

SUPERIOR COURT OF JUSTICE – ONTARIO

491 Steeles Avenue East, Milton ON L9T 1Y7

RE: Joseph Berlingieri, Plaintiff

AND:

11776240 Canada Inc. Doing Business as Concepts Build Group
And Concept Kitchen & Bath, Dustin Timothy Hanco and Timothy
Benjamin Hanco, Defendants

BEFORE: Justice M. Kurz

COUNSEL: Ian Breneman and Dessa Booth, for the Plaintiff
Graeme R. Oddy, for the Defendants

HEARD: June 9, 2026, in-person

ENDORSEMENT

Introduction

1. There are two motions before this court. The Defendants, 11776240 Canada Inc. Doing Business as Concepts Build Group and Concept Kitchen & Bath, Dustin Timothy Hanco and Timothy Benjamin Hanco, move to dismiss or stay the Plaintiff's action on the ground that it is an abuse of process. The Plaintiff brings a cross-motion for an order, if necessary, granting him leave, *nunc pro tunc*, under s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*") to continue this action on behalf of the creditors of Concepts Plumbing and Bath Inc. ("CPBI").

2. The Defendants allege that this action is an abuse of process because the Plaintiff previously issued a counterclaim against CPBI, a corporation related to the corporate Defendant, 11776240 Canada Inc. ("117"), and not a party to this action, in a construction lien action (the "Lien Action"). That counterclaim (the "Counterclaim") was

never resolved, as CPBI filed an assignment in bankruptcy on May 25, 2023. It did so after its Lien Action was dismissed and its lien against the Plaintiff's property was lifted.

3. The Defendants assert that the abuse of process arises in these circumstances as:

- a. The Plaintiff should have moved to amend the stayed Counterclaim in the Lien Action, as this separate action offends the policy against duplicative proceedings arising out of the same cause of action;
- b. This action prejudices them as they would wish to raise a limitation argument in any motion to amend the Counterclaim; and
- c. It "bypasses the framework in [s. 38 of the *BIA* ("s. 38")] for pursuing action against a bankrupt for alleged improprieties in the bankruptcy".

4. The Plaintiff resists the Defendant's motion, arguing that s. 38 does not apply here. That is because he does not allege any impropriety within CPBI's bankruptcy, such as a fraudulent conveyance or a transfer of the bankrupt corporation's assets. Nor does he make a claim against CPBI's property in this action, or seek to sue on behalf of CPBI. Rather, the Plaintiff seeks to pierce CPBI's corporate veil by suing what he describes as CPBI's corporate "alter ego" as well as its principals.

5. The Plaintiff adds that, due to the automatic bankruptcy stay under s. 69.3(1) of the *BIA*, there is no extant litigation against CPBI. Nor has he engaged in any prior litigation against the Defendants. Further, there is no prejudice to the Defendants regarding their limitation defence – they can raise it at any stage in these proceedings.

6. That said, the Plaintiff asserts that his answer to the limitation issue is discoverability. He claims that he did not become aware of the existence of the "alter egos" of CPBI until well into the Lien Action litigation.

7. For the reasons which follow, I find that this action does not constitute an abuse of process. The determination of abuse of process and the appropriate remedy are, as

set out below, to be determined holistically and on a case-by-case basis. Here, I agree that there is presently no ongoing litigation between the Plaintiff and CPBI. Nor do I see any prejudice in requiring the Defendants to move on a limitation defence rather than raise it in a motion to amend pleadings in a stayed action.

8. To require the Plaintiff to move to a) lift the stay under the *BIA*, b) seek leave under s. 38 of the *BIA* to bring a proceeding on behalf of CPBI's creditors against the Defendants and c) amend the Counterclaim to add the Defendants would in the circumstances of this case offend the general interpretative principles set out in rr. 1.04(1) and (1.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, (the "*Rules*"). Those subrules direct the court to liberally construe the *Rules* so as to:

- a. "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits", and
- b. "make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved in the proceeding".

9. If I am wrong in that regard, I would grant leave under s. 38, allowing the Plaintiff to bring his action against the Defendants on behalf of the creditors of CPBI.

10. I add that my ruling in this endorsement is strictly procedural. It does not touch on the merits of any claim or defence raised in this action. That is for another day.

