

CANADA / JUDGMENT

Gescan v. Vancouver Green Electric Ltd.

2016 BCSC 1220

COURT

Supreme Court of British Columbia

DECIDED

4 July 2016

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2016 BCSC 1220 Gescan v. Vancouver Green Electric Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gescan v. Vancouver Green Electric Ltd.,

2016 BCSC 1220

Date: 20160704

Docket: S169175

Registry: New Westminster

Between:

Gescan, a division of Sonepar Canada Inc.

Plaintiff

And

Vancouver Green Electric Ltd. and Siavash Behrooz-Nowbar also known as Steve Behrooz

Defendants

And

Gescan, a division of Sonepar Canada Inc.

Defendants by way of Counterclaim

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Plaintiff:

A.N. Habib

B. Corwin, Articled Student

Counsel for the Defendants:

W. Ryan

J. Bhullar, Articled Student

Place and Date of Trial/Hearing:

New Westminster, B.C.

January 26, 2016

Place and Date of Judgment:

New Westminster, B.C.

July 4, 2016

- [1] This case arises out of the failure of an electrical contractor, the defendant Vancouver Green Electric Ltd. ("Vancouver Green"), to pay the plaintiff the sum of \$68,127.21 claimed for the supply of electrical materials for several construction projects. Vancouver Green had made a credit application to the plaintiff in 2010 which had been accepted by the plaintiff and under which the plaintiff granted credit for the supply of electrical materials. The amount claimed by the plaintiff from Vancouver Green was not disputed and a default judgment was entered against Vancouver Green in early 2015.
- [2] The electrical materials which were supplied by the plaintiff were all supplied during 2014.
- [3] The defendant, Siavash Behroozi-Nowbar also known as Steve Behroozi ("Mr. Behroozi") is a principal of Vancouver Green. Mr. Behroozi has been sued in his personal capacity as the plaintiff alleges Mr. Behroozi is a co-covenantor, along with Vancouver Green, under the terms of a credit application made by Vancouver Green to Gescan. Mr. Behroozi denies that he is a co-covenantor or guarantor of the debts of Vancouver Green.
- [4] Although Vancouver Green failed to pay Gescan's invoices for materials supplied by Gescan to several construction projects, Gescan did not file a claim of builders lien against any of those projects.
- [5] The claim of the plaintiff further alleges that Vancouver Green "received certain sums of money on account of the contract price entered into in respect of the Improvements", i.e. the various construction projects. The plaintiff alleges those moneys received by Vancouver Green were trust funds under s. 10 of the Builders Lien Act, S.B.C. 1997, c. 45 and that Vancouver Green appropriated or converted all or part of the sums of money received in respect of the improvements contrary to the terms of that trust. Further, the plaintiff alleges that Mr. Behroozi "assented to or acquiesced in the breach of trust" to the extent of

\$68,127.21 and is therefore personally liable for damages for participating in a breach of the trust created by s. 10 of the Act.

