

In The Supreme Court of British Columbia

BETWEEN:

Coast Capital Savings Credit Union

Petitioner

AND:

The Symphony Development Corporation, Gurmel Singh
Kainth, Shminder 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 Inc., McRae's Environmental Services Ltd.,
Graestone Ready Mix Inc., Valley Geotechnical Engineering
Services Ltd., D.K. Bowins & Associates Inc., Vancouver City
Savings Credit Union

Respondents

NOTICE OF APPLICATION

Name(s) of applicant(s): 497308 B.C. Ltd.

To: Symphony Development Corporation

TAKE NOTICE that an application will be made by the applicants to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, BC on November 15, 2010 at 9:45 a.m. for the order set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An order reversing the determination of the Receiver of October 4, 2010 regarding the claim of 497308 B.C. Ltd.
2. A declaration that 497308 B.C. Ltd.'s secured claim in the amount of \$420,638.40 is valid and should be allowed by the Receiver.

3. In the alternative, an order that the Receiver continue to hold an amount equivalent to the claim of 497308 B.C. Ltd. as security for such claim pending the disposition of Action No. S086772 and an order that the stay of proceeding in that action be lifted.

Part 2: FACTUAL BASIS

1. The Redmond family has been active in real estate development in the lower mainland for over 30 years.

2. In the period leading up to and to shortly after 2000 individual members of the Redmond family as well as various companies controlled by them acquired a number of parcels of land in the District of Maple Ridge not far from lands which subsequently came to be referred to as the "Symphony Lands".

3. Some of the lands adjacent to the Symphony Lands were owned by Redmond family controlled companies 497308 B.C. Ltd. and 685457 B.C. Ltd. Those lands were referred to as the Norond Lands.

4. The Norond Lands could only be developed if services, including water services, were provided to the site. Ordinarily, this would require the construction of a water reservoir with sufficient capacity for the number of residential units which were proposed for development. Each of the several neighboring landholders who were considering development faced the same issue regarding the need to provide water services and a reservoir.

5. Eventually a written agreement (the "Agreement") was negotiated under which the owners of four potential residential developments agreed to jointly build a single water reservoir which would be shared between the various proposed developments. The four parties to the Agreement were identified as the Norond Group, the Redmond Group, the Walske Group and Epic Homes Ltd.

6. The Norond Group consisted of the two numbered companies identified above, 497308 B.C. Ltd. and 685457 B.C. Ltd. The understanding was that one of those corporations would take the lead in building the water reservoir and related systems and would invoice the other developers. Each party to the agreement would then pay their share

of the costs certified by Damax Consultants Ltd. in proportion to the share of the capacity of the water system allocated to each developer.

7. 497308 B.C. Ltd. built the water system at a cost which was appropriately certified by Damax Consultants Ltd. at \$2,808 per unit.

8. The Agreement was executed on behalf of the Walske Group by the president of the then registered owner of the Symphony Lands, R.C.B. Enterprises Ltd. R.C.B. Enterprises Ltd. did so at the request of 670206 B.C. Ltd. 670206 B.C. Ltd. had by then signed an agreement to purchase the Symphony Lands and had participated in the negotiation of the Agreement.

9. The purchase agreement between R.C.B. Enterprises Ltd. and 670206 B.C. Ltd. required 670206 B.C. Ltd. to pay all costs related to the development of the Symphony Lands.

10. Symphony Development Corporation later took an assignment of all rights and obligations of 670206 B.C. Ltd. under the purchase agreement with R.C.B. Enterprises Ltd. Symphony Development Corporation thereby became responsible for all development costs. Clearly Symphony Development Corporation knew that the cost of the water system built by 497308 B.C. Ltd. was one of the unpaid development costs. The Agreement was found by the Receiver within the files of the Symphony Development Corporation and, further, the preliminary development costs for the Symphony Development, as certified by the engineer for Symphony Development Corporation, shows the "water reservoir cost sharing" as an obligation payable.

11. Representatives of Symphony Development Corporation at times acknowledged their obligation to pay the amounts owing under the Agreement. However, Symphony Development Corporation eventually refused to pay.

