

CANADA / JUDGMENT

Morbank Financial Inc. v. 0476779 B.C. Ltd.

2013 BCSC 2008

COURT

Supreme Court of British Columbia

DECIDED

4 November 2013

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2013 BCSC 2008 Morbank Financial Inc. v. 0476779 B.C. Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Morbank Financial Inc. v. 0476779 B.C. Ltd., 2013 BCSC 2008 Date: 20131104 Docket: S124690 Registry: Vancouver Between: Morbank Financial Inc. Plaintiff And 0476779 B.C. Ltd., Eric Alan Burton, Doris Inge Giesbrecht, Roger Field and William Grantmyre Defendants And Doris Inge Giesbrecht, Roger Field, William Grantmyre, Mark Martel, Darren Zimmerman, 0476779 B.C. Ltd. and Tenants-In-Common Corporation Third Parties Before: The Honourable Mr. Justice Funt Reasons for Judgment Counsel for the Plaintiff: D. Crerar, E. Little Counsel for the Defendant Eric Burton R.J. McDonnell Appearing on her own behalf: Doris Giesbrecht Appearing on his own behalf: Roger Field Appearing on his own and on behalf of 0476779 B.C. Ltd. William Grantmyre Counsel for First West Credit Union W. Roberts, S. Nelligan Place and Date of Hearing: Vancouver, B.C. December 6 & 18, 2012 February 7 & 8 April 4, 5, 10, 17 & 25, 2013 Place and Date of Judgment: Vancouver, B.C. November 4, 2013 I. Introduction

- [1] The plaintiff has applied to strike the Responses to Civil Claim and Third Party Notices filed by 0476779 B.C. Ltd. ("779"), Ms. Doris Giesbrecht, Mr. Roger Field, and Mr. William Grantmyre (the "four defendants"). For the purposes of this application, the defendant, Mr. Eric Burton, sides with the plaintiff.
- [2] For the reasons below, the plaintiff's application is granted. A "just, speedy, and inexpensive determination of [a] proceeding on its merits" (Rule 1-3 of Supreme Court Civil Rules, B.C. Reg. 168/2009) is only possible if the parties are willing to respect and abide by the Rules of Court and Orders of the Court. The actions of each of the four defendants establish that none of them wishes to do so. II. The Proceedings
- [3] In brief terms, the claim of Morbank Financial Inc. ("Morbank") is for relief in connection with a fraudulent conveyance. Mr. Burton is a judgment debtor of Morbank. Mr. Burton was 779's sole voting common shareholder and director. 779 owned four properties in Fort St. John, including three tenanted commercial properties.

- [4] Mr. Burton has pleaded that in the fall of 2010 Mr. Field misrepresented to him that he should resign as 779's sole director. He has further pleaded that Mr. Field with Ms. Giesbrecht and Mr. Grantmyre (and others) then conspired to dilute his shareholding and transfer the three tenanted commercial properties owned by 779 to Ms. Giesbrecht.
- [5] Ms. Giesbrecht granted first and second mortgages with respect to the three commercial properties to First West Credit Union as first mortgagee, and Dr. Steven Kirzner and Ms. Mia Mackoff as second mortgagees. There is no allegation that First West, Dr. Kirzner or Ms. Mackoff had any knowledge of any fraud or other irregularities when funds were loaned to Ms. Giesbrecht and the mortgages were taken as security. The principal amounts of the first and the second mortgages are \$1,257,500 and \$350,000 respectively. For related proceedings see *First West Credit Union v. Giesbrecht*, 2013 BCSC 564 (leave granted August 29, 2013, CA040921) ("First West #1") and *First West Credit Union v. Giesbrecht*, 2013 BCSC 1484 ("First West #2").
- [6] Morbank and Mr. Burton wish to restore Mr. Burton to his position as 779's sole voting common shareholder and director, and return to 779 the three commercial properties now held by Ms. Giesbrecht. In *First West #1*, I ruled that these three commercial properties were validly charged by the first and second mortgages and I granted, among other relief, an order nisi of foreclosure. The ability to apply for an order absolute was stayed as part of the appeal proceedings.
- [7] The four defendants are self-represented. It was apparent during the various hearings that each of the individual defendants was intellectually capable of understanding the matters before the Court. The legal issues involved were also not complicated. The production of documents for the litigation and those which may in any way relate to the mortgage proceeds are readily understandable matters.
- [8] Morbank and Mr. Burton have sought from the four defendants information and production of documents both for the litigation and in order to locate and freeze the mortgage proceeds. In this regard, there have been eight Orders issued:
- (a) July 3, 2012 (Justice Davies) (ex parte) time limited freezing order;
 - (b) September 14, 2012 (Justice Davies) documents and discovery;
 - (c) October 3, 2012 (Justice N. Smith) extend freezing order, documents and discovery, affidavit of documents.
 - (d) December 6, 2012 (Justice Funt) particulars of present location of mortgage proceeds, including the physical and geographical location of the funds with particulars as to the persons or financial institutions in possession of the funds;
 - (e) December 18, 2012 (Justice Funt) extend freezing order, production of all documents concerning the mortgage proceeds;