- [6] In 2008, two years prior to Vancouver Green entering into the credit agreement with the plaintiff, Mr. Behroozi had purchased a personal residence which was located on Capella Drive in Richmond, BC. The plaintiff further claims that Mr. Behroozi used the trust funds to purchase or increase his equity in the Capella Drive residence. They filed a certificate of pending litigation pursuant to this claim on March 11, 2015.
- [7] On February 17, 2015, counsel for Gescan sent a demand letter to Vancouver Green and Mr. Behroozi for the principal debt of \$68,127.21 plus interest and costs.
- [8] Upon receipt of the demand letter, Mr. Behroozi, as president of Vancouver Green, sent an email message to the law firm representing Gescan on February 26, 2015, in which he committed to responsibility towards the account, advised "he" had not been paid on three projects and was intending to go to court to collect on them. He added that he was selling his house to pay creditors, advised there should be enough money to satisfy "his" creditors. He asked Gescan to await the sale.
- [9] Counsel for Gescan responded with a letter to counsel for the defendants dated May 4, 2015, advising they had submitted a default judgment against Vancouver Green, confirmed the filing of the certificate of pending litigation against the Capella Drive residence and made a demand for "further details" of six of the projects where Vancouver Green had worked and Gescan had supplied materials. The demand was for "full civic addresses for the projects your client identified" and listed the additional six projects.
- [10] Mr. Behroozi acknowledges that in 2014, Vancouver Green encountered financial difficulties when the contractor/developer who contracted them to complete three construction projects did not pay them. At paras. 4-6 of his affidavit made October 1, 2015, Mr. Behroozi deposed:
 - 4. The corporate defendant ran into financial difficulty on the Fairmile, Esplanade Ave. and King Georges Way projects in that it did not receive sufficient monies to pay these materialmen and labourers all of the monies due to them on those projects.
 - 5. None of the monies that were received on account of the Fairmile, Esplanade Ave. and King Georges Way projects were used other than to pay materialmen and labourers on those projects.
 - 6. Attached hereto and marked Exhibit "A" is a statement showing the proceeds received by the corporate defendant and the disbursement of those funds to labourers and suppliers and a listing of all accounts payable of suppliers to the Fairmile project.

- [11] The statement attached as Exhibit "A" to Mr. Behroozi's affidavit is 21 pages in length and includes a listing of revenue received by Vancouver Green on the Fairmile Road project amounting to \$217,028.91 against invoices issued by Vancouver Green totalling \$327,177.45, which left a receivable owing to Vancouver Green of the difference, i.e. \$110,148.54.
- [12] Pages 1 and 2 of Exhibit "A" to Mr. Behroozi's affidavit appears to be a budget or estimate of costs on the Fairmile Road project. I say "budget or estimate" as almost all of the costs are in rounded amounts as opposed to specific amounts and the descriptions refer to items included in the scope of work as opposed to a cost breakdown. Page 2 shows a total of \$248,529.94 as the sum of the cost of items to which have been added GST and PST of \$19,518.91 plus a permit cost of \$2,500 and supervision costs of \$56,628.60 for total costs of \$327,177.45, which sum matches exactly the total of the invoices issued by Vancouver Green.
- [13] However, the costs of performing the work by totalling the amount of cheques issued for payroll and material suppliers for the Fairmile Road project is not \$248,529.94, but \$136,119.34. Adding permit supervision costs and taxes to the latter represents total costs of approximately \$211,582.26. If Vancouver Green was paid \$217,028.91 as deposed by Mr. Behroozi, Vancouver Green would have been paid approximately \$5,446.65 more than the costs of the job, or earned a notional profit on that project.
- [14] The document also lists all invoices for labour and materials which includes invoices from the plaintiff, some of which remain unpaid. Of the total of \$68,127.21 in unpaid invoices claimed by the plaintiff, \$36,778.52 remains due for unpaid invoices for materials supplied to the Fairmile Road project, \$8,771.19 for materials supplied to the Esplanade Avenue project and \$12,168.41 for materials supplied to the King George Boulevard project.
- [15] There is no evidence before the court regarding the income and costs of Vancouver Green on any other of the several other projects on which Gescan is claiming to be unpaid.
- [16] Mr. Behroozi later deposed in the same affidavit:
28. When the Corporate Defendant began to experience financial difficulties I had no income and received no payments from the Corporate Defendant and as a result I was forced to place a second mortgage on my personal residence in order to live on and pay my personal bills.
- The second mortgage was in an amount of \$100,000 and was granted in June of 2014 to a private investor.
30. In order for the Company to continue its business I was forced to place a third Mortgage on my personal residence the majority of which net proceeds of the Mortgage were injected into the Corporate Defendant so that it was able to pay creditors on that date[.]
31. In order to continue my business I decided to sell my personal residence as I had run out of funds to live on and wanted to pay some monies to the suppliers of the corporate Defendant so that I could continue business.

