IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sanovest Holdings Ltd. v. Ecoasis Pacific Properties LP,* 2023 BCSC 2092

Date: 20231031
Docket: S233683
Registry: Vancouver

Between:

Sanovest Holdings Ltd.

Petitioner

And

Ecoasis Pacific Properties Limited Partnership

Respondent

Before: The Honourable Justice Blake

Oral Reasons for Judgment

In Chambers

Counsel for Petitioner:	L.C. Hiebert
Counsel for Respondent:	S. Turner
Place and Date of Hearing:	Vancouver, B.C. October 12, 2023
Place and Date of Judgment:	Vancouver, B.C. October 31, 2023

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I. INTRODUCTION

[1] Sanovest Holdings Ltd. (“Sanovest Holdings”) brings the within petition for an order appointing MNP Ltd. as the receiver over all of the assets of Ecoasis Pacific Properties Limited Partnership (“Ecoasis Pacific LP”) on the basis that they say Ecoasis Pacific LP has defaulted on a loan Sanovest Holdings made to Ecoasis Pacific LP. Specifically, Sanovest Holdings says it demanded that Ecoasis Pacific LP repay the amount of US $3,634,253.62 on April 19, 2023, and Ecoasis Pacific LP has failed to repay this amount.

[2] Ecoasis Pacific LP opposes the appointment of a receiver over its assets, and has brought an application in the within petition to be heard at the same time as this petition, to convert the petition into an action and to be granted leave to file a counterclaim. Ecoasis Pacific LP says that it currently holds the sum of approximately US $1,920,000 in an account with HSBC, and that it has received advice that it may receive further tax refunds of up to US $1,560,000. It offers to hold these amounts, which may total as much as US $3,500,000, in an interest-bearing HSBC account, on an undertaking to this Court it will not distribute the funds pending resolution of the issues in this proceeding. It also advises it will accept any other orders this Court makes with respect to holding the cash assets secure.

[3] While Ecoasis Pacific LP does not dispute that Sanovest Holdings provided it with financing, it disputes whether Sanovest Holdings advanced the full amount it committed to advance pursuant to the loan documents. It also disputes the rate of interest due and owing pursuant to that loan, and it alleges that Sanovest Holdings has breached obligations it verbally agreed to at the time of the closing of the agreement.

II. BRIEF BACKGROUND

[4] Ecoasis Pacific LP is a British Columbia limited partnership, which was formed for the purpose of pursuing a real estate development in Hawaii. This project involved the purchase of four residential lots in the community of Hualalai, on the Big

Island of Hawaii, and the construction of high-end residences on those lots (the "Hualalai Project").

[5] There are two limited partners of Ecoasis Pacific LP: 610274 BC Ltd. and Sanovest Properties Ltd. 610274 BC Ltd. is a BC company controlled by Daniel Matthews and his wife. Sanovest Properties Ltd. is a BC company controlled by Tom Kusomoto and his son Tian Kusomoto. The Kusomotos also control the petitioner Sanovest Holdings. Each of 610274 BC Ltd. and Sanovest Properties Ltd. hold 50% of the partnership units in Ecoasis Pacific LP.

[6] To pursue the Hualalai Project, Dan Matthews and Tom Kusomoto formed a Hawaiian company called Ecoasis Hualalai Homes Ltd., to act as the general partner for Ecoasis Pacific LP. Dan Matthews and Tom Kusomoto each hold 50% of the shares of Ecoasis Hualalai Homes Ltd.

[7] Pursuant to a commitment letter dated November 14, 2013, Sanovest Holdings advanced funds to Ecoasis Pacific LP (collectively the "Loan"). The Loan principal was to be US $12,000,000. On the face of the Loan documents, the interest rate applicable was 19%. The Loan requires Ecoasis Pacific LP to pay the Lender all fees (including legal fees on a solicitor and own client basis), costs and expenses incurred by the lender in connection with the enforcement of the Loan.

[8] Pursuant to the terms of the Loan, an event of default will have occurred if Ecoasis Pacific LP:

a) fails to pay the Loan on demand by Sanovest Holdings;

b) fails to comply with any other obligation under the Loan; or

c) defaults on any other payment due to Sanovest Holdings under the Loan, or any other agreement with Sanovest Holdings.

