

Citation: Taylor Ventures Ltd. v. 545959
B.C. Ltd.

Date: 20000531

2000 BCSC 830

Docket No.: C984815

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.**

PLAINTIFF

AND:

545959 B.C. LTD.

DEFENDANT

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

Counsel for the Trustee

R.A. Millar

of Taylor Ventures Ltd.:

Counsel for 545959 B.C. Ltd.:

F.G. Potts

Dates and Place of Hearing:

June 17 and 18, 1999
January 17 to 19, 2000
Vancouver, BC

[1] In this action, the plaintiff through its Receiver and Manager and Trustee in Bankruptcy (the "Trustee") claims that a transfer to the defendant of certain properties in Langley (the "Walnut Grove Lands") is null and void under the provisions of the **Fraudulent Conveyance Act** and **Fraudulent Preference Act**, for a declaration that Taylor Venture Ltd. ("TVL") is the beneficial owner of the Walnut Grove Lands as 545959 B.C. Ltd. ("545959") holds legal title to the Walnut Grove Lands on an express, constructive or resulting trust and, in the alternative, that 545959 owes TVL certain monies that TVL advanced towards the properties prior to the transfer of the Walnut Grove Lands to 545959. In its Statement of Defence, 545959 denies the allegations contained in the Statement of Claim and specifically denies that it entered into any scheme or arrangement to injure TVL as alleged.

[2] In this application, 545959 seeks to vary the order made on January 22, 1998 in Action No. A980224 which appointed the Receiver and Manager in order that it is clear that the Receiver and Manager will be personally liable for any damages or costs it or TVL is adjudged or ordered to pay to 545959 and so that the liability of the Receiver and Manager shall not be limited in any way and that TVL post security of at least \$20,000 for the costs of 545959 in this action.

[3] As well, pursuant to Rule 18A of the **Rules of Court** and ss. 256 and 257 of the **Land Title Act**, 545959 also requests orders that the action of the plaintiff be dismissed, that the Certificate of Pending Litigation filed against the Walnut Grove Lands be cancelled or that, in the alternative, the Certificate of Pending Litigation be cancelled upon the defendant giving security and, in the further alternative, that the plaintiff be required to enter into an undertaking and give security in an amount satisfactory to the court as a condition of the Certificate of Pending Litigation remaining registered as against the Walnut Grove Lands. The trial of this action has been set for February 12, 2001.

BACKGROUND

[4] Through a series of complicated transactions, 545959 became the registered owner in fee simple of the Walnut Grove Lands. The Walnut Grove Lands were derived through various subdivisions from two parcels of land.

[5] In what is described by the parties as the "Barril Lands", TVL entered into an option agreement to purchase those lands from Barril Developments Ltd. ("Barril"), assigned its rights under the option on January 31, 1996 to a TVL associated company, 512046 B.C. Ltd. ("512046"), 512046 exercised the option and became the registered owner of the Barril Lands and at the same time granted a mortgage over the Barril Lands to both Clova Properties Ltd. ("Clova") and 436409 B.C. Ltd. ("436409"), 512046 used the proceeds from the Clova mortgage and the 436409 mortgage to pay approximately \$305,000 to Barril and approximately \$180,000 to TVL.

[6] Regarding what is referred to by the parties as the Hans-Johnson Lands, TVL acquired title for the Hans-Johnson Lands from Joginder and Surinder Hans on July 28, 1994. On March 3, 1995, TVL entered into a written agreement with 491503 to transfer its interest in the Hans-Johnson Lands to 491503 for a purchase price of \$1,000,000. On March 8, 1995, TVL transferred legal title to the Hans-Johnson Lands to 491503 for the stated purchase price of \$1,000,000 but received only \$464,079.07. No further funds were paid to TVL by 491503 on account of the purchase price other than the \$464,079.07 which had been obtained by 491503 when it granted a mortgage on the Hans-Johnson Lands to Westminster Savings Credit Union ("Westminster").

