

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *SS Unimix Capital (Canada) Inc. v. Tiger Bay Development Corporation*,
2024 BCSC 1434

Date: 20240806
Docket: S2208889
Registry: Vancouver

Between:

SS Unimix Capital (Canada) Inc.

Plaintiff

And

**Tiger Bay Development Corporation
Tiger Bay Village Corporation
Cun Fu Cheng**

Defendants

Before: The Honourable Justice Hoffman

Oral Reasons for Judgment

Counsel for the Plaintiff:

D. Way

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Place and Date of Trial/Hearing:

Vancouver, B.C.
July 30, 2024

Place and Date of Judgment:

Vancouver, B.C.
August 6, 2024

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Introduction

[1] As these are oral reasons that will be published. I reserve the right to edit them where necessary to correct typographical or grammatical errors in reading out my reasons. I will also omit full citations from my reading of these oral reasons in the interests of time.

[2] The plaintiff in this matter is a shareholder of the defendant Tiger Bay Development Corporation (“TB Development”). TB Development owns 13 parcels of land in Britannia Beach near Squamish, British Columbia and is in the process of undertaking a large land development referred to as the Tiger Bay Project. In February 2022, the plaintiff filed this action alleging various claims arising from the financial management of TB Development and the handling of the Tiger Bay Project.

[3] The defendants, TB Development, Tiger Bay Village Corporation, and Cun Fu Cheng, apply for an order cancelling a certificate of pending litigation (“CPL”) filed by the plaintiff against the 13 parcels of land listed in an annex to the defendants’ notice of application (“the Development Lands”) pursuant to s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250.

[4] This order is sought on two grounds:

- 1) The CPL ought never to have been issued as the claim advanced by the plaintiff is not based on a proprietary interest and any remedy would not result in the acquisition of a proprietary interest in the Development Lands; and
- 2) The registration of the CPL is causing the defendants hardship and inconvenience.

Factual Background

[5] The Development Lands were purchased in 2011. The Tiger Bay Project is a master-planned community with plans to offer 1050 residential units for sale over a build-out period of 20 years. According to the defendants, the master plan also

includes a winery, commercial space, a daycare and a surf park. The Tiger Bay Project is pursuing approval and rezoning from the Squamish-Lillooet Regional District.

[6] The Tiger Bay Project is the vision of Mr. Cheng, who incorporated TB Development in October 2009 for the purpose of advancing this vision.

[7] The plaintiff, Susong Canada Capital Investment Co. Ltd., now SS Unimix Capital (Canada) Inc. (“SS Unimix”), alleges that it became involved with TB Development in 2011 by investing \$5,500,000 in TB Development in exchange for a 10% ownership stake (“Investment Agreement”). Mr. Yi Song is a director and shareholder of SS Unimix.

[8] It is alleged in the notice of civil claim (“NOCC”) that the Development Lands are valued at \$82,695,900.00, and that they comprise all of the assets of TB Development.

[9] The parties in submissions took the court through the lengthy background regarding various transactions and re-organizations of debt and share capital that occurred between the entering into the Investment Agreement in 2011 and the filing of this claim in February 2022. It is not necessary to set out the background. The details are set out in the parties’ materials for the application. It suffices to say that these events led the plaintiff to file the NOCC in this proceeding which advances the following main factual claims:

- a) Mr. Cheng made various representations to induce the plaintiff to invest \$5,500,000 and become a 10% shareholder in TB Development including a representation that the funds invested would be used only for the development of the Tiger Bay Project (NOCC, para. 13).
- b) In November 2012, Mr. Cheng caused TB Development to transfer its beneficial interest in two land parcels located in North Vancouver (unrelated to the Tiger Bay Project) for the purpose of raising finances for the construction of the Tiger Bay Project (NOCC, para. 21(a)–b)).

- c) Corporate funds were used for purposes other than the Tiger Bay Project, including for a winery business without the consent of SS Unimix and for Mr. Cheng's other business projects (NOCC, para. 21(c), (k) and (l))
- d) Mr. Cheng caused TB Development to take certain steps or enter into certain agreements which were "exorbitant" or "questionable" or contrary to SS Unimix's expectations as a shareholder (NOCC, para. 21 (d)–(i)).
- e) The Tiger Bay Project has advanced too slowly and with insufficient oversight contrary the plaintiff's expectations as a shareholder (NOCC, para. 21(j) and (m)).
- f) Mr. Cheng, in January 2022, caused TB Development to enter into an agreement to sell the Development Lands to a third party (the "Sale Agreement") (NOCC, para. 21(n)).

