IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jenor Steel Incorporated v. 466372 B.C. Ltd.,* 2023 BCSC 369

Date: 20230221
Docket: S209046
Registry: Vancouver

Between:

Jenor Steel Incorporated

Petitioner

And

466372 B.C. Ltd. and Sonic Holdings Ltd.

Respondents

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	E. Aitken
Counsel for the Respondents:	E. Clavier
Counsel for the Application Respondent, DC Machine Parts Inc.:	P. Loewen
Place and Dates of Hearing:	Vancouver, B.C. February 16-17, 2023
Place and Date of Judgment:	Vancouver, B.C. February 21, 2023

[1] The Petitioner, Jenor Steel Incorporated (“Jenor”), and the Respondent, 466372 B.C. Ltd. (“466”), are each 50% owners of an industrial commercial property in Chilliwack. The Respondent, Sonic Holdings Ltd. (“Sonic”), although not one of the property owners, is the lessor of the property to a tenant named DC Machine Parts Inc. ("DC Machine"). Mr. Ray Roussy owns and controls both 466 and Sonic. The property occupies 1.63 acres. It houses a building of about 14,500 square feet. DC Machine carries on business there.

[2] In this application, Jenor applies for an order approving the sale of the property to Thomas Strahl under an agreement made December 28, 2022. Jenor also requests an order that 466, Sonic, and DC Machine deliver possession of the property to Jenor and a writ of possession requiring DC Machine to deliver vacant possession to Jenor. Related orders are sought as found in Jenor's notice of application filed December 29, 2022.

[3] This Court has already ordered that the property be sold. Justice Kirchner made that order in reasons dated May 20, 2022.

[4] Two decisions of this Court set out the factual context of this dispute. The first is the one by Justice Kirchner. The citation for his reasons is *Jenor Steel Incorporated v. 466372 B.C. Ltd.*, 2022 BCSC 1135. The second decision was by Mr. Justice Ross on December 16, 2022, cited as 2022 BCSC 2307. I will be referring to both decisions but a reader of my reasons today on the present application should, before proceeding further, have read both of those judgments. They reveal a bitter dispute. As much as Jenor wants to get the property sold as Justice Kirchner ordered, the Respondents want there to be no sale or, if a sale is necessary, to have the property sold only as is. That is, with DC Machine continuing to operate at the site.

[5] Jenor wants to sell the property vacant, that is with DC Machine gone, because according to the best available evidence, the property is worth several millions of dollars more on the market when vacant than it is with the existing tenant in place.

[6] The Kirchner order last May also ordered, among its further provisions, that the listing agent for the sale be John Eakin, an experienced local realtor. Mr. Eakin had acted for Tom Savage, the owner of Jenor, and Mr. Roussy when their companies bought the property in 2007.

[7] The proposed sale now before the Court includes vacant possession as one of its terms, and is for $7.5 million. It can be sold in that price range only if it is sold with vacant possession. The Kirchner order stipulates that the property is to be listed at the price recommended by Mr. Eakin. Mr. Eakin fully supports the $7.5 million sale price. His evidence is that if the property is sold only with the tenant remaining in place under a fixed-term lease, the property's value in the market is only around $3.5 million. Mr. Eakin also gave evidence that the rent paid by DC Machine at present is below market. Further, he testified that every one of the 11 parties expressing interest to purchase the property either requested or stipulated that they wanted vacant possession. As Justice Kirchner found at para. 97 of his reasons, after reviewing the law:

> [97] … I agree that the impact on others who do not own the property but who are presently leasing it does not provide good reason to refuse the order for sale.

[8] I would add, parenthetically, that in the four affidavits filed in the present application by DC Machine, including affidavits from two directors of DC Machine, I did not see clear evidence of prejudice to that company resulting from a move from the premises that might be necessary under the order requested on this application. Nonetheless, in case there is evidence I have missed in the voluminous materials on this urgent application, I will assume there is some degree of prejudice to DC Machine from a move.

[9] I will say something more about the DC Machine lease because it was raised before me as a substantial reason against exercising my discretion to approve the sale that is requested on this application. As noted earlier, Justice Kirchner did not accept that a lease to DC Machine on the facts of this case constituted a good reason not to order a sale (see paras. 73, 77-81, 89-97 of the Kirchner reasons). He

found also at para. 95 that any financial benefit 466 obtains from the lease is not a basis for denying a sale under s. 6 of the *Partition of Property Act*, R.S.B.C. 1996, c. 347 [*PPA*].

