

CANADA / JUDGMENT

Trainer v. Tractorhill Sales Ltd.

2018 BCSC 2043

COURT

Supreme Court of British Columbia

DECIDED

21 November 2018

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2018 BCSC 2043 Trainer v. Tractorhill Sales Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trainer v. Tractorhill Sales Ltd.,

2018 BCSC 2043

Date: 20181121

Docket: S1711814

Registry: Vancouver

Between:

William Trainer

Plaintiff

And

Tractorhill Sales Ltd., Stacey Trainer and Brian Greig

Defendants,

Plaintiffs by Counterclaim

And

William Trainer

Defendant by Counterclaim

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for Plaintiff and Defendant by Counterclaim:

T.M Tomchak

Y. Li-Reilly

Counsel for Defendants and Plaintiffs by Counterclaim:

E.A. Poyner

Place and Date of Hearing:

Vancouver, B.C.

October 5, 2018

Place and Date of Judgment:

Vancouver, B.C.

November 21, 2018

Introduction

- [1] This litigation relates to three individuals who are the shareholders in three companies (the defendant Brian Greig holds his shares through a holding company). The companies are the defendant Tractorhill Sales Ltd., which sells used construction and farming equipment, SSC Ventures (No. 49) Ltd., a proposed defendant which owns a property located at 26180 31B Avenue, Aldergrove (the "Property") and SSC Ventures (No. 51) Ltd., which operates the Property.
- [2] The plaintiff claims that the individual defendants have been funnelling money out of Tractorhill in the guise of salaries to themselves in inappropriate priority to obligations under a profit sharing agreement and a lease agreement. In addition, the plaintiff claims that the individual defendants used his shareholder loan in Tractorhill, instead of Tractorhill's own funds, to make an investment in another company run by one of the individual defendants, contrary to an agreement pertaining to that investment. The plaintiff also believes that the defendants intend to cause SSC 49 to sell the Property.
- [3] The plaintiff applies for several orders. Only the interlocutory injunction is completely opposed. The various orders are:
- a) that SSC 49 and SSC 51 be added as defendants. This order is not opposed by the existing defendants. These defendants own and operate the Property. The Property is the subject of the injunction application. Between them, the individual plaintiff and defendants own all of the shares of the companies that are sought to be added as defendants;

- b) amendments to the notice of civil claim, or alternatively, an order allowing the plaintiff to join a petition under s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57 against the defendants, including the defendants to be added to this action. The defendants object to four paragraphs of the proposed amendments but not the balance;
 - c) an interlocutory injunction enjoining and restraining: a) SSC 49 from selling, disposing of, transferring, borrowing against or encumbering the Property; and b) Tractorhill or any of the individual defendants from causing the Property to be dealt with in the same way, to which the defendants are opposed;
 - d) document production of certain corporate documents by SSC 49 and SSC 51, to which the defendants agree to make a diligent search, and produce either the documents within 21 days or an affidavit deposing the documents which could not be found within a further seven days; and
 - e) document production from the accountant for the companies to produce certain documents. The accountant has been served and does not oppose the order with some modifications. The defendants do not oppose the order as modified by the accountants.
- [4] The central issue on both the opposed amendments and the injunction is the nature of the plaintiff's interest in and claim in regard to the Property. The plaintiff seeks to amend to his notice of civil claim to plead a constructive trust with regard to the Property. The defendant asserts the proposed amendments do not properly plead either a remedial or a substantive constructive trust.
- [5] With regard to the interlocutory injunction, the plaintiff's notice of application frames it as a common law, or Rule 10-1 injunction under the Supreme Court Civil Rules, B.C. Reg. 168/2009. At the return of the application, the plaintiff provided written submissions and oral argument seeking an injunction on the basis of s. 227 of the Business Corporations Act. The defendants argue that I should limit the consideration of the injunction to the basis set out in the notice of application. The defendants say that under Rule 10-1, the plaintiff must show a proprietary interest in the Property, which he cannot do on the facts and which he has no proper pleadings to support.