[7] On June 4, 1996, 512046 transferred its interest in the Barril Lands to Mr. Ralph Taylor, the principal of TVL. On June 14, 1996, 491503 transferred its interest in the Hans-Johnson Lands to Mr. Ralph Taylor. Mr. Ralph Taylor then arranged for the amalgamation of the Hans-Johnson Lands and the Barril Lands and, once amalgamated, legal title to the amalgamated lands (the "Walnut Grove Lands") was then transferred to 491503 B.C. Ltd. ("491503").

[8] Subsequent to the transfer to 491503, a Declaration of Trust dated March 8, 1995 between 491503 and TVL was created in September, 1997. In the agreement, 491503 acknowledged that it was acting as a "bare Trustee and Agent" for TVL as "Beneficiary who is the Beneficial Owner of the Property" and that the "purpose of this Declaration Trust is to facilitate financing on the part of Taylor Ventures Ltd." As well, 491503 acknowledged and declared that:

... any interest presently owned by the Trustee or hereafter acquired by the Trustee in the Property shall be held by the Trustee in trust for the Beneficiary. All profits and advantages arising from the Property are and shall be held by the Trustee for the use, benefit and advantage of the Beneficiary and all operating costs and liabilities shall be the responsibility of and be paid by the Beneficiary. The Beneficial ownership of the Property belongs to the Beneficiary.

[9] The Sole Director, Member and Officer of 491503 was and is Mr. Alan McLean. In an affidavit sworn January 11, 2000, Mr. McLean states:

3. Prior to March of 1995 I and my family had been large investors with Taylor Ventures. These investments were usually done on an unsecured basis. In 1994 and early 1995 I was concerned about the large of [sic] amount of money my family had invested in Taylor Ventures which was in the order of \$500,000.00 to \$700,000.00. Arising out of this concern I from time to time approached Ralph Taylor and requested that some type of security be given for this investment.

4. In February or early March of 1995 Ralph Taylor contacted me and indicated to me that he was prepared to provide security to me and he described a plan to me whereby the lands which are the subject matter of this proceeding would be transferred to a "shelf company" incorporated by Michael Oliver and that I would be appointed director and shareholder of that company. I was told that Taylor Ventures had also raised mortgage financing against the lands which would be used in the development of the Walnut Grove development which included the lands transferred to 491503. Ralph Taylor also advised me that Taylor Ventures would be responsible for all carrying costs associated with the property and that he would be responsible for the development of the lands.

5. I do not recall any specific terms upon which the "security" arrangement with TVL would operate. I felt that this arrangement represented some security to me but it was my clear understanding that 491503 was holding the property in trust for Taylor Ventures and that the moment Taylor Ventures called for the reconveyance of the property, 491503 would have to transfer it back to Taylor Ventures. I do recall at the time attempting to ensure that I would not be liable for capital gains tax on the sale of the property, but I do not recall anything being done about it. In the past I have used declarations of trust to establish that I did not have a taxable interest in the land.

6. After the transfer of the lands to 491503 Ralph Taylor regularly provided cheques to me so that 491503 could meet the regular obligations associated with the lands. I exercised no control over the lands and all decisions such as that were made by Mr. Taylor.

7. In the summer of 1997 I became concerned about the financial condition of Taylor Ventures. I was having difficulty getting cheques from Ralph Taylor to make payments and I had to actually pay the taxes personally and then seek reimbursement. Due to

these troubles and the fact that I was busy on other matters and as I felt that I had no real security, I told Ralph Taylor in the summer of 1997 that I was no longer interested in having 491503 holding title to the lands and he said that he would attend to an alternate arrangement.

8. On or about October 29, 1997, Ralph Taylor called me and asked me to attend at his house as he had arranged a transfer of the lands. He took me to Michael Oliver's office where [sic] I met Darryl Howlett for the first time. I had heard of Mr. Howlett and I knew that he was a realtor but I had no recollection of ever meeting him before. We attended at the office of Michael Oliver to sign transfers of the lands ...