[10] The hearing before Justice Ross was on December 12-14, 2022, with judgment on December 16, 2022. He found that a lease dated November 9, 2015, between Sonic as landlord and DC Machine as tenant had lapsed and that DC Machine was only an overholding tenant on a month-to-month tenancy. Mr. Eakin on December 16, after the Ross judgment, asked Sonic to deliver to DC Machine a notice to vacate the premises by the end of January. However, again on the same day, that is December 16, unbeknownst to Jenor, Sonic entered a new lease with DC Machine commencing January 1, 2023, with a 10-year term and a five-year right of renewal. Sonic did not produce that lease to Jenor until January 11, despite Jenor's requests that it do so from the time that Jenor learned of it. The correspondence surrounding the formation of the new lease has not been produced, although Jenor has requested it. The new lease was, in my view, 466's most recent effort to stop the sale of the property, despite the Kirchner order and supporting reasons. Sonic and DC Machine knew, on December 16, 2022, both that the Court had already ordered a sale in May of last year, which included in paragraph 5 an order that 466 and Sonic would not interfere with the listing (at the price Mr. Eakin recommended per paragraph 5 of the order), and that Justice Ross found DC Machine to be only a month-to-month tenant. The new lease for a fixed term was one in a series of efforts to circumvent the Kirchner order of sale. I have not mentioned the 18-day trial and Justice Watchuk's reasons on October 1, 2019, dismissing Mr. Roussy's claim through Sonic against Mr. Savage of Jenor, which decision was upheld by the Court of Appeal on November 23, 2021, with leave to appeal dismissed by the Supreme Court of Canada, nor have I made reference to the hearing before Justice Skolrood, as he then was, when on this Court, resulting on October 13, 2022, in him ordering 466 to sign the then-current listing agreement for selling the property, which 466 then stated in writing it was doing "under protest". There have been other hearings as well. Justice Edelmann on November 2, 2022, had to order DC Machine to provide access to Mr. Eakin and others attending the

property for the purpose of the sale process and to prohibit DC Machine from interfering with access and from distributing information to attendees essentially disparaging the property. What the hearings have in common is 466 and its agents doing all they can to avoid having this land sold. As Mr. Roussy's lawyer wrote to Mr. Savage back in 2015, Mr. Roussy is intent on retaining the Chilliwack property "one way or another". Nothing has changed. (I would note that the lawyer mentioned there is not the Respondents' present counsel.)

[11] I respectfully adopt paras. 33, 34, and 96 from the Kirchner reasons:

> [33] Mr. Savage said he does not want to continue to hold any property jointly with Mr. Roussy or his companies. It is clear that the relationship between Mr. Roussy and Mr. Savage is irrevocably damaged and, indeed, highly acrimonious.
>
> [34] It is also clear that the purpose for which they jointly acquired the Chilliwack Property has long been spent with the bankruptcy of SDSI in 2014.
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> …
>
> [96] I agree with the petitioners [Jenor] when they say the respondents [466 and Sonic] are effectively asking the court to permit the respondents to continue operating in a way by which they derive the sole benefit of the Chilliwack property on an indefinite basis and on terms neither party has agreed to. I agree that is fundamentally unfair to Jenor as the other co-owner.

[12] The urgency behind these reasons has perhaps resulted in portions of them being slightly out of sequence, but I want to include a further word about the lease to DC Machine. Sonic buys from DC Machine some DC Machine product for use in Sonic's business. Sonic, as the landlord for DC Machine, does not hold that position in the normal way; that is, as an owner of the land. Sonic has no ownership of the property. Instead, Sonic was only an assignee, in about 2015, of an interest of the Business Development Bank of Canada, who was an earlier lender to the business Mr. Savage and Mr. Roussy started together. As I noted before, Mr. Roussy owns both 466 and Sonic. He is, in my view, in somewhat of a conflicted position, at least in the sense that 466 stands to benefit from the sale of the property for $7.5 million but Sonic stands to lose rent revenue under the lease with DC Machine. Fortunately, Justice Kirchner's order stipulates a holdback of $4.5 million from the sale which will

be the subject of an accounting, also ordered, in which Sonic's interests can be considered. Sonic therefore is protected.

