IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. Howse,*
2024 BCSC 1334

Date: 20240718
Docket: 1400445
Registry: Kelowna

Between:

Jason Smith

Plaintiff

And

Simon Howse, Parastone Developments Ltd., Montane Developments Ltd., West Fernie Developments LP, 578097 BC Ltd., 0875750 BC Ltd., Eeto and Unta Holdings Ltd., Hanover Can Co. ULC, Parastone Holdings Ltd., 901 Fernie Property Developments Ltd. and 901 Fernie Limited Partnership

Defendants

Before: The Honourable Justice Branch

Oral Reasons for Judgment

Counsel for Plaintiff:	A. Memory
Counsel for Applicant Defendants, Simon Howse, Parastone Developments Ltd. and Montane Developments Ltd.:	H. Jones
Place and Date of Hearing:	Kamloops, B.C. June 21, 2024
Place and Date of Judgment:	Kamloops, B.C. July 18, 2024

Table of Contents

I. INTRODUCTION

[1] This application involves a request to remove Certificates of Pending Litigation ("CPLs") registered against certain properties so that a development can proceed.

II. BACKGROUND

[2] There are numerous defendants in this case. Several of them – Simon Howse, Parastone Developments Ltd. ("Parastone"), and Montane Developments Ltd. ("Montane") (collectively, the "Applicants") – apply to cancel or discharge CPLs registered against the properties set out in Appendix A (the "Properties").

[3] The Properties make up a 500-acre parcel of land in the City of Fernie, BC (the "Development"). Montane is the owner of the Properties and Parastone is operating as the developer. To date, Montane has sold 114 lots in the Development. Currently, phases six and seven are being developed, which phases include an additional 45 lots comprised of 3 multi-family building sites and 42 single-family homes.

[4] The plaintiff began working for Parastone in 2006. Simon Howse is a principal and majority shareholder of Parastone. Mr. Howse owns 148 Class A voting shares and 32 Class B voting shares. The plaintiff owns only 20 Class C voting shares of Parastone.

[5] The plaintiff also owns 10 Class C non-voting common shares of Montane. Mr. Howse is the Trustee of the Howse Family Trust, which owns 60 Class A voting common shares and 30 Class B voting common shares.

[6] In 2023, the plaintiff was dismissed from his position at Parastone. The Applicants allege that this was because of a drug and alcohol addiction problem.

[7] The plaintiff filed this Notice of Civil Claim on April 4, 2024 ("NCC"). He also filed a separate claim in which he advances a wrongful dismissal claim. The present claim primarily seeks remedies based on the alleged oppression of the plaintiff as a

minority shareholder of Parastone and Montane. The claim alleges that certain dealings by these companies have diminished the value of the plaintiff's shares. The allegations of oppressive conduct include the following:

a) Parastone and Montane paid Mr. Howse an inequitable share of dividends;

b) Parastone and Montane arranged to build houses for Mr. Howse and his family at an artificially or unfairly reduced price;

c) Mr. Howse arranged for an entity other than Parastone to own the offices out of which Parastone operates in order to benefit that other entity and Mr. Howse;

d) Mr. Howse arranged for Parastone to do work at a reduced fee for a related company;

e) Mr. Howse arranged for Montane to sell a property at an artificially low price to ease Mr. Howse's cash flow problems;

f) Mr. Howse set up separate companies into whose hands certain of the profits that should have been payable to Parastone were redirected;

g) Mr. Howse misappropriated funds from Parastone and Montane for his own purposes or the benefit of related companies; and

h) Parastone and Montane have not repaid monies owing to the plaintiff.

[8] It should be noted that none of the alleged misconduct relates specifically to any of the Properties that are the subject of the challenged CPLs.