- (f) February 8, 2013 (Justice Funt) expand and extend freezing order, affidavit of assets;
 - (g) April 5, 2013 (Justice Funt) affidavit of assets by April 9, 2013; and
 - (h) April 10, 2013 (Justice Funt) all documents relating to source, path and present whereabouts of the mortgage proceeds, ability to produce documents subject to objection and the Court's determination as to the validity of the objection.
- [9] In response to the Court's February 8, 2013 and April 5, 2013 Orders, each of the four defendants filed an affidavit of assets. In his April 9, 2013 affidavit Mr. Grantmyre swore that his only asset was a watch. Mr. Field, in his April 8, 2013 affidavit and combined with other statements made, indicated that he had few assets of any value.
- [10] In her April 9, 2013 affidavit Ms. Giesbrecht swore that aside from the three commercial tenant properties (\$2,400,000 in total value, without taking into account the first and second mortgages of approximately \$1,600,000), she had significant assets of a condominium (\$325,000), a farm property in Ontario (\$399,000) and a receivable from Beltempo Estates Ltd. ("Beltempo") (\$945,000).
- [11] Beltempo is a private corporation of which, at the April 10, 2013 hearing, Mr. Grantmyre said he was a director.
- [12] Ms. Giesbrecht also refers to approximately \$300,000 of rental income owing. I understand that this amount relates to the lease with 0473117 B.C. Ltd., which is the subject lease in First West #2.
- [13] In his April 9, 2013 affidavit, Mr. Grantmyre, on behalf of 779 as "Chairman and representative", swore that its main assets were a \$2,120,000 note receivable from Ms. Giesbrecht (due April 1, 2016), a property in Fort St. John (value not stated, but I understand it to have a value of approximately \$103,000 based on a 2010 property assessment).
- [14] In sum, Mr. Grantmyre and Mr. Field have assets of little worth. 779's main asset is a \$2,120,000 note receivable from Ms. Giesbrecht. It only has value approaching its principal amount if Ms. Giesbrecht's \$945,000 receivable from Beltempo has value. As described below, there is a refusal to produce documents related to Beltempo. III. Two Different Explanations
- [15] The Court was given two different explanations as to the use of the majority of the mortgage proceeds. The first explanation was that the proceeds had been used or were to be used in relation to a 41-unit condominium development in Fort St. John. The second explanation related to warehouses and two businesses (a moving company, Red Wagon Moving & Storage ("Red Wagon"), and a furniture business, Rivard's Sawmill Builders' Supply Co. Limited ("Rivard's)), in Chilliwack.

- [16] I set forth below in considerable detail the two explanations because they show that the four defendants have not been forthcoming and that the timing of the second explanation is not the result of an oversight or mistake.
- (a) Mortgage Proceeds were used in Fort St. John
- [17] At the December 18, 2012 hearing, the Court was told the mortgage proceeds were for a development referred to as the "Alaska Road Project" in Fort St. John. In a December 14, 2012 letter submitted by David A. Hunter, on behalf of Ms. Giesbrecht, it was stated: Pursuant to paragraph [2] of the Order, our client, Doris Giesbrecht, advises that she had no knowledge as to the present location of all or any portions of the funds received from First West Credit Union, Steven Lawrence [Kirzner], or Mia Gita Mackoff pursuant to the mortgages referred to in paragraph 1 of the Order (the "Funds"). Ms. Giesbrecht advises that \$56,000 of the Funds were paid directly to the Defendant Roger Field for architectural drawings relating to a property development of two of the properties at issue in this litigation: 10420 and 10416 Alaska Road, Fort St. John, British Columbia (the "Development"). The remainder of the Funds were paid to the Defendant William Grantmyre, also for the purpose of the Development. The Funds were paid to Mr. Field and Mr. Grantmyre prior to the Order of the Honourable Mr. Justice Davies of July 3, 2012. (my emphasis)
- [18] Mr. Hunter acted for Ms. Giesbrecht for only a short period of time.
- [19] At the December 18, 2012 hearing Mr. Grantmyre took the witness box and Mr. Crerar asked him how the mortgage proceeds were received and how they were to be used: Q How about a date? A Over the years I received tens of thousands of dollars from Giesbrecht. Q All right. When you say "over the years," help out the court there. Which years? A Over the last five years I would say. Q All right. All right. Well, let's focus it down. The First West mortgage was obtained in March 2011. All right? Since March 2011, how much money have you received from Ms. Giesbrecht? A Again, I would have to revisit my records, but over \$100,000. Q Could it be \$500,000? Or is that too high? A I wouldn't want to guess. But it's over \$100,000, yes. Q This development on the Alaska Road property, describe for the court, please, what sort of development you were proposing. A The company, the numbered company, the seller of the three pieces of property in question, retains ownership to a 7,500 square foot vacant lot just adjacent to this water company site on Alaska Road. The plan was, and still is, to consolidate those two lots into one by virtue of a rezoning of the property, demolish the existing building, excavate the contaminated land, and establish a 41-unit condominium for sale building/facility on it with up to 20,000 square feet of commercial on the main floor. Q All right. How much money has already been directed with respect to that condo project that's envisioned for the Alaska Road properties? A Without checking my records I couldn't say, but over \$100,000. Q Could it be \$300,000? A It could be. Q But you're saying \$500,000 would be too much? A No, I didn't say that. You didn't ask that question. Q All right. Well, let me ask you, sir. I am trying to help you give a more precise answer to the court. Is it closer to \$100,000 or closer to a million dollars? A I have no idea without checking my records. As I've said, over \$100,000 has been invested and spent on this development in the soft cost stage. Q