Background

11. In 2019, the Plaintiff and his wife hired an entity they describe as "Concept Kitchen and Bath" ("Concept KB") to renovate the kitchen in their home. The Plaintiff asserts that he worked directly with the Defendants, Dustin Hanco and Timothy Hanco, whom he says he understood to be the "proprietors" of Concept KB.

12. The Plaintiff alleges, based on discussions with the Hancos, that he understood that they and their staff used various business names utilizing the word, "Concept". Those names were: "Concept", "Concepts", "Concept Kitchen and Bath", "Concepts

Plumbing”, “Concepts Build Group”, and “Concepts Lighting”. The Plaintiff claims that Dustin Hanco told him that the Hancos were rebranding their business as “Concept Build Group”. This led him to the impression that the Hancos used various business names for the same business.

13. The work on the Plaintiff’s kitchen began in June 2020. The Plaintiff was unhappy with the work performed and the demands made upon him and his wife for added funds to support the renovation work. All work on the project ended on December 18, 2020.

14. On March 17, 2021, CPBI filed a construction lien against the Plaintiff’s home and commenced the Lien Action against the Plaintiff, his wife and the CIBC. On May 7, 2021, the Plaintiff and his wife filed their Counterclaim to the Lien Action. They claimed the amounts they said that they had incurred to rectify CPBI’s negligent work and for other losses arising out of its alleged mismanagement of the kitchen renovation project.

15. The Lien Action and Counterclaim proceeded to discoveries of Dustin Hanco on behalf of CPBI on June 24, 2022. The Plaintiff and his wife later brought an undertakings motion against CPBI. On February 2, 2023, before the undertakings motion was heard, CPBI’s counsel was granted leave to be removed from the record. It never appointed new counsel.

16. The Plaintiff deposes that the removal of counsel first caused him to engage in an “investigation” of CPBI’s solvency, its branding, and its location. Until the removal of counsel from the record, he understood CPBI to be a solvent business.

17. On April 12, 2023, in response to a motion by the Plaintiff and his wife, Conlan J. vacated CPBI’s construction lien and dismissed the Lien Action, leaving the Counterclaim intact. He further adjourned the motion to strike CPBI’s defence to the Counterclaim and granted the Plaintiff and his wife costs of \$7,500, payable within 30 days.

18. On May 25, 2023, CPBI filed an assignment in bankruptcy. Apparently unaware of that assignment, the Plaintiff and his wife rescheduled the motion to strike CPBI’s

statement of defence for June 29, 2023. They were served with CPBI's Notice of Bankruptcy on June 21, 2023, which pursuant to s. 69.3(1) of the *BIA* stayed the Counterclaim.

19. The Plaintiff commenced this action on February 13, 2024. In it, the Plaintiff claims "the sum of at least TWO HUNDRED FORTY THOUSAND DOLLARS (\$240,000)" for the following damages:

- i. consulting fees in the amount of \$5,000;
- ii. project management fees in the amount of \$50,000;
- iii. costs to remediate and complete certain construction work in the amount of approximately \$69,000;
- iv. costs due to delay in construction of approximately \$16,000; and
- v. legal costs and disbursements [in the Lien Action] in the amount of approximately \$100,000.

20. In his Statement of Claim, the Plaintiff pleads that the Defendants are liable for CPBI's alleged breach of contract, negligence, and misrepresentation. He further pleads that the Hancos exerted "complete domination and control over [117 and CPBI]" and "[117] was incorporated and operated for an improper or fraudulent purpose."

21. After the Defendants claimed that the Plaintiff was required to obtain an order under s. 38 of the *BIA* in order to proceed with this action, the Plaintiff filed a proof of claim in the CPBI bankruptcy proceedings. When asked for their position regarding an action such as this one, CPBI's bankruptcy trustee responded that it "is not pursuing any action whatsoever against any party" and offered "no comment as to [the pursuit] of any other parties involved."

22. Although the Defendants expressed the view that the Plaintiff was required to bring a motion under s. 38 of the *BIA* in order to proceed with his claim, the Defendants filed a statement of defence in this action.

23. The Plaintiff served his affidavit of documents on November 15, 2024. In January 2025 the Defendants indicated their intentions to do the same by the end of March 2025. However, they never did so. Counsel exchanged emails about their availability for discoveries in June 2025, but never set a date. The Defendants brought this motion on September 30, 2025.

Issues

24. This motion raises the following issues:

- a. Is this action an abuse of process?
- b. Does the Plaintiff require authorization under s. 38 of the *BIA* in order to continue with this action?
- c. If so, should this court grant authorization to continue with this action under s. 38 of the *BIA*?