[9] The plaintiff seeks remedies flowing from this alleged oppression, including a plea for a declaration of a constructive trust and the right to an associated tracing remedy. He also advances claims said to be brought on behalf of the companies as opposed to solely for himself personally. He seeks the following remedies, *inter alia*:

> a. an order that the corporate veil be lifted amongst Howse's Companies, and, in particular:
>
> 1. The Plaintiff claims as follows:…
>
> a. an order that the corporate veil be lifted amongst Howse's Companies, and, in particular:
>
> ii. an order that Parastone and Montane have interests in the assets of Howse's Companies, specifically:
>
> 1. the Montane Properties, described as follows: ...
>
> ...
>
> b. the following interim or final orders with a view to remedying the unjust enrichment and the oppressive conduct pursuant to s. 227 of the Business Corporations Act, SBC 2002, c 57 [the "BCA"]:
>
> i. a declaration that Howse has engaged in conduct that is oppressive or unfairly prejudicial to Smith, within the meaning of s. 227 of the BCA; and, in particular:
>
> ...
>
> 5. a declaration that, as a remedy to rectify the oppressive self-dealing of Howse, and Howse's piercing of his own corporate veil, Smith is entitled to claim a tracing remedy or constructive trust on behalf of Parastone and Montane, without the need to commence a derivative action (the "Constructive Trust and Tracing Remedies"); and
>
> 6. a declaration that Smith is entitled to claim the Constructive Trust and Tracing Remedies with respect to the property of Montane and Parastone; including but not limited to a declaration that Smith is entitled to:
>
> a. claim an interest in the land owned by Montane, and a Certificate of Pending Litigation against such lands…

[10] Elsewhere in the NCC, the plaintiff provides further particulars of his claim standing in the shoes of the Applicants to seek certain remedies on behalf of the corporate Applicants without seeking leave to advance a derivative action:

> 14. Where there are allegations of self-dealing by the director/majority shareholder to the detriment of the corporation and the other shareholder, a court can declare the beneficial ownership of property at common law by the corporation as a remedy to rectify a finding of oppression. An oppressed shareholder may claim a tracing remedy or constructive trust claim on behalf of a company as a means of rectifying oppression, and without the need of commencing a derivative action. *CSA Building Sciences Western Ltd.*, 2012 BCSC 1058 [CSA Building Sciences] at para. 22

> 15. A shareholder is not precluded from filing a certificate of pending litigation on behalf of a company. *CSA Building Sciences* at para. 23

[11] The Applicants proffered evidence in relation to certain of these allegations and denied others more generally. They put forward evidence said to support the following responses:

a) After considering the different rights applicable to the various classes of shares and the actual amount of dividends paid, the plaintiff has actually received higher dividends per eligible share than Mr. Howse;

b) There was nothing unusual about the terms under which the plaintiff's house was built, given that Mr. Howse and his in-laws paid a higher rate for houses Parastone built for them;

c) Many, if not all, of the plaintiff's claims are barred by limitation periods;

d) The property alleged to have been used as Parastone's offices was never used for that purpose; and

e) All work done by Parastone was properly invoiced, even the work done for related companies.

[12] The filing of the NCC and the registration of the challenged CPLs only came to the Applicants' attention in April 2024 when Parastone requested a draw on its $3,000,000 construction credit facility. A term of this financing is that there be no encumbrances over the Development. As such, the draw was suspended in light of the CPLs. The Applicants also allege that the CPLs are also interfering with the finalization of a new $25 million credit facility from the Royal Bank of Canada.

III. ANALYSIS

[13] The right to file a CPL is governed by s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*]. If a party who holds the property subject to a CPL takes the position that the filing party did not have the right to file a CPL, or that the CPL is causing undue hardship, that party may apply for an order that the CPL be removed.

A. INTEREST IN LAND

[14] The first ground upon which a CPL may be removed is that the pleadings on which the CPL is based fail to disclose an interest in the relevant property. As stated in *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.*, 2019 BCCA 357:

> [36] … [T]he court must consider only whether the pleadings contain a claim for an interest in land. In other words, it is not open to a judge to cancel a CPL on the basis a claim to an interest in land is weak or there is no triable issue…

[15] The Applicants argue that the NCC does not claim an interest in the Properties subject to the challenged CPLs.

[16] Firstly, the Applicants note that the claims advanced are primarily those of a shareholder. Generally speaking, a shareholder has no proprietary interest in land owned by the corporation: *Schmidt v. Balcom*, 2016 BCSC 2438 at para. 26.