And what steps have taken [sic] in terms of the soft costs that you are referencing with respect to this Alaska Road project? A We're at the stage where our preliminary drawings have been completed, engineering studies have been done. Costing for excavating the contaminated land has been looked into and parties to do that have been contacted. Some investigation into obtaining financing for it has been done. That's all I can recall at the moment. Q All right. And the engineering and preliminary architectural drawings, those were arranged through Mr. Field? A Mr. Field's firm, Field, Field & Field have been a well-established, respected, architectural engineering firm in the city of Grand Prairie for over 30 years. They are the type of company that is more expertised in developments like this, yes. Q And did you pay Mr. Field's firm for those services? A Yes, there has been compensation paid to Field, Field & Field, yes. Q All right. How much? A Without checking my records I couldn't say, sir. Q Okay. Give the court a ballpark, sir. A Over \$100,000. Q It seems to be a theme. A It's a safe number, without my records. Q And we're not talking about a long period of history here. The development drawings that I saw were, I believe, dated September 2012. You've handed them up to the court at some earlier hearing? A That's the completed set. It takes months in order to get to that stage. Q Yes. So with that as a pivot, when did you pay Mr. Field's company for his work? A Again, I'd have to check my records. I don't have that with me. Q Was it before or after September 2012, sir? A Possibly before and after. Q So you gave me preliminary drawings, engineering. What other expenditures have there been in relation to the Alaska Road property? A Again, I'd have to check my records. I don't have that in front of me. Q All right. Now, is it possible that any of the funds you received from Giesbrecht were spent on other projects of yours? A Again, without having some records I couldn't tell you. Q All right. And are you working on any other projects right now? A Other than that particular project? Q Correct. A Not at this time. Q All right. So I put it to you it would be somewhat unusual that you would use Giesbrecht's funds for any other project. Fair to say? Any Giesbrecht funds spent on a project of yours would go to the Alaska Road project? A No. To start with, there is no identification to what Giesbrecht's funds are. If you are saying that - that she provided funds specifically for that, then that's possible. Q I'm not saying that. I'm asking you, sir. You are the one who received these funds. A Well, then ask it a different way and I'll try to answer it. Q All right. So we've established that you have received funds from Ms. Giesbrecht - A Absolutely. Q - over the past sixteen months? A Absolutely, yes. Q Apart from this Alaska Road property, is there any other matter that you would be spending those funds on? A I can't think of any at the moment. Q As you say, this project is in its preliminary stages. Do you have any cash reserves with respect to the Alaska Road project for future expenses? A Cash reserves for what purpose? Q Well, presumably this project is at an early stage. You are going to actually have to build it. A M'mm-hmm. Q Have you kept funds for the next stages of the project, or are the funds spent on the project and you have no more? A Which funds are you referring to now? Q Any funds. A Well, that's not quite a question, any funds. I mean, I have my own resources too. Q Okay. A Are you referring to my money? Q All right. Let's take a step back. Of the funds that Giesbrecht has advanced to you, have you spent and exhausted all of them on the Alaska Road project? Or have you kept some in a bank account, for example? A No. There is no segregation of what

Giesbrecht provides or any other investor provides. And if there are any funds left from which he has provided, I wouldn't be able to identify those funds. Q You talk about investors there. Have you received funds with respect to the Alaska Road project from anyone else, apart from Giesbrecht? A No. Q So, where did you put those funds after you received them from Ms. Giesbrecht? A Again, I'd have to check my records to see where any deposits were made. Q Is it safe to say you didn't put them in a mattress? You put them in one of your bank accounts; right? A Yes. (my emphasis)

[20] In sum, Mr. Grantmyre swore he had financial records, and at that moment could not think of any project other than the Alaska Road property.

[21] At the December 18, 2012 hearing, Mr. Grantmyre was also questioned by Mr. McDonell, counsel for Mr. Burton. Mr. Grantmyre testified that the mortgage proceeds he received from Ms. Giesbrecht went, at least in part, to Beltempo's company account. MR. McDONELL: Q The monies that you received from Ms. Giesbrecht, did they go to you personally or to a company account? A I believe they went to a company account. Q And what is the name of that company? A [Beltempo] Estates Ltd. Q Is that two words? Bell - A One word, [Beltempo] Estates Ltd. Q And where is that - is that a company that you are involved in? A That is the company that I referred to that has the bank accounts with the Bank of Montreal. Q And did all funds from Ms. Giesbrecht to you - directed towards you - go that company? A I can't say for sure. Q Some of it may have gone to your personal accounts? A It may have. Q Did it go to any other companies' accounts? A I'd have to check. I can't say at this time. Q These are records available to you? A Yes. Q And these are all records in your power to produce? A Reasonably, yes. Q And those would include Beltempo Estates company; correct? A Yes.

[22] It is apparent that Beltempo may have a significant role with respect to the mortgage proceeds.

[23] Ms. Giesbrecht and Mr. Field, both present at the December 18, 2012 hearing, heard Mr. Grantmyre's testimony.

(b) Mortgage Proceeds were used in Chilliwack

[24] At the April 5, 2013 hearing, Mr. Field, Mr. Grantmyre and Ms. Giesbrecht prepared a rough two-page schedule as to how the mortgage proceeds were used. Most of the proceeds were apparently spent on projects and businesses in Chilliwack. Mr. Grantmyre stated: MR. GRANTMYRE: So the distribution of those funds, My Lord, in the orders that's referred to Harbour [Harvard] Place. This is a parcel of real estate which houses approximately 20 condominium warehouses in the community of Chilliwack. Five of those warehouses, three of them were acquired by the numbered company 477, I think it was. And that was done approximately two years ago. Two adjacent condominium warehouses were acquired under contract for closing December 12th, just past. And in the interim those two warehouses were rented and renovated. So between the five warehouses - they are like store fronts - there are five warehouses, those are a quarter of a million dollars spent. The two businesses occupying those locations was the Rivard's Furniture and Red Wagon Moving & Storage. The

