



No. H091522
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

COAST CAPITAL SAVINGS CREDIT UNION

Plaintiff

And

**THE SYMPHONY DEVELOPMENT CORPORATION, GURMEL SINGH KAINTH,
SCHMINDER JOHAL, 497308 B.C. LTD., 0769932 B.C. LTD., EMCO CORPORATION,
PACIFIC UTILITY CONTRACTING LTD., UNLIMITED EXCAVATING &
LANDSCAPING LTD., JACK CEWE LTD., C&C TRUCKING (1988) LTD., OCEAN
CONSTRUCTION SUPPLIES LIMITED, NORA ROSALIE MARVIN, BASSI BROTHERS
FRAMING LTD., UNITED RENTALS OF CANADA LTD., McRAE'S ENVIRONMENTAL
SERVICES LTD., GRAESTONE READY MIS INC., VALLEY GEOTECHNICAL
ENGINEERING SERVICES LTD., D.K. BROWN & ASSOCIATES INC., VANCOUVER
CITY SAVINGS CREDIT UNION**

Defendants

NOTICE OF APPLICATION

Name of applicant: Bassi Brothers Framing Ltd.

To: PricewaterhouseCoopers Inc. – Receiver Manager
and their counsel Steven D. Dvorak
Bull, Housser & Tupper LLP
3000-1055 West Georgia St
Box 11130, Vancouver B.C. V6E 3R3

TAKE NOTICE that an application will be made by the applicant, Bassi Brothers Framing Ltd., to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, B.C., on November 15, 2010 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order declaring that the claim of Bassi Brothers Framing Ltd. ("Bassi Brothers") is a secured claim against the Symphony Development Corporation ("Symphony Development");
2. An order that mortgage in favour of Bassi Brothers filed on March 27, 2009 under registration number BB864578 (the "Mortgage") and the contract of purchase and sale dated March 25, 2009, between Bassi Brothers and Symphony Development (the "March 25, 2009 Purchase and Sale Agreement") are valid and enforceable against Symphony Development;
3. An order that the debt owed by Symphony Development to Bassi Brothers under the Mortgage shall be distributed to Bassi Brothers from monies realized for Symphony Development's assets;

4. An order that Symphony Development holds \$3,151,861.32 in a constructive trust for Bassi Brothers which funds shall not be divisible amongst the creditors of Symphony Development and shall be paid to Bassi Brothers forthwith; and
5. Costs.

Part 2: FACTUAL BASIS

Background

1. PricewaterhouseCoopers Inc. was appointed Receiver and Manager (the "Receiver Manager") of Symphony Development by order of Mr. Justice Walker dated January 12, 2010.
2. On March 25, 2010, Mr. Justice Walker approved a claims process to be followed by the Receiver Manager to determine the nature and quantum of claims against Symphony Development to facilitate a distribution of monies realized for Symphony's assets.
3. Through their former counsel, William D. MacLeod of Campbell Froh May & Rice, Bassi Brothers submitted a Proof of Claim dated May 3, 2010, in which it claims a secured amount of \$3,151,861.32.
4. By letter dated June 21, 2010, from the Receiver Manager to Campbell Froh May & Rice, the Receiver Manager requested certain additional documents.
5. Mr. MacLeod provided the requested additional documents to the Receiver Manager by letter dated July 3, 2010.
6. The Bassi Brothers or their counsel had no further contact from the Receiver Manager after the June 21, 2010 letter. The Receiver Manager has not interviewed Jaswant Basi or Buhlar Basi.
7. On October 4, 2010, the Receiver Manager submitted its sixth report to the court (the "Report") wherein on the limited material gathered by the Receiver Manager it disallowed the Bassi Brothers' claim as summarized below:
 - a. the advances made by Bassi Brothers were made to Symphony Homes (Albion Slopes #1) Limited ("SHAS1") and to Symphony Homes (Albion Slopes #2) Limited ("SHAS2") and not to Symphony Development;
 - b. the acknowledgement of debt executed by Symphony Homes on March 25, 2010 (the "Acknowledgment of Debt") was intended to evidence a pre-existing obligation that is not supported by the available documents;
 - c. The Acknowledgement of Debt fails as an assumption of liability for lack of fresh or any consideration;
 - d. The Acknowledgment of Debt and the mortgage executed by Symphony Development on March 25, 2010 (the "Mortgage"), constitute a fraudulent preference.