[10] In respect of the allegations in sub-paragraph (f) above, both parties at the hearing agreed that the negotiations in respect of the Sale Agreement were abandoned such that if TB Development had such an intention as alleged, it was not realized.

[11] In terms of the legal basis for the claims advanced, the plaintiff alleges that the facts set out in the NOCC are sufficient to establish a breach of the Investment Agreement, fraud, oppression and that the Development Lands are impressed with a constructive trust in favour of the plaintiff. The allegations of fraud are located in the legal basis section of the NOCC and are confined to the following:

- a) By entering into the Sale Agreement for the Development Lands without the knowledge or consent of the plaintiff, with the intent to strip TB Development of its assets for Mr. Cheng's personal benefit, the defendants have fraudulently misappropriated the investment from the plaintiff; and

- b) Mr. Cheng knowingly and falsely represented to Mr. Song and SS Unimix that the investment would only be used for the Tiger Bay Project which induced Mr. Song to cause SS Unimix to advance the investment funds.

[12] The Developments Lands are subject to a single mortgage in the original principal amount of \$10,000,000.00 in favour of Amber Mortgage Investment Corp. (“Amber”) and 1129057 B.C. Ltd. (the “Amber Mortgage”) bearing an interest rate of 8.75 percent. Mr. Song, a director of the plaintiff, SS Unimix, is also a director of Amber.

[13] In November 2023, Amber commenced foreclosure proceedings on the Amber Mortgage. In January 2024, Amber assigned the Amber Mortgage to an unrelated numbered company, 1459809 B.C. Ltd.

[14] While the CPL does not relate directly to the foreclosure proceedings, the existence of the CPL has hindered the defendants’ efforts to re-finance the property. Until very recently, the foreclosure proceedings were being held in abeyance. On July 25, 2024, 1459809 B.C. Ltd. advised TB Development that if did not make a payment of \$3 million by August 15, 2024, it would proceed with the foreclosure proceedings. An officer of TB Development provided evidence that unless the CPL is removed and re-financing is obtained, it will be unable to satisfy this demand.

Analysis

[15] There are two issues for consideration:

- a) Should the CPL be discharged on the basis that the plaintiff fails to advance a claim for an interest in land as required by s. 215 of the *Land Title Act*?
- b) Should the CPL be discharged under ss. 256-257 of the *Land Title Act* on the basis that that they are causing hardship and inconvenience?

Land Title Act, s. 215 - Claim to Interest in Land

[16] The Court of Appeal in *Berthin v. Berthin*, 2018 BCCA 57 at para. 32, has described a CPL as “an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the issues in dispute can be resolved.” The purpose of a CPL is to prevent the defeat of a plaintiff’s claim by the defendant transferring the property in dispute to a third party.

[17] Recently, Justice Murray stated in *1077708 BC Ltd. v. Agri-Grow Farm Services Ltd.*, 2019 BCSC 977 at para. 39, that a CPL is “an extraordinary and powerful pre-trial tool [that] must be grounded on more than mere conjecture.”

[18] Under s. 215 of the *Land Title Act*, a CPL may only be issued and registered against land if it is based on a pleading that claims a proprietary interest in land.

[19] The following principles are applicable to applications to cancel a CPL under s. 215 of the *Land Title Act*:

- a) A necessary precondition to the issuance of a CPL is that a party to a proceeding has established an arguable or *prima facie* case for its claimed interest in land: *Jacobs v. Yehia*, 2015 BCSC 267 at paras. 21–22;
- b) Whether a CPL is properly based on a proprietary claim against the defendant’s lands is a threshold question, and the court will direct the cancellation of a CPL where the claim is not a proprietary claim against the defendant’s lands: *Seville Properties Inc. v. Coutre et al*, 2005 BCSC 1105 at paras. 7–8; *Xiao v. Fan*, 2018 BCCA 143 at paras. 19, 27;
- c) The mere fact that a claim relates to land does not convert it into a claim for a proprietary interest: *RodRozen Designs Inc. v. 0977168 B.C. Ltd.*, 2016 BCSC 834 at paras. 18–19, citing *Jacobs*;
- d) The court considers the pleadings filed in support of the CPL, not any subsequent amendments: *Bilin v. Sidhu*, 2017 BCCA 429 at para. 62;

- e) It is improper to file a CPL as leverage to secure a financial claim: *Drein v. Puleos*, 2016 BCSC 593 at paras. 8–10.