Issue No. 1: Is this action an abuse of process?

25. In *Cashin Mortgages Inc. v. 2511311 Ontario Ltd.*, 2023 ONSC 1040, at paras. 39-40, I summarized the right of this court to stay or dismiss an action which is an abuse of process as follows:

39 Under Rule 21.01(3)(d) a defendant may move to have an action stayed or dismissed because it is frivolous, vexatious or otherwise an abuse of the process of the court. A defendant can also seek the same relief under Rule 21.03(3)(c) when "another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter". The court may also, on its own initiative, stay or dismiss a proceeding if it appears on its face to be frivolous, vexatious or otherwise an abuse of the process of the court: Rule 2.1.01(1).

40 In *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras. 39-41, LeBel J, writing for the Supreme Court of Canada offered a summary of the doctrine of abuse of process in Canadian law, starting from the inherent jurisdiction of the court to control its process to prevent abuse. He wrote:

39 In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P.M. Perell, "A Survey of Abuse of Process", in T.L. Archibald and R.S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, [page245] at p. 1667, as "oppressive treatment". In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

40 The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process. [Emphasis added.]

41 As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used [page 246] to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. ... The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

26. Furthermore, as I wrote in *Cashin Mortgages*, at para. 42, “the doctrine of abuse of process can address an attempt to relitigate an issue, it can also apply to a multiplicity of actions which raise the risk of inconsistent judicial decisions and/or double recovery (see also: *Canadian Standards Assn. v. P.S. Knight Co.*, 2015 ONSC 7980, at para. 24)”.

27. In the recent case of *1086289 Ontario Inc. (Urban Electrical Contractors) v. Welland (City)*, 2026 ONCA 352, at paras. 25-26, Madsen J.A., writing for the Court of Appeal for Ontario, described the need for a holistic evaluation of any claims of abuse of process as follows:

[25] The doctrine calls for a holistic evaluation of the acts in issue and the resulting impact on the process. This includes an assessment of whether the impugned action is fueled by improper intent, has resulted in prejudice, oppression or unfairness, or whether it has otherwise undermined the integrity of the administration of justice.

[26] Thus, the first question to be asked – whether there has been an abuse of process – is not governed by categorical pre-determinations. Common to the application of the doctrine across the areas of law is judicial discretion. The doctrine is characterized by its flexibility. It is not encumbered by specific requirements.

[Footnotes omitted.]

Defendants’ Arguments Regarding Abuse of Process

28. Here, the Defendants argue that this action is an abuse of process because the Plaintiff brought this action rather than moving to add them as parties to the Counterclaim, thereby circumventing:

- a. r. 5.04(2), which allows the court, at any stage of a proceeding, to “add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment”.
- b. r. 26.02(c), which allows a party to amend their pleadings at any stage of the proceeding, with leave of the court.

29. The Defendants’ factum adds that the Plaintiff’s abuse of process “deprives [them] of their procedural rights to advance a limitations argument on a motion to amend”.

30. The Defendants rely on *Maynes v. Allen-Vanguard Technologies Inc.*, 2011 ONCA 125, where the Ontario Court of Appeal upheld the motion judge’s finding that a third action by the Plaintiffs, related to their first two actions, was an abuse of process. The Plaintiffs, former corporate executives, had sued for relief arising from the re-purchase of their shares under a stock option plan. After the close of pleadings in the earlier proceedings, the Plaintiffs chose to initiate a new action against non-parties to the original actions but for the same remedies and based on the same cause of action. In doing so, they chose not to move to add the non-parties as defendants in their original actions, which had yet to be determined. That was found to be an abuse of process because it circumvented the requirement in r. 26.02(c) to obtain leave of the court to add a non-consenting party to an action after pleadings were closed.

31. Writing for the court, Weiler J.A. stated, at para. 38:

The plaintiffs should have sought leave of the court to name the Added Defendants in the Ongoing Actions and to amend their pleadings to plead any relief they had not already claimed, either pursuant to rule 26.02(c) or rule 26.01. As mentioned, rule 26.01 obliges the court to amend a pleading "on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment."

