 170.

(iv) The Absence of a Claim for Damages

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[32] Relying on *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 (S.C.J.), at para. 14, the plaintiff submits that the fact that there is no claim for damages is a relevant consideration in determining whether specific performance is an available remedy. However, the issue in *Dhunna* was whether to discharge a CPL. In that context, whether or not there is an alternative claim for damages is relevant because if there is not, the absence of a CPL, which is meant to be a temporary measure, could have the effect of ending the litigation altogether. In my view, the same considerations do not apply when making a final determination as to whether specific performance is an appropriate remedy. A party cannot obtain specific performance she is otherwise not entitled to by choosing not to seek damages.

(v) Conclusion

[33] Based on the foregoing, I have concluded that even if there was a breach of the APS between the plaintiff and the vendor defendants, specific performance would not be an appropriate remedy. As a result, this is an appropriate case in which to grant partial summary judgment dismissing the claim for specific performance.

[34] I recognize that as a result of this decision, the only remaining remedy available to the plaintiff if she can establish a breach of the APS is an effectively meaningless declaration. However, that is the result of her choice not to seek damages.

C. The Purchaser Defendants' Motion

(i) The Land Titles Act and the "Mirror Principle"

[35] My conclusion respecting the availability of specific performance effectively ends the litigation as against all defendants. However, for the sake of completeness I will address the purchaser defendants' motion for summary judgment, which they seek on the basis that pursuant to the *Land Titles Act,* R.S.O. 1990, c. L.5, they were entitled to rely on the vendor defendants' good and marketable title to the property without making further inquiries. The plaintiff submits that the purchaser defendants had actual or constructive notice that somebody else had a prior equitable interest in the property or, in the alternative, that they were wilfully blind to the existence of such an interest.

[36] The principles underlying the *Land Titles Act* were very recently considered in *Stanbarr Services Ltd. v. Metropolis Properties Inc.,* 2018 ONCA 244, where the court adopted the following from M. Neave, "Indefeasibilty of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 (at para. 13):

> The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the

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> register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and [are] the essence of the land titles system...

(ii) Is Constructive Knowledge of a Defect in Title an Exception to the Mirror Principle?

[37] There are exceptions to the mirror principle. The clearest of these is fraud: *Stanbarr,* at para. 14. However, the plaintiff has abandoned her allegation of fraud. Another exception is knowledge of a defect in title. The plaintiff submits that this exception encompasses both actual and constructive knowledge, as well as wilful blindness. The defendants submit that only actual knowledge can constitute an exception to the mirror principle.

[38] The defendants' position finds support in *Stanbarr,* at para. 26:

> Because notice has been considered to be one of a limited number of exceptions to the mirror principle, it has been strictly construed. Our courts insist on actual notice of a defect. Actual knowledge means just that; the party must actually know about the defect. It is not sufficient that it has become aware of facts that may suggest it should make inquiries: *Rose v. Peterkin* (1885), 13 S.C.R. 677, at pp. 694-695. Constructive knowledge is insufficient. Thus, the factual analysis in considering a notice argument is limited to a consideration of what the party knew, not what it could have known had it made inquiries

[39] In support of her position that constructive knowledge is sufficient, the plaintiff relies on *Corkum v. Dagley,* 2006 NSSC 126, 243 N.S.R. (2d) 162, at para. 46, where the Court relies on B. Ziff, *Principles of Property Law,* 3rd ed. (Toronto: Carswell, 2000), at p. 415 for the proposition that "In equity, notice may be (i) actual; (ii) imputed; or (iii) constructive". However, one effect of the land titles system is that these types of equitable principles are limited insofar as they are inconsistent with the doctrine of indefeasibility of title: *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (S.C.J.), at paras. 51-54. It follows that unless the transfer of title at issue in *Corkum* was under a land titles system, the equitable principles relied on in that case will not be applicable to the case at bar. Nowhere in *Corkum* is it stated that the transfer was under a land titles system. I note that the transfer in *Corkum* was on June 8, 2001. The Nova Scotia *Land Registration Act,* S.N.S. c.6 2001, which introduced the land titles system, came into force in March 2003.

