IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1138270 BC Ltd. v. DB Services of Victoria Inc.,* 2024 BCSC 1390

Date: 20240801
Docket: S233392
Registry: Victoria

Between:

1138270 BC Ltd. and M.J.R. Holdings Ltd.

Plaintiffs

And

DB Services of Victoria Inc.
DB Land Acquisitions Inc.
1113412 BC Ltd.
1082112 BC Ltd.
1404233 BC Ltd.
Pacific Cove Design Inc.
Margaret McKay
Matthew McKay
Gary Lahnsteiner

Defendants

Before: Associate Judge Harper

Reasons for Judgment

Counsel for the Plaintiffs:	T.M. Summers
Counsel for the Defendants, DB Land Acquisitions Inc., 1113412 B.C. Ltd., 1082112 B.C. Ltd., 1404233 B.C. Ltd., Pacific Cove Design Inc., Margaret McKay, and Matthew McKay:	N.M. Vaartnou
The Defendant, Gary Lahnsteiner:	No appearance at this hearing
Place and Date of Hearing:	Victoria, B.C. July 8, 2024
Place and Date of Judgment:	Victoria, B.C. August 1, 2024

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Introduction

[1] The defendants, DB Land Acquisitions Inc. ("DBLA"), 1113412 B.C. Ltd., 1082112 B.C. Ltd., 1404233 B.C. Ltd. (233), Pacific Cove Design Inc., Margaret McKay, and Matthew McKay (collectively, the "applicants"), apply for the following:

1) to vary a consent order made January 2, 2024 (the "Consent Order") to cancel a certificate of pending litigation registered under no. CB1068162 ("CPL") against property located at 805 Goldstream Avenue, Langford, BC (the "Goldstream Avenue Property"); and

2) to reduce the amount of security to be posted in respect of the plaintiffs' claims against their properties from $2,500,000 as required by the Consent Order to $192,287.37.

[2] The defendant, Mr. Lahnsteiner, is represented by different counsel than the applicants. Although not appearing at this hearing, he filed an application response in support of the application.

[3] The defendant, DB Services of Victoria Inc. ("DBS") assigned itself into bankruptcy in July 2023.

[4] The plaintiffs are the owners of a property located at 647 Goldstream Avenue, Langford, on which M.J.R. Holdings Ltd. ("MJR") is carrying out the construction of a residential development known as Rockford Place (the "Project").

[5] In September 2021, MJR entered into two fixed-price contracts with DBS for the construction of the Project.

[6] DBLA is a company related to DBS that the applicants say primarily operates as a holding company for real estate. Prior to DBS's bankruptcy, DBLA also provided drafting and administrative services to DBS and, according to DBS and DBLA, incurred costs on DBS's behalf.

[7] During the events at issue in the litigation, Margaret McKay, Matthew McKay (Ms. McKay's son), and Mr. Lahnsteiner were the directors of DBS (collectively, the "DBS principals").

[8] Pacific Cove Design Inc., is a shareholder of DBS and DBLA.

[9] The numbered companies, 1113412 B.C. Ltd., 1082112 B.C. Ltd., and 233, hold title to DBLA properties in trust for DBLA's benefit. 233 holds title to the Goldstream Avenue Property.

[10] The plaintiffs claim that the DBS principals used fraudulently-sworn statutory declarations to obtain progress payments for work performed on the Project between January and July 2023. Each statutory declaration attests that there were no outstanding or overdue payments to subcontractors or suppliers. The plaintiffs say that, contrary to the attestation, many subcontractor accounts remained outstanding at the time each statutory declaration was sworn, at least for the period December 2022 to June 2023.

[11] The plaintiffs allege that the progress payments were misappropriated to directly and indirectly preserve the DBLA properties. As a result, the plaintiffs claim an interest in DBLA properties by way of constructive trust. MJR claims DBS owes money to MJR and MJR has made a claim in DBS's bankruptcy in the amount of $570,000.

[12] The applicants do not deny that there were unpaid subtrades at the time that the statutory declarations were sworn, but say that that fact alone does not mean the declarations were false. The applicants say that many of the agreements that DBS entered into with its subcontractors provided that the subcontractors' invoices were not payable until DBS received funds from MJR. Accordingly, MJR would not have been responsible for any unpaid work performed by those subcontractors at the time the statutory declarations were submitted.

[13] The applicants do not deny that DBS made payments to DBLA during the relevant time period. They say that DBS did so to pay for the administrative and drafting services that DBLA was providing to DBS.

[14] For the purposes of this application, the applicants concede that the plaintiffs have an interest in the Goldstream Avenue Property, but say that the interest is no

greater than about $192,000 which is the amount the applicants say DBS transferred to DBLA because DBLA could not cover its own expenses.

The Consent Order

[15] The applicants filed an application on November 16, 2023, seeking to discharge the CPL registered with the Land Title Office under no. CB976604 by the plaintiffs against four properties that the plaintiffs allege are beneficially owned by DBLA and are at issue in the action. The four properties are:

1) the Goldstream Avenue Property;
2) the Peatt Road Property;
3) the Hockley Avenue Property; and
4) the Terminus Property.