32. She added at paras. 39-40:

By starting the New Action instead of moving to amend their pleadings in their existing actions to claim "enhanced relief" against the Added Defendants, the plaintiffs circumvented the court's jurisdiction to: (1) assess whether the defendants would be prejudiced by an amendment and to determine whether that prejudice can be compensated for by costs; (2) to impose costs in favour of the defendants for granting the amendment; and (3) to impose other terms that are just.

40 The filing of the statement of claim in the New Action also placed an inappropriate burden on the defendants who had to bring a motion to strike the New Action, when the onus should have properly been on the plaintiffs to convince the court that leave should be granted to amend their pleadings in the Ongoing Actions.

33. The Defendants argue that the same conduct is taking place here.

34. The Defendants also rely on *SIF Solar Energy Income & Growth Fund v. Aird & Berlis LLP*, 2024 ONCA 946, at para. 43. In that case, the court considered both the precedent of *Maynes* and that of *Abarca v. Vargas*, 2015 ONCA 4, 123 O.R. (3d) 561. *Abarca* was a case arising out of a motor vehicle accident. The plaintiffs issued a tort claim against the other driver and owner in the accident. But they also commenced a second action, against their own insurer based on the underinsured motorist coverage in their auto insurance policy. The court found that the second action was not an abuse of process.

35. At para. 41 of *SIF*, van Rensburg J.A. wrote with approval of the principle set out in *Abarca*, that the commencement of a second action when the first action could have been amended to add the new defendants, is not necessarily an abuse of process. She stated:

41 I read this court's decision in *Abarca* as rejecting the general principle that A&B advances here: that it is always an abuse of process when a second action is commenced in circumstances where the first action could have been amended to add a defendant or claim. Rules 26.02 and 5.04 govern the amendment of pleadings and adding parties to an action, but do not preclude the issuance of separate proceedings even if they involve common factual matrices and

overlapping parties. Rather, the rules of consolidation and joinder exist to address situations where actions should be tried together or consolidated.

36. Justice van Rensburg stated further, at para. 43, that the particular factual circumstances of the second action, including the propriety of the purpose of its commencement, are relevant considerations to the determination of whether the second action is an abuse of process.

37. Regarding the limitations issue, the Defendants argue that this action was commenced nearly four years after the issuance of the Counterclaim, raising clear limitations issues. They assert that they are deprived of their right to raise the limitation issue in response to a motion to add them as parties to the Counterclaim. They refer to the decision of Belobaba J. in *Gale v. Rothbart Centre for Pain Care*, 2021 ONSC 4535.

38. In *Gale*, a doctor and his professional corporation sued his former employer and some principals of the employer for wrongful dismissal. The claim against the non-employer defendants was dismissed on consent. The employer was later assigned into bankruptcy, thereby staying the action. The plaintiff filed a claim in the bankruptcy. The medical practice was continued by another corporation.

39. The automatic stay on proceedings was ultimately lifted. But after the lifting of the stay, the plaintiffs chose not to continue that lawsuit. Rather, they commenced a second lawsuit against the employer, two of the personal defendants in the first lawsuit (although claims against them had been dismissed in the first action) and eight others. As Belobaba J. explained at para. 9:

The 2019 Action repeats the same wrongful dismissal claim as in the 2015 Action and seeks the same relief, repeating almost verbatim many of the paragraphs of the 2015 Action. However, the Second Action also advances claims challenging the propriety of steps taken in the bankruptcy and alleging fraudulent conveyance, unjust enrichment, oppression, the common employer doctrine and piercing the corporate veil.

40. Belobaba J. found that the second action was an abuse of process. He made that finding because the second action circumvented the *BIA* process. As he found, “the

core complaint -- the improper transfer of assets to the successor company" was a matter that should properly have been the subject of the bankruptcy proceedings. In other words, the plaintiff should have challenged the transfer of assets from the bankrupt corporation to the new operating company in the bankruptcy itself. There were two ways to challenge that – either by the trustee bringing its own action or a proceeding under s. 38 of the *BIA*.

41. As Belobaba J. summarized at para. 26:

In short, the *BIA* prescribes a comprehensive procedure for the adjudication of the plaintiff's claims of impropriety in the transfer of the assets to the Silver Medical Group. The circumvention of this prescribed procedure by the commencement of the Second Action is an abuse of process.