9. When I attended at Mr. Oliver's office I likely exchanged a few words with Mr. Howlett but I was not aware of any of the dealings involving Mr. Howlett and Taylor Ventures. The signing was done quickly and Mr. Taylor, Mr. Howlett and I left and we had coffee together. We did not discuss any of Mr. Howlett's dealings during that discussion.

[10] On October 29, 1997, 491503 transferred its interest in the Walnut Grove Lands to 545959 with the stated consideration for the transfer being \$1.00 and "other valuable considerations." It is alleged by the Trustee that, between March 15, 1996 and December 19, 1997, TVL continued to pay the monthly mortgage payments and associated costs on the lands formerly referred to as the Barril Lands. It is also alleged by the Trustee that, between March 8, 1995 and until November 27, 1997, TVL made the payments on account of the Westminster Mortgage and also made payments for the property taxes owing for the years 1995 through 1997 on the Hans-Johnson Lands as well as the amalgamated property owned by 545959 after October 29, 1997.

POSITION OF THE TRUSTEE

[11] The Trustee alleges that:

(a) 491503, Mr. McLean and Mr. Taylor entered into "a scheme or arrangement" whereby legal title to the Walnut Grove Lands were transferred to 491503 to enable Mr. Taylor and TVL to "circumvent the lending policies and limits of" Westminster concerning the maximum amount which would be lent to one particular borrower and to allow TVL to raise further financing monies for its investments for other purposes or, in the alternative;

(b) to provide security for previously unsecured obligations of indebtedness to 491503 or Mr. McLean or to give 491503 preference over other creditors of TVL;

(c) that the transfer of any portion of the Walnut Grove Lands by TVL to 491503 was "an unlawful corporate act made by a director of TVL" in breach of the fiduciary duty that Mr. Taylor owed to TVL;

(d) that 545959 and Mr. Howlett were aware that 491503 and Mr. McLean held the Walnut Grove Lands in trust for TVL;

(e) 545959 took title to the Walnut Grove Lands with the knowledge that the transfer by TVL to 491503 was an unlawful corporate act made by Mr. Taylor in breach of the fiduciary duties he owed to TVL; and

(f) that the transfer of the Walnut Grove Lands from 491503 to 545959 was a disposition of property made with the intent to defeat, delay, hinder, prejudice or defraud the creditors of TVL of their just and lawful remedies against TVL.

[12] In his June 4, 1999 affidavit, George Abakhan, the President of the substituted Trustee in Bankruptcy of TVL states:

4. Based upon my investigations in relation to various land dealings involving TVL it appears that there was a systematic pattern whereby land owned or paid for by TVL would be transferred to numbered companies usually incorporated by the same lawyer and the lands would then be mortgaged to Westminster Savings Credit Union ("WSCU"). Typically the companies that took title to the lands would be investors in TVL or persons which I would describe as being close to Ralph Taylor. In most cases the numbered company that acquired the lands did not advance any "new" money or pay the stated purchase price for the lands. Thereafter TVL would pay the costs associated with the lands.

6. It is my belief that this scheme for the holding of title to these lands was designed to avoid the lending limits that WSCU required TVL or its related borrowers to adhere to.

7. In addition, there appears to be a scheme or arrangement whereby TVL would buy properties, mortgage them (often to WSCU) and then transfer them to a numbered company at an "inflated" or stepped up price and re-mortgage them (again to WSCU) based upon appraisals done invariably by the same appraiser. These appraisals appear to be difficult to justify having regard for the amounts paid for the lands and the amounts they appeared to be worth in 1998.

8. It is my belief that the Plaintiff in this action will be able to prove that 491503 held these lands on a trust or under such a scheme and that the scheme can be

demonstrated to have caused injury, loss and damage to TVL's creditors and investors.

10. Moreover, it is of importance that the determination of the "ownership" of these lands and the other lands which were transferred to the numbered companies be considered in such a way so as to demonstrate the widespread pattern set out above of transfer of title of assets owned by TVL, which were purchased with investor's funds, and which have now ended up in the hands of a few persons.