[9] As security for the Loan, Ecoasis Pacific LP granted to Sanovest Holdings a security interest in all of its present and after-acquired personal property, pursuant to a signed written security agreement dated November 14, 2013 and registered in the

British Columbia Personal Property Security Registration System under base registration number 662909H, and renewed under base registration number 745557M (the "Borrower GSA").

[10] Clause 6.1 of the Borrower GSA provides that the happenings of one or more Events of Default (as defined in the Loan, and as set out above) will constitute an Event of Default under the Borrower GSA. Clause 6.5(b) of the Borrower GSA provides that upon and following the occurrence of an Event of Default (as defined therein), Sanovest Holdings may enforce its rights by applying for a court-appointed receiver. Clause 6.5(e) of the Borrower GSA provides that any time after the security interests created in the Borrower GSA have become enforceable, Sanovest Holdings may appoint in writing any qualified person to be a receiver of the Collateral (as defined therein). Ecoasis Pacific LP does not dispute that the Borrower GSA expressly provides the Lender the ability to appoint a receiver over the Debtor's assets, undertakings and collateral.

[11] Further, as security for the Loan, Ecoasis Pacific LP granted mortgages over Lots 1-4 of Hualalai Resort Phase 2-C Subdivision No. 3 (the "Mortgages") (the "Properties"). The Properties were sold between 2019 and 2021, and the Mortgages were discharged.

[12] There is a dispute as to the actual agreement between the parties with respect to the interest rate they agreed to. Notwithstanding the Loan documents, Ecoasis Pacific LP disputes that 19% is the applicable rate of interest, and takes the position that the real interest rate agreed to between Ecoasis Pacific LP and Sanovest Holdings was 8%. It says that the face rate of the Loan was established on the advice of tax lawyers and accountants retained by Ecoasis Pacific LP, but there was a verbal agreement between the parties that Sanovest Holdings would in fact only receive an 8% interest return on the Loan, and that the remaining 11% would be treated as the partners' residual equity and divided equally between them (the "Verbal Interest/Equity Agreement"). Sanovest Holdings disputes the existence and the terms of the Verbal Interest/Equity Agreement.

[13] Ecoasis Pacific LP also argues that in furtherance of the Hualalai Project, and in consideration for the substantial time and effort devoted to the Hualalai Project by Mr. Matthews and his wife, as well as remuneration paid to an assistant, Sanovest Holdings verbally agreed that it would:

a) provide an accounting of the Loan, including all disbursements and receipts;

b) fund the cost of preparing Canadian financial statements and tax returns for Ecoasis Pacific LP and its limited partners out of proceeds from sales of the Hualalai Project;

c) pay other closing costs, all in priority to repayment of the Loan;

d) pay the balance outstanding on the Loan (at 8%); and

e) distribute the balance, if any, equally to Ecoasis Pacific LP's limited partners, 610274 BC Ltd., and Sanovest Properties Ltd.

(collectively the "Verbal Closing Obligations Agreement").

[14] Tom Kusomoto has not provided his position with respect to the existence of the alleged Verbal Closing Obligations Agreement.

[15] Ecoasis Pacific LP does not dispute that it owes funds to Sanovest Holdings; rather it disputes the total amount Sanovest Holdings advanced, and the interest rate applicable to those advancements. It disputes that Sanovest Holdings advanced the total of the sum of US $12,000,000 to Ecoasis Pacific LP, and puts Sanovest Holdings to the strict proof thereof. It acknowledges that in 2013, Sanovest Holdings initially advanced approximately US $9,000,000 to fund the purchase of the four lots in Hualalai, and advanced further funds to cover some construction costs. However, it says Sanovest Holdings never provided an accounting of the Loan and is in breach of the Verbal Closing Obligations Agreement.

[16] By letter dated April 19, 2023, Sanovest Holdings demanded Ecoasis Pacific LP repay the indebtedness they said remained due and owing (the "Demand Letter"). They gave notice in the Demand Letter that if the total amount demanded was not received by April 29, 2023, Sanovest Holdings would commence legal proceedings without further notice. Ecoasis Pacific LP did not repay any of the debt.

III. ISSUE

[17] Ecoasis Pacific LP says Sanovest Holdings makes a bold assertion that the amount outstanding under the Loan as at April 2023 was US $3,634,253.62, but has provided no accounting with respect to the calculation of that amount. Further, Ecoasis Pacific LP argues that the applicable interest rate should be 8% per annum, not 19%, and the excess should be recorded as profit, not debt.