The Amendments

- [6] The individual defendants have been in charge of the financial management and operation of the corporate defendants since around 2011. They took over from the plaintiff at that time.
- [7] The dealings of the parties are subject to four agreements: a profit sharing agreement under which, in part, the plaintiff repaid his salary to Tractorhill as an investment in the form of a shareholder loan; a 2013 agreement pertaining to shares in Grande West, a public company run by the plaintiff; a lease agreement pertaining to the Property with Tractorhill as landlord and Grande West as tenant, notwithstanding that the Property is owned by SSC 49;

and a 2015 agreement by which Tractorhill invested in Grande West in exchange for shares and share warrants.

- [8] As related above, the plaintiff argues that the individual defendants are funnelling money out of Tractorhill for the benefit of themselves and to the detriment of the plaintiff. The plaintiff seeks the following:
- a) damages in breach of contract pertaining to alleged breaches of the agreement;
 - b) a declaration of oppressive conduct;
 - c) a declaration of a resulting or constructive trust over the Grande West shares and warrants;
 - d) a constructive trust over misappropriated funds;
 - e) orders requiring the individual defendants to buy the plaintiff's shares in Tractorhill or vice versa;
 - f) an order requiring the individual defendants to see all of their shares in SSC 49 to the plaintiff;
 - g) orders relating to production and inspection of records pertaining to Tractorhill and SSC 49 and;
 - h) that an inspector be appointed to conduct an investigation into the affairs of Tractorhill and SSC 49 pursuant to Part 8, Division 3 of the Business Corporations Act.
- [9] The plaintiff seeks to amend his pleadings to join SSC 49 and SSC 51 as defendants, to add pleadings pertaining to oppressive conduct, and to plead that SSC 49 holds the Property in a constructive trust for the plaintiff.
- [10] The law pertaining to amending pleadings is that amendments should be allowed as are necessary to determine the real question between the parties. It is a generous approach, allowing for pleadings as they are presented or could be presented so that, as far as possible, all matters in controversy between the parties may be completely and finally determined: *Morriss v. British Columbia*, 2010 BCCA 95 at para. 17; and *Victoria & Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982), 30 B.C.L.R. (2d) 45 (S.C.) at 46.
- [11] The law pertaining to amending pleadings is the same as the law pertaining to strike a pleading, the court does not hear evidence and considers the pleadings assuming the facts pled are true: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (CA) at para 22-27. Novel pleadings are permitted. So long as the material facts have been pled, the case should be permitted to proceed so the court can consider whether it is successful based on the facts as proven at trial: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.

- [12] There are limits to this generous approach. Most notably, the amendments to a notice of civil claim when combined with the original pleading must disclose a reasonable claim, and must set out the material facts giving rise to the claim: *Victoria & Grey Metro Trust Co.* at 47; Rule 3-1(2)(a) Supreme Court Civil Rules.
- [13] The proposed amendments which are disputed are:
- a) paragraph 37, pertaining to the plaintiff's attempts to seek financial information from the defendants;
 - b) paragraph 38, pertaining to a meeting of the directors of Tractorhill and SSC 49 to remove the plaintiff as an officer and director of Tractorhill and SSC 49 without proper notice to the plaintiff; and
 - c) paragraph 10, alleging that the plaintiff made payments towards the purchase of the Property such that SSC 49 holds the Property in a constructive trust for the plaintiff, and in addition to the prayer for relief seeking a declaration that SSC 49 hold the Property in a constructive trust for the plaintiff.

Proposed Paragraphs 37 and 38

- [14] In my view, proposed paragraphs 37 and 38 relate to the claim of oppressive conduct. They are under that heading, and they follow proposed amendments pertaining to the oppressive conduct. While it could be argued that they amount to pleading evidence, not material facts, in my view they are properly characterized as particulars of the oppressive conduct. I allow these amendments.

Proposed Paragraph 10 and the Prayer for Relief - Constructive Trust

- [15] The proposed amendment at paragraph 10 is as follows:
10. The Plaintiff has made loans to and invested in each of Tractorhill and Landco [SSC 49 and SSC 51]. He has paid to Landco 49 [SSC 49] approximately \$180,000 towards the purchase of the Property, made various shareholder loans totaling approximately \$200,000 to Tractorhill, and personally guaranteeing a loan, jointly with Brian and Stacey, against the Property. Landco 49 holds the Property in constructive trust for the Plaintiff.
- [16] In addition, the plaintiff proposes to add to the prayer for relief a request for a declaration that SSC 49 holds the Property in a constructive trust for the plaintiff.
- [17] The defendants assert that the paragraph 10 proposed amendment is not sufficient to plead a remedial constructive trust because a remedial constructive trust is only available to remedy unjust enrichment or breach of fiduciary duty but the material facts have not been pled for unjust enrichment or breach of fiduciary duty. As there is no suggestion that the parties were in a fiduciary relationship, the focus of the defendants' argument was on unjust enrichment. The defendants also say that the plaintiff would not be able to show that a monetary award would be insufficient, a requirement for a remedial constructive trust.