8. It appears that the Receiver Manager has disallowed the claim submitted by Bassi Brothers without full knowledge of the factual background and, therefore, was not able to engage in a fulsome analysis of Bassi Brothers' claim.
9. It appears that the Receiver Manager did not have material documentation and information:
 - a. a caveat against the Albion Slopes properties that was filed by SHAS1 on February 19, 2009 (the "Caveat").
 - b. a personal guarantee of Gurmel Kainth in favour of Bassi Brothers dated March 25, 2009 (the "Personal Guarantee")
 - c. a contract of purchase and sale dated March 25, 2009, between Bassi Brothers and Symphony Development (the "March 25, 2009 Purchase and Sale Agreement")
 - d. a release of the Caveat, which was filed on March 27, 2009 (the "Caveat Release").

History

10. In late 2005 Bahlar Basi and Jaswant Basi were approached by Gulmel Singh Kainth ("Kainth") and Malkit Singh Johal ("Johal"), the directors of the Symphony Development, proposing that Bassi Brothers invest in a 3-phase residential property development in Maple Ridge, B.C. ("Albion Slopes").
11. Kainth and Johal requested an investment in the first phase ("Phase 1") and the second phase ("Phase 2") of Albion Slopes by way of either a loan from Bassi Brothers, which would be repaid with interest, or an investment to become a 50% shareholder in Phase 1 and in Phase 2 of the development.
12. When initially approached by Kainth and Johal with this proposal, Kainth and Johal represented to Jaswant and Bahlar Basi that any investment they made in the Albion Slopes project would be fully protected or returned in full.
13. Bassi Brothers invested funds to become a 50% shareholder of Phase 1 and to agreed to invest funds to become a 50% shareholder of Phase 2.
14. From January, 2006, to March, 2006, Bassi Brothers made deposits totaling \$1,000,100.00 into the bank account of SHAS1.
15. From January, 2007, to October, 2007, Bassi Brothers and other investors brought in by Bassi Brothers contributed an aggregate of \$570,000.00 to the bank account of SHAS2.
16. Kainth and Johal represented to Bassi Brothers that another corporate entity, Symphony Homes Limited ("Symphony Homes"), held an ownership interest in Albion Slopes. The relationship between Symphony Homes and Symphony Development was never explained or discussed with Jaswant or Bahlar Basi.
17. Bassi Brothers, Kainth and Johal agreed that Bassi Brothers would inject funds into the accounts of SHAS1 and SHAS2. The funds injected into SHAS1 and SHAS2 were to be used to acquire the Phase 1 and Phase 2 property from Symphony Homes. In order to acquire

this property from Symphony Homes, it was agreed that SHAS1 and SHAS2 could pay deposits to Symphony Homes, which funds were to remain in Symphony Homes' accounts until closing of the sales of the Phase 1 and Phase 2 property to SHAS1 and SHAS2.