- [17] Mr. Behroozi attached as Exhibit "L" to his affidavit a copy of the Contract of Purchase and Sale of his residence dated February 8, 2015, which sale was to close on April 30, 2015. Mr. Behroozi then deposed that he received a letter from counsel for the plaintiff on February 17, 2015, demanding payment of invoices totalling \$68,127.21 plus interest at 26.5% and costs which totalled \$85,511.60.
- [18] However, this sale was halted by the certificate of pending litigation. Despite requests by counsel for the defendants to release the certificate, the plaintiff refused to discharge it. A consent order was made in this proceeding on June 5, 2015, cancelling the certificate upon Mr. Behroozi depositing in court the amount of the claim as substitute security for the lands charged without prejudice to Mr. Behroozi claiming that the certificate was improper or defective.
- [19] In May of 2015 the defendants issued a counterclaim alleging that the plaintiff had not delivered any materials to his residence nor did any funds that might be construed as trust funds find its way into Mr. Behroozi's residence. In the counterclaim the defendants seek damages including additional conveyancing costs and legal costs occasioned by the filing of the certificate of pending litigation, punitive damages for improperly filing the certificate of pending litigation and special costs.
- [20] The application before the court is for a summary trial under Rule 9-7 of the Supreme Court Civil Rules in which the plaintiff seeks judgment against Mr. Behroozi for the amount of \$68,127.21 plus interest and costs, the plaintiff having previously entered a default judgment against Vancouver Green.
- [21] The defendant Mr. Behroozi has not contested the appropriateness of this application for a summary trial.

I. Issues

[22] The issues are as follows:

A. Is Mr. Behroozi jointly and severally liable to Gescan under the terms of the credit application dated June 9, 2010?;

B. If A. is answered in the negative, then could Mr. Behroozi be liable as alleged pursuant to the s. 10 trust under the Builders Lien Act and if so, was the plaintiff entitled to file a certificate of pending litigation against the title to Mr. Behroozi's residence?

C. Did Gescan wrongfully file the certificate of pending litigation, making them liable for damages?

II. Analysis

A. Is Mr. Behroozi Jointly and Severally Liable to Gescan under the Credit Application of June 9, 2010?

[23] Gescan says Mr. Behroozi is jointly and severally liable under the credit application. They argue, with reference to the terms of the agreement, he signed on both behalf of the corporation and in his personal capacity as a co-covenantor.

[24] Mr. Behroozi denies that he guaranteed or otherwise was a co-covenantor of the obligations of Vancouver Green to the plaintiff.

[25] The relevant portions of the credit application, which was a form of agreement prepared by Gescan, are as follows:

- a) Vancouver Green was named in the box requiring the "Company or Proprietor's Legal Name";
- b) In another box, Mr. Behroozi's name was inserted under the heading "Principals or Directors"; in the same box, Mr. Behroozi checked a box indicating the business was a corporation.
- c) The very fine print of the credit application included:

..... the principal and applicant hereby agree to the following terms and conditions.

Interest will be charged at a rate of 26.8% per annum calculated from the date the account becomes past due.

Every transaction indicated or referred to in any notice, invoice, statement, confirmation or other communication and every statement of account shall be deemed and treated as authorized and correct and as ratified and confirmed by the customer unless Gescan receives from the undersigned written notice to the contrary within fifteen days upon receipt of such notice, invoice, statement, confirmation or other communication forwarded by Gescan to the customer by ordinary mail.

.....

I/we hereby covenant that this application for charge account shall inure to the benefit of your successors, assigns and subsidiary companies and shall apply with respect to goods supplied by any of them to the above named customer.

.....

I/we agree to pay all collection costs including solicitor costs on a solicitor and client basis which may arise from nonpayment of the account.

In consideration of Gescan extending credit to the principal and applicant, the undersigned principal co-covenantor shall be jointly and severally liable as principal debtor and not as guarantor or surety for due payment of all amounts of money payable by the above named customer to Gescan.