[13] In his June 4, 1999 affidavit, Herb Cowan, the Vice-President of the former Trustee and Receiver and Manager of TVL, states:

5. Based upon the records of TVL in the possession of the Receiver Manager it appears that on March 8, 1995 TVL transferred title to the lands to 491503 B.C. Ltd. ("491503") for no apparent consideration notwithstanding the fact that TVL had paid substantial amounts for option payments to acquire the lands and TVL had significant equity in the lands and the stated purchase price by 491503 was \$1,000,000. It appears that on or about that date the lands were mortgaged to Westminster Savings Credit Union ("WSCU") for approximately \$465,000 on registration of this mortgage the proceeds of \$459,082.85 were paid to TVL. There is no record that the balance of the purchase price was paid by 491503 to TVL. 491503 is a company controlled by Alan McLean who I understand was an investor in TVL.

6. Based upon the records of TVL it appears that subsequent to the transfer to 491503, TVL paid all expenses in relation to the lands and paid the mortgage instalments due to QWSCU until TVL became incapable of paying its obligations.

8. Upon the appointment of the Receiver Manager it was determined that 491503 transferred the lands to the defendant [545959] which is a company controlled by Darryl Howlett. The records of TVL did not disclose the reasons for such transfer and the records did not disclose the payment of money to TVL despite the apparent substantial equity in the lands.

9. Based upon its investigations, the Receiver Manager formed the opinion that 491503 held the lands on a trust for TVL and that the subsequent transfer of the lands to the defendant was in breach of trust or was a fraudulent conveyance. The Receiver Manager commenced a prior action to assert its position for the benefit of TVL and its creditors and of investors.

POSITION OF 545959 AND MR. HOWLETT

[14] In his May 13, 1999 affidavit, Darryl Howlett as President and Director of 545959, states that he and his family began to make investments with Mr. Ralph Taylor, the principal of TVL in May, 1990, that he had known Mr. Taylor for over 25 years, that he had been involved in business with him over the years and that he had taken title to two other properties in the name of companies where he was the sole shareholder during the years he invested in properties with Mr. Taylor. Regarding the Walnut Grove Lands, Mr. Howlett states in his May 13, 1999 affidavit:

5. During the course of 1993 until in or about 1998 I was involved with Mr. Taylor in developing the Walnut Grove subdivision. In particular, I used my contacts with municipal authorities, engineers, other realtors and other developers to assist in obtaining zoning approval, subdivision approval, site services and all things necessary for a new residential and commercial development. There were a number of public hearings and negotiations which required substantial hours of my time. Mr. Taylor was unable to devote time to the development of Walnut Grove, so I basically acted as the owner's representative and developer of the properties. I incurred numerous expenditures for architectural fees; property taxes; an appraisal; the 1998 property taxes; mortgage payments' engineer's fees; and, insurance.

6. At a certain point, the lots were owned by a numbered company, 491503 B.C. Ltd., which wanted to divest itself of its interest in properties in Walnut Grove. I had been pressing for collateral for my investments with TVL as the Chilliwack development was proceeding slowly and the Walnut Grove lots were closer to market. I was going to pull out my investments in TVL. Mr. Taylor asked me whether I would be prepared to take title to certain lots in the Walnut Grove subdivision and take over the mortgage with the Westminster Savings Credit Union on the properties. I agreed and decided I was prepared to carry on with my investment with TVL in exchange for the Walnut Grove lots.

7. Mr. Taylor asked me to enter into an arrangement similar to the arrangement we had made with respect to the Chilliwack property, that is I would carry on assisting with the development of the particular Walnut Grove properties which were to be put in the name of my numbered company, would obtain the listings on those properties, and would sell the properties at the best possible prices.

8. On or about October 22, 1997, the company controlled by Alan McLean, 491503 B.C. Ltd. transferred its interest in two lots in the Walnut Grove area to 545959 B.C. Ltd. One lot was subsequently subdivided by me into seven separate lots, which are the subject of this proceeding.