Plaintiff's Arguments regarding Abuse of Process

42. The Plaintiff responds, relying on *SIF*, that commencing this new action does not necessarily represent an abuse of process. In *SIF*, van Rensburg J.A. reviewed a number of cases which spoke to whether the commencement of a second and overlapping action constituted an abuse of process. She summarized the result of her review at para. 45 as follows:

These cases recognize that, while the commencement of a second proceeding may give rise to concerns about overlapping questions of law and fact or the risk of inconsistent verdicts, it is not necessarily an abuse of the process of the court. While a party might require a remedy in order to avoid prejudice caused by a multiplicity of actions, that remedy is frequently an order under r. 6.01 for consolidation or trial together, with appropriate procedural directions to address the interests of all parties.

43. In coming to this conclusion, van Rensburg J.A. chose the nuanced principle regarding the determination of an abuse of process in the face of overlapping actions cited in *Abarca*, rather than the rigid principle cited in *Maynes*. As van Rensburg J.A. wrote at para. 48:

For there to be an abuse of process, there must be something more than the commencement of a second proceeding in which there are overlapping issues or parties. There must be evidence that there was a "misuse of the court's procedure" based on the circumstances of the case.

44. The Plaintiff denies any such misuse here. He points to para. 50 in *SIF*, where van Rensburg J.A. wrote: "there is no mandatory requirement for all claims and parties to be joined in the same proceeding". Contrary to findings in the previous cases like *Maynes* and *Gale*, van Rensburg J.A. found that the failure to utilize the r. 26.02 process was not prejudicial to the defendants in the action before her since recourse to amendment under that subrule is not mandatory.

45. The Plaintiff adds that he owes no costs awards to the Defendants (and in fact, CPBI is liable to him and his wife for \$7,500 in costs of the motion to dismiss the Lien Action). Since the Counterclaim is stayed, there is, as stated above, no other extant action and thus no concern about a multiplicity of proceedings.

Analysis of Abuse of Process Issue

46. In considering the arguments and authorities offered by the parties, I find, for the reasons which follow, that this action does not represent an abuse of process.

47. As set out above, this action, in the face of the Counterclaim is not automatically an abuse of process. I must consider the particular circumstances.

48. First, this action does not represent a multiplicity of proceedings as the Counterclaim has been automatically stayed for over three years. I see little risk of it being revived, let alone inconsistent verdicts arising in the two proceedings. Thus, there is no other proceeding pending, per r. 21.03(3)(c).

49. Second, I see no reason to believe that there is an intent to misuse the court's process in commencing this action. The Plaintiff and his wife were fully prosecuting the Counterclaim when the bankruptcy stay went into effect. They were trying to move it on

to trial. They did not owe any costs to CPBI. There was no circumvention of any process in the Lien Action or Counterclaim.

50. Third, the facts of this case are distinguishable from the facts of the cases which the Defendants rely upon. I say this because:

- a. Unlike the circumstances in *Maynes* or *SIF*, the Counterclaim is stayed. While there was a bankruptcy stay in *Gale*, the automatic stay had been lifted by the time of the motion before Belobaba J.
- b. While the lower court's stay of the second action was continued by the Court of Appeal in *SIF*, the stay was made temporary only, pending the motion to add the defendants in the second action to the first one. Among the factors which van Rensburg J.A. considered was the notion that the defendants in the first action would be entitled to express their views as to whether a motion to join the defendants in the second action to their action would prejudice their interests. In as much as the defendant in the Counterclaim, CPBI, is now bankrupt and its trustee has clearly indicated that it takes no position on the possibility of other proceedings, that factor does not apply here.
- c. Unlike the cases cited above, only one of the two plaintiffs by counterclaim in the Counterclaim is a plaintiff in this action. This is a minor but distinguishing factor in this case.

51. Fourth, while there may be a procedural advantage to the Defendants in raising their limitation defence in a motion to add them as parties to the Counterclaim, that advantage is not a strong one. It can be overcome by an award of costs, if appropriate. The limitation issue itself, remains the same.

52. Fifth, in looking at the case holistically and in light of the factors and findings set out above, the process suggested by the Defendants seems to violate the principles set out in rr. 1.04(1) and (1.1). That proposed process is: 1) a motion to lift the *BIA* s. 69.3

(1) stay; 2) a s. 38 motion to allow the Plaintiff to bring an action against CPBI, even though it has no assets; and 3) a motion to add the defendants to that action or consolidate proceedings. That is far from the most expeditious and least expensive determination of the claims raised by the Plaintiff. It would require a disproportionate and unnecessary expenditure of the resources of the parties and the court. I understand that the limitation issue (in which discoverability will be central) will have to be determined as well as the merits of the Plaintiff's claim. But doing so in the manner suggested by the Defendants adds to the length and cost of these proceedings.