[20] This case raises the question of whether the plaintiffs' NOCC satisfies the threshold requirement of claiming an interest in property. The defendants take the position that the NOCC makes clear at para. 16(c) that the plaintiff is a shareholder who invested \$5,500,000 "in exchange for 10% of the equity of TB Development or 10% of the fully paid and non-assessable shares of the Company".

[21] Further, the defendants say that reading the claim as a whole, the allegations amount to concerns that the Investment Agreement has been breached and that TB Development is being mismanaged.

[22] The defendants rely on the well-established principle that shareholders hold no proprietary or equitable interest in a corporation's assets, including real property, and, therefore, are not entitled to a CPL: *Sherk v. Smith*, 2007 BCSC 1309 at paras. 13, 23; *Seville Properties* at paras. 14–17; *Hollaus v. Moria*, 2019 BCSC 104 at paras. 69–73.

[23] As a mere shareholder, the defendants say that the plaintiff has no equitable or proprietary interest in the Development Lands. Further, they say that even if the plaintiff succeeds in its action, it would not be entitled to a registrable interest in the Development Lands. To conclude otherwise would undermine this foundational principle of corporate law and open the flood gates for disgruntled shareholders to claim constructive trusts against the land assets of a corporation whenever they question the management decisions of the corporation.

[24] The plaintiff contends that the NOCC pleads fraudulent misrepresentation and seeks a tracing remedy and that this is sufficient to establish a claim that it has a constructive trust in the Development Lands. The plaintiff relies on *Jacobs* at para. 25 for the proposition that "where funds are obtained through wrongful means and can be traced to the acquisition or improvement of land, the court may impose a remedial constructive trust sufficient to sustain a CPL."

[25] The plaintiff relies also on *Xie v. Lai*, 2017 BCSC 2035 at para. 31, for the principle that the only question in an application to cancel a CPL is whether a constructive trust is a possible remedy. The test is not whether the plaintiff will be successful.

[26] I now turn to a consideration of whether, on the pleadings as they currently stand, it would be open to the court to grant a constructive trust remedy.

[27] In *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 26, Justice Matthews articulated the test to establish a constructive trust:

[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: *Kerr v. Baranow*, at para. 50; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 92; *Li v Li*, 2017 BCSC 1312 at para. 227.

[28] Justice Matthews went on to contrast an application to cancel a CPL, in which the operative question is whether the pleadings disclose a claim for an interest in land, with a motion to strike:

[30] ... Unlike in an application to strike a claim for failing to disclose a cause of action, where pleadings are read liberally and are often not struck if they are inadequate but could be amended to disclose a cause of action, the party who filed the certificate of pending litigation may not maintain the certificate when the pleadings were inadequate to disclose a claim to an interest in land at the time the certificate was filed. If the pleadings were not adequate when the certificate was filed, the certificate was never valid and is immediately cancelled: *Bilin* at para. 62, citing *RCG Forex* at para. 62. In such a case, the plaintiff can seek to amend the pleadings and then file a valid certificate of pending litigation in the event that the amended pleadings disclose a claim to an interest in the land: *Bilin* at para. 68.

[29] The plaintiff relies on the recent Court of Appeal decision in *Batth v. Sharma* 2024 BCCA 29 in support of its position that the NOCC has sufficiently plead a claim in constructive trust against the Development Lands. In that case, the Court upheld

the dismissal of an application to cancel two CPLs on what counsel for the plaintiff says are analogous facts to the case now before the Court.