two units that were under contract operated as Rivard's in which it sold furniture, antiques to some degree, but it also manufactured what is referred to in Ontario as Muskoka furniture but here it's Adirondack furniture, it's called, wooden lawn furniture, tables and so on. So that's its business, to build that furniture and to retail it. So the environment in those two units was constructed in such a way to allow for the assembly to build the creating of these from scratch 2 by 4s to making wooden lawn furniture. So the environment in the two, and the environment in the three, both an expenditure - these are not absolutely accurate, but they're within 5 percent, let's say - a quarter of a million dollars of the proceeds from the funding was used to retrofit those two facilities. The warehouse - the three warehouses that's used as the Red Wagon storage facility is capable of handling containers, you've seen these, pods. And you've seen the harbour containers, the metal ones. This environment houses up to 53 wooden-style containers capable of storing a one-bedroom apartment content in it. So that the three-unit facility is actually a self-storage is what it is. People will request one of these containers to be brought to their home or their office where they will have a period of time to fill them up. A vehicle comes back and picks up this container, brings it back to the warehouse and stacks it the height of three levels. So that particular facility was retrofitted to accommodate 53 of these 12-foot stackable storage containers. THE COURT: Who owns the facility? MR. GRANTMYRE: It's owned by the numbered company. THE COURT: Okay. MR. GRANTMYRE: Which is part of the information that's here, the 477 I think is the numbered company. Those units in that storage facility have come in at a cost of \$1,150 without transportation and without taxes. That's the cost. They have a five-year life expectancy. So part of the expenditures to retrofit and to implement the storage concept are depicted in here as some of those costs. The price of those units which are sitting ready to be assembled in the facility have been paid for with some of these funds. So a portion of the monies have been used for not only the inventory in the furniture side of it, but also in the container side which is considered inventory from the container point of view, plus the renovations. So that's part of the expense that's depicted in here. Now, the creation of this lawn furniture and these containers, the containers aren't dealt with, but they're purchased - disassembled and then assembled. But the furniture's built here. And the building of the furniture and the assembly of the containers considered -- needs manpower. And five employees were employed during this time in order to assemble and to build this furniture. They since have been laid off, of course. That all took place in the two units that was named Rivard's in the Harbour Place location since December past. That space - Rivard's is no longer in there, due to circumstances. The units have been sold by the pseudonym investment group to a contractor who has ripped out all of those newly installed improvements because he's turned it into his front end of his construction company. So I guess you could say that was kind of a waste of money. So that's - THE COURT: Which is the waste of money? The 75,000 or .. MR. GRANTMYRE: The 75,000 plus the quarter of a million for the improvements. Now, half of those improvements, of course, which have come to a stop, are being done inside the three warehouses. So a quarter of a million collectively between the five. Two now have been lost. The other three are in a foreclosure because of the inability to make the payment. Those improvements are 90 percent complete and that's with a second floor office space,

electrical, plumbing, et cetera. And that is the front portion to the Red Wagon Moving & Storage business. And the purpose of having it there was to support that business. The Red Wagon - THE COURT: Who owns Red Wagon? MR. GRANTMYRE: The Red Wagon is owned by Red Wagon, the corporation. THE COURT: Yes, but who owns Red Wagon the corporation? MR. GRANTMYRE: It's owned by the group. And is something - THE COURT: The group. Who's the group? MR. GRANTMYRE: Well, the Rivard's enterprise as well as the numbered company who owns the three units, as well as the Red Wagon business. Those three entities are theoretically owned by the numbered co-defendant in this action. THE COURT: Theoretically owned? Or owned? MR. GRANTMYRE: Shares haven't been issued. But the monies from the development, the leveraging of the Fort St. John properties, were expended in the advancement of the company into these two other enterprises to create cash flow. So the ownership of Red Wagon shares, the ownership of the Rivard's, which was a dba, it's not a corporation yet, but essentially it belongs to the 477 company which is depicted in the order as one of the freezing orders. So that corporation runs the Red Wagon. That corporation runs the Rivard's dba. So - and the ownership of the 477 is the property of the defendant numbered company from Fort St. John. Does it make any sense at all? MS. GIESBRECHT: I think it's 476. MR. GRANTMYRE: 47 - whatever the number is. I can't remember. But Fort St. John, the entity that provided the capital to do these enterprises is the shareholder of this new enterprise, Red Wagon and the numbered company. That's where the shareholders are. That's who owns - THE COURT: In theory? MR. GRANTMYRE: Well, I say in theory because at the time - THE COURT: Who owns the shares right now? If I went to the share registry - MR. GRANTMYRE: The shares are sitting there. I don't know. THE COURT: They haven't been issued? MR. GRANTMYRE: No, they haven't been issued. I don't believe that is an issue at this point, My Lord. But it - and the interesting part about it, My Lord, is that Mr. Field, the entity - not Mr. Field - Mr. Burton - who is suing the numbered company in fact is a shareholder in that whole enterprise by virtue of his 50 shares. And I might mention something else that hasn't been said - and I'll say it here now today so that it is on the record, My Lord. Mr. Burton's equitable interest in those properties in Fort St. John has been taken into consideration, and he was to be credited for the value of that equitable interest in the bigger collection of all. So that when these properties and these shares in reference to the Harbour-Place and the other business were officially on the books because an opening statement hasn't been done. THE COURT: Is there any agreement that says that? MR. GRANTMYRE: There is no agreement. This was the general understanding. THE COURT: No memorandum of understanding? MR. GRANTMYRE: No, My Lord. THE COURT: Nothing in writing? Not even on a napkin? MR. GRANTMYRE: No. Mr. Burton and Mr. Field obviously have had conversations in the past about this. Mr. Burton is not knowledgeable about the Red Wagon and/or the Harbour Place. When he removed himself as the director and so on it was so he could go away and do his water business. And the only connectivity there would be expand his water business into Alberta, into the Spirit River property. Outside of that, the general operations of the company, he wasn't involved. But he was aware that at a point in time a settlement would be made. Shares of whatever magnitude would be issued to him based on the collection of all of the assets under that numbered company. So