- [18] Unjust enrichment is used to restore money or property to a plaintiff who can establish: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding detriment; and (3) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32. The defendants argue that the plaintiff has not pled unjust enrichment in relation to the Property because the contractual relationships between the parties would be a complete juristic answer to any claim of enrichment and corresponding deprivation.
- [19] I will not decide that point but it is clear that the proposed paragraph 10 is not sufficient to plead a remedial constructive trust because there is no pleading of unjust enrichment in relation to it. If a remedial constructive trust is intended, then paragraph 10 is not a proper pleading and cannot support an amendment to the prayer for relief of a declaration of constructive trust.
- [20] In *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350, Newbury J.A. reviewed the development of the constructive trust in Canada, the United Kingdom and the United States in order to consider whether constructive trusts were only available to remedy unjust enrichment and breach of fiduciary duty or whether they were also available on a wider substantive or institutional basis.
- [21] Justice Newbury quotes from the Court of Appeal in *Atlas Cabinets and Furniture Ltd. v. National Co.* (1990), 45 B.C.L.R. (2d) 99 (C.A.) in which Lambert J.A., at 108, described the difference between the two types of constructive trusts:

A Substantive Constructive Trust

A substantive constructive trust must be distinguished from a remedial constructive trust. In a substantive constructive trust, the acts of the parties in relation to some property are such that those acts are later declared by a court to have given rise to a substantive constructive trust and to have done so at the time when the acts of the parties brought the trust into being. The difference between a substantive constructive trust and a resulting trust may, in cases where the property reverts to the settlor, be no more than a matter of terminological preference. In a remedial constructive trust, on the other hand, the acts of the parties are such that a wrong is done by one of them to another so that, while no substantive trust relationship is then and there brought into being by those acts, nonetheless a remedy is required in relation to property and the court grants that remedy in the form of a declaration which when the order is made creates a constructive trust by one of the parties in favour of another party. .

- [22] Justice Newbury concluded that in Canada, a remedial constructive trust is available to remedy unjust enrichment and breach of fiduciary duty but it is also open to the court to develop the law pertaining to substantive constructive trusts on a case-by-case basis "where good conscience so requires": *BNSF Railway* at para. 55 citing *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 34.

- [23] In Canada, when a constructive trust is referred to it is generally taken to mean a remedial constructive trust. A plaintiff who seeks a substantive constructive trust should plead that expressly: see BNSF Railway at para. 85.
- [24] In both cases, there are two criteria that must be met. The first is that the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between his or her claim and the property which is the subject of the substantive construction trust or the proposed remedial constructive trust: Kerr at paras. 50-51; Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 at para. 92; BNSF Railway at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is insufficient or inappropriate in the circumstances: Kerr at para. 52; Pro-Sys at para. 92. The election in this regard need not be made until the end of trial but at that stage the plaintiff must elect and if he or she elects a constructive trust he or she must be able to show that monetary damages are insufficient or inappropriate.
- [25] In this case, the plaintiff has pled unjust enrichment and constructive trust in relation to the claims pertaining to the shares and warrants of Grande West. This would lead one to conclude that the constructive trust sought with regard to those shares is remedial: BSNF at para. 85.
- [26] Given that unjust enrichment has not been pled with regard to the Property, it may be that the proposed amendment is intended to be a substantive constructive trust. If that is what the plaintiff seeks, he should plead that expressly: BNSF at para. 85. The proposed amendments do not reveal what kind of constructive trust the plaintiff seeks or the factual and legal basis for it.
- [27] Having said that, I do not accede to the argument that the plaintiff cannot claim a substantive constructive trust because he would not able to show that monetary damages are insufficient. That election need not be made until the end of trial and is a factually driven assessment. It would be inappropriate to preclude a pleading on the basis of a factual argument of that nature. However, the factual basis for asserting that damages would be an insufficient remedy should also be pled: BSNF at para. 85.
- [28] The proposed pleadings are inadequate. In keeping with the generous approach to amending pleadings, I dismiss the application with leave for the plaintiff to propose and apply for amendments that comply with BNSF.