18. At no time did Bahlar or Jaswant Basi authorize or agree that the deposits made by Bassi Brothers to the accounts of SHAS1 and SHAS2 may be used for, or to flow through to Symphony Development or to be used for any purpose other than as part of the purchase funds for the acquisition of the Phase 1 and 2 property.
19. On or about December 9, 2006, Symphony Development and SHAS1 executed a memorandum of understanding for the purchase of Albion Slopes Phase 1 property from Symphony Homes ("MOU1").
20. On or about December 9, 2006, Symphony Development and SHAS2 executed a memorandum of understanding substantively similar to MOU1, but with respect to the purchase of the Phase 2 property ("MOU2").
21. On August 27, 2008, a purchase and sale agreement was executed by Symphony Homes and SHAS1 (the "August 27, 2008, Purchase and Sale Agreement"). A deposit of \$2,000,000.00 was required and was acknowledged in the Agreement as having already been paid. The Deposit was returnable to SHAS1 if Symphony Homes defaulted under the agreement.
22. A number of issues arose after SHAS1 and Symphony Homes entered the August 27, 2008, Purchase and Sale Agreement:
 - a. Symphony Homes defaulted under the August 27, 2008 Purchase and Sale Agreement by:
 - i. Failing to achieve by October 15, 2008, sufficient servicing of the lots so as to allow the District of Maple Ridge to issue building permits for the construction of single family detached dwellings;
 - ii. Failing to achieve subdivision, servicing and grading of the lots by October 30, 2008
 - b. Despite their default, Symphony Homes did not return the deposit paid under the Agreement.
 - c. Kainth and Johal represented to Jaswant and Bahlar Basi that subdivision and completion of servicing was proceeding and would occur soon. They further promised that the Phase 1 and Phase 2 land transfer would occur soon.
 - d. When this did not occur, Jaswant Basi made inquiries in February 2009 and discovered:
 - i. a number of encumbrances not previously disclosed by Kainth or Johal, including a number of liens and a mortgage registered in favour of a numbered company that was owned by Kainth and a business associate;
 - ii. that, in breach of the representation by Kainth and Johal that deposit monies would be held by Symphony Homes until Phase 1 and Phase 2 properties

were transferred to SHAS1 and SHAS2, Symphony Homes had on June 6, 2006, issued a cheque to Symphony Development in the amount of \$2,000,000.00.

23. As a result of Symphony Homes' default under the August 27, 2008 Purchase and Sale Agreement, a caveat against the Albion Slopes properties was filed by SHAS1 on February 19, 2009
24. As Bassi Brothers had lost confidence in Kainth, Johal, and Symphony Homes due to the failure by Symphony Homes to complete by October 2008, the discovery of the encumbrances, and the wrongful transfer of funds to Symphony Development, in early 2009 the parties commenced discussions to restructure their arrangements.

The New Deal

25. Bassi Brothers' relationship with Symphony Development was restructured in March 2009, resulting in a restructured relationship (the "New Deal"). Six documents relate to the New Deal:
 - a. the Caveat,
 - b. the Personal Guarantee,
 - c. the Acknowledgement of Debt,
 - d. the Mortgage,
 - e. the March 25, 2009 Purchase and Sale Agreement, and
 - f. the Caveat Release.
26. At no time did any parties agree upon and/or execute any of the documents comprising the New Deal under duress.
27. Bassi Brothers' interest in the Property was not only restructured by the execution the Mortgage and Acknowledgement of Debt, but also by the execution of the March 25, 2009, Purchase and Sale Agreement, and the Personal Guarantee, the execution of the Personal Guarantee, and Bassi Brothers' agreement not to bring an action.
28. Bassi Brothers agreed to forgo bringing any action on the debt for breach of the August 27, 2008, Purchase and Sale Agreement, and agreed to remove the Caveat from title to the Albion Slope properties in exchange for the New Deal.
29. In the March 25, 2009, Purchase and Sale Agreement a deposit of \$1,570,000.00 is acknowledged to have already been received by Symphony Developments and was to be applied to the purchase price of \$3,600,000.00 excluding GST if the sale was completed by the closing date of June 15, 2009.
30. The Agreement further stipulates that the Deposit "will be paid to the Buyer upon the default of the Seller...if the Seller is in default of its obligation to complete the sale...."

31. Symphony Development is in default of its obligations under the March 25, 2009, Purchase and Sale Agreement, therefore Bassi Brothers commenced foreclosure proceedings in September 2009. Those foreclosures proceedings were effectively halted on January 12, 2010, by this receivership.