that is how this thing had expanded. And that's why we have a great deal of difficulty trying to deal with these things because Mr. Burton is making allegations which we can't understand. And what we have done - the reason for the Red Wagon - and I'll say this - is that Red Wagon - you are familiar with the U-Haul service. THE COURT: Yes. MR. GRANTMYRE: Red Wagon is a federally chartered corporation designed specifically to go across the country in depots. Just like U-Haul. MS. GIESBRECHT: Zippy Shell. MR. GRANTMYRE: Zippy Shell. Nobody would know that. The containers, being as they are, are the specific dimensions for which haulers like Williams and United require in order to put them into their overland vehicles so that the container can be shipped from coast to coast. All the way to PEI. This was the -- and still is to some degree - the plan for the Red Wagon. The cash generation and the value of that company is astronomical potential. And as you are well aware, there's plenty of statistics on the basis that people are downsizing and relocating. So the business of self-storage and relocation is a driving industry right now. And that's why this one here was developed for that purpose. So again I'm giving this information. It's not in a proper form or documentation. And I hope it will be taken in the spirit of - that it has been offered. And as I have disclosed off the record to the counsel behind me here, that everything that I'm telling you is documentable. Everything is there. And we - THE COURT: Will you produce those documents? MR. GRANTMYRE: We will produce those documents. THE COURT: Why haven't they been produced yet? MR. GRANTMYRE: No, sir. They haven't been - THE COURT: But why not? MR. GRANTMYRE: Why not? I understand - THE COURT: Sorry; I don't mean to have upset in my voice if I do, because these are court orders. MR. GRANTMYRE: I understand, My Lord. There is no, as you said, even a paper napkin. We could make the assertion that Mr. Burton was part of this whole program, but as you said, there's not even a Denny's napkin. THE COURT: But there's other documents you are now saying. MR. GRANTMYRE: Documents in the sense that - improvements that were spent. The monies that were spent on the improvements and containers that were purchased. That's documentable. The deposit, the purchase of the Harbour Place property, we have the record for that, of course. But in relation to the conveyance, it has no meaning to that except when it comes to, as you've asked, where's the money? So we're trying to put that in the prospective of where's the money. A lot of monies have been used. 2 million seems to a popular number. But in fact, as you can see by what was advanced to Ms. Giesbrecht, 814,000 plus what was advanced at 270,000, that's the total of monies. The rental monies in question from those three properties, which only two are producing rental, was only \$11,000 a month. And that's accounted for in here, minus the expenses, and there was a net amount. I have given you sort of an overall picture, if you wish, because Mr. Field is the one that produces the paper - THE COURT: So you are saying all these companies are in essence owned by 779? MR. GRANTMYRE: All the companies are owned by 047. MS. GIESBRECHT: Yes. THE COURT: Yes, 0476779. MR. GRANTMYRE: That's correct. THE COURT: The defendant numbered company [779]. MR. GRANTMYRE: That's correct.

(c) Document production

- [25] Mr. Eric Little is co-counsel for Morbank. His April 16, 2013 affidavit provides a useful summary of the document production by the four defendants as matters stood after the April 10, 2013 Order and reflects the non-compliance by the four defendants. As described by Mr. Crerar, the further production of documents in advance of the April 25, 2013 hearing resulted in "almost no new documentation" and, in particular, did not answer the question of "where the money is now". Mr. Little's April 23, 2013 affidavit verifies Mr. Crerar's descriptions.
- (d) Further written submissions of the four defendants
- [26] At the conclusion of the one-hour hearing on April 25, 2013, I asked for summary written submissions by Morbank and Mr. Burton (he adopted Morbank's submissions) and gave the four defendants the opportunity to reply.
- [27] Mr. Grantmyre, in his written submission in response to Morbank's April 29, 2013 written submission, took the position that Beltempo is not a party to the action and accordingly compliance is not required. As noted above, on December 18, 2012, Mr. Grantmyre testified that funds from Ms. Giesbrecht were deposited in a Beltempo account. In this regard, on his written submission, Mr. Grantmyre stated (in part): 11.(a) Funds in the Beltempo account may be used in the discretion of Beltempo. Funds received by Beltempo from Giesbrecht used by Beltempo in its discretion. The Plaintiff continues to mislead the court as to Giesbrecht and Grantmyre operating the business of Rivard's and Red Wagon's Moving and Storage. The Plaintiff continues to move back and forth as to who operated Rivard's furniture and antiques and Red Wagon Moving and Storage. Sometimes it is Giesbrecht, sometimes it is Giesbrecht and Grantmyre. Beltempo is not part of this action.
- (b) The Plaintiff does not identify what units are being foreclosed on nor what business is no longer active nor the relevance this has to the Plaintiff's claim or fraudulent conveyance.
- (c) The Plaintiff states that funds in the Beltempo account are in fact spent. The Plaintiff has not provided any justification for the freezing of the Beltempo account if in fact the account is empty.
14. As the Defendants in an effort to meet the obligations under discovery have provided the plaintiff with numerous documents including relevant emails. The Plaintiff continues their overarching request for material that either does not exist or are not relevant and have not been proven to be relevant by the Plaintiff.
- [28] Ms. Giesbrecht took a similar tack in her written submissions. She stated (in part):
24. Plaintiff's counsel refers to undisclosed documents concerning version #2 but has not advised me of what those undisclosed documents are.
- a. 08774477 B.C. Ltd. is not a litigant in this mater, Red Wagon Moving and Storage is also not a litigant in this matter.