53. Sixth and finally, as set out immediately below, I do not find that it is necessary for the Plaintiff to move under s. 38 in order to proceed against the Defendants.

Issue No. 2: Does the Plaintiff require authorization under s. 38 of the *BIA* in order to continue with this action?

54. Section 38(1) of the *BIA* reads as follows:

Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

55. This provision follows s. 30(1)(d) of the *BIA*, which grants the trustee the right (subject to the approval of the inspectors) to “bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt”.

The Defendants’ s. 38 Arguments

56. The Defendants argue that the Plaintiff must apply under s. 38 to continue with his claim against them. They assert in their factum that the Plaintiff's claim, in essence, is that the Defendant 117 “has obtained CPBI's property and there were other improprieties related to the bankruptcy”.

57. The Defendants refer to paras. 45-46 of the Statement of Claim in this action, which read as follows:

45. Further, Concepts Inc. and Concept Build Group Inc. did not function independently from each other or from the Hancos. From about late 2019 to late 2021, the Hancos operated Concepts Inc and Concept Build Group Inc. simultaneously and interchangeably. Throughout that time, Concepts Inc. and Concept Build Group Inc.:
- a. operated in the same industry and provided the same home renovation services;
 - b. had the same registered address and same place of business;
 - c. used the same website domains, email addresses, and telephone numbers;
 - d. carried on business using the unregistered business name Concept Kitchen & Bath;
 - e. used the same equipment and vehicles;
 - f. shared employees and subcontractors;
 - g. shared signage;
 - h. shared business logos and other indicators of goodwill;
 - i. used the same bank accounts interchangeably; and
 - j. such further and other factors as might be relevant to this litigation, that counsel may advise, or this Honourable Court may permit.

(ii) Improper Purpose

46. [117] was incorporated and operated for an improper or fraudulent purpose. In particular, the Hancos incorporated and operated [117] so that they could continue operating [CPBI's] business and using the goodwill associated with the name Concept Kitchen while avoiding [CPBI's] creditors, including the Berlingieris, its negligence and breach

of contract regarding the Project, and the liabilities and costs associated with the Lien Action.

58. While the Defendants do not cite it, the Plaintiff pleads the reason he seeks to pierce the corporate veil of 117 and CPBI as follows:

52. As a result, [117] was able to continue using the assets, business, and goodwill of [CPBI] while avoiding [CPBI's] creditors, the liabilities associated with the negligence and breach of contract on the Project, and the costs and liabilities in the Lien Action.

53. The Plaintiff pleads that the corporate veil should be lifted in this instance because the failure to do so would be flagrantly opposed to justice.

59. The Defendants contend that these are pleadings which allege an impropriety in the bankruptcy which the trustee has declined to pursue. The Defendants cite *Gale*, where Belobaba J. wrote, at para. 17, that the *BIA* “provides a comprehensive regime for the reorganization of a failing debtor's assets and for the equitable distribution among creditors in accordance with established legal priorities and procedures.”

The Plaintiff's s. 38 Arguments

60. The Plaintiff contends that this is not a case where he has brought an action “related to the property of the bankrupt” CPBI. He seeks nothing from CPBI or on its behalf. Rather he seeks to sue 117 and pierce the corporate veil of both CPBI and 117 to sue their principals, the Hancos.

61. The Plaintiff cites *Indcondo Building Corp. v. Sloan*, 2012 ONCA 502, 352 D.L.R. (4th) 235, leave to appeal refused, 2013 CanLII 384 (S.C.C.), where Goudge J.A., writing for the court, stated at paras. 23-24:

23 In *Shaw Estate (Trustee of) v. Nicol Island Development Inc.*, 2009 ONCA 276, 51, C.B.R. (5th) at 12, this court set out the purpose of s. 38 of the *BIA*. Speaking for the court, Cronk J.A., at para. 37, cited with approval *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* (1994), 27 C.B.R. (3d) 1 (Alta. C.A.), at paras. 14-15, leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 346:

In my view, its primary purpose is to ensure that the bankrupt's assets are preserved for the benefit of the creditors. It provides the mechanism for creditors to proceed with an action when the trustee refuses or fails to act; thereby ensuring that assets of the bankrupt (which may otherwise go unrecovered) are available to creditors willing to finance the litigation.