10. It was the intention of Mr. Taylor and myself that I would have both legal and

beneficial ownership to the Walnut Grove property, firstly as collateral for the investments by my family and I in Taylor Ventures, and secondly as a joint venture partner with TVL. The terms of the joint venture were that once the Walnut Grove property had been sold, the proceeds of the sale of the property would be divided as follows:

- (a) first to repay any mortgage or liens on the property;
- (b) to provide me with security for my exposure on my personal guarantee on the Chilliwack properties;
- (c) to repay the investments my family and I had made in TVL;
- (d) to repay myself for any expenses incurred in owning, maintaining and redeveloping the Walnut Grove properties, as well as or any expenses incurred in owning, maintaining and developing the Chilliwack properties;
- (e) the profits would then be split in an equitable manner between myself and TVL, taking into consideration how much work would have been done by me to bring the lots to market.

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

[15] In his June 16, 1999 affidavit, Darryl Howlett states:

3. Around the middle of 1996 I advised Mr. Taylor that I was contemplating redeeming my investments in Taylor Ventures Ltd. and I explained to him my concerns set out in paragraph 2 above. Mr. Taylor suggested the arrangement as set out in my affidavit of May 13, 1999 at paragraphs 6 to 10. However, the transfer of the property did not take place until October 1997 for a couple of reasons.

4. One reason was that the Langley property had to be subdivided so the lots were not created right away. Another reason had to do with the choice of lots. I had many discussions with Mr. Taylor and others involved as to the best development options, before we settle upon the lots which were transferred to my company.

5. Regarding the period of time leading up to Taylor Ventures Ltd. going into receivership, I did not believe Taylor Ventures Ltd. was insolvent. I knew Taylor Ventures Ltd. was unable to make some payments and was having difficulties with some investors redeeming their shares, but I believed, based on my conversations with Ralph Taylor, that Taylor Ventures Ltd. had enough in assets to satisfy all demands and pay everyone off. The problem, as I understand it, was that Taylor Ventures Ltd. could not simply sell all of its assets at once to do so.

6. After meetings with the investors at Ralph Taylor's home, I suggested to Mr. Taylor that he should contact a receiver. I recommended that he contact the offices of Coopers & Lybrand, who ultimately did become the receiver. I did so because I believed this would be the best way to deal with Mr. Taylor's problems. I did not believe that Mr. Taylor had done anything improper or fraudulent. I simply believed that he was unable to resolve his problems without professional assistance. I attended the initial meeting with Coopers & Lybrand and Mr. Taylor. At that time it was not suggested that Taylor Ventures Ltd. was insolvent. Rather, it was suggested that once all the property was sold that perhaps all investors would be paid out. The main concern expressed by the representatives of Coopers & Lybrand had to do with Taylor Ventures Ltd.'s problems concerning failing to comply with securities regulations for the sale of the shares.

[16] In his May 27, 1999 and June 3, 1999 examinations for discovery, Mr. Howlett was asked the following questions and gave the following answers relating to the Walnut Grove Lands:

Q Do you know what insolvent means?

A Unable to meet your financial obligations is my understanding of it, or unable to pay your debts.

Q All right. That's a good --. That's a good starting point. When did you become aware that Taylor Ventures was insolvent?

A I'm not certain of the date.

Q Well, as it in August of 1997?

A No. It was later.

Q Okay.

A His financial situation began to unravel in the fall of 1997.

[17] Relating to a meeting in November of 1997 where there was a discussion in the presence of Mr. Taylor regarding the insolvency of TVL, Mr. Howlett was asked the following questions and gave the following answers at his May 27 and June 3, 1999 examinations for discovery:

Q The discussion at your dinner with Ralph and John McLean [not related to Mr. Al McLean of 491503] was the insolvency of TVL, was it not?

A At that particular point in time there was discussion of -- the meeting that we had with Coopers Lybrand prior to John McLean coming on board, which was just right after that meeting we had in Coopers Lybrand office, was to discuss alternatives. And at that particular point, I forget how they described it, but in essence it -- I forget what they called it. I don't remember. But it was not a bankruptcy. It was some form of receivership.

Q Or a proposal of bankruptcy?

A Yes.