- b. Counsel for the Plaintiff is making a speculation.
25. Beltempo is not a litigant in this matter. I am not responsible for what Mr. Grantmyre asserts; I am not a director, officer or shareholder in Beltempo. Counsel again is making a speculation regarding banking records in my power. During the 10 February 2013, I did correct statements made by Mr. Grantmyre when he stated that I had already provided the amended list to the Plaintiff.
- [29] With respect to Mr. Field, Morbank in its April 29, 2013 written submission stated (in part):
42. Insofar as Field does not appear to be connected to Beltempo, it may be that he has less access to records of that central corporation.
43. That being said:
- (a) Field should have access to documents and knowledge with respect to Version #1 of where the Proceeds went: he is the architect of the Fort St. John development, and on his own evidence involved extensively in planning and permits and construction communications.
- (b) Field should have access to documents and knowledge with respect to Version #2 of where the Proceeds went: he was the person who drafted the Exhibit "A" summary of where the funds were spent, and created it with Grantmyre and Giesbrecht.
44. Further, as Field was an officer and director of 0476779 B.C. Ltd., Field should have documents and knowledge about:
- (a) the dilution of the 0476779 B.C. Ltd. shares. He acknowledges that he participated directly in this act (Field Affidavit #1, para. 10, Tab 17);
- (b) the draining of the accounts of 0476779 B.C. Ltd.; and
- (c) the rents collected by 0476779 BC Ltd from the transferred properties, which 0476779 BC Ltd continued to do after the transfer.
45. Mr. Field remains in breach of the document discovery orders. It is undisputed that Giesbrecht and Grantmyre directed \$56,379.36 to Mr. Field, ostensibly in consideration for Mr. Field's work on the Fort St John project. Yet no receipt or banking records or work product (apart from a few pages of architectural drawings falling short of \$56,000 of work) have been produced. Field has produced no banking records or emails.
- [30] In response Mr. Field submitted (in part):
42. I agree with Mr. Crerar's statement, I have no access.
43. a. This does not appear to me to be a breach of the order, Mr. Crerar does not state any order as reference.
- b. My position is the same as above.

44. Mr. Crerar does not state which order that I am in breach of but is merely making statements.
45. Again, Mr. Crerar makes statement without reference to alleged breaches, nor does he reference the orders that breaches were a result of. IV. Discussion and Law
- [31] The Rules of Court and, in addition in this case, the Orders of this Court, require the timely and good faith disclosure of documents. In his April 29, 2013 written submissions on behalf of Morbank, Mr. Crerar stated: The Defendants do nominally deliver lists, affidavits, and documents. But document lists remain incomplete; affidavits of documents, assets, and information remain unparticularized and incomplete; most deliveries have been late. They deliver just enough to be allowed a further second chance.
- [32] I agree with Mr. Crerar.
- [33] As described above, Mr. Grantmyre has given two different explanations as to the disbursement of the mortgage proceeds. Ms. Giesbrecht and Mr. Field were both mum during and remained mum after Mr. Grantmyre's first explanation. The first explanation was provided after the December 6, 2012 Order which read (in part): Within five days of the date of this Order, each Defendant, other than the Applicant, including the Defendants Doris Inge Giesbrecht and William Grantmyre, shall produce and deliver to counsel for the Applicant, Eric Alan Burton, Mr. McDonell, and counsel for the Plaintiff, Mr. Crerar, particulars of all information each knows as to the present location of all or portions of the funds received from First West Credit Union, Steven Lawrence [Kirzner] or Mia Gita Mackoff pursuant to the mortgages described in paragraph 1 above. The information is to include the physical and geographical location of the funds with particulars as to the persons or financial institutions in possession of the funds.
- [34] Especially in light of the December 6, 2012 Order, Mr. Grantmyre's first explanation was both incomplete and contumacious.
- [35] In *Schwarzinger and Tag Properties SA v. Bramwell*, 2011 BCSC 304, Justice Fitzpatrick provided a comprehensive and useful description of the key principles the Court should consider in exercising its discretion to striking pleadings. I will follow Fitzpatrick J.'s principles in order.
- (1) Draconian Measure
- [36] Our common law system is litigant-driven. Over many centuries our exceptional system has shown the ability to adapt to changing times and increasingly complicated relationships, and it is the envy of people in many other countries. Litigants may come to this Court to resolve disputes based on the evidence presented and the application of the law.
- [37] Only when the litigants are willing to follow the Rules of Court and Orders of the Court can a litigant-driven system work. Whether represented or unrepresented virtually all litigants accept and recognize the need to comply with the Rules of Court and Orders of the Court.