(collectively, the “Properties”)

[16] There was insufficient court time available to hear the application. There were sales and refinancing pressures on the applicants as a result of which the Consent Order was made which provided for the discharge of the CPL against the Properties to allow for the sale of the Peatt Road Property and the Hockley Avenue Property, and the refinancing of the Goldstream Avenue Property. Following the registration of the new mortgage against the Goldstream Avenue Property, the CPL would be re-registered.

[17] The Consent Order has the following specific provisions regarding the Goldstream Avenue Property:

a) prior to the acceptance of any offer to purchase the Goldstream Avenue Property, DBLA will provide the plaintiffs with details of that offer and the estimated proceeds from the sale (para. 6);

b) if such an offer was acceptable to the plaintiffs and they agreed to discharge the CPL, the amount of $2,500,000 will be paid from the sale proceeds of the Goldstream Avenue Property into trust with the defendants’ counsel as security for the amounts claimed by the plaintiffs to be traceable into the Properties (paras. 7 and 9);

c) in the event the net sale proceeds from the sale of the Goldstream Avenue Property were less than $2,500,000, the plaintiffs may re-register a CPL against the Terminus Property (para. 10);

d) the parties are at liberty to apply to vary the form or the amount of the security for the plaintiffs' claims (para. 12).

[18] Following the execution of the Consent Order, the plaintiffs registered the CPL against the Goldstream Avenue Property.

This Application

[19] Pursuant to s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], it is a precondition for the filing of a CPL that the applicant is claiming an interest in land. At this stage of the proceedings, the issue is not whether the plaintiffs can prove an interest in land; rather, the issue is whether they are claiming such an interest: *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd*., 2007 BCSC 1379, at para. 22. For the purpose of this application, the applicants assume, without conceding, that the plaintiffs have claimed an interest in the Properties sufficient to ground the CPL.

[20] The applicants wish to sell the Goldstream Avenue Property (which is bare land) and say they cannot do so with the CPL on title. They say that following the bankruptcy of DBS, DBLA no longer intends to operate in property development. They are paying interest on their mortgage in the amount of approximately $51,000 per month and other expenses such as property taxes to hold onto the Goldstream Avenue Property.

Applicable Legal Principles

[21] The application is framed as a claim of hardship and inconvenience. Sections 256 and 257 of the *LTA* provide:

> **Cancellation of certificate of pending litigation on other grounds**
>
> 256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
>
> (a) particulars of the registration of the certificate of pending litigation,

(b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and

(c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

(2) An owner whose indefeasible title or charge is registered subject to a certificate of pending litigation under section 217 (2) (a) or (c) (ii) may, on setting out in an affidavit

(a) that the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate contains no allegation that the owner is not a purchaser in good faith and for valuable consideration,

(b) that the owner applied to register the owner's indefeasible title or charge before the certificate was received by the registrar, and

(c) particulars of dates and times of receipt, application and registration of the owner's application and the certificate,

apply for an order that the registration of the certificate be cancelled.

(3) An application under this section must be made to the court in which the proceeding was commenced and must be brought

(a) as an application in that proceeding, if the applicant is a party to the proceeding, or

(b) by petition, if the applicant is not a party.

Power of court to order cancellation

257 (1) On the hearing of the application referred to in section 256 (1), the court

(a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on

(i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and

(ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or

(b) may refuse to order the cancellation of the registration, and in that case may order the party

(i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and

(ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.

> (2) The form of the undertaking must be settled by the registrar of the court.
>
> (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.
>
> (4) On hearing the application referred to in section 256 (2) and on being satisfied that
>
> (a) the facts set out in the affidavit are consistent with the records of the land title office, and
>
> (b) there is nothing in the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate that expressly or by necessary implication alleges that the owner is not a purchaser in good faith and for valuable consideration,
>
> the court may make an order declaring that the owner's indefeasible title or charge is not affected by the certificate of pending litigation or the outcome of the proceeding.
>
> (5) On receipt of an order made under subsection (4), the registrar must file it and cancel the registration of the certificate of pending litigation.

[22] Evidence of hardship and inconvenience is required, including the grounds for those statements. The court should not be "exacting" in its analysis of hardship and inconvenience: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2014 BCCA 388 at para. 28.

Discussion

[23] The evidence of hardship and inconvenience as a result of the CPL is set out in Matthew McKay's affidavit #3 sworn June 3, 2024.

[24] The applicants say that DBLA and 233 have listed the Goldstream Avenue Property for sale but will be unable to complete a sale with the CPL registered against title. In the interim, those companies are incurring significant holding costs for the Goldstream Avenue Property.

[25] DBLA wishes to use the proceeds of sale of the Goldstream Avenue Property to pay down its mortgage on the Terminus Property and to pay its tax obligations. DBLA and 233 want to know what purchase price they can accept which they say

depends, in part, on the amount of security required to be posted from the sale to satisfy the CPL.