[17] The plaintiff does not quarrel with this general principle. However, the plaintiff says that two aspects of the NCC avoid the operation of this general principle:

a) The claim for a constructive trust and tracing remedy; and

b) The claim on behalf of the corporations, which corporations clearly do have an interest in the Properties.

[18] In relation to the plaintiff's first argument, the Applicants' response is that the plea in the NCC is insufficient to ground the filing of the CPLs, given that it does not plead that the Properties are "referential property" associated with the cause of action. In *Nouhi v. Pourtaghi*, 2019 BCSC 794, the Court stated:

> [26] A party seeking either type of constructive trust must satisfy two criteria, in addition to the cause of action or circumstances on which the remedial or substantive constructive trust is based. The first is that there must be referential property. i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: *BNSF* at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is inadequate, insufficient or inappropriate in the circumstances…

[19] The Applicants also argue that the constructive trust claim does not create an interest in land, given that the plaintiff fails to plead that damages would be an inadequate remedy.

[20] There is some uncertainty as to whether it is necessary to plead the inadequacy of monetary damages in order to survive an application to set aside a CPL: *Dhanani v Kassam*, 2022 BCSC 2271 at paras. 24-32. I decline to strike the CPLs based on this point, given that the Applicants' first position is a sufficient basis to find in the Applicants' favour in relation to the plaintiff's first argument. Specifically, I find that the absence of a pleading of a basis for a specific link between the constructive trust/tracing claim and the Properties is fatal to the CPLs (subject to the plaintiff's second argument below). While the NCC does outline the existence of referential property in relation to many of the claims noted above, the specific Properties that are the subject of the challenged CPLs on this application are not among those for which a link is drawn. I find that in order to sustain a CPL, a remedial constructive trust claim should plead a relationship between the plea and the associated property. For example, the requirement was met in *Nouhi* (see para. 48), but is not met here. Unless there is a specific noted reason that a referential property cannot be identified at the pleadings stage, a defendant should be informed of the basis for seeking a proprietary remedy against the particular property from the outset: *Nouhi*, paras. 29-30.

[21] This leaves the plaintiff's second proposed detour around the general principle that a shareholder has no property interest in a corporation's real property assets. This alternate route is based on the plea that the plaintiff has the right to stand in the shoes of the corporations, and the corporations do have an interest in the Properties.

[22] The Applicants do not contest that the advancement of a claim on behalf of the corporations is at least possible, a reasonable concession in light of the decision in *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.,* 2012 BCSC 1058 [*CSA*]*,* where the Court held as follows:

> [21] The question here is whether the nature of a particular oppression action allows the oppressed minority shareholder to claim on behalf of the company against the wrongdoer without starting a derivative action. The answer is far from clear. Jeffrey G. McIntosh, "The Oppression Remedy: Personal or Derivative?" (1991), 70 Can. Bar Review 29 at 49, stated:
>
> > For every holding that the oppression remedy may not be enlisted in a derivative cause, there is an opposite holding.
>
> [22] However, it seems that where, as here, there are allegations of self-dealing by the director/majority shareholder to the detriment of the corporation and the other shareholder, the answer may well be that a court can declare the beneficial ownership of property at common law by the corporation as a remedy to rectify a finding of oppression (*Covington v. Fund Inc. v. White* (2000), 2000 CanLII 22676 (ON SC), 10 B.L.R. (3d) 173 (Ont. SCJ), affirmed, (2001), 2001 CanLII 28384 (ON SCDC), 17 B.L.R. (3d) 277. If that is so, there is no logical reason why an oppressed shareholder could not claim a tracing remedy or constructive trust claim on behalf of a company as a means of rectifying oppression, and without the need of commencing a derivative action.
>
> [23] There is nothing that I am aware of in the *Land Title Act* that would preclude the filing of a certificate of pending litigation by a shareholder on behalf of a company, if the shareholder has the legal standing to do so. Of course I am not deciding in this application that the petitioner is entitled to such an oppression remedy, or that on the proven facts of this case it would be an appropriate remedy. I am only finding that the current state of the law seems to suggest that the petitioner is not barred by the rule in *Foss v. Harbottle* from seeking such a remedy.

[23] However, the Applicants argue that, in order to support a CPL, such a claim requires something more. That "something more" is, once again, the identification of specific referential property.