[40] The plaintiff also relies on *Bank Leu AG v. Gaming Lottery Corp.* (2003), 231 D.L.R. (4th) 251 (Ont. C.A.), at para. 38 and *I.M.P. Group Ltd. v. Dobbin,* [2008] O.J. No. 3572 (S.C.J.), at paras. 148-150. However, those cases related to the sale of shares, not real property in the context of a land titles system.

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[41] Based on *Stanbarr,* it is clear to me that apart from fraud, only actual notice of a defect in title will constitute an exception to the mirror principle. Thus, the issue to be determined is whether the purchaser defendants had actual notice of a defect in the title to the property.

(iii) Did the Defendants Have Actual Knowledge of a Defect in Title?

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[42] The plaintiff submits that the defendants had actual notice of a defect in title "both through the Vendors advising them of her prior purchase agreement and the clause confirming the same in Schedule A of the Subsequent APS."

[43] In my view, no inference of actual knowledge can be reasonably drawn from this evidence. At its highest, the evidence demonstrates that the defendants were aware that there was a prior APS which for some reason failed to close. If anything, this would lead the defendants to conclude that the other potential purchaser had no interest in the property as the transaction whereby such interest was to be acquired did not close.

(iv) Wilful Blindness

[44] The plaintiff also takes the position that the defendants were wilfully blind with respect to whether there was a defect in the title. The question of whether wilful blindness can create an exception to the mirror principle was left open in *Stanbarr,* at para. 26, fn. 2. For the purposes of this motion, I will assume that it can.

[45] The concept of wilful blindness is well known to the criminal law and has the same meaning in the civil context: *Wescom Solutions Inc. v. Minetto,* 2017 ONSC 249, 40 C.C.L.T. (4th) 244, at para. 85. The concept was explained in *R. v. Jorgensen,* [1995] 4 S.C.R. 55, at paras. 102-103:

> As Glanville Williams wrote in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 157-58:
>
> > [T]he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. . . .
> >
> > . . . In other words, there is a suspicion which the defendant deliberately omits to turn into certain knowledge. This is frequently expressed by saying that he "shut his eyes" to the fact, or that he was "wilfully blind".
>
> And, at pp. 158-59, the learned author states:

> Before the doctrine of wilful blindness applies, there must be realisation that the fact in question is probable, or, at least, "possible above the average".
> . . .
>
> . . . A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness.

> A finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

[46] The fact that the defendants could have conducted further inquiries, even if such inquiries were advisable, does not equate to a finding of wilful blindness. As noted earlier, all the defendants knew was that a prior APS had failed to close for some reason. There is no basis to infer that the defendants realized that a defect in title was probable, let alone that they deliberately failed to make inquiries in order to be able to deny knowledge.

(v) Conclusion

[47] For the foregoing reasons, it is clear that there is no triable issue as between the plaintiff and the purchaser defendants. Even if the previous owner defendants breached their APS with the plaintiff, the purchaser defendants were entitled to rely on their title to the property.

[48] Given my conclusions, it is not necessary for me to consider the motion to set aside the CPL.

III. DISPOSITION

[49] For the foregoing reasons, the motion for partial summary judgment brought by the defendants Nirmalarajah Gunarajah, Viveka Ramesh, Mohinder Sansoye and Surinder Sharma is granted and the claim for specific performance is dismissed.

[50] The motion for summary judgment brought by the defendants Shanthi Balasingham and Nanthakumaran Balasingham is granted and the action against them is dismissed.

[51] If the parties are unable to agree on costs, the plaintiff may make written submissions not exceeding three pages, exclusive of a costs outline, within 10 days of the date of these reasons and the defendant may make written submissions of the same length within 10 days of receiving the plaintiff's submissions.

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Schreck J.

Released: July 27, 2018.

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MUSAB SAEED

Plaintiff

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NIRMALARAJAH GUNARAJAH, VIVEKA RAMESH, MOHINDER SANSOYE, SURINDER SHARMA, SHANTHI BALASINGHAM and NANTHAKUMARAN BALASINGHAM

Defendants

REASONS FOR DECISION

Schreck J.

Released: July 27, 2018.