

CANADA / JUDGMENT

United Homes v. Bavarian Gallery

2000 BCSC 1333

COURT

Supreme Court of British Columbia

DECIDED

7 September 2000

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2000 BCSC 1333

Citation: United Homes v. Bavarian Gallery Date: 20000907

2000 BCSC 1333 Docket:

00/2990

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

UNITED HOMES VICTORIA LTD., TRUSTEE FOR
HAWKES MORTGAGE LTD.
PETITIONER

AND:

BAVARIAN GALLERY LTD., HANS JUERGEN
WASNER AND BRIGITTE WASNER
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE QUIJANO

Counsel for the Petitioner: Jacqueline Horton

Counsel for the Respondents: Richard Bennett

Counsel for Shanrock Investments Ltd.: Andrew Rafuse

Date and Place of Hearing/Trial: August 31, 2000 and

September 1, 2000

Victoria, B.C.

INTRODUCTION

- [1] This application is brought by United Homes Victoria Ltd. as Trustee for Hawkes Mortgage Ltd. seeking a determination as to which of the inventory, chattels and equipment located at property owned by the respondents is subject to a general security agreement between Hawkes Mortgage Ltd. and the respondents.

NARRATIVE

- [2] Briefly the background to this dispute is as follows.
- [3] The respondent Bavarian Gallery Ltd. owns real property in Port Renfrew, British Columbia, which is commonly referred to as the Lighthouse Pub and Restaurant. The respondents, Hans Juergen Wasner and Brigitte Wasner, were at all material times the sole shareholders, officers and directors of Bavarian Gallery Ltd.
- [4] In June of 1997 the respondents, Bavarian Gallery Ltd., Hans Juergen Wasner and Brigitte Wasner, entered into a general security agreement dated June 10, 1997 as part of a refinancing package with the petitioner Hawkes Mortgage Ltd. The general security agreement provides in clause 1 as follows:

1. SECURITY INTEREST

1.1 Subject to the exception in clause 2, the Debtor does hereby:

- (a) mortgage and charge as and by way of a continuing, fixed, and specific charge to and in favour of Secured Party, and assign, transfer, and grant by way of mortgage, charge, assignment, transfer, and security interest in all of the Debtor's right, title, and interest, present and future, in and to all Goods, Chattel Paper, Instruments, Documents of Title, Money, Securities, and Intangibles located at, on, or about the real property ("Real Property") described in Schedule "A" hereto or used or acquired in connection with or related exclusively to the business of the Debtor conducted on or with respect to the Real Property and in and to and all Proceeds and renewals thereof and therefrom, accretions thereto, and substitutions therefor, including, without limitation:
- (i) all inventory of whatever kind and wherever situate, including, without limitation, goods acquired or held for sale or lease or furnished or to be furnished under contracts of rental or service, all raw materials, work in process, finished goods, returned goods, repossessed goods, and all packaging materials, supplies, and containers relating to or used or consumed in connection with any of the foregoing (collectively the "Inventory")
- (ii) all equipment of whatever kind and wherever situate, including, without limitation, all machinery, tools, apparatus, plant, fixtures, furniture, furnishings, chattels, motor vehicles, air conditioning, heating, ventilating, electrical, mechanical, plumbing, communications and data systems, elevators, escalators and other conveyancing devices, boilers, furnaces, carpets, blinds, window coverings, curtains, drapes, awnings, light fixtures, doors, windows, demising walls, partitions, wiring, pipes and conduits, and other tangible personal property of whatsoever nature

or kind that is not Inventory, and all parts, components, attachments, accessories, accessions, replacements, substitutions, additions, and improvements to any of the foregoing (collectively the "Equipment"); ...

[5] The exception in clause 2 is as follows:

2. EXCEPTIONS AND DEFINITIONS

The Security Interest granted hereby shall not extend or apply to and the Collateral shall not extend to [consumer goods/the last day of the term of any lease or agreement] therefor but upon the enforcement of the Security Interest the Debtor shall stand possessed of such last day in trust to assign and dispose thereof as the Secured Party shall direct....

[6] Schedule "A" to the General Security Agreement reads as follows:

SCHEDULE "A"

Collateral prior to, now, or hereafter located on or about or at or used or acquired in connection with the real property legally described as:

Parcel Identifier 023-744-952

Lot 1, District Lot 17, Renfrew District, Plan VIP65199

including but not limited to :

- (2) DEEP FRIERS
- (1) 48" RANGE
- (1) 24" CHARBROILER
- (1) HOT FOOD TABLE
- (1) SANDWICH TABLE
- (1) PASS-THRU DISHWASHER
- (1) SLICER
- (1) FOOD PROCESSOR
- (3) WORKTABLES
- (1) HEATLAMP
- (1) GLASS WASHER
- (1) ICE MACHINE
- (1) MOBILE BUN RACK
- (1) EXHAUST HOOD 13' & FIRE SUPPRESSION SYSTEM

- (1) BAR SINK
- (1) DEEP FREEZER (WALK-IN)
- (110) CHAIRS
- (28) TABLES
- [7] The General Security Agreement was registered in the Personal Property Security Registry and a Notice of Security Interest was filed at the Land Title Office against title to the property.
- [8] The respondents have claimed since in or about January of 1999 that the chattels at the Lighthouse Pub were owned by a company called Shanrock Investments Ltd. and that Shanrock operated the business of the Lighthouse Pub by way of a lease agreement. The respondents, Hans Juergen Wasner and Brigitte Wasner, are the directors and officers of Shanrock and Shanrock was added as a party to the foreclosure proceedings by an order of Master McCallum made February 1, 1999. The order nisi of foreclosure was granted March 1, 1999 and included an order that the subject mortgage had priority to the interests of the respondents, including Shanrock Investments Ltd. A Notice of Repossession and Intention to Sell the Property was delivered to the respondents and all of the personal property was seized in March of 1999.
- [9] Sometime after the order nisi was granted the trustee was told by the respondents that the chattels and fixtures at the Lighthouse Pub property belonged to Shanrock Investments Ltd. and that those chattels and fixtures were not, therefore, covered by the general security agreement.
- [10] Recently the respondents acknowledged that fixtures at the Lighthouse Pub were covered by the general security agreement by virtue of being affixed to the land, but the respondents continued to maintain that the remainder of the chattels and equipment were the owned by Shanrock Investments Ltd. until the morning of the hearing of this application, at which time the respondents acknowledged that the chattels and equipment located at the Lighthouse Pub were owned by Bavarian Gallery Ltd. With the exception of six small items, the liquor and the food.
- [11] During the course of submissions it became clear that what remained to be resolved was whether the inventory at the pub was owned by Bavarian Gallery Ltd. or Shanrock Investments Ltd. and whether the language of the general security agreement limited the items secured to those set described in Schedule "A". No further reference was made in submissions to the six small items.

- [12] The respondents produced a lease agreement between Shanrock Investments Ltd. and Bavarian Gallery Ltd. made in 1996 which provided Shanrock Investments Ltd. with the right to operate the Lighthouse Pub. That lease agreement expired in May of 1999 but it appears that the pub continues to be operated by the Wasners through the vehicle of Shanrock Investments Ltd.
- [13] Shanrock Investments Ltd. filed income tax returns for each of the years 1996, 1997 and 1998 and according to the property and financial statements for Shanrock Investments Ltd. for those years they carried an ongoing inventory with a value of between \$11,000 and \$13,000. According to the financial statements of Bavarian Gallery Ltd. it had an inventory during those years of between \$256,000 and \$359,000.
- [14] The Wasners say that they are no longer the shareholders of Shanrock Investments Ltd., their shares having purportedly been transferred to their children in 1997. However, I am satisfied that the Wasners, through Shanrock Investments Ltd., have operated and continue to operate the Lighthouse Pub and Restaurant at the property owned by Bavarian Gallery Ltd.
- [15] The petitioner's position is that all of the chattels and fixtures situate at the Lighthouse Pub are covered by the language of the General Security Agreement and that Schedule "A" must be read in its entirety and therefore is not to be taken to limit the scope of the security provided by the agreement.
- [16] The respondents say that at the time the General Security Agreement was entered into Mr. Hawkes, the principal of Hawkes Mortgage Ltd., assured Hans Juergen Wasner that the General Security Agreement would cover only those items set out in Schedule "A" and it was on that basis that the Wasners entered into the General Security Agreement. According to the respondents, two of the several items that were not to be subject to the General Security Agreement were the beer delivery system and the satellite television system. The difference in value would, therefore, appear to be significant although no figures were provided with respect to the value of those items which, if the respondents are correct, are not to be included as security under the agreement.
- [17] The respondents say that the representations made by Mr. Hawkes at the time that the General Security Agreement was entered into constitute a collateral agreement and therefore no effect ought to be given to the language used in Schedule "A": "...including but not limited to".
- [18] No evidence was provided by the petitioners to contradict Mr. Wasner's evidence as to the representations allegedly made by Mr. Hawkes. It was argued on behalf of the petitioners, however, that Mr. Wasner's evidence was unreliable, that his evidence ought to be considered not credible and that therefore no weight should be given to it. This argument is founded on the acknowledgement made at the opening of argument that Brigitte Wasner had not been truthful in an earlier affidavit in which she maintained that all of the chattels were owned by Shanrock Investments Ltd.

- [19] The second issue is whether the inventory at the Lighthouse Pub is covered by the agreement or whether it is the property of Shanrock Investments Ltd. The petitioner says that if the inventory is the property of Shanrock Investments Ltd., Shanrock was put in place in order to defeat the rights of Hawkes Mortgage under the General Security Agreement and therefore the court should look behind the arrangements, pierce the corporate veil, and find that all of the goods and chattels are covered by the Agreement.

ANALYSIS

- [20] Dealing firstly with the issue as to whether the General Security Agreement covers only those items set out on Schedule "A" or whether it covers all of the chattels and fixtures in accordance with the language of clause 1, I have reviewed the form and language employed in the General Security Agreement in the context of the evidence of Hans Juergen Wasner with respect to the issue of a collateral agreement. It appears from some of the language employed on the face of the agreement that it was a precedent form which was not completely filled out but rather was utilized for expediency by the parties. This accords with the evidence of Hans Juergen Wasner who said that Mr. Hawkes was in a hurry to get the agreement completed and it was done without either party attending their lawyer.
- [21] Shortly after the General Security Agreement was signed and the refinancing documents completed Hawkes Mortgage Ltd. went into bankruptcy.
- [22] The respondents say that they were induced to sign the General Security Agreement by the representation made by Mr. Hawkes that only the items on Schedule "A" would be covered by the agreement.
- [23] The petitioner says that the evidence of Hans Juergen Wasner with respect to the circumstances of the making of Schedule "A" is simply an attempt to introduce parol evidence in order to modify the contract and that it does not amount to a collateral contract.
- [24] Proceeding then to consider the law with respect to collateral contracts and parol evidence I was referred to a number of decisions. Perhaps the most useful authority on this issue, in the circumstances, is *Hawrish v. Bank of Montreal* (1969), 2 D.L.R. (3d) 600. In *Hawrish* the bank had sued a solicitor who was acting for a corporation and who had signed a form for the corporation's bank which was a "continuing guarantee up to the amount of \$6,000, of all present and future debts". The solicitor gave evidence that the guarantee was only to be of the then current overdraft of \$6,000 and only binding until the bank obtained the guarantees of the persons eventually elected as directors. That evidence contradicted a portion of the recital in the guarantee which said that it was the entire contract. The issue was whether that evidence was admissible as an exception to the parol evidence rule. At p. 603 Judson, J., speaking for the court, said this:

In the last half of the 19th century a group of English decisions, of which *Lindley v. Lacey* (1864), 17 C.B. (N.S.) 578, 144 E.R. 232; *Morgan v. Griffith* (1871), L.R. 6 Ex. 70, and *Erskine v. Adeane* (1873), L.R. 8 Ch. 764, are representative, established that where there was parol evidence of a

distinct collateral agreement which did not contradict nor was inconsistent with the written instrument, it was admissible. These were cases between landlord and tenant in which parol evidence of stipulations as to repairs and other incidental matters and as to keeping down game and dealing with game was held to be admissible although the written leases were silent on these points. These were held to be independent agreements which were not required to be in writing and which were not in any way inconsistent with or contradictory of the written agreement.

At pp. 604 to 605 the court says:

In *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 at p. 47, a case having to do with the existence of a warranty in a contract for the sale of shares, there is comment on the existence of the doctrine and a note of caution as to its application:

It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare... Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn....

Bearing in mind these remarks to the effect that there must be a clear intention to create a binding agreement,...

- [25] The court in *Hawrish* then concluded that there must be a clear intention to create a binding collateral agreement.
- [26] In the present case there is, as I have said, the evidence of Mr. Wasner as to representations he says were made to him by Mr. Hawkes at the time that the General Security Agreement was being completed. However, the written agreement is complete on its face and the alleged collateral agreement is inconsistent with the clear terms of the written agreement. Therefore, the evidence does not support the conclusion that there was a collateral agreement that would limit the chattels available as security to those set out on Schedule "A". I find therefore that the General Security Agreement covers all of the chattels, fixtures and other items referred to on the face of the General Security Agreement which are owned by Bavarian Gallery Ltd. and situate at the Lighthouse Pub property.
- [27] That leaves the question as to whether the inventory situate at the Lighthouse Pub belongs to Shanrock Investments Ltd. or to Bavarian Gallery Ltd. It is apparent from the evidence that Shanrock Investments Ltd. carried an ongoing stock of liquor, food and miscellaneous small restaurant supplies with a value variously, from time to time, of between \$11,000 and \$13,000. Clearly that inventory belongs to Shanrock Investments Ltd.

[28] Shanrock Investments Ltd. was operating the pub before the General Security Agreement was entered into and has operated the pub continuously since. Although the Wasner's were, at all relevant times, operating the pub the I am not persuaded that the petitioner has established that this is a circumstance which calls for a "piercing of corporate veil" in order to allow the petitioner to access property owned by Shanrock Investments Ltd. Therefore, to the extent that there is inventory at the Lighthouse Pub property used for the day-to-day operations of the pub, that inventory is not the property of Bavarian Gallery Ltd. and does not, therefore, form any part of the security under the General Security Agreement.

COSTS

[29] Success was divided. But, considering that it was not until the opening of argument that the respondents acknowledged that Bavarian Gallery was the owner of the chattels and equipment and that that was a significant issue between the parties to that point, the petitioner will have it's costs at scale 3.

"G.M. Quijano, J."

The Honourable Madam Justice G.M. Quijano

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/00/13/s00-1333.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/united-homes-v-bavarian-gallery-2000>

Prepared on 27 October 2026 · Esheria