[26] The plaintiffs say that the Consent Order does not preclude the sale of the Goldstream Avenue Property. The applicants disagree with that interpretation of the Consent Order and say the while the Consent Order provides for the posting of security if the Goldstream Avenue Property is sold, the property cannot be sold unless the CPL is removed and that is something the Consent Order does not address.

[27] I read the Consent Order the way the plaintiffs do. In my view, the conveyance of the Goldstream Avenue Property would be handled in the usual way with solicitors' undertakings. Title of the Goldstream Avenue Property would be transferred on the condition that the $2,500,000 from the net sale proceeds was paid into trust. The plaintiffs would not impede the sale because they say they are happy that the applicants plan to sell. If the applicants receive an offer that they consider to be the best offer available and if that offer, if accepted, is insufficient to clear title given the $2,500,000 in security that would have to be paid into trust, the parties could (and should) discuss matters and attempt to reach a reasonable accommodation of both of their interests. This dialogue is consistent with the statutory scheme surrounding CPLs which seeks to balance the rights of the parties where adverse consequences caused by registration of the CPL prejudices the land owner: *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141, para. 28. If negotiations fail, the applicants may renew their application and have the court set the amount of security on the evidence that exists at the time of the application.

[28] Therefore, I conclude that the registration of the CPL on title does not preclude the applicants from selling the Goldstream Avenue Property. The registration of the CPL is not, in and of itself, evidence of hardship and inconvenience.

[29] The more difficult issue to resolve on this application is whether the security amount of $2,500,000 should be reduced on the grounds of hardship and

inconvenience. Section 257(3) of the *LTA* provides that the court may take into consideration the probability of the party's success in the action in respect of which the certificate was registered. The amount of security should be tied to the claim to the interest in land: *Wosnack v. Ficych*, 2022 BCCA 139 at paras. 28–30.

[30] The applicants argue that the $2,500,000 is much greater than the plaintiffs' alleged interest in the Properties and likely represents all, or nearly all, of the net sale proceeds that would be unavailable to the applicants for other purposes. The applicants assert that the plaintiffs are simply seeking to broaden and re-characterize their claim to obtain full pre-judgment security in order to maximize their leverage against the applicants. I note that the trial date is September 2025 and it is true that if the $2,500,000 is, on the evidence, greater than the value of the plaintiffs' interest in land, then the amount should be reduced on the basis of hardship and inconvenience. It would be unfair to the applicants to have their money tied up in trust.

[31] In *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd*., 2007 BCSC 1379, there was some hardship (carrying costs and an inability to dispose of the lands): para. 24. The difficult issue was the determination of security: para. 29. The court attempted to assess the probability of success in the claim for damages and the amount of such damages. The court held that the defendant does not in every case have to post security equal to the estimated damages: para. 30. Notably, the court was unable to determine which side was likely to succeed: para. 31. Taking everything into account, the court ordered that security of $1,000,000 be posted.

[32] The plaintiffs in this case say that the court has insufficient evidence on which to assess the likelihood of success on the claims, or to determine the quantum. They say, albeit without clear evidence in support, that their claims for an interest in land might be in the millions of dollars. At the hearing before me, I made an order by consent that the plaintiffs be permitted to retain any third-party software specialist necessary to gain access to the electronic accounting system that DBS used, known

as the “Sage 300 accounting system” in order to analyze the financial records (the “Sage Records”). The objective of the order is for the plaintiffs to try to identify the transactions underlying the action. Further clarity on the intercorporate financial dealings may therefore assist in determining appropriate security.

[33] *Wosnack* is an example of the court being able to ascertain the damages in relation to the claim against land in order to set the appropriate amount of security. The Court of Appeal reduced the security ordered by the chambers judge on the basis of a finding that the plaintiffs’ claim could not exceed, by law, the amount of the reduced security.

[34] This application is dissimilar to *Wosnack* in that I am unable on the evidence before me to make a clear determination as to the value of the plaintiffs’ claim in the Properties. It would be an injudicious exercise of discretion to pick a number out of thin air. I am unable to do what the parties succeeded in doing in negotiating the terms of the consent order, namely, “pick a number” (even though the applicants say they were forced to capitulate to the plaintiffs’ position on the amount because of the pressing issues facing them). I agree with the plaintiffs that the question of the appropriate amount of security is, in part, dependent on the plaintiffs’ ability to trace the alleged misappropriated funds from DBS to DBLA. A significant issue in dispute is whether DBS paid its subcontractors as required. The data resulting from the Sage Records consent order may assist the parties, and the court, in determining the appropriate amount of security to be posted upon the sale of the Goldstream Avenue Property.

[35] The plaintiffs should have the opportunity to examine the Sage Records, but it is important that the consideration of the appropriate amount of security not be unreasonably delayed. If $2,500,000 is too high on the evidence that is produced as a result of the review of the Sage Records, the applicants are prejudiced if their application is delayed. In order to avoid foot-dragging, the applicants should be able to renew their application after 45 days from the release of these reasons regardless of the status of the analysis of the Sage Records.

Disposition

[36] The application is dismissed with liberty to re-apply after 45 days from the release of these reasons.

[37] Costs will be in the cause.

"Harper A.J."