[30] In *Batth*, the notice of civil claim claimed a CPL against two properties. One property was owned by the Batths, and the other by a corporation called ICGS. The central allegations in that case were that the Batths approached the plaintiff, Mr. Sharma, to make an investment, which Mr. Sharma ultimately provided, in a company called Lifetec. Mr. Sharma alleged that the Batths wrongfully converted and misappropriated the loan monies for their own personal use and for the use of ICGS. In particular, it was alleged that the Batths and ICGS each used the funds to acquire or increase their interest in the two properties that were the subject of the CPL.

[31] Mr. Sharma also sought a tracing of the loan funds and any profits realized through the use of the loan funds. There was a further allegation that the Batths and ICGS were unjustly enriched. The notice of civil claim did not expressly plead that Mr. Sharma was entitled to an interest in land through a constructive trust. Nevertheless, the Court of Appeal upheld the chambers judge's reading of the pleadings as a whole that the claim was for an interest in land. This conclusion was based on the claim for a tracing together with allegations that the Batths made fraudulent misrepresentations and that ICGS wrongfully used a portion of the loan to acquire or increase their equity in the two properties.

[32] In *Batth* at para. 31, the Court of Appeal held that:

[31] The law is well established that a constructive trust in respect of property, also sometimes described as an institutional or substantive constructive trust, can arise when a party fraudulently uses money provided by the plaintiff towards the payment or maintenance of the property.

[33] In my view, *Batth* is distinguishable. In that case the investment funds provided by Mr. Sharma were not invested in the company but were used to acquire and augment property interests of the defendants in properties that were not held by the company in which the plaintiff had invested. In this case, SS Unimix invested in

TB Development knowing that it held the Development Lands. The investment was not misapplied to an unrelated property to which the funds could be traced.

[34] As discussed above, by operation of law, becoming a shareholder of TB Development did not confer a property interest to the Development Lands: see *Hollaus; Sherk and Seville Properties*. The claim alleges that TB Development did not sufficiently apply SS Unimix's investment to the Tiger Bay Project and that TB Development considered selling the Development Lands. These allegations are insufficient to transform the plaintiff's shareholder interest into a constructive trust in the Development Lands. In other words, they do not provide the required nexus between the claim and the property.

[35] The Plaintiff says that the allegations of wrongdoing make constructive trust a potential remedy. However, rule 3-7(18) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 requires that full particulars of allegations of fraud and misrepresentation be set out in the pleading. As outlined above, unlike a motion to strike where the pleadings are read generously with an eye to whether any defects can be addressed through amendments, in the context of a CPL, the claim as pleaded must meet the threshold of constituting a claim to an interest in land.

[36] As they stand, the pleadings of fraud are generalized and lack sufficient particulars to make them distinct from the complaints relating to the management of TB Development and the use of the funds provided pursuant to the Investment Agreement. Further, there are no allegations that any fraudulent action on the part of the defendants resulted in an alteration of the TB Developments' proprietary interests in the Development Lands or in another property.

[37] The plaintiff also says that the NOCC seeks relief for oppression and that the declaration of a constructive trust is a potential remedy in respect of this claim. The plaintiff points to the decisions of *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2012 BCSC 1058 at para. 22 and *0832643 B.C. Ltd. v. Mitchell Group Investments Inc.*, 2018 BCSC 628 at para. 32.

[38] *1043325 Ontario Ltd.* is distinguishable on its facts. There, the allegation was that the directors used funds invested in the company, CSA, to purchase properties for their personal benefit. The shareholder filed a claim and registered a CPL against the properties. The claim sought a declaration that the directors held the property in trust for CSA. The court declined to cancel a CPL on the properties because the shareholder was effectively standing in the shoes of the company and asserting a claim that the company had a beneficial ownership of the property allegedly purchased by the directors. Here, SS Unimix is asking the court to declare a constructive trust in its favour rather than in favour of TB Development.

[39] *0832643 B.C. Ltd.* is also distinguishable. In that case, it was alleged that the corporate parties and the shareholder parties had agreed in shareholder agreements that the companies would hold the lands that were the subject of the CPL in trust for the shareholders. There are no such allegations in this case.

[40] Neither of these authorities displaces the application of the principle that shareholders do not hold property interests in the assets of the corporation.