The secondary purpose, relating to notice, is to make sure the section operates fairly. While it is fair that those parties willing to accept the risks and costs of litigation receive a preference in terms of recovering their losses, the right to that preference must be shared with all creditors.

24 Cronk J.A. went on at para. 72, to clearly describe the difference I have delineated:

A creditor obtaining a s. 38 order advances not his or her own cause of action but, rather, the trustee's cause of action: *Re Zammit* (1998), 3 C.B.R. (4th) 193 (Ont. Gen. Div.), at para. 4. The proceeding authorized by a s. 38 order is brought on the basis that the trustee in bankruptcy has the right to bring the action, and the creditor with a s. 38 order is taking the action as if the creditor were the trustee. As the Motion Judge indicated, once a s. 38 order is made, the creditor to whom it is granted stands in the shoes of the trustee: see for example, *Swerdlow*, at para. 17. This accords with the intended purpose of s. 38(1) of the Act, namely, to ensure that the bankrupt's assets are preserved for the benefit of all creditors.

62. The Plaintiff says that his claim is not one that the trustee of CPBI's bankruptcy could make. The Plaintiff does not claim that CPBI transferred assets to 117 or the Hancos or there was an improper preference given to another creditor, which are the typical s. 38 circumstances.

63. The Plaintiff points to *Canada (Attorney General) v. Standard Trust Co.* (1991), 84 D.L.R. (4th) 737 (Ont. Gen. Div.), where Houlden J.A., writing for the Ontario Court (General Division), found that a trustee in bankruptcy cannot bring an oppression claim against the directors of a bankrupt corporation. As Houlden J.A. wrote at p. 744:

A trustee in bankruptcy takes the property of a bankrupt as he finds it. Subject to statutory provisions, such as those dealing with fraudulent preferences and settlements, he only succeeds to the rights of the bankrupt and has no higher or

greater rights. The trustee in bankruptcy stands in the shoes of the bankrupt, except where statutory provisions otherwise decree. [Citations omitted.]

64. Houden J.A. added at para. 15 that oppression under the *Business Corporation Act* “is a personal remedy; it belongs to the person who has been oppressed by the actions of the corporation or its affiliates... The trustee in bankruptcy, as I have said, has no higher rights than the bankrupt corporation, and consequently, it cannot bring the [oppression] application under s. 247 [now s. 248].”

65. The Plaintiff argues that his claim is a personal one, which does not belong to CPBI’s trustee. That trustee cannot seek to pierce the corporate veil of the bankrupt corporation, CPBI, to hold its principals or affiliates liable for conduct in which they and the bankrupt corporation were involved. As he states in his factum:

The creditor seeks damages from the directing minds or corporate affiliates to rectify a wrong to the creditor. Since the wrong was committed against the creditor the claim belongs to the creditor rather than the bankrupt or the trustee. That type of claim does not belong to bankrupt’s property or seek a return [of] the bankrupt’s assets for the benefit of all creditors.

66. The Plaintiff also relies on the following cases in which s. 38 was not invoked in allowing proceedings to continue despite the fact that one of the defendants was bankrupt:

- a. In *Can-Industrial Electric v. City of Toronto*, 2022 ONSC 7376, Ilchenko A.J. lifted the stay of proceedings against the bankrupt corporation but did not refer to s. 38. As he wrote at para. 17:

The Bankrupt is the only defendant to the Action that is a bankrupt, for which a lift stay order is required. None of the other defendants to the Action, being Vincenzo, Fabrizio, Maria and Michele Gallucci (the “**Individual Defendants**”) are bankrupt.

- b. The same result occurred in *Syndic de 9332-8102 Quebec Inc.*, 2022 QCCS 2621, where the stay was lifted, not to obtain judgment against the bankrupt corporation but to pierce its corporate veil and obtain judgment in fraud

against the bankrupt corporation's alter ego: see paras. 30, 43. Once again, there was no reference to s. 38.