[18] Ecoasis Pacific LP takes the position that in all of the circumstances, a receiver should not be appointed but rather that this petition should be converted to an action, and that they should have leave to file the counterclaim attached to their response to petition.

IV. ANALYSIS

[19] Sanovest Holdings relies upon s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253, which states as follows:

> **Injunction or mandamus may be granted or receiver appointed by interlocutory order**
>
> **39** (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.
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> (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.
>
> (3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

[20] The parties are largely in agreement on the applicable legal principles. The law is clear that the granting of a receivership order is "extraordinary relief which should be granted cautiously and sparingly": *Cascade Divide Enterprises, Inc. v. Laliberte*, 2013 BCSC 263 at para. 81.

[21] Current jurisprudence establishes that notwithstanding loan and security documents contemplate the appointment of a receiver upon an event of default, that is not sufficient for an automatic appointment of a receiver: *Bank of Montreal v. Gian's Business Centre Inc.,* 2016 BCSC 2348 at paras. 22–24. Rather, "the courts should review the matter holistically and decide whether on the whole of the circumstances it is, in fact, just and convenient to appoint a receiver". The analysis has been described as calling for "a robust review of all the circumstances": *Bank of Montreal* at para. 24.

[22] In determining whether the appointment of a receiver is just or convenient, the caselaw has made clear the Court is to consider many different factors. In the often-cited decision of *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527, the Court listed numerous factors that may be considered in deciding whether to appoint a receiver. In the recent decision of *Pandion Mine Finance Fund LP v. Otso Gold Corp.,* 2022 BCSC 136, Justice Gomery provided a useful summary of the applicable law:

> [53] The purpose of a court-ordered receivership, generally, is to preserve and protect property pending the resolution of issues between the parties: *Lamare Lake* at para. 51. The cases identify a long list of considerations to be taken into account in determining whether the appointment of a receiver is just or convenient. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527 at para. 25, Masuhara, J. adopted a list of factors from a leading test, *Bennett on Receivership, 2nd ed.* (Toronto: Carswell, 1999) at p. 130. This approach was affirmed in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477 at paras. 21 – 55. The factors are:
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> > a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
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> > b) the risk to the security holder taking into consideration the size of the debtor's equity in the asset and the need for protection or safeguarding of the assets while litigation takes place;

> c) the nature of the property;
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> d) the apprehended or actual waste of the debtor's assets;
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> e) the preservation and protection of the property pending judicial resolution;
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> f) the balance of convenience to the parties;
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> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
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> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
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> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
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> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
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> k) the effect of the order upon the parties;
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> l) the conduct of the parties;
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> m) the length of time that a receiver may be in place;
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> n) the cost to the parties;
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> o) the likelihood of maximizing return to the parties;
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> p) the goal of facilitating the duties of the receiver;
>
> p) the goal of facilitating the duties of the receiver.
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> [54] These factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Bank of Montreal v. Gian's Business Centre Inc.,* 2016 BCSC 2348 at para. 23.
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> …
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> [59] A court-appointed receiver is objective and neutral, characteristics of particular importance in a case involving competing claims and factual disputes. The receiver may seek assistance from the court. In the context of a receivership, the court may give directions for the resolution of contentious issues.

[23] In *CMI Roadbuilding Inc. v. Key-West Asphalt Products Ltd.,* 2022 BCSC 1789 at para. 33, Justice Macintosh made clear that a receiver can be appointed even where the facts are actively disputed, provided the "evidence establishes the basis for the appointment consistent with the tests found in cases such as *Maple Trade Finance".* See also *Ward Western Holdings Corp. v. Brosseuk*, 2021 BCSC 919 at para. 41.

[24] Ecoasis Pacific LP argues that it is neither just nor convenient for a receiver to be appointed, and rather says it is appropriate to convert the within petition to an action, and allow them to bring a counterclaim in that action. They argue there is no risk of dissipation of assets at this time, the business of Ecoasis Pacific LP has concluded, and they will suffer stigma and prejudice if a receiver is appointed. They rely upon the decision of *Southern Cone Capital Ltd. v. EnVest Food Products (Mauritius) Ltd.,* 2017 BCSC 2385:

> [43] There is no emergency or risk of dissipation of assets at this time. SCC has perfected the majority of its security with the shares being held at the registered office of DLC in British Columbia. These shares are currently held by DLC's solicitors. Conveniently, DLC's office is in the exact same location as that of SCC's office. While there is one share certificate in Mauritius, there is no allegation the shares cannot be traded. Mr. Pajak, being the majority shareholder in DLC, could transfer that share certificate as required. The one instance of alleged dissipation is alleged to have occurred in 2014. This timeline belies urgency and does not establish the pressing need required in such an instance or as shown in Cascade. Very few, if any, of the factors as discussed in Maple Trade can be considered applicable.
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> [44] The only real benefit of a receivership for SCC is what has been expressed to be a desire for an orderly and cost-effective way of managing the process through a court appointed receiver. That, however, is not sufficient to overcome the stigma and prejudice suffered when a receiver is appointed (see *Korion Investments Corporation v. Vancouver Trade Mart Inc.,* [1993] B.C.W.L.D. 2928 (S.C.).

[25] However, I am not persuaded that it is appropriate in the circumstances to convert the within petition to an action. Notwithstanding R. 22-1(7)(d) of the *Supreme Court Civil Rules* provides that I may make such an order, even if I were to do so, the petition as currently formulated would not address the issues Ecoasis Pacific LP wishes to address. It acknowledges that if I were to order the petition to be converted to a notice of civil claim, I would also have to order that Sanovest Holdings amend the relief they sought in the petition not to seek the appointment of a receiver, but rather to seek repayment of the alleged debt. That is, to amend it to frame their claim in a manner that allows Ecoasis Pacific LP to assert the defences to the debt claim it wishes to assert. That is, in my opinion, not appropriate.

[26] I am satisfied that there has been a default, and that Sanovest Holdings is entitled, under the terms of their security, to appoint a receiver.

[27] Further, notwithstanding Ecoasis Pacific LP's argument that a receiver ought not to be appointed, as it is willing to undertake to this Court that it will hold all of its cash assets in an interest-bearing HSBC account pending resolution of the issues in this proceeding, I am persuaded that it is just and convenient to appoint a receiver in all of the circumstances. I say this for the following four reasons.

[28] First, when I consider whether irreparable harm may be caused if no receivership order is made, I am satisfied that notwithstanding Ecoasis Pacific LP's argument that it may suffer stigma and prejudice if such an order is made, there is greater potential harm to Sanovest Holdings with the continuing delay in having their claim resolved, and payment made on the outstanding debt.

[29] Second, the risk to Sanovest Holdings is a significant factor. The evidence establishes that the funds remaining to pay the outstanding amount due and owing will be less than the amount Sanovest Holdings has demanded. In these circumstances, this factor favours the appointment of a receiver.

[30] Third, when I consider the balance of convenience of the parties, I am satisfied that it is clear that it favours Sanovest Holdings. Notwithstanding the fact that the parties have conflicting views of what is due and owing, I am satisfied that the evidence establishes the basis for the appointment. Ecoasis Pacific LP does not dispute the funds are due and owing, but wishes to advance arguments that verbal agreements exist which may affect the total amount ultimately found to be owing. Those arguments can be advanced in the receivership proceeding, and it is neither appropriate nor convenient to order this petition be converted into an action, and the action amended to seek the relief in a manner that Ecoasis Pacific LP can defend in the manner it wishes to. Converting the petition in the manner proposed would be costly, time consuming, and may ultimately be unnecessary.

[31] Finally, when considering both the enforcement of rights by Sanovest Holdings under the Borrower GSA, and the potential costs to the parties, notwithstanding that there are costs associated with a receivership, I am satisfied it is possible that a receivership may ultimately be less costly than the process

advocated for by Ecoasis Pacific LP. I say this because many, if not all, of Ecoasis Pacific LP's arguments may either be determined by the receiver, or alternatively, if necessary, by way of an application for directions in the receivership. This is a cost-effective manner of resolving the dispute, and it also militates in favour of the appointment of a receiver. Notwithstanding there may ultimately be litigation, nonetheless the appointment of an objective and neutral receiver may either resolve or narrow many of the competing claims, or at least streamline the necessary litigation in an efficient manner.

V. CONCLUSION

[32] Upon a thorough consideration of all of the circumstances, I am satisfied it is appropriate to appoint MNP Ltd. as receiver pursuant to s. 39 of the *Law and Equity Act*. The petition is granted in the form of order proposed by counsel for the petitioner, and the application of Ecoasis Pacific LP is dismissed.

[33] As these were given as oral reasons, they have been edited without change to the substance or result.

'Blake, J.'