[13] Mr. Savage, who owns Jenor, is 68. He needs money from the sale partly to pay bills from his prolonged but successful legal dispute with Mr. Roussy. The business relationship between the two men has disintegrated to nothing.

Applicable Law

[14] As is often the case, the facts of this case largely drive the proper outcome without the law being in serious dispute.

[15] Before turning to the substantive law for the application, I address briefly a submission the Respondents, and, more particularly, DC Machine made that the Ross order estops Jenor from succeeding on the present application. As I understand the submission, Justice Ross' reasons found a landlord-tenant relationship between Sonic and DC Machine, with the result, it is argued, that only Sonic can stop the tenancy, not Jenor and not the Court. However, the application before Justice Ross was not under the legislation or rules governing the present application, nor was Justice Ross intending to intrude upon this Court's jurisdiction flowing from the Kirchner order. In my view, the discretion given to the Court under the partition legislation and the Supreme Court Rules referred to below is not intended to be taken away, and is not taken away, by the fact that there is a tenant interest that may be curtailed by an order for sale, either under the partition legislation or the Supreme Court Rules. The existence of a tenant instead is only a factor for the Court to take into account in the balancing of interests on the present application.

[16] Turning to the substantive law, s. 6 of the *PPA* provides:

> In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it

> sees good reason to the contrary, order a sale of the property and may give directions.
>
> [Emphasis added.]

[17] Thus, there is a presumption favouring a sale. There needs to be a good reason to not sell.

[18] Jenor also relies on Rule 13-5(1) and (4) of the *Supreme Court Civil Rules* addressing sales by the court:

> **Rule 13-5 — Sales by the Court**
>
> **Court may order sale**
>
> (1) If in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.
>
> …
>
> **Directions for sale**
>
> (4) The court may give directions for the purpose of effecting a sale, including directions
>
> …
>
> (f) settling the particulars or conditions of sale,
>
> …
>
> (i) that any conveyance or other document necessary to complete the sale be executed on behalf of any person by a person designated by the court, …
>
> [Emphasis added.]

[19] Justice Huddart, as a member of this Court, addressed the above provisions, as they stood in 1991, in an application to fix the terms of an order to sell in *Jabs Constructions Ltd. v. Callahan* (1991), 61 B.C.L.R. (2d) 383 (S.C.). After a review of English and Canadian authorities addressing whether a sale should be ordered (see paras. 12-23 of her reasons), she concluded, at para. 24, as follows:

> Taking guidance from these decisions I am satisfied that this court's primary goal in crafting a process of sale must be fairness to both parties. The court must apply an even hand to ensure that the maximum mutual benefit is obtained. The primary criterion will be the pecuniary result. That will involve

> necessarily a consideration of each party's commercial interests. An important secondary factor will be the integrity of the court process.
>
> [Emphasis added.]

[20] In my view, that passage has application on the current motion and, in my view, both of the criteria Justice Huddart derived from the case law addressing sales have application here, and support the orders Jenor requests. The pecuniary result of the proposed sale clearly confers substantial financial benefit on both Jenor and 466 as the two owners, particularly when contrasted with a sale of the property as the Respondents advocate with the DC Machine lease kept in place. The sale price of the land when vacant is probably more than double the sale price of the tenanted land.

[21] Justice Huddart spoke of the integrity of the court process as an important secondary factor. I am not making any finding of unlawful conduct on the part of 466 or Mr. Roussy in the protracted court process over the past eight years or so, but I do find that 466 has devoted itself to trying to prevent a sale which this Court has already ordered. The excuse 466 advances is that all it is really doing is advocating its view of what the sale should be, that is with the property remaining with a tenant, but 466 knows that such a sale would derive such a small return that no one will support it, thus preserving the *status quo* of no sale. 466 has been challenging the court process for some time with its sequence of obstructive positions. (I want to be clear that I cast no aspersion on Respondents' counsel in that regard.)

[22] On both grounds expressed by Justice Huddart, in the exercise of my discretion, I grant the orders requested in Jenor's notice of application, with new dates being inserted for particular closing events as necessary. The alternative, that is, to rule against the application, would be to have possibly years more of stalemate between two owners whose relationship is now wholly dysfunctional.

[23] Costs can be spoken to.

[24] I thank all three counsel for their strong and helpful submissions.

"Macintosh J."