[41] The plaintiff argues that another basis for a remedy of a constructive trust of the lands disclosed in the NOCC is the plea of unjust enrichment. In particular, the NOCC pleads that “the Defendants have been unjustly enriched by their receipt of the Investment, and have caused the Plaintiff to suffer a corresponding deprivation by misappropriating the Investment. There is no juristic reason for the enrichment and corresponding deprivation.”

[42] This claim equally does not ground an interest in property. Again, the NOCC makes clear that the investment to receive 10 percent of the shares of the TB Development was made pursuant to the Investment Agreement. As noted by the Court of Appeal in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 43, “[t]he existence of a contract is one of the established categories of juristic reason that will bar a claim for unjust enrichment”. The Court went on at paras.47–51 to discuss the circumstances in which a claim seeking a breach of contract and unjust enrichment have been allowed to proceed and

concluded that such claims may only proceed in tandem where the alleged benefit was advanced “extra-contractually, or beyond the scope of the contract”.

[43] The NOCC contains no allegation that the investment provided was outside the scope of the Investment Agreement.

[44] As I read the claim as a whole, I am not satisfied that the claim relates to an interest in land. Rather, the claim is fundamentally for breach of contract relating to the Investment Agreement whereby SS Unimix acquired a minority shareholder stake in TB Development.

[45] Accordingly, I grant the application to cancel and discharge the CPL.

[46] Although not necessary to dispose of the application, it is concerning that Mr. Song, a principal of SS Unimix, was also a principal of Amber when the mortgage was advanced on the property. Amber commenced foreclosure proceedings in respect of the mortgage on November 28, 2023. Further, this mortgage was not assigned to another lender until January 11, 2024, well after the CPL was filed in February 2022. This, together with the lack of a factual basis for the constructive trust claim advanced in the NOCC, causes me to suspect that the real motivation for the CPL was to secure the plaintiff’s investment in the Development Lands.

[47] As noted above, filing a CPL as leverage to secure a financial claim is not a lawful purpose for employing a CPL: *Drein* at para. 8.

***Land Title Act*, ss. 256–257 - Hardship and Inconvenience**

[48] If I am wrong that the claim is not for an interest in land, I turn to a consideration of the alternative relief sought to cancel the CPL pursuant to ss. 256–257 of the *Land Title Act*. These provisions permit a court to cancel the CPL if the defendant is suffering or is likely to suffer hardship and inconvenience by reason of registration of the CPL.

[49] Hardship and inconvenience will be established where there is a clear intention to develop the property and the CPL is preventing the defendant from obtaining financing effectively hobbling any ability to develop a property. The inability to re-finance the property at a lower rate of interest is also evidence of hardship and inconvenience; *Jacobs* at para.52; *Taylor v. Banicevic*, 2015 BCSC 15 at paras.30–33.

[50] Courts will similarly find hardship where a CPL registered on a property may result in foreclosure proceedings: *Wang v. Yu*, 2017 BCSC 1076 at paras. 43–44.

[51] The evidence before me is that attempts have been made to re-finance the property to secure financing to prevent the foreclosure proceedings from advancing, but no lender is willing to come forward until the CPL on the property is resolved. Further, without the ability to re-finance the property, the threat of foreclosure is imminent. Accordingly, I find that hardship under s. 256 is established.

[52] With respect to what security would be appropriate in these circumstances under s. 257(2) of the *Land Title Act*, I am of the view that, if the CPL were cancelled pursuant to s. 256, the only security required would be an undertaking by the defendants to pay damages to the plaintiff that may arise from the cancellation of the CPL.

[53] The existence of sufficient assets to satisfy the plaintiffs claim weighs against the need for security and where a claim is weak, an undertaking to pay damages may constitute sufficient security; *Gill v. Pannu*, 2021 BCSC 2607 at paras. 37-41.

[54] According to the pleadings, the Development Lands are valued at over \$83 million dollars, and the Amber mortgage of just over \$13 million is the sole mortgage registered against the properties. Thus, there is ample equity in the properties to satisfy any monetary judgment.

[55] If I am wrong that the claim is not for an interest in land, the pleadings are such that the claim for a constructive trust would, at best, be described as tenuous.

Further, some of the allegations in the claim date back over 10 years and are subject to strong limitation defences.

[56] As the defendants are the successful party, they will be entitled to its costs of the application.

“Hoffman J.”