[24] In *CSA*, the Court noted the existence of such a plea in that case:

> [7] The petitioner seeks, as one of its remedies, a declaration that Ralph and Maria Jeck hold property in trust for CSA because the Properties were acquired and maintained by funds "taken" from CSA and TD Bank on the back of CSA's guarantee.
>
> [8] Based on this claim, the petitioner filed certificates of pending litigation against the Properties listed in the petition…
>
> [Emphasis added]

[25] Hence, the Applicants argue that even if the plaintiff is in a position to make a claim "on behalf of the company", this does not negate the need for there to be a referential property in order to support a CPL that depends on this somewhat novel

cause of action. I agree. Nothing in the decision in *CSA* negates the requirement for an interest in land to be engaged by the pleadings in order to support the CPL. At para. 8, the Court acknowledged that the CPLs in that case were based on a claim that directly engaged the properties upon which the CPLs were filed. Specifically, the allegedly misappropriated funds were used to purchase the properties subject to the CPL.

[26] The plaintiff agreed at the hearing that there has been no subsequent decision in which a BC court has relied on the decision in *CSA* to sustain a CPL where there was no tie between the claim and the properties subject to the challenged CPL. I see no basis to extend or modify the law to allow such detached CPLs to be filed.

[27] In sum, I find that the NCC does not disclose a proper interest in the Properties and that the CPLs must be declared invalid on this basis alone.

B. HARDSHIP AND INCONVENIENCE

[28] If I am wrong on this point, the Court may also cancel the CPLs if the Applicants have established hardship and inconvenience caused by the presence of the CPL: *LTA*, ss. 256–257. The onus is on the Applicants to establish such hardship. Our Court of Appeal discussed the necessary evidentiary threshold in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388:

> [28] As a preliminary matter the applicant must show that it is experiencing or likely to experience “hardship and inconvenience” as a result of the registration of the CPL. It appears that the degree of hardship required is the subject of disagreement in the Supreme Court of British Columbia. While some judges have proceeded on the basis that the hardship need not be “significant” ... others have required “severe suffering”… To the extent that these or other decisions of the trial court suggest that “hardship” in s. 256(1) may be met by proof of hardship that is “insignificant” or “not significant”, I would disagree. I doubt that the Legislature intended the threshold under s. 256 to be surmounted by proof of hardship that is only “trifling”. On the other hand, I agree that a court should not be “exacting” in its analysis of hardship and inconvenience.

[29] In *Kaur v. Chandler*, 2018 BCSC 1283, Justice Fitzpatrick provided examples of what may constitute hardship and inconvenience caused by CPLs:

> [45] Examples of hardship and inconvenience will vary from case to case and require an analysis of the particular circumstances before the Court. Examples of hardship and inconvenience caused by CPLs can generally include: impeding the ability to close a sale (*Marrello* and *Enigma*); impeding a sale process where the CPL is dissuading persons from making an offer (*Watson Island Development Corp. v. Prince Rupert (City)*, 2015 BCSC 1474 at paras. 37-41); and impeding the ability to obtain financing for the continued development of the lands: *Syed v. Randhawa*, [1993] B.C.W.L.D. 1899 at paras. 15-19 and 23 (S.C.) (WL).
>
> [Emphasis added.]

[30] An applicant must do more than make general allegations of inconvenience, but rather must provide particulars that demonstrate hardship. Generalizations unsupported by specific proof of hardship and inconvenience are insufficient, as discussed in *Grant v. Sandhu*. 2019 BCSC 2236:

> [34] The affidavits contain vague conclusory statements, such as the "bank is not pleased" with the CPL. There is no correspondence from the bank or accountants appended to the affidavits, nor are there affidavits from Ms. Diaz or the accountant. There is no evidence that would establish that it is the CPL as opposed to the litigation over the easement that may be impeding re-financing. The comments regarding the position of the Bank of Montreal and the opinion of the accountant are hearsay (without the required specific reference to the source) and possibly double hearsay. It is not clear that either of the adult children have personal knowledge of some of the matters stated. The way the affidavits are worded leaves me in doubt that they have personal knowledge of some of the matters stated. Mr. Sandhu, who is the owner of the property, did not swear his own affidavit.

