

Citation: Taylor Ventures Ltd. v. 442931 Date: 20000531
B.C. Ltd.

2000 BCSC 831

Docket No.: C984811
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**TAYLOR VENTURES LTD.
BY ITS RECEIVER-MANAGER
PRICEWATERHOUSECOOPERS INC.
IN ITS CAPACITY AS RECEIVER-MANAGER,
TRUSTEE IN BANKRUPTCY
AND
JUDICIAL TRUSTEE OF TAYLOR VENTURES LTD.**

PLAINTIFFS

AND:

442931 B.C. LTD.

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE BURNYEAT
(IN CHAMBERS)**

Counsel for the Plaintiffs:

R.A. Millar

Counsel for the Defendant:

F.G. Potts

Dates and Place of Hearing:

June 16 and 18, 1999
January 17 and 18, 2000
Vancouver, B.C.

[1] Taylor Ventures Ltd. ("TVL") by its Receiver and Manager and Trustee in Bankruptcy (the "Receiver and Manager") claims against 442391 B.C. Ltd. ("442391") for a declaration that TVL is the beneficial owner of certain properties in Chilliwack (the "Chilliwack Lands") and that 442391 holds legal title to the Chilliwack Lands on an "express, constructive or resulting trust" for TVL or, alternatively, for an order that 442391 pay to TVL the amount determined to represent the unpaid purchase price relating to an agreement between TVL and 442931 to see the purchase of the Chilliwack Lands by 442391. In its Statement of Defence, 442391 says that it paid good and adequate consideration for the Chilliwack Lands and that it never entered into an scheme or arrangement to injure TVL as alleged in the Statement of Claim.

[2] 442931 now applies pursuant to Rule 18A of the Rules of Court that the action of the plaintiff be dismissed, that the Certificate of Pending Litigation filed against the Chilliwack Lands be cancelled. In the alternative, the defendant submits that the plaintiff should be required to enter into an undertaking and give security in an amount satisfactory to the court as a condition for the Certificate of Pending Litigation remaining registered on title against the Chilliwack Lands and that the order made on January 22, 1998 in Action No. A980224 (Vancouver Registry) be amended in order to include a provision that the Receiver and Manager shall be personally liable for any damages or costs it or TVL may be adjudged or ordered to pay to 442391.

BACKGROUND

[3] Until July 15, 1994, TVL was the registered owner in fee simple of the Chilliwack Lands which consist of approximately 142 acres on Lickman Road in Chilliwack. On or about July 11, 1994, TVL entered into a written contract of purchase and sale with 442391 to sell the Chilliwack Lands to 442391 for \$3,000,000. On or about July 14, 1994, TVL transferred its interest in the Chilliwack Lands to 442391 by transfers registered in the New Westminster Land Title Office on July 15, 1994. At the time of transfer, the Chilliwack Lands were not subject to any mortgages or other financial encumbrances. After the transfer, 442391 granted a mortgage to Westminster Savings Credit Union ("Westminster") in the amount of \$1,500,000 which was registered against the

Chilliwack Lands on or about July 15, 1994 ("the Mortgage"). Pursuant to a Direction to Pay executed on behalf of 442391, TVL was paid the net mortgage proceeds in the amount of \$1,485,075.08 once the Mortgage was registered.

[4] The plaintiff alleges that none of the balance of the purchase price was ever paid by 442391. The plaintiff also alleges that TVL and not 442391 paid all of the mortgage payments to Westminster in respect of the Mortgage and all of the other costs in relation to the Chilliwack Lands after the transfer of the lands on July 14, 1994 and until about October 22, 1997.

[5] It is alleged by the plaintiff that 442391 and its principal, Darryl Howlett, entered into a "scheme or arrangement" whereby legal title to the Chilliwack Lands were transferred to 442391 in order to enable TVL and its principal, Ralph Taylor, to "circumvent the lending policies and limits" of Westminster "concerning the maximum amount which could be lent to one particular borrower and allow TVL to raise further financing monies for its investment or other purposes" or that, alternatively, the purpose of the "scheme or arrangement" was "to provide security for previously unsecured obligations or indebtedness to Howlett or persons unknown" or to give 442391 "preference over other creditors of TVL."

[6] In his affidavit sworn March 31, 1999, Mr. Howlett stated that he assisted Mr. Taylor and TVL in carrying out preliminary development analyses of the Chilliwack Lands as Mr. Taylor "was quite busy overseeing several different investments of TVL." Mr. Howlett describes his agreement with Mr. Taylor and TVL as follows:

8. Because I wanted security for my investment in TVL and Mr. Taylor could not devote sufficient time to work on the development of the Chilliwack Property, I reached an agreement with Mr. Taylor that was as follows:

(a) the Chilliwack property would be transferred to me. A mortgage would be arranged against the property for \$1,500,000.00, and I would be the mortgagor.