[18] At his May 27 and June 3, 1999 examinations for discovery, Mr. Howlett was also questioned about the suggestion that various properties were put into the names of others in order that Westminster financing might be available. Mr. Howlett was asked the following questions and gave the following answers at those examinations for discovery:

Q Well, were you involved or did you have knowledge or were you the architect or did you know nothing? And by architect I mean architect of the transaction where Al McLean's company took title to those properties.

A I didn't know the circumstances, other than I was told that several of these properties were transferred into other people's names for the purpose of financing.

Q You said that part of the purpose was to assist in raising mortgage financing. Why was--. Why did they have to go through those types of transactions to raise mortgage financing?

A My understanding of it was that Taylor was at his limit with - Westminster Credit Union was his primary lender. And as --. These properties, as titles transferred, in most cases they were tied up under option, and option payments were made, and eventually the titles have been cleared and transferred into, quote, "TVL's" name. Now I didn't have any knowledge of this initially. You brought up Ken Hick's name. [An associate of Mr. Howlett at Re/Max Treeland Realty.] And he provides me with a lot of information. And the way these sales come through on our statistics through the land registry. So did you sell the property? No. So it was in a, quote, "foreigner's" name, people I didn't know.

Q So these people are holding the property for the benefit of TVL?

A Yeah. Now, the mortgaging that was put on here really wasn't all that far out of whack as far as dollar volume was concerned. I'm not certain that this whole piece here ultimately only had about 1.5 million on it, and it sold for in excess of seven and a half. So let's suppose that Taylor had optioned it for 1.2, or something like that, and completed on it three years down the road, he would have property taxes and architectural fees and engineering fees and survey fees and so on and so forth. So he may - he may have recovered money here. I don't know that he --. I don't know whether he pulled any, you know, amount beyond costs.

Q Well, didn't he tell you that that was why it was done in that way.?

A He did tell me that the reason he was doing that was that he was at his limit, and he had discussed this scenario or formula or whatever with the credit union, and they found it acceptable.

Q Well, did he discuss it with Gary Thomas?

A As far as I know he did.

Q Was security for your investment a primary motivating factor for taking title to the lands that Al McLean's company owned?

A It was one of. I don't know that it was primary.

Q Did Mr. [Al] McLean say that he was simply - his company was simply holding this property in trust for TVL?

A I didn't discuss it with him at that time. But subsequent to that, I don't know. That's what I believe.

Q It doesn't make any sense to me.

A Well, Taylor did. Taylor said he [Mr. Al McLean] was holding it in trust for Taylor.

Q Oh, I see. So Ralph Taylor told you - and let's try to pin down a time. Did Ralph Taylor tell you in October of '97 that Al McLean's company was holding those two properties in trust for TVL?

A Long before.

Q Long before?

A Long before.

Q What discussions did you have with Mike Oliver [solicitor of TVL and Mr. Taylor] about the transfer of that property from Al McLean's company to your company

A It was very limited. He said one, who's signing the disclosure as far as PST is concerned? I said I will. Who is paying the property purchase tax? I said I am.

Q And that was it?

A That was it.

Q But did he inquire why you were getting the benefit of this property as opposed to Taylor Ventures?

A No. Taylor had instructed him.

Q So Taylor had previously instructed Mike Oliver to prepare the necessary documents to effect the conveyance from McLean's company to your company?

A As far as I know, yes.

[19] Mr. Ralph Taylor was examined for discovery in Action No. C984815 and Action No. C984811 on April 23, 1999. The questions and answers pertinent to the Walnut Grove Lands are as follows:

Q And then we come to, now it says that his company [the company of Mr. McLean, 491503] did not pay any money for the acquisition of legal title to the land amalgamated, the Barril land, amalgamated with the Hans-Johnson land?

A No. That was another deal where the property was transferred to him for mortgage arrangements because the Taylor Ventures had a \$3 million limit. So the property was transferred to him, and he got the mortgage, and Taylor Ventures got the benefit of that mortgage money, and then he got the benefit of security for his shares.

Q Great. Okay.

A Same as Howlett. They're all the same basically. Except on Howlett's, he did all the work.