Interlocutory Injunction

The Notice of Application and the Written Submissions

- [29] The section of the notice of application pertaining to the injunction refers to Rule 10-1 as the source of the authority for the injunction. The order sought is described as an order to preserve property. There is no reference to an oppression remedy injunction pursuant to s. 227 of the Business Corporations Act. The notice of application does refer to s. 227 of the

Business Corporations Act as a legal basis for the relief sought in the notice of application. Counsel for the defendants asserted that she understood the reference to s. 227 in the notice of application to be in regard to the proposed amendments about oppressive conduct.

- [30] The defendants served an application response addressing the application for an interlocutory injunction on the basis that it was sought under Rule 10-1. Counsel for the defendants asserts that she did not adduce the evidence that she would have or address the arguments as she would have if she was responding to a s. 227 oppression remedy injunction.
- [31] At the return of the application on October 5, 2018, plaintiff's counsel handed up a written argument in which the interlocutory application was addressed only with regard to s. 227 of the Business Corporations Act. Rule 10-1 was not referred to at all.
- [32] The plaintiff points out that the page limit for the notice of application was ten pages and in that page limit he had to address his application to add parties, make amendments, seek discovery and deal with the injunction. I agree that means that only the essential points on each issue could be addressed. However, the plaintiff completed this in nine pages so clearly if s. 227 was a source of interlocutory injunctive relief in addition to Rule 10-1, that could have and should have been asserted. In my view, counsel for the defendants' assertion that she understood s.227 to be referenced with regard to the amendments is reasonable.
- [33] It is clear that in between serving the notice of application and the return of the application the plaintiff decided to argue for an injunction under s. 227 instead of Rule 10-1 but did not give notice to the defendants of that.
- [34] In my view, it would be unfair and contrary to the purpose of having written notices of application requiring a concise statement of the relief sought as well as the factual and legal grounds for the relief sought to allow this to proceed as an injunction application under s. 227, given the difference in legal tests which I will now address.
- [35] Section 227 of the British Columbia Business Corporations Act reads as follows:
- 227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
- (2) A shareholder may apply to the court for an order under this section on the ground
- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

- (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
- (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
 - (a) directing or prohibiting any act,
 - (b) regulating the conduct of the company's affairs,
 - (q) requiring the trial of any issue, or
 - (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

[36] The test for granting interim relief under s. 227(3) of the Business Corporations Act is the same test is for granting an interim injunction laid down by the court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

See also *Fission Uranium Corp. v. Dahrouge*, 2014 BCSC 1214 at paras. 164-166.

[37] Rule 10-1(1) of the Supreme Court Civil Rules reads as follows:

Property that is the subject matter of a proceeding

(1)The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

[38] The test for granting an order under Rule 10-1, often called a preservation order, is similar but not identical to the three step *RJR-MacDonald* test referred to above. Although some of the cases, for example *Fission Uranium*, citing *Crosshair Exploration & Mining Corp. v. Universal Uranium Ltd.*, 2010 BCSC 334, quote the test as being "essentially the same", those cases also cite *Ossoli-Talesh v. Emami* 2003 BCSC 1924 in which Gray J. set out the test under Rule 46, the precursor to Rule 10-1, as not being exactly the same as follows at para. 43-44:

[43]

- (a) Is there a claim on the evidence and not just on the pleadings to a proprietary interest in property?
- (b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
- (c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?

(d) Does the balance of convenience favour the granting of the order?