(b) I would then take all necessary steps to attempt to arrange rezoning of the property so it could be developed into multi-unit residential dwellings. Essentially, I would perform the tasks of an owner/developer.

(c) TVL would make the mortgage payments and pay for the expenses associated with development, including taxes on the Chilliwack Property.

(d) After the Chilliwack Property had been rezoning [sic] and could be developed, the proceeds of the sale of the property would be divided as follows:

(i) first, to repay the mortgage on the property;

(ii) second, to repay both myself and TVL for any expenses incurred in owning, maintaining and redeveloping the property;

(iii) the profits would then be split 50/50 between myself and TVL.

9. The profit split was agreed upon to be an incentive to me to develop the Chilliwack Property, without being paid remuneration for my efforts to develop the property.

10. The Chilliwack Property was transferred to the Defendant company by TVL, in July 1994. A mortgage was placed on the property and my company signed the mortgage and I executed a guarantee of the mortgage.

11. It was always my understanding that if TVL defaulted on the agreement or failed to repay my investment to me, then the Chilliwack property would be mine to deal with or sell as I chose.

12. Thereafter, I spent hundreds of hours working on the development of the Chilliwack Property.

13. I believe that I would have completed the rezoning and redevelopment work by 1997 but then TVL was unable to make payments for the continued work, in 1996 and 1997. At that time I was informed by Mr. Taylor, and verily I believe, that TVL's cash flow was down and TVL was spending more of its money on other development projects.

14. After the Receiver was appointed for TVL in early 1998, TVL ceased making mortgage payments on the mortgage on the Chilliwack Property. Accordingly, my company, the Defendant, and I are responsible for the payments, and I have paid \$33,000.00 for the mortgage payments to the Westminster Savings Credit Union.

16. I understand from the Statement of Claim that it is alleged that I was aware that Mr. Taylor had breached fiduciary duties owed to TVL by transferring the Chilliwack Property to my company. I do not know what fiduciary duties are alleged to have been breached and I had no knowledge that TVL had done anything improper when it transferred the Chilliwack Property to me. As far as I was concerned, the agreement I reached with Mr. Taylor was in the best interests of both of us, and that is why TVL agreed to transfer the Chilliwack Property to my company.

[7] Westminster commenced foreclosure proceedings relating to the Mortgage under Supreme Court of British Columbia Action No. H990860 (Vancouver Registry), ("the "Foreclosure Proceedings"). Mr. Howlett guaranteed the Mortgage and, accordingly, he was named as a party in the Foreclosure Proceedings. In the Foreclosure Proceedings, Mr. Howlett and 442391 opposed the application for judgment by Westminster on the basis that TVL, Mr. Taylor and Westminster conspired to withhold information from him that the Chilliwack Lands were not worth \$3,000,000 when they were transferred to 442391 and that Mr. Taylor, TVL and Westminster had conspired to arrange for an overvalued appraisal of the property indicating its appraised value at \$3,300,000 at a time when they knew that the value was not \$3,300,000 and when they were under an obligation to advise Mr. Howlett and 442391 of the overvalued appraisal.

[8] The application for judgment in the Foreclosure Proceedings was heard by me on November 15, 1999 with further submissions received by March 13, 2000. In my Reasons, judgment was granted against Mr. Howlett and 442391 for \$1,685,629.54 as at June 18, 1999. As well, the property has now been sold leaving Westminster with a deficiency judgment against Mr. Howlett and 442391 in an amount in excess of \$800,000. Accordingly, there will be no funds available to either the Receiver and Manager or to 442391 from the sale of the Chilliwack Lands.

[9] However, Mr. Howlett and 442391 have appealed my Ruling that Westminster is entitled to Judgment. Accordingly, the questions raised by the plaintiff and the defendant must still be answered in the context of funds being available if the Mortgage is ultimately found not to charge the Chilliwack Lands, in the context of an accounting between TVL and 442391 relating to the unpaid purchase price for the Chilliwack Lands or in the context of an accounting between the parties if there is found to be a joint venture between the parties regarding the development of the Chilliwack Lands. It will also be necessary to deal with the application by the defendant to hold the Receiver and Manager personally responsible for any damages or costs that TVL may be ordered to pay to 442391 in due course if this litigation continues.