- [38] If a litigant, through actions and despite words to the contrary, does not comply with the Rules of Court and Orders of the Court, the Draconian measure of striking that litigant's pleadings must be considered.
- (2) Second Chance
- [39] The Orders in this action reflect the chances given to the four defendants to comply. The four defendants state that they recognize the importance of the Rules of Court and Court Orders but they do not comply. They make promises in Court but do not keep them. In his April 29, 2013 written submission, Mr. Crerar made this point by referring to the transcript of the April 10, 2013 proceedings (Little Affidavit #1, Ex. D, pp. 8, 12-16).
- [40] There has been ample time during which the four defendants could have complied.
- (3) Proportionality and Alternate Remedy
- [41] I have considered whether a remedy other than striking the pleadings of the four self-represented defendants might be appropriate. In this regard, I considered whether I should order examinations for discovery with particular terms.
- [42] On reviewing the proceedings, I have concluded that discoveries with terms or indeed any other remedy would be fruitless. The April 10, 2013 Order provided: If any of the Four Defendants objects to the production of any document or category of documents, or is unable to provide such documents, the defendant shall list the document or category of documents and shall provide with particularity the reason for the refusal or inability to produce the document or category of documents, and, in the case of a refusal, shall bring the respective documents to Court at the Hearing, as set out below, for review by the Court and determination of the validity of the refusal. At the subsequent April 17, 2013 hearing, none of the four defendants asked the Court to make a ruling regarding documents that they possessed or controlled but refused to produce.
- [43] As noted above, Mr. Grantmyre and Ms. Giesbrecht submit in their respective written submissions that Beltempo is not a party to the litigation and this is one basis for their respective refusals to produce documents in relation to Beltempo.
- [44] Mr. Field simply asserts that Mr. Crerar "does not state any order or reference". After the various hearings and issuing freezing orders and an order for a list of assets (among others), I accept that Mr. Field understands that he is required to produce documents and that he in fact refuses to do so. He had the opportunity to produce documents to the Court for a determination by the Court for review and determination of the validity of any refusal.
- [45] As Mr. Crerar noted, the April 5, 2013 schedule is in Mr. Field's handwriting and was prepared by Mr. Grantmyre, Ms. Giesbrecht and Mr. Field. In his April 5, 2013 explanation Mr. Grantmyre stated: "I have given you an overall picture, if you wish, because Mr. Field is the one that produces the paper." Mr. Field did not contradict Mr. Grantmyre's statement.

(4) Explanations for Default

- [46] None of the four defendants has explained why nothing was said about the Chilliwack project until April 5, 2013. Mr. Grantmyre, on behalf of himself and 779, states in his April 29, 2013 submission: The Defendants explanation to the court of the distribution of the proceeds belonging to Giesbrecht as a result of her personal leverage of the real estate legitimately acquired with a legitimate mortgage placed on it advised the court of the disbursement of her money. The Plaintiff considers the explanation as 2 different accounting for the disbursement when in fact there is only one accounting and the balance of the explanation is an extension of that accounting of Ms. Giesbrecht's funds. Grantmyre has never denied being a director in Beltempo Estates Ltd. ("Beltempo").
- [47] The April 8 and 9, 2013 affidavits listing the four respective defendants' assets reveal little. Each of the sworn statements of Mr. Grantmyre, on his own behalf and for 779, of Ms. Giesbrecht and of Mr. Field evidence no shareholdings and specifically no shareholdings in the capital of either Beltempo or Red Wagon. (With respect to 779, the affidavit appears to be contrary to what Mr. Grantmyre told the Court on April 5, 2013.)
- [48] As noted above, Mr. Grantmyre and Ms. Giesbrecht take the position that because Beltempo is not a party in the action, compliance is not required.
- [49] The corporate registry searches attached to the first affidavit of Jessica Guichon (a legal assistant employed by Morbank's counsel), show that Mr. Grantmyre is the "attorney" for Rivard's (which is extra-provincially registered in B.C.) and Ms. Giesbrecht is a director of Red Wagon (an Alberta company). Both corporations were part of the second explanation involving the Chilliwack project.
- [50] Despite the December 6, 2012 and December 18, 2012 Orders and the further February 7 and 8 proceedings, Mr. Grantmyre did not describe the Chilliwack Project until the April 5, 2012 hearing.
- [51] In his April 5, 2013 explanation regarding the Chilliwack Project, Mr. Grantmyre stated: "Two adjacent condominium warehouses were acquired under contract for closing December 12, just past." It is apparent that at the December 18, 2012 hearing, Morbank, Mr. Burton and the Court were being told one version by Mr. Grantmyre and Ms. Giesbrecht through counsel (Fort St. John - Alaska Road Project) while significant funds were contemporaneously being spent in Chilliwack. As noted above, Mr. Field remained silent and made no attempt to correct matters until the preparation of the rough schedule at the April 5, 2013 hearing. He does not assert that he was unaware of the Chilliwack Project before that time or that Mr. Grantmyre or Ms. Giesbrecht had kept information from him.
- [52] Mr. Field took an elusive approach in connection with his response to paragraphs 44 and 45 of the Morbank April 29, 2013 submission. As noted by Mr. Crerar, Mr. Field swears in his first affidavit sworn September 12, 2012 that he was an officer and director of 779. As Mr. Crerar states in his April 29, 2013 submission: It is undisputed that Giesbrecht and

Grantmyre directed \$56,379.36 to Mr. Field, ostensibly in consideration for Mr. Field's work on the Fort St. John project. Yet no receipt or banking records or work product (apart from a few pages of architectural drawings falling short of \$56,000 of work) have been produced. Field has produced no banking records or emails.