[44] The traditional test for the granting of an interim injunction was set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and *British Columbia (Attorney General) v. Gitanmaax Band* [also referred to as *Attorney General of British Columbia v. Wale*] (1986), 9 B.C.L.R. (2d) 333 (C.A.), *aff'd* [1991] 1 S.C.R. 62. The traditional test is as follows:

i. A preliminary assessment must be made of the merits of the case to ensure that there is a fair or serious question to be tried.

ii. It must be determined whether the applicant would suffer irreparable harm if the application were refused.

iii. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[39] It stands to reason that at Rule 10-1 injunction incorporates a test of a proprietary interest since the rule refers to "property which is the subject matter of a proceeding or as to which a question may arise". Accordingly, the Rule 10-1 test has four steps which encompass the *RJR-Macdonald* three steps but which also require the court to inquire into the applicant's proprietary interest in the property and belief that it is threatened with disposition. See also: *McKnight v. Hutchison*, 2011 BCSC 36 at para. 145-146; and *Shair.Com Global Digital Services Ltd. v. Arnold*, 2018 BCSC 1512 at para. 14. As *Ossoli-Talesh* sets out, the proprietary interest must be supported both by the pleadings and by the evidence on the interlocutory application.

[40] The plaintiff argues that a proprietary interest is not required for an injunction under s. 227 of the *Business Corporations Act* restraining the sale of property, relying on *Seville Properties Ltd. v. Coutre*, 2005 BCSC 1105; and *Sunner v. A-Z Foam Ltd.*, 2018 BCSC 1113. I will not decide this point because I have decided to not consider the application under s. 227 of the *Business Corporations Act* for the reasons I stated above.

[41] The plaintiff argues that if a proprietary interest is required, he satisfies it based on the proposed constructive trust pleading and because he has personally guaranteed the loan taken by SSC 49 against the property. With regard to the constructive trust, I have not permitted that amendment in its current form and it cannot support this interlocutory injunction application. With regard to the personal guarantee, the plaintiff has not provided any evidence about the nature of the guarantee that amounts to a proprietary interest that would entitle him to restrain the owner's use or disposition of the Property.

- [42] Accordingly, the plaintiff has not established a proprietary interest in the Property sufficient to support a Rule 10-1 interlocutory injunction restraining its owner from dealing with it in the regular course of business. As that threshold requirement has not been met, the application for an injunction pursuant to Rule 10-1 is dismissed. I will not consider the remaining factors in case some of those factors are to be considered under a properly constituted application under s.227 of the Business Corporations Act.
- [43] I have ruled that an application under s.227 of the Business Corporations Act is not properly before me. Accordingly, I have not heard or disposed of such an application and the plaintiff is not precluded from making such an application.

Conclusion

[44] I order:

- a) SSC Ventures (No. 49) Ltd. and SSC Ventures (No. 51) Ltd. be added as defendants;
- b) the amended notice of civil claim be further amended in the form appended to the plaintiff's notice of application except proposed paragraph 10 and the proposed amended to the prayer for relief pertaining to a constructive trust over the Property, without prejudice to the plaintiff proposing constructive trust amendments in relation to the Property that accord with BNSF;
- c) the application for an interlocutory injunction enjoining and restraining SSC 49 from selling, disposing of, transferring, borrowing against or encumbering the Property, Tractorhill or any of the individual defendants from causing the Property to be dealt with in the same way, pursuant to Rule 10-1 of the Supreme Court Civil Rules, is dismissed;
- d) the defendants SSC 41 and SSC 51 shall make a diligent search for the categories of documents described in the plaintiff's notice of application, produce the documents located within 21 days of this order, and if some documents or categories of documents cannot be found, deliver an affidavit deposing to that within a further seven days;
- e) Squire & Company shall independently produce the following documents to the application within 14 days of this order:
 - i. accounting records for each of Tractorhill, SSC 49 and SSC 51, including:
 - (1) accounting ledgers or accounting software entries since 2011;
 - (2) journal entries since 2011;
 - (3) bank statements for all bank accounts since 2011 in the possession of Squire & Company;
 - (4) complete financial statements since 2011, and any notes or entries that accompany, supplement or support the financial statements;

(5) records regarding all shareholder loans, characterized as "short term debt" in the financial statements or otherwise, including any withdrawals from or repayments to each loan since the loans were made, the value of each loan as of August 31 of each calendar year since the loan was made, and the current value of each loan;

ii. corporate documents in the possession of Squire & Company for each of Tractorhill, SSC 49 and SSC 51.

[45] The defendants have been largely successful on these applications. I order costs to the defendants in the cause.

"Matthews J."

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