- c. In *Re Reza Khoshnik*, 2026 ONSC 1581, the creditor had sued what he said was a former business partner (the "partner") and two corporations for fraud, misrepresentation, breach of trust, conversion, conspiracy, unjust enrichment, and oppression. The suit arose out of an alleged business arrangement between the plaintiff, the partner, the partner's wife and two corporations to buy, renovate and sell various properties. The creditor claimed that the partner used the two corporations as his alter egos in carrying out the various torts against him. Thus, he sought to pierce their corporate veils. After the partner (but not the two corporations) declared bankruptcy, the creditor moved to lift the automatic stay. Ilchenko J.A. granted his request but in doing so, did not refer to or cite the need to invoke s. 38 regarding the claim against the two corporations.

67. Relying on these cases, the Plaintiff asserts that the Hancos used a variety of business entities and names interchangeably and as alter egos for an improper purpose, to mislead him and allow them to act negligently and in breach of contract. That is why he seeks to pierce the corporate veils of CPBI and 117. As he points out, neither CPBI nor its trustee could do that.

68. The Plaintiff adds that he is not seeking to recover property which belonged to CPBI or which vested in the trustee. Nor is he challenging the propriety of CPBI's bankruptcy. Rather he seeks to obtain judgment against the Hancos, personally, as well as against 117, for what he describes as damage that they caused him by conducting their affairs interchangeably with CPBI.

69. Without judging the merits of his claims against the Defendants, I accept the Plaintiff's arguments that he is not required to bring a s. 38 application in order to continue this action. His claims are not claims for the assets of CPBI nor are they claims which its trustee could make. Thus, for the reasons offered by the Plaintiff, as set out

above, I find that it is not necessary for the Plaintiff to apply under s. 38 to continue this action.

Issue No. 3: If the Plaintiff requires authorization under s. 38 to continue this action, should this court grant that authorization?

70. Because of my finding above, it is not necessary to answer this question. If I am wrong about the ability of the Plaintiff to continue this action without leave under s. 38, I would grant the Plaintiff leave under s. 38.

71. I say that because the Plaintiff satisfies the criteria for leave under s. 38 set out in para. 53 of *Shaw Estate*, cited above. There, Cronk J.A. explained the application of the three prerequisites for the invocation of s. 38, as follows:

There are three prerequisites to the invocation of s. 38(1): (i) the applicant for a s. 38 order must be a creditor of the bankrupt; (ii) the applicant must request the trustee in bankruptcy to take the proceeding that the applicant believes would be for the benefit of the estate of the bankrupt; and (iii) the trustee must refuse or neglect to take the requested proceeding. Where these prerequisites are satisfied, the court, in the exercise of its discretion, may grant leave to the applicant to take the proposed proceeding in its own name and at its own expense and risk, subject to notice of the contemplated proceeding being given to the bankrupt's other creditors.

72. Here:

- a. The Plaintiff had a claim against CPBI at the time of its bankruptcy, under the broad definition of the relevant terms found in the *BIA*. The term, “creditor” is defined as “a person having a claim provable as a claim under this Act”. The term, “claim provable in bankruptcy”, is defined as “any claim or liability provable in proceedings under this Act by a creditor”. The Plaintiff had both the claim he made in the Counterclaim and a costs award against CPBI.

- b. The Plaintiff did request the position of CPBI's trustee regarding this action. While not explicit, that request implicitly requested the trustee to take on the action.
- c. As set out above, the trustee responded that it "is not pursuing any action whatsoever against any party" and offered "no comment as to [the pursuit] of any other parties involved." If I am incorrect that the Plaintiff's request of the trustee can be read as an implicit request to take on the action, I find that the request and responding position expressed by the trustee made such an explicit request unnecessary.

Thus, the Plaintiff would meet the criteria of s. 38, if he were required to do so.

Conclusion

73. For the reasons cited above, I dismiss the Defendant's motion.

Costs

74. I have already asked counsel to agree on the costs payable to the successful party in this motion. They were unable to do so and called upon me to make that determination.

75. Nonetheless, the parties should again attempt to resolve the issue of costs on their own. If they remain unable to do so, the Plaintiff may submit his costs submissions of up to three pages, double spaced, one-inch margins, plus a bill of costs/costs outline and offers to settle within 14 days of release of this endorsement. He need not include the authorities upon which he relies so long as they are found in the commonly referenced reporting services (i.e. CanLII, LexisNexis Quicklaw, or Westlaw) and the relevant paragraph references are included. The Defendants may respond in kind within a further 14 days. No reply submission will be accepted unless I request it. If I have not

received any submissions within the time frames set out above, I will assume that the parties have resolved the issue and will make no costs order.

Kurz J.

Released: July 22, 2026