Part 3: LEGAL BASIS

The applicant will rely on:

Supreme Court Civil Rules 2010; Supreme Court Rules of Court 2009

1. Rules 1-3, 8-1 and 14-1.

Outline of Legal Argument

Direct Debt

2. It is respectfully submitted that had the Receiver Manager had full knowledge of the factual background of the agreements between Bassi Brothers and Symphony Developments, it would have allowed Bassi Brothers' claim.
3. On March 25, 2009 Bassi Brothers and Symphony Development entered into the New Deal under which a debt is now owed directly from Symphony Development to Bassi Brothers.
4. It is further submitted that this New Deal was entered into for good and valid consideration and did not constitute a fraudulent preference.
5. The *Fraudulent Preferences Act*, R.S.B.C. 1996, c. 164 is not cited in Appendix K.1 of the Report. Relevant sections of this *Act* provide:

3 Subject to section 6, a disposition of property by a person at a time when the person is in insolvent circumstances, is unable to pay the person's debts in full, or knows that he or she is on the eve of insolvency, is void as against an injured creditor, if made

(a) with intent to defeat, hinder, delay or prejudice creditors or some of them, and

(b) to or for a creditor with intent to give the creditor preference over other creditors or some of them.

6 (1) Nothing in sections 3, 4 and 5 applies, if the money paid, or the property disposed of bears a fair and reasonable relative value to the consideration, to a sale in good faith, to a payment made in the ordinary course of business to innocent persons, to a payment to a creditor, or to a disposition in good faith of property of any kind made in any of the following circumstances:

(a) in consideration of a present actual payment in good faith in money;

(b) by way of security for a present actual advance of money in good faith;

(c) in consideration of a present actual disposition in good faith of any

property.

6. It is generally accepted that past consideration is no consideration. However, case law has affirmed that a conveyance to secure an existing debt may be a conveyance for good consideration. This is often the case in circumstances in which an existing debt is held to be good consideration when there is an aspect of forbearance in suing on the debt.

First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd., [1994] B.C.J. No. 1766 (Q.L.)(B.C.S.C.)(reversed on other grounds 15 B.C.L.R. (3d) 254 (C.A.), leave to appeal refused [1996] S.C.C.A. No. 13 (Q.L.)(S.C.C.);

Western Prosperity Investment Holdings Ltd. v. Good Star Enterprises Ltd. et al, 2000 BCSC 1663 at para 34

7. British Columbia Supreme Court decisions have further affirmed the proposition that the courts may exercise their discretion to imply forbearance to sue on the debt as constituting adequate consideration, even if it is past consideration, after a careful review of the evidence respecting all the circumstances.

Western Prosperity Investment Holdings Ltd. v. Good Star Enterprises . et al,
supra

Bossin v. Vancouver Folk Music Festival Society, [1997] B.C.J. No. 2169
(B.C.S.C. in Chambers)

8. Case law has held that honest pressure on the part of the creditor rebuts the presumption of intent on a debtor's part to act in fraud of the law. Furthermore, it is a defence under the statute if valuable consideration is given bearing a fair and reasonable relative value to the disposition of property. In this case there was no new advance of money but a forbearance to claim the debt owing. That has been held to fall within the provisions of section 6(1)(b) of the *Act*.

Bossin v. Vancouver Folk Music Festival Society, supra at para. 18

Western Prosperity Investment Holdings Ltd. v. Good Star Enterprises Ltd. et al, supra, citing *Bank of Montreal v. Ngo (1985)*, 66 B.C.L.R. 171 (S.C.)