POSITION OF THE RECEIVER AND MANAGER

[10] In his June 4, 1999 affidavit, Herb Cowan, the Vice-President of the original Receiver and Manager, states his belief that the Chilliwack Lands were originally purchased by TVL "using funds likely derived from project investors and expenses were paid from time to time from pooled funds which also were likely derived from investors funds although it is my expectation that no funds of any investors could be traced to this project given the state of the accounting records of TVL." Mr. Cowan further states in his affidavit:

6. Based upon my investigations it is my understanding that TVL purchased Chilliwack in 1990 for \$1,200,000.00. In 1994 TVL purported to sell the lands to the Defendant for \$3,000,000.00. At the time of completion of that sale a mortgage was granted to the Defendant by Westminster Savings Credit Union ("WSCU") in the amount of \$1,500,000.00 most of which proceeds were paid to TVL. Thereafter TVL paid most costs of holding the property including mortgage instalments, taxes and other such costs.

8. After its appointment the Defendant provided evidence to the Receiver Manager which suggested that the lands were conveyed to the Defendant pursuant to a development and profit sharing agreement however this agreement was not evidenced in writing. The Receiver Manager formed the opinion that the transfer of the lands took place in suspicious circumstances and the Receiver Manager attempted to secure the interests of TVL and its investors and creditors through this action and a prior action.

[11] In this action and in Action No. C98415, Mr. Ralph Taylor of TVL attended an examination for discovery on April 23, 1999. Mr. Howlett was asked about the Statement of Claim of the plaintiff in this action. The questions and answers pertinent to this action and the Chilliwack Lands are:

Q ... The first part, the "to enable you and TVL to circumvent the lending policies and limits of Westminster Savings Credit Union concerning the maximum amount, "that's what you were talking about when you say 3 million was the most they could lend to any one borrower, right?

A Yes, They make it really sound badly here the way they've written it. That was not the intent at all. They make it sound like it was a midnight scheme and crooked. The truth of the matter is, it was a daylight plan and in the open with the manager of the Credit Union knowing about it, with my lawyer knowing about it, with my investor friends knowing about it. It was the same offer made to a hundred people in the club.

. . . .

Q Now, the next paragraph, paragraph 12, it says that the Howlett numbered company holds the legal title to the Chilliwack lands on an express, constructive or resulting trust. Now, those are some legal terms I'm not going to question you on. But, in any event, on a trust for the benefit of TVL, and TVL retains the entire beneficial interest in the Chilliwack lands?

A Yes, that's true.

. . . .

Q After all that was cleared out [the debt to Westminster] Howlett would get the

commissions for doing the sales?

A Yes, and be paid for his time.

Q For his time, and then the profits were split 50/50 between Howlett's company and TVL?

A No. The profits would be split among the shareholders.

Q Okay. Maybe I'm unclear about that. I'm going to show you a statutory declaration you apparently signed, I guess, in March 1998. Have you seen that document before?

A 1998? This 50/50 split is only the final figure.

[12] Accordingly, Mr. Taylor states that TVL was to have a beneficial interest in the Chilliwack Lands and that the arrangement in place with Mr. Howlett was that Mr. Howlett would receive commissions of 5% on the sales, both parties would be reimbursed for any expenses and then the profits would be split "among the shareholders" (being those who had invested funds with TVL and who had been provided the security of the Chilliwack Lands those investments).

POSITION TAKEN BY MR. HOWLETT AND 442391

[13] Mr. Howlett's position regarding the arrangement between 442391 and TVL differs from the explanation provided by Mr. Taylor on at least the following points: the profits after paying the Mortgage and repaying expenses would be split 50/50 (and not as Mr. Taylor indicates 100% to TVL), 442391 would receive 50% of the profits instead of Mr. Howlett receiving money for his efforts (not as Mr. Taylor indicates with a commission of 5% instead of the usual commission of 2-1/2%), and that, if TVL defaulted on its agreement, then the Chilliwack Lands would be his "to deal with or sell as I chose."

[14] On May 27 and June 3, 1999, Mr. Howlett attended an examination for discovery in this action as well as Actions C984411 and C984815. The question and answers which are pertinent to the Chilliwack Lands are as follows:

Q Describe that involvement to me.

A In 1994 Mr. Taylor suggested that I take over as owner/developer, run an application with Chilliwack to achieve a much higher and better use, to coordinate architects, engineers, and other consultants. That was the point at which the property was transferred to me.

Q Can you tell me -- . Can you explain to me how the price had increased from 1.2 million for the property to 3 million?

A No.

Q Were you of the opinion that the property was worth \$3 million?

A I don't know. The only I had to go by was an appraisal.

Q Whose appraisal was that?

A I believe it was done by Ken Rogers.

Q Did you have any concern as to what the value of the property was?