[Emphasis added.]

- d) The area for signatures provided two locations for "Principal Signature" and two locations for witnesses to sign. Mr. Behroozi signed in one of the locations noted "Principal Signature" and printed his name below his signature. Mr. Behroozi signed the agreement once. In so doing he did not indicate whether he was signing as a principal or representative of Vancouver Green or in his personal capacity.
- [26] Outside of the agreement, the many invoices issued by Gescan for materials supplied contained the words "Sold To" above the name "ZZLGL Vancouver Green Electric" and under the words "Shipped To" stated "Vancouver Green Electric Ltd." There is no explanation of why "ZZLGL" appeared before the name Vancouver Green Electric.

Decision

- [27] For the reasons that follow, I find that Mr. Behroozi is not a "co-covenantor" under the terms of the Credit Application.
- [28] The issue of whether Mr. Behroozi is jointly and severally liable under the credit application is primarily one of contractual interpretation.
- [29] In interpreting a contract the court must consider the entire agreement such that terms are construed with a view of giving meaning to all of its provisions: *Canadian Newspapers Co. v. Kanda General Insurance Co.* (1996), 30 O.R. (3d) 257 at 270 (C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 553.
- [30] The specific issue of determining the capacity a signatory to a credit note is further informed by s. 51 of the Bills of Exchange Act, R.S.C. 1985, c. B-4:

Signing in representative capacity

51 (1) Where a person signs a bill as drawer, endorser or acceptor and adds words to his signature indicating that he has signed for or on behalf of a principal, or in a representative character, he is not personally liable thereon, but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

Rule for determining capacity

- (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.
- [31] In this case, the credit application deems, in the last paragraph of the fine print portion that "in consideration of Gescan extending credit to the principal and applicant, the undersigned principal co-covenantor shall be jointly and severally liable as principal debtor and not as guarantor or surety" The above clause refers to two separate parties, i.e. the "principal and applicant" and the "principal co-covenantor". Elsewhere in the application, there are three separate references to the "customer" which is not a defined term but could only practically refer in this case to Vancouver Green; the meaning being ambiguous, I note this

interpretation is consistent with the invoicing of Gescan. In order to be bound by the terms of the credit application each of those parties would have to execute the document.

- [32] Mr. Behroozi signed above the words "Principal Signature". In the box on the application where "Principals or Directors" are to provide their names and information, Mr. Behroozi inserted his name and also "checked" a box to indicate that Vancouver Green was a "corporation". This box seeks information as to those involved with the business, whether it be a corporation, partnership or sole proprietorship. The only logical interpretation of this portion of the application is that Mr. Behroozi is advising that the applicant, i.e. Vancouver Green, is a corporation of which he is a principal or director. It was Vancouver Green that was seeking a credit facility and therefore the signature of Mr. Behroozi would have been given in his capacity as a director or principal of Vancouver Green. Section 51(1) of the Bills of Exchange Act would thus apply to his benefit.
- [33] Further, the terminology used in the credit application is inconsistent and confusing. In addition to the considerations set out above, there is no designated space for a "co-covenantor", the "customer" or the "corporation" to sign the document. The credit application was created by the plaintiff and the uncertainty as to its terms invites application of the doctrine of contra proferentum such that the uncertainties are to be interpreted against the person drafting the document, here Gescan.
- [34] Gescan otherwise made no argument for how Vancouver Green could bind Mr. Behroozi as a co-covenantor.
- [35] As such, and despite the language in the credit application suggestion some kind of joint liability, I have determined he did not sign the application in his personal capacity.
- [36] Finally, it is apparent from the statements in the affidavit of Mr. Behroozi that he was intent on borrowing against and/or selling his home in order to pay debts of Vancouver Green. Although on occasion Mr. Behroozi referred to "my responsibility towards this account", and "my creditors", especially in his email message of February 26, 2015, to counsel for Gescan, I am satisfied that he was not intending to refer to the debts as personal obligations, only that he, as an officer of Vancouver Green, felt responsibility to the creditors and made a decision to use personal assets to pay the creditors. In using the terms "my responsibility" and "my creditors", I am satisfied he was not admitting personal legal responsibility for the claims of creditors but only that he felt a moral obligation to the creditors for the failure of his company to pay its creditors. He had taken the position he was not personally liable to the plaintiff. Even if he had been of the opinion that he was personally responsible, as a lay person not trained in legal matters he was mistaken in that the credit application did not give rise to personal liability. Not being personally liable as a co-covenantor or guarantor of the debts of Vancouver Green, Mr. Behroozi had no personal financial obligation to the plaintiff and would not have been required to sell his residence to pay the debts of Vancouver Green, save for the possibility, as alleged by the plaintiff, that Mr. Behroozi may have an obligation to the plaintiff pursuant to the trust created by s. 10 of the Builders Lien