9. In reaching the New Deal, it is submitted that the honest pressure by Bassi Brothers to secure and/or recoup the debt documented in the cancelled cheques provided to the Receiver Manager and in the Acknowledgment of Debt was exerted upon Symphony Development.
10. The Mortgage was included in the Restructure partially because Symphony Development, Kainth, and Johal had previously defaulted in performing under various agreements. Therefore, as a key part of the new transaction, Bassi Brothers needed to be satisfied that monies they had paid by way of deposits were secured in the event the March 25, 2009, Purchase and Sale Agreement did not complete.
11. It was a part of the New Deal that Bassi Brothers would forbear pursuing the litigation contemplated in the Caveat as consideration for the Mortgage and the Purchase and Sale Agreement. In return for this forbearance, the parties restructured their affairs.

Constructive Trust

12. Case law has held that a constructive trust may be imposed over the assets of an insolvent defendant, thus elevating the plaintiff from the status of general unsecured creditor to beneficiary of a trust and removing the trust property from the assets available to satisfy creditors. In order for a plaintiff to assert a successful claim for a constructive trust, the plaintiff must be able to satisfy the requirements of tracing

Ontario (Securities Commission) v. Consortium Construction Inc., 1993 CarswellOnt 908, 1 C.C.L.S. 117 (Ont. C.J., Commercial List) at paras 57-58

13. Tracing in equity is possible where the claimant can establish that the defendant or a third party is in a fiduciary relationship to him/her, which has been broken, and that he/she has an equitable proprietary interest in the property.

Chitty on Contracts (28th ed.), Vol.I (London: Sweet & Maxwell 1999) at 30-098 to 30-100

14. The fact that money has been paid into the wrong hands is sufficient to impose a fiduciary relationship between the recipient of the money and the person properly entitled to it. In such a situation, there is authority for the proposition that a court may impose the equitable proprietary remedy of a constructive trust in order to ensure that a defendant is not unjustly enriched by the receipt and retention of a mistaken payment. Once a constructive trust is established, it can have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt.

Ontario (Securities Commission) v. Consortium Construction Inc., supra at para 60 citing *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd.*, [1979] 3 All E.R. 1025, [1981] 1 Ch. 105 at 120 (Ch. D.) at 119.

Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd., supra, quoting *Re Berry*, 147 F. 208 (2nd Cir. C.A., 1906) at p. 210

15. Bassi Brothers did not authorize the transfer of their deposits from Symphony Homes to Symphony Development.
16. From an equitable standpoint, similar to what is quoted in *Barnabe v. Touhey*, supra, the money in dispute never belonged to Symphony Development; therefore their creditors, upon the principles of equity, have no right to it.
17. It is submitted that, as the now-insolvent Symphony Development holds the funds wrongfully, a fiduciary relationship exists between the investors, Bassi Brothers, and the wrongful holder of the funds, Symphony Development. The funds are therefore traceable, being held in a constructive trust for Bassi Brothers and are not divisible amongst the creditors of Symphony Development.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Jaswant Basi, to be sworn and submitted.

The applicant estimates that the application will take 1 day.

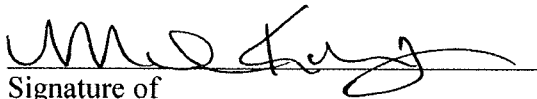
This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must

- (a) file an application response in Form 33 within 5 days after the date of service of this notice of application or, if the application is brought under Rule 9-7 of the Supreme Court Civil Rules, within 11 days after the date of service of this notice of application, and
- (b) at least 2 days before the date set for the hearing of the application, serve on the applicant 2 copies, and on every other party one copy, of a filed copy of the application response and the other documents referred to in Rule 9-7 (12) of the Supreme Court Civil Rules.

Date: November 3, 2010



Signature of

filing party lawyer for filing party

bc **Robin N. McFee, Q.C.**
 SUGDEN, MCFEE & ROOS LLP
 700 – 375 Water Street
 Vancouver, BC V6B 5N3
 Telephone: 604.687.7700, Fax: 604.687.5596
 B-4562-1

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

.....

Date:

.....
 Signature of Judge Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts