

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jenor Steel Incorporated v. 466372 B.C. Ltd.*,
2024 BCSC 2140

Date: 20241126
Docket: S209046
Registry: Vancouver

Between:

Jenor Steel Incorporated

Petitioner

And

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

Respondents

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Petitioner:

E. Aitken

Counsel for Respondents:

E.B. Clavier

Place and Date of Trial/Hearing:

Vancouver, B.C.
November 12, 2024

Place and Date of Judgment:

Vancouver, B.C.
November 26, 2024

Introduction

[1] The petitioner Jenor Steel Incorporated (“Jenor”), seeks an order for payment of \$1 million to each of itself and the respondent 466373 B.C. Ltd. (“466”), totalling \$2 million, from a \$4.5 million holdback amount currently held in trust by Fasken LLP.

Background

[2] The underlying petition proceeding is brought under the *Partition of Property Act*, R.S.B.C. 1996, c. 347 [PPA]. Jenor and 466 are the former owners of a commercial manufacturing property located in Chilliwack, British Columbia (the “Property”).

[3] In May 2023 the Property was sold by order of Justice Macintosh for \$7.5 million. From the sale proceeds a holdback of \$4.5 million (the “Holdback”) was paid to Fasken LLP, counsel for the respondents, to be held in trust to secure two charges held by the respondent Sonic Holdings Ltd. (“Sonic”) registered on title to the Property. Sonic is affiliated with 466, with both entities having Ray Roussy as principal.

[4] The two charges at issue, intended to be secured by the Holdback, include the following:

- a) a mortgage debt of Jenor, secured by its interest in the Property, which was assigned by BDC to Sonic in June 2015 (the “BDC Mortgage debt”);
and
- b) a judgment obtained by RBC, and assigned by RBC to Sonic in November 2014, against Sonic Drill Systems Inc. (“SDSI”), a company jointly owned by Jenor and 466, who became indebted as a result of corporate guarantees provided in respect of RBC’s loan to Sonic (the “RBC Judgment debt”).

(collectively, the “Sonic charges”)

[5] The Holdback amount of \$4.5 million, was set on May 20, 2022, when Justice Kirchner first ordered that the Property be sold. Justice Kirchner ordered that the Holdback be paid into court or held otherwise as agreed by the parties. When the Property was sold for \$7.5 million pursuant to the order of Justice McIntosh made in May 2023, the parties agreed that \$4.5 million, the Holdback, would be held by Fasken LLP.

Summary of the Position of Jenor

[6] Jenor submits that the Holdback was intended to provide “ample security” for the Sonic Charges, with the \$4.5 security based on Mr. Roussy’s evidence when the matter was before Kirchner J. that the cumulative amount owing on the Sonic charges was approximately \$2.7 million, with approximately \$2.2 million owing in respect of the BDC Mortgage debt and \$507,000 owing in respect of the RBC Judgment debt, which had been registered against Jenor’s interest in the Property.

[7] Jenor submits that when considering what amount should be held back from the proceeds of sale of the Property that Kirchner J. found that “\$4.5 million far exceeds the combined value of the [BDC] mortgage and the RBC judgment, and there is no evidence [before him] to suggest it will not more than cover any further financial entitlements the respondents might establish through an accounting or otherwise”: *Jenor Steel Incorporated v. 466372 B.C. Ltd.*, 2022 BCSC 1135, at para. 103.

[8] Jenor submits that following the sale of the Property in May 2023, Sonic produced, only after court orders for production were obtained, copies of financial statements showing that the total amount owing to Sonic as assignee of the BDC mortgage debt, as at February 2023, was approximately \$1.117 million – or less than half the amount intended to be secured by the Holdback. As well, they point out that in his affidavit sworn October 16, 2024, Mr. Roussy confirmed that the principle amount of the mortgage was this amount and that if the mortgage is found to be enforceable, which is disputed between Jenor and the respondents, one-half of that

amount, \$558,600 plus interest, is owed by Jenor and will have to be paid from the Holdback.

[9] In addition, Jenor submits that in May 2023 the amount owing by Jenor on the RBC Judgement debt assigned to Sonic was approximately \$56,000 – approximately \$450,000 less than the amount intended to be secured by the Holdback. In support of this they point to the following:

- a) In January 2014, Master MacNaughton, as she then was, granted judgement to RBC for \$507,232.94 plus interest jointly and severally against Jenor and 466.
- b) In October 2014 Master Scarth, as she then was, after hearing an application brought by RBC, granted an order for sale of lands on Enterprise Way in Surrey, BC (owned jointly by Jenor and 466) for \$456,100 and ordered that the sale proceeds be used to pay first taxes, then real estate commissions, and finally the amount due and owing under the RBC Judgment.
- c) The vendor's statement of adjustments for the property on Enterprise Way and letter from RBC's solicitors at the time of sale in 2014, show that the after paying taxes, and commissions and other fees the net sale proceeds were \$431,385.38.

[10] Jenor submits that with the application of the net sales from the sale of the Enterprise Way property against the RBC Judgment debt, as ordered by Master Scarth, the maximum amount owing to Sonic was approximately \$111,000 (including pre and post judgment interest) in May 2023 when the Property was sold – of which it would be responsible for one-half, with 466 responsible for the other half.

[11] In summary, Jenor submits that the current \$4.5 million holdback significantly over-secures the value of Sonic's charges – which Jenor submits total approximately \$1.156 million plus interest. Jenor submits that it should receive a distribution of \$1 million, along with 466, from the amount \$4.5 million currently held in Fasken

LLP's trust account, rather than having more of their money than is required remain in trust. They submit that leaving \$2.5 million in trust is more than sufficient to cover the amounts which may be owing under the BDC Mortgage debt and the RBC Judgment debt.