Act.

[37] In sum, I find that Mr. Behroozi is not liable as a co-covenantor in contract and that claim against him is dismissed.

B. Is Mr. Behroozi Liable for Damages for Participation in a Breach of the Trust Created by s. 10 of the Builders Lien Act?

[38] In order for the plaintiff's claim under the s. 10 trust to succeed, it is incumbent upon the plaintiff to firstly prove that it remains unpaid for materials delivered to a construction site and that the trustee, in this case Vancouver Green, received money on account of its contract and has applied all or a portion of the trust funds for a purpose not authorized by the trust. In order for the principal of a corporate trustee to be liable for participating in a breach of the trust by the trustee, the plaintiff must prove that the director or officer actively participated in the breach.

[39] One defence raised by Mr. Behroozi to the claims against him under the trust created by s. 10 of the Builders Lien Act is that the action for breach of trust was commenced outside the limitation period for actions against a trustee of a trust as required by s. 14 of the Builders Lien Act which states:

14 An action by a beneficiary or against a trustee of a trust created under section 10 must not be commenced later than one year after

- (a) the head contract is completed, abandoned or terminated, or
- (b) if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available.

[40] Completion is a defined term under the Builders Lien Act:

1(1) In this Act:

.....

"Completed", if used with reference to a contract or subcontract in respect of an improvement, means substantially completed or performed, not necessarily totally completed or performed.

- (2) For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
 - (a) 3% of the first \$500,000 of the contract price,
 - (b) 2% of the next \$500,000 of the contract price, and
 - (c) 1% of the balance of the contract price.

- (3) For the purposes of this Act, an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.
- [41] The action in this case was commenced on March 10, 2015, and so to be compliant with s. 14, the projects would have to have been completed after March 10, 2014. While both representatives of Gescan and Mr. Behroozi have deposed as to when the Fairmile Road project was completed so as to trigger the limitation period, it is not possible from that evidence to determine when the contracts were completed. In evidence are certificates of electrical inspections, photographs of portions of the building showing areas complete; however, there is no evidence as to whether the contract, subcontract or improvement was complete or even if Vancouver Green was working pursuant to a contract with an owner or as a subcontractor to a general contractor. As a result, I make no comment on this defence as raised by Mr. Behroozi. Any finding as to the dates of substantial completion would have to be the subject of a trial of the action.
- [42] The same issue exists with reference to the Esplanade Avenue and King George Boulevard projects.
- [43] Regarding the Fairmile Road project, if my calculations are correct, the evidence suggests that Vancouver Green received approximately \$5,446.65 on account of its contract price which is unaccounted for in the expenses for that project as discussed earlier in these reasons. If that is the case, the maximum amount of trust funds which Vancouver Green has failed to account for is \$2,173.06 which is the maximum possible breach of the s. 10 trust for monies received by Vancouver Green for the Fairmile Road project if the claim under the s. 10 trust has been commenced within the limitation period.
- [44] Again, if it is proven that this action was commenced within the limitation period, I find that Mr. Behroozi was the operating mind and principal of Vancouver Green and if there was a breach of the s. 10 trust that can be pursued, the maximum amount of his liability for participating in that breach is \$2,173.06. I state "if" there is a breach as it is not clear from the accounting records produced on account of the Fairmile Road project that all of the costs incurred on that project which were paid for the purposes of the s. 10 trust have been included in the material before me. If I am wrong in that respect, and there are portions of the accounting records which are not clear, I will hear further submissions if the parties wish to so proceed.
- [45] Gescan has submitted that the defendants have failed to provide particulars of their contracts under which Gescan supplied electrical materials to Vancouver Green. The demand for particulars made by Gescan's counsel is contained in counsel's letter of May 4, 2015:

In order to properly investigate the remaining 6 projects, our client requires that your client provide further details. Accordingly, please provide full civic addresses for the projects your client identified as follows:

1. Bewicke,
2. West 15th,
3. Squamish Nation,
4. North Village,
5. Greek Village,
6. Bayview.

[46] It is my understanding upon reviewing the evidence that no particulars have been provided in response to the above demand save the address of at least two of the above projects. If Gescan was one of the "persons engaged in connection with the improvement" by Vancouver Green on each of those projects, which would result in Gescan being found to be a beneficiary of the trust created by s. 10 of the Builders Lien Act, and can prove that trust funds received by Vancouver Green were not used to pay others "engaged in connection with [those] improvements" and that amounts remain unpaid for materials supplied to those projects, Gescan would be able to prove a breach of trust to the extent that they remain unpaid to the extent discussed above. However, to do so they would have had to know the addresses or at least the location of the improvements in order to have been able to prove a lien or that the plaintiff was a beneficiary of the s. 10 trust at the time they sent the letter: see s. 15(3) of the Builders Lien Act; see also *Dom. Bridge v. T.D. Bank* (1986), 7 B.C.L.R. (2d) 295; *Convoy Supply Ltd. v. CDN Roof Doctor Ltd.*, 2012 BCSC 352. By this reasoning the plaintiff would have been demanding information which should have been readily at hand if they were in a position to claim and prove a lien against any of the above projects.

[47] I also note that the plaintiffs did not demand an accounting of the contracts but only their civic addresses.

[48] The plaintiff submits that the onus is on the defendants to provide a proper accounting of monies received and disbursed on contracts for individual projects. Counsel refers to the decision of *Okanagan Aggregates v. Boake*, 2006 BCSC 466, in support of the onus being on the defendants to provide an accounting:

[28] In the instant case Okanagan has made a claim under s. 10 of the Builders Lien, and, in its affidavit material, Mr. Satchell deposes that he believes the asphalt was delivered as directed by Mr. Boake, who then received payment for those deliveries. Okanagan did not show that Mr. Boake received monies from a particular job for which the plaintiff supplied materials.