A No.

Q Why is that?

A By that time I had a pretty good feeling that that property could be -- that the zoning could be changed out there, and there was potential for values far above and beyond \$3 million.

Q As a part of the transaction you were required to obtain a mortgage from Westminster Credit Union?

A That's correct.

Q And can you fully, and as completely as you can, tell me all the discussions that you had with Mr. Taylor in relation to obtaining that mortgage, and in particular what was the strategy of TVL, as you understood it, in selling the property to the numbered company for 3 million and mortgaging it for 1.5?

A The discussion that I had with Mr. Taylor was relatively brief. It was prior to what normally would have been a Saturday meeting. I'm not certain of the day of the week. He had finally come up with a plan that he wanted to talk to me about with respect to developing Chilliwack. He said that he had an appraisal on the property for \$3 million.

Westminster Credit Union would or had approved a mortgage for \$1.5 million. And we discussed our arrangement as far as profit participation.

. . . .

Q Did you understand that the monies that TVL had invested in the property prior to the numbered company's acquisition had come from investors?

A My understanding was that there had been a group that had been involved in Chilliwack, but a great number of them had been paid off over time.

Q So the Chilliwack property had been the subject matter of a specific division for -- within TVL as a project?

A It was supposed to be a project, yes.

Q And to your knowledge prior to the acquisition of the property investors would have put money in and received shares in the Chilliwack property?

A That was my understanding.

Q And you made no inquiry to determine precisely where this 1.5 million that you were personally liable for was going to go?

A No.

. . . .

Q So you were prepared to give a guarantee of a \$1.5 million mortgage without any consideration of what you thought the value of the property was?

A That's correct.

Q Why did the numbered company obtain title to that property?

A Mr. Taylor offered me security for my invested dollars.

Q How much were those?

A At that particular point in time I'm not certain, but I believe that they were in excess of 350 and less than 400.

. . . .

Q So the purpose of the transfer into the company which you controlled was to give you security for your otherwise unsecured investment?

A That was part of it, yes.

. . . .

Q But you understood, as I recall your evidence, that you under -- that Taylor would use the transfers to the numbered companies and would use the other nominees as a means to get around limits imposed upon him to borrow money from Westminster Savings Credit Union?

Q What I was told is he was at his limit with Westminster Credit Union, and through this type of transaction mortgaging -- additional mortgaging could be achieved.

Q All right. And was that mechanism used in the case of Chilliwack Mountain?

A That was my understanding of it.

. . . .

Q You've explained to me that you had some kind of agreement with Mr. Taylor?

A Yes.

Q And that is that your company would take title to the property, in part as security for your prior advances?

A Yes.

Q That you would try to carry out a development of the property?

A Yes.

Q That TVL would fund the costs associated with it?

A Yes.

Q That when the property was developed and sold, or developed or sold, that the mortgage would be repaid first?

A That's correct.

Q TVL would be reimbursed for --

A Their invested capital.

. . .

Q All right. If I look at paragraph 8 of your affidavit, you'll see that if the property were to be sold, you'd first pay the mortgage?

A First we pay the mortgage. Second, to repay both myself and TVL for any expenses incurred in owning, maintaining and redeveloping the property. The profits would then be split 50/50 between myself and TVL.

. . .

Q And you were alive to the issue of security. So the question becomes what was your agreement with Ralph as to how your security was to be satisfied? Was it to be satisfied out of 50 percent of the profits?

A No. That was not my understanding. We had a joint venture agreement, and I was to get 50 percent of the profits.

Q All right. But your description of the agreement here isn't complete, because it doesn't tell me when you are going to get paid on your, quote, security interest, if you had to rely on it when the Chilliwack property was sold.

A Well, when we discussed the transfer of the property earlier, there was two purposes, as security for my invested dollars, and a joint venture agreement between TVL and myself or Taylor, to rezone the property.

Q Well, does paragraph 8 set out fully what the nature of the agreement that you had with Ralph Taylor was?

A Well, it may not -- it may be a little vague, but I believe that (d)(ii) does cover that. What (d)(iii) says is secondary pay both myself and TVL for any expenses incurred in owning, maintaining and redeveloping the property. Now at that particular juncture, my agreement with Taylor was he was supposed to be paying most of the expenses. I incurred some sundry expense like phone calls and gas and photocopy and things like that. But it clearly -- clearly says I wanted security for my investment. So security for investment, I am the owner of the land. If my investment dollars are at risk, I will be paid. That was my understanding.

. . .

Q Well, what I'm trying to figure out is what is the profit? Is it the difference between what you sell it and the cost -- the value of the mortgage, or is it the difference between what you sell it for and what you had agreed to buy it for, which was \$3 million?