Summary of the Position of the Respondents

[12] The respondents agree that if the BDC Mortgage debt is found to be enforceable half of the outstanding loan amount, \$558,600, plus interest will be owed by Jenor and will have to be paid from the Holdback funds

[13] With respect to the RBC Judgment debt the respondents say that the proceeds from the sale of the Enterprise Way Property were not used to reduce the RBC Judgment debt, but rather were used to reduce the total debt owned by SDSI to RBC prior to Sonic taking an assignment of the RBC loan. The respondents say that the RBC Judgment debt now totals \$664,185.46 including interest.

[14] The Respondents say that after the bankruptcy of SDSI (which I assume occurred some time around 2014), that the principle of Jenor, Mr. Savage, one of SDSI's co-owners, refused to take contribute to costs or assist in the management of the Property and the Enterprise Way Property including property management, maintenance costs, taxes before these properties were sold. They submit, in summary that 466 did all the required work and paid all costs, which results in an unjust enrichment in Jenor's favour, which they say totals \$715,622 as at January 31, 2024.

[15] In summary, the respondents say that the total potential amount which may be found payable to them from Jenor equals approximately \$1.938 million, exclusive of legal costs, a further claim for unjust enrichment and additional interest and possibly other adjustments.

[16] The respondents oppose the release of any amount of the Holdback until the RBC Judgment and the BDC Mortgage Debt are satisfied along with the other amounts it says are owing to 466 and Sonic. They submit that the Holdback was set

to secure the combined value of the BDC Mortgage debt and the RBC Judgment debt and any further financial entitlements they might establish through an accounting or otherwise – referring to para. 103 of the reasons of Kirchner J.

Analysis

[17] Jenor submits that this Court has the jurisdiction to order that the amount of the Holdback be reduced by \$2 million, with \$1 million paid to it and \$1 million paid to 466.

[18] Section 6 of the *PPA* provides that a court may “give directions” where it orders that property be sold. Section 11(3) provides that the proceeds of sale of a property must be directed to, under subsection (c) any person becoming absolutely entitled. Neither of these provisions expressly provide this Court with the jurisdiction to make a subsequent order reducing the amount of sales proceeds previously ordered to be held back after a property is sold pursuant to the *PPA*.

[19] Jenor refers to the decision in *Gooliaff v. Gooliaff* [1990] B.C.J. No. 2673, in support of its argument that this Court has the inherent jurisdiction to reduce the amount of the Holdback. At para. 16 in *Gooliaff* Justice MacDonald found that Rule 43(4) (now Rule 13-5 of the Supreme Court Civil Rules) can be “read sufficient broadly to permit an interim partial payment of proceeds of sale, pending trial” pursuant to this Court’s inherent jurisdiction. Rule 13-5 provides that when this Court orders a property to be sold, the Court may give directions including, under subsection (4)(e) requiring payment of the purchase price into court or to trustees or to other persons.

[20] The respondents concede that this Court has the inherent jurisdiction to reduce the amount of the Holdback. I am satisfied that I have the jurisdiction to do so.

[21] I will first address the question of what the Holdback is intended to secure.

[22] In my view, the Holdback can logically secure claims as against the Property which has been sold. Those include the BDC Mortgage debt secured by the Property and the RBC Judgment debt registered against the Property. Having reviewed the reasons of Kirchner J., and in particular para. 103 I conclude that he ordered that \$4.5 million be held back in respect of these debts and any further entitlements the respondents might establish through an accounting or otherwise in respect of those debts.

[23] I do not find that the Holdback was intended to secure collateral claims against the properties' owners – such as the unjust enrichment claim of the respondents against Jenor and Mr. Savage for approximately \$715,622. As a result, I do not find that the amount of the Holdback should be maintained to secure a potential claim by the respondents arising from unjust enrichment of Jenor, or a similar claims arising from an alleged failure by Jenor or Mr. Savage to contribute to business expenses.

[24] With respect to the amount of the RBC Judgment debt the order of Master Scarth made in October 2014, was clear that proceeds from the sale of the Enterprise Way property were to be applied (after taxes and commissions) to the RBC Judgment debt. Accordingly, I accept for the purposes of determining the amount of the Holdback that should remain, that the amount of that debt to be secured is, in total, approximately \$111,000 plus interest. I note parenthetically that Sonic has commenced a separate civil claim seeking payment from Mr. Savage and Jenor in respect of the RBC Judgment debt.

[25] As I have already said, the respondents concede that the amount to be secured in respect of the BDC Mortgage debt is approximately \$1.2 million.

[26] In summary, the Property was ordered to be sold by Justice McIntosh pursuant to the *PPA*. Justice Kirchner previously made an order requiring that \$4.5 million be held back as security for Sonic charges. Jenor has adduced evidence, which was not before Kirchner J. which satisfies me that this amount of security is now excessive. I find that a reasonable hold-back amount is \$2.5 million –

which is approximately two times the estimated \$1.2 Million owing to Sonic in respect of the RBC Judgment debt and the BDC Mortgage debt.

Conclusion

[27] Jenor’s application for an order that \$1 Million immediately be paid to each of Jenor and 466, or others as they may designate, from the \$4.5 million holdback currently held in trust with Fasken LLP is granted. The balance of the holdback together with accrued interest will continue to be held by Fasken LLP until further written agreement or order of this Court.

[28] Jenor is awarded its costs of this application.

“Mayer J.”