[31] The registration of the CPL must cause the alleged hardship: *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at para. 37.

[32] In my view, the Applicants have provided sufficient evidence to establish hardship. They have shown that there is a concern on the part of their current and prospective lender about the existence of the CPLs, and that the financing necessary to continue with the Development has been impinged as a result. I am satisfied that the evidence supports that the CPLs have “impeded further progress”

of the discussions with the Applicants' lenders: *Mariash v. 0715422 B.C. Ltd.*, 2012 BCSC 788 at para. 44.

[33] I conclude that clearing away the CPLs is a necessary step for the progress of the Development and that none of the other steps required to proceed with the Development appear to be insurmountable. Hence, the required causation element has been satisfied.

[34] Where the hardship test is met, the Court may impose such security terms as it deems appropriate: *LTA*, s. 257(1)(a).

[35] In setting the amount of the security, the Court may consider the probability of the party's success in the action: s. 257(3). At this stage, the Court is entitled to consider the available evidence, as well as the pleadings: *Aviawest Resorts Inc. v. Memory Lane Developments Inc.*, 2004 BCSC 999 at para. 28.

[36] On the basis of the limited record before me, I have concerns about the strength of the plaintiff's case for an interest in the Applicants' lands for all the reasons discussed above. I note that it is the probability of success of the proprietary claims that is to be considered at this stage: *Mariash* at para. 46.

[37] The quantum of the plaintiff's claim is also relevant to the determination of the appropriate security. This is very difficult to assess at this stage, particularly given the plaintiff's minority stake in the companies.

[38] Given the tenuous claim to the Properties on the merits, and the lack of certainty regarding quantum, had it been necessary to proceed on this ground, I would have exercised my jurisdiction to order that the CPL be discharged upon the posting of a relatively modest security of $10,000 per property, or $100,000 in total: *Mariash* at para. 50; *CSA* at paras. 24–26.

IV. CONCLUSION

[39] The challenged CPLs are cancelled.

[40] Unless there are facts of which this Court is unaware, the Applicants should be entitled to their costs in the cause. If either party wishes to make further submissions on costs, they may contact the registry to make arrangements for a one-hour virtual hearing at 9 a.m. on a mutually agreeable date.

"The Honourable Mr. Justice Branch"

APPENDIX A

The properties subject to this application are the following:

PID: 024-784-303
Lot A, District Lot 4589, Kootenay Land District Plan NEP66828, Except Plan EPP44900, EPP51119, EPP45555 and EPP48838;

PID 007-576-391
Lot A, District Lot 4589, Kootenay District Plan 9587, Except Plans NEP22339, NEP62291, NEP62407, NEP62408, NEP64706, NEP64864, NEP65351, NEP66828, NEP66830, EPP44900, EPP51119, EPP45555, EPP48838, EPP55349, EPP72587, EPP77751, EPP87188, EPP90403 and EPP100240;

PID 028-291-158
Lot A, District Lot 4589, Kootenay District Plan NEP91182;

PID 016-403-851
Assigned Parcel 54 (see 35831I), District Lot 4589, Kootenay District, Except (1) Parcel A (Reference Plan 120048I) and (2) Plans 9460, 14910, NEP79711 and NEP81640

PID 011-836-911
Parcel 87 (See 139017I), District Lot 4589, Kootenay District, Except Plans 6273, 6724, 6726, 6912, 6913, 9301, 9393, 12703, 13080, 14415, 15270, NEP20274, NEP22339, NEP62291, NEP62407, NEP62408, NEP64864, NEP66829, NEP66830, NEP91126, EPP44902 and EPP45555;

PID 031-886-400
Lot A, District Lot 4589, Kootenay District Plan EPP126163;

PID 030-398-738
Lot 1, District Lot 4589, Kootenay District Plan EPP77696, Except Plans EPP77751, EPP87188 and EPP100240;

PID 030-168-554
Lot 1, District Lot 4589, Kootenay District Plan EPP72587;

PID 026-923-131
Lot A, District Lot 4589, Kootenay District Plan NEP82674; and

PID 024-200-867
Lot 1, District Lot 4589, Kootenay District Plan NEP62291, Except Plan NEP65006