- [29] The defence submits that Okanagan has not provided the appropriate background to its claim under the Builders Lien Act by its failure to describe details as referred to in [CommDoor Aluminium v. Solar Sunrooms Inc. (2003), 43 C.B.R. (4th) 118 (Ont. S.C.J.)] However, the details of the transactions for which Mr. Boake received asphalt are peculiarly within his knowledge. It is his information that would presumably have been obtained by Okanagan through discovery of documents and the examination for discovery of Mr. Boake.
- [30] However, Mr. Boake failed to respond to the demand for discovery of documents and did not attend to the examination for discovery. He now seeks to utilize his decision to ignore the court process as a means to thwart Okanagan's trust claim under the Builder's Lien Act.
- [31] I am not prepared to condone Mr. Boake's refusal to participate in this action. I am satisfied that it is sufficient that Okanagan has raised the issue of monies having been received by Mr. Boake from customers. The details of those transactions lie with Mr. Boake. It is not up to Okanagan to construct such accounting.
- [49] In this case, Mr. Behroozi has provided particulars of the accounting of Vancouver Green for the Fairmile Road project only. In Exhibit "J" to his affidavit, he has provided the addresses of two of the remaining projects, i.e. the West 15th Avenue project in North Vancouver and a project in Richmond, although it is not possible to determine which of the projects listed in the letter of May 4, 2015, was in Richmond. Overall, Mr. Behroozi has provided a partial response to the demand for particulars, especially in relation to the Fairmile Road project which is the project on which the majority of the value of Gescan's claim rests.
- [50] The failure to respond to a demand for particulars as described in Okanagan Aggregates amounted to a deliberate refusal to cooperate. That issue was amplified by the defendant's failure to appear for an examination for discovery. There is no such blatant refusal to provide particulars in the case at bar where substantial disclosure have been provided respecting the Fairmile Road project and some, although limited further information has been provided by Mr. Behroozi regarding other projects on which his company worked. The response of Mr. Behroozi has no doubt been tempered by the actual demand, which asked only for the addresses of some of the projects and did not seek accounting. Gescan has submitted, based on the reasoning in Okanagan Aggregates, that the onus rests upon the defendants to provide an accounting where the information sought would have been within the knowledge of the defendants. I agree, to the extent that the particulars sought are within the knowledge of the defendants: such particulars would include invoicing by the defendant trustee, evidence of payments received by the trustee and the payment for work and materials to material suppliers, workers, subcontractors and sub-subcontractors, but not to an accounting of prime contracts when the defendant is a sub-contractor or lower on the contractual chain.
- [51] As such, on the disclosure issue I would order Gescan must first identify with clarity the particulars which are sought within the limitation referred to above and Mr. Behroozi will have 90 days to provide all such particulars to Gescan.

- [52] Finally, Gescan's claim is directed to the funds directed from Vancouver Green and used towards the purchase or improvement of the Capella Drive property which was owned by Mr. Behroozi. As that property was purchased in 2008 and the projects in question where trust funds may have been diverted were all built in 2014, it could not be said that trust funds were invested to purchase the Capella Drive property, only that trust funds may have been used by Mr. Behroozi to make payments on the mortgage or mortgages registered against that property while he owned the property. Through further disclosure by Mr. Behroozi it may well be that he used some funds from one of the projects in question to make payments on the mortgages, however, I would suspect that the equity of Mr. Behroozi in that property would only have been minimally enhanced by the principal portion of such payments.
- [53] To summarize, if Gescan wishes to continue to pursue its claim to trace funds through Vancouver Green to Mr. Behroozi and the use of those funds to increase the equity in that property, there must be further detailed demands for particulars and responses to the same which may or may not prove a breach of the s. 10 trust.
- [54] As addressed above, a limitation defence may or may not be available to Mr. Behroozi; in order to make a determination as to the dates when the various projects or contracts were completed would require further disclosure from the parties as to when the projects had been completed.
- [55] Accordingly, this application as it relates to a claim for judgment under the s. 10 trust is premature and I adjourn the summary trial application pending further more detailed requests for particulars and a response to the same as stated earlier in these reasons, should the plaintiff be inclined to continue in light of the potential recovery should the court find in favour of the plaintiff on the tracing issues flowing from the potential breach of the s. 10 trust. To the extent this argument affects the issue of whether Gescan wrongfully filed the certificate of pending litigation and what damages may result from that, that issue is also adjourned. I do order dismissal of the contractual claim as against Mr. Behroozi for the reasons given above.
- [56] Further, the monies held in security should be reduced to the extent that the triable issue raised by Gescan, as it relates to the property, are limited to the mortgage payments allegedly made by Mr. Behroozi with monies received from Gescan: see *Siemens Contracting Ltd. v. Norxex Civil Contractors Inc.*, 2008 BCSC 190. It is for the parties to calculate what this amount could be; the security will be paid to Mr. Behroozi accordingly.
- [57] Mr. Behroozi is entitled to the costs of defending the contractual claim against him on Scale B, such costs to be taxed by the registrar.

"Jenkins J."

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