12. On September 26, 2008 497308 B.C. Ltd. commenced a Supreme Court of British Columbia Action No. S086772 against R.C.B. Enterprises Ltd. as the original party to the Agreement and against Symphony Development Corporation. The primary claim against Symphony Development Corporation is that Symphony Development Corporation was

unjustly enriched in that 497308 B.C. Ltd. paid for the water system which created the development capacity of the Symphony Lands, Symphony Development Corporation benefitted from those expenditures and Symphony Development Corporation refuses to pay any of the costs. 497308 B.C. Ltd. also claims a constructive trust in the Symphony Lands.

13. By March of 2010 497308 B.C. Ltd. had completed its examinations for discovery of the defendants R.C.B. Enterprises Ltd. and had commenced its examinations for discovery of Symphony Development Corporation. The trial had been set for September 7, 2010. In addition, the defendant R.C.B. Enterprises Ltd. had joined various parties, including 670206 B.C. Ltd., as third parties.

14. On March 25, 2010 a Receiver was appointed with respect to the affairs of Symphony Development Corporation and a stay of all proceedings against Symphony Development Corporation was ordered. During the course of the receivership a claims review process had been undertaken by the Receiver.

15. On October 4, 2010 the Receiver gave notice that it was not allowing the claims of 497308 B.C. Ltd. The Receiver found that there was inadequate evidence that Symphony Development Corporation had accepted a contractual obligation. The Receiver also found that the claim of 497308 B.C. Ltd. did not amount to a claim for an interest in land.

16. It is the position of 497308 B.C. Ltd. that both findings of the Receiver are incorrect and should be overturned.

Part 3: LEGAL BASIS

1. The primary claim against 497308 B.C. Ltd. is not a contract claim. The claim of 497308 B.C. Ltd. is an equitable claim for unjust enrichment.

2. The specific circumstances in which the principles of unjust enrichment apply are not closed. The general principles allow recovery where there has been an enrichment (here by Symphony Development Corporation), a corresponding deprivation (here by 497308 B.C. Ltd.) and the absence of a juridical reason for the enrichment. All of those elements are amply established here.

3. The imposition of a remedial constructive trust against the Symphony Lands in favour of 497308 B.C. Ltd. is an appropriate remedy. Such a trust does represent an interest in land. As a result, the claim of 497308 B.C. Ltd. for a constructive trust representing the \$420,634.40 cost of the water system attributable to the Symphony Lands should be recognized as a secured claim.

4. In the alternative, if the theoretical basis of the 497308 B.C. Ltd. claim has been established but if the level of evidence does not rise to the usual standard which would be applied at trial, then the cause is the stay of proceedings which was ordered at the time of the receivership. The interests of the creditors of Symphony Development Corporation in a summary determination of all claims should not override the right of the parties in action in B.C. Supreme Court in Supreme Court of British Columbia Action No. S086772 to a process which is fair.

5. Several key documents showing that Symphony Development Corporation accepted the obligation to pay amounts owing under the Agreement were not delivered by Symphony Development Corporation to 497308 B.C. Ltd. in the course of action No. S086772. Symphony Development Corporation's copy of the Agreement and the inclusion of the obligation under the Agreement in the preliminary cost estimates certified by the engineer for Symphony Development Corporation were discovered by the Receiver in the files of Symphony Development Corporation. To that extent, 497308 B.C. Ltd. has benefitted from the receivership proceeding. However, it is up to the Court to consider the evasions of Symphony Development Corporation in the context of the evidence of all of the parties to Action No. S086772.

6. 497308 B.C. Ltd. should be allowed further discovery rights against Symphony Development Corporation.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Jennifer Redmond sworn August 10, 2010

2. Affidavit #2 of Jennifer Redmond sworn August 10, 2010

The applicants estimate that the application will take 90 minutes.


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 Gordon R. Johnson

☐ applicant ☒ lawyer for applicant(s)
497308 B.C. Ltd.

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

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 matters 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

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NOTICE OF APPLICATION

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