A Well, to be honest with you, I'm confused myself. But assuming that you're correct, then in my opinion what Taylor would have gotten paid back was every dollar that he put into it. And it depends on the scenario. Am I at loss as far as my invested dollars are concerned in other projects?

. . .

Q And as I understand it now, you are saying that profit would be calculated upon deducting the \$3 million purchase price from what the ultimate sale price of the property was, less the development costs that either one of you incurred on the way through, to the time of sale?

A I don't know.

Q The numbered company agreed to pay \$3 million for the property, correct?

A Numbered company didn't agree to pay \$3 million. That was a transfer price. The numbered company had no resources to pay \$3 million.

DISCUSSION

[15] Judgment should only be granted pursuant to Rule 18A if I can find the facts necessary to decide the issues between the parties. In this case, I have concluded that I cannot. The nature of the "arrangement" between TVL and Mr. Howlett is set out in a number of ways by Mr. Howlett and those conflict with the theories of the plaintiff as well as what is stated by Mr. Taylor on his discovery. The transfer may have provided security to Mr. Howlett for the advances that he and his family had made to TVL as investors in TVL so that the transfer might well be attacked as a fraudulent conveyance of a fraudulent preference. Alternatively, the transfer may well have been an outright sale in which case a further \$1,500,000 is due by 442931 to TVL or TVL may have an unpaid vendor's lien against the property for that sum. Alternatively, the transfer may well have been part of a joint venture agreement between TVL and 442931 but, if that was the purpose of the transfer, the nature and terms of the joint venture agreement are uncertain. It may have been that Mr. Howlett was to receive all reimbursement for his expenses by receiving an increased rate of real estate commission on the sale of the subdivided lands on the basis that he would be the real estate agent for such sales. It may have been that his "... expenses incurred in owning, maintaining and redeveloping the property" were to be paid before the profit was then to be split on a 50/50 basis. On the basis of the materials before me, I cannot find the facts necessary to decide why and under what conditions the Chilliwack Lands were transferred by TVL to 442931.

[16] There is also no certainty as to the obligations of TVL and Mr. Ralph Taylor under any joint venture agreement which may have been in place as between TVL and 442931 and what was to occur if those obligations were not fulfilled. In his affidavit, Mr. Howlett states what was to happen according to "his understanding." However, Mr. Howlett provides no detail as to what documents or what discussions may have led him to that "understanding." More importantly, Mr. Howlett does not state that he would own the property free and clear of any interest of TVL and Mr. Ralph Taylor if there was a default. Rather, he states that any default would allow him "to deal with or sell [the property] as I choose." It is not clear whether default brings the joint venture agreement to an end so that Mr. Howlett could deal with the property as he chose but subject to the rights of TVL or whether he could deal with the property as he chose because 442931 was now the beneficial and legal owner of the property free of any interest of TVL and Mr. Ralph Taylor.

[17] Relating to what would happen if there was default, Mr. Howlett states that default would be if TVL "failed to repay my investment." That statement appears to imply that the transfer of the Chilliwack Lands was as a security agreement for the repayment of the investment in TVL of Mr. Howlett and his family. If it was not, then the default would only occur after the property had been sold and, because the property had not been sold at the time Mr. Howlett alleges that there was a default, it is difficult to see how there is currently a default which would allow Mr. Howlett to deal with or sell the property as he chose. While Mr. Howlett has taken the position that the inability of TVL to carry on with its obligations under the joint venture agreement amounted to a default, this statement that a default would only occur if TVL failed to repay his investment conflicts with the position taken. It should also be noted that the default alleged by Mr. Howlett would result in 442931 owning the property free and clear of the interest of TVL after 442931 having paid only \$33,000 to Westminster, undertaking whatever efforts were required to obtain re-zoning for the Chilliwack Lands, and paying only one-half of the \$3,000,000 purchase price.

[18] On the question of legal and beneficial ownership, Mr. Howlett referred to the agreement as a "joint venture agreement." At his discovery, Mr. Howlett says that "essentially" he would "perform the tasks of an owner/developer." This latter statement falls far short of an assertion that 442931 was the legal and beneficial owner after the property had been transferred to 442931.

[19] While I am in a position to dismiss the application of 442931 pursuant to Rule 18A, I am not in a position to grant judgment in favour of the plaintiff because of the inability to make the necessary findings of fact which would determine the issues set out in the Statement of Claim and the Statement of Defence. Accordingly, the matter is to be heard at trial.

"G.D. Burnyeat, J."
The Honourable Mr. Justice G.D. Burnyeat