- [53] Mr. Field and Mr. Grantmyre note that as of the time of their respective written submissions, the April 5, 2013 and April 10, 2013 Orders had not been entered. At the December 6, 2012 hearing, the Court, at the conclusion of the hearing, stated: So with that, I so order and, as I say, that order is effective now, so please obey those orders, and it's more than a please, I say that politely, it's a court order, it must be obeyed.
- [54] At the April 4, 2013 hearing, the Court also stated that an Order is effective from the time of pronouncement.
- [55] The four defendants also assert that Morbank's pleadings are not supported by the evidence and have responded to the Civil Claim on this basis. In particular, the four defendants assert that 779 issued further shares to raise capital and that the transfer of the three tenanted commercial properties to Ms. Giesbrecht was for valuable consideration.
- [56] At the April 10, 2013 hearing, Mr. Grantmyre said with respect to funds raised by 779 from the issuance of shares: The TIC, Tenants-In-Common purchased shares from the company. It paid \$50,000 for those shares. That \$50,000 went into the company account and has been accounted for. Mr. Crerar says that we declare that we have turned around and used these monies for development purposes, but there's only \$56,000 to Mr. Field. Well, let me say, sir, that Mr. Crerar doesn't tell the company how it should develop its interest. If it develops its interest by investing in something else or buying a piece of equipment or doing this or doing that, that's a company prerogative. That's not something that we have to go to a creditor for or a shareholder for and ask if we've got permission to do that. It's a decision to make whether it benefits the company or not. And whatever actions were taken benefitted the company in many different ways.
- [57] As Mr. Crerar noted, Ms. Giesbrecht in a March 17, 2011 email (Chui affidavit #9, p. 73) wrote: "I am the shareholder in Tenants-in-Common, who is the shareholder in the numbered company [779]." (I note that based on her April 9, 2013 affidavit, she was no longer a shareholder.)
- [58] In his April 29, 2013 submission, Mr. Crerar states that "no documents evidencing this payment appear to have been produced".
- [59] In his submission, Mr. Crerar also states that the \$2,120,000 promissory note that was the consideration stated to have been given by Ms. Giesbrecht for the transfer of the three commercial properties "is unusual on its face; and it is dated a week after the closing of the transfer of the Properties".

- [60] At the April 5, 2013 hearing, Mr. Grantmyre stated that the promissory note was dated April 1, 2011 because the rents from the commercial properties were to be received on the first of each month, that reference to it was made at the time of closing, and that Mr. Field, Ms. Giesbrecht and he knew one another and had worked together in the past so there was no concern when the promissory note would be delivered. Mr. Grantmyre recognizes that the promissory note does not bear interest.
- [61] Mr. Grantmyre says that there was never any doubt that the promissory note would be repaid because Ms. Giesbrecht would enjoy future profits from the Fort St. John development based on her share of the profits.
- [62] If one accepts Mr. Grantmyre's explanation that the four defendants have a strong defence, this still does not justify non-compliance. The merits of a litigant's position can only be tested when the litigant is willing to comply with the Rules of Court and Orders of the Court.
- (5) Conclusion
- [63] Where litigants are not willing to abide by the Rules of Court and Orders of the Court, the litigation process falters and the complying litigants are prejudiced. This is the case at bar. I agree with Mr. Crerar's summary at paragraph 3 of his April 29, 2013 written submission: The Defendants have failed to produce documents that show the central issues in this action:
- (a) the present location of the Proceeds;
 - (b) the accounting and bank records for Beltempo (the last known destination of the bulk of the Proceeds);
 - (c) documents indicating where the Proceeds went after Beltempo;
 - (d) ledgers, spreadsheets, or other accounting records indicating the path of the Proceeds;
 - (e) with respect to Version #1 and Version #2 of the destination of the Proceeds: agreements, requests, directions, emails, communications, visa statements, contracts, applications (for property development or otherwise), plans, permits, purchase agreements, resolutions, documents related to the Fort St. John real estate development, purchase agreements or information concerning the properties at Harvard Place, Chilliwack, or purchase funds for that property or the Red Wagon or Rivard's businesses operated there;
 - (f) the source or payment of the \$50,000 to buy the 50,000 new shares of 779;
 - (g) documents or agreements concerning the issuance of the 50,000 new shares.
- [64] The four defendants were warned on various times as to the importance of compliance and the serious consequences of non-compliance. I will strike the Responses to the Civil Claim and Third Party Notices as sought by the plaintiff. V. Relief

- [65] The Responses to the Civil Claim and the Third Party Notices filed by each of the four defendants are struck.
- [66] The transfer of the properties located at 10415 Alder Road, 10493 Alder Road and 10420 Alaska Road, all of Fort St. John, British Columbia, described below, will be reversed and transferred back to 779:
- (a) PID 012-806-960 Lot 10 Block 3 Section 2 Township 84 Range 19 West of the 6th Meridian Peace River Plan 9723;
 - (b) PID 009-297-049 Lot 11 Block 3 Section 2 Township 84 Range 19 West of the 6th Meridian Peace River Plan 9723; and
 - (c) PID 010-730-541 Lot 8 Block 1 Section 36 Township 83 Range 19 West of the Sixth Meridian Peace River District Plan 8551 (the "Transferred Properties").
- [67] New shares issued in the capital of 779 will be cancelled and reversed, with the result that Mr. Burton will hold 100% of the voting common shares in the capital of 779.
- [68] For greater certainty, nothing in this Order or the Orders pronounced herein on July 3, 2012, October 3, 2012, December 6 and 18, 2012, February 8, 2013, or April 5 and 10, 2013, infringes or prohibits any rights of First West Credit Union in its proceeding involving Ms. Giesbrecht, Dr. Kirzner, Ms. Mackoff, Morbank and Mr. Burton in the Supreme Court of British Columbia, Fort St. John Registry No. 21349; or any rights of Dr. Kirzner and Ms. Mackoff to continue proceedings or to commence further proceedings to enforce their security.
- [69] Morbank and Mr. Burton have also sought damages and special damages. I have not had the benefit of Morbank's and Mr. Burton's legal argument with respect to an award of damages and special damages. I ask counsel to arrange a one-hour hearing for submissions to be made at a date that is convenient for counsel, or, if more convenient, counsel may make written submissions on the relief sought.
- [70] The February 8, 2013 Order may now need to be varied. If necessary, I ask counsel to schedule a time before me so that a varied Order may be settled.
- [71] Morbank will have its costs for the proceeding, on a special costs basis, jointly and severally against the four defendants, to be assessed.
- [72] If there are other matters that should be addressed, Morbank and Mr. Burton have liberty to apply. ____ "Funt J." ____ Funt J.

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