Q What was Mr. Howlett's role at Walnut Grove?

A Basically the same as Chilliwack. He was to do most of the City Hall work.

Q Yup?

A And work with the architect and the engineer and Fisheries and environment. He was to do all that kind of thing.

Q The difference being, mind you, with Chilliwack, he's pretty much doing it on his own. Whereas with Walnut Grove, you had done a lot of that work already and he was helping you out?

A I had done some of it, yes. And he had worked on it for several years.

Q Okay. I'm not going to go through paragraph to paragraph of this Hans-Johnson land where we've got the various situations. When McLean's company transferred the land to Howlett's company, that was obviously at your request that that be done?

A No. That was at McLean's request.

Q Why was that, Did he tell you?

A Because he was working for Erin Mortgage, and Erin Mortgage was being sued, and he figured that he would be sued as well. So that would tie up the property, right?

Q Umhum. Had Howlett told you at any point in time and through all this that before you transferred the land to him, that he wanted to get some security for his investment?

A Yes.

Q Did he say anything to you ever like, Gee, if I don't get some security, I'm going to have to pull my money out or redeem or anything?

A Yes, he did redeem some.

Q Is that part of the reason you gave him security, so he wouldn't redeem the rest?

A Yes, And for the work he had some because I hadn't paid him. Like, I owed him for his work and couldn't pay, and he wanted to redeem some shares which I couldn't pay. So I gave him land as collateral.

DISCUSSION AND CASE AUTHORITIES

[20] After consideration of all of the materials before me, I am satisfied that this is not an appropriate matter to be dealt with pursuant to the provisions of Rule 18A. Firstly, summary trials under this rule are not well suited to factually complex cases: **Cannaday v. Tod Mountain Development Ltd.** (1998) 44 B.C.L.R. (3d) 195 (B.C.C.A.). Secondly, the issues raised in this action are interrelated to a number of other actions of which I am the trial judge as well as the case management judge. The complex nature of the transactions which are alleged by the Trustee to constitute a "scheme" involving Mr. Taylor and various others including Messrs. McLean and Howlett are such that it would be inappropriate to deal with this matter outside the context of the various other actions commenced by or on behalf of the Trustee or as against the Trustee arising out of the "scheme" alleged. In this regard, see **Honeywell Ltd. v. British Columbia Buildings Corp.** (1998) 45 B.C.L.R. (3d) 201 (B.C.C.A.).

[21] Thirdly, I am not satisfied that I am presently in a position to find the facts necessary to determine the issues between the parties. To grant judgment for or against the defendant or the plaintiff might well lead to an unjust result at this point. In this regard, see **Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.** (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.). Specifically, I am not in a position to determine whether Mr. Howlett was aware of the trust arrangement between 491503 and TVL, whether Mr. Howlett or 545959 at any time acknowledged that the Property was being held in trust by 545959 for TVL, the exact nature of what Mr. Howlett refers to as a "joint venture agreement", whether the intent of the parties was such as to prefer Mr. Howlett or 545959 over other creditors of TVL, what was meant by Mr. Howlett by his statement that: "... if TVL defaulted on our joint venture agreement or failed to repay my investment to me, then the Walnut Grove property would be mine to deal with or sell as I choose", if there has been a default or whether there is any lingering balance owing by 545959 to TVL as a result of the transfer of the Walnut Grove Lands to 545959.

[22] Fourthly, I am satisfied that it is inappropriate to determine the credibility of the position advanced by Mr. Howlett on the basis only of his affidavits and his examinations for discovery. It is obviously the case that the Trustee has no personal knowledge of the facts upon which the "scheme" alleged was structured and of the knowledge or lack of knowledge of Mr. Howlett relating to the same. I am satisfied that it will only be after the court has heard the testimony of the appraiser, Mr. Thomas formerly of Westminster, Mr. Howlett, Mr. Oliver the former lawyer for Mr. Taylor and TVL, Mr. McLean, Mr. Taylor and others having personal knowledge of these matters that the credibility of Mr. Howlett can be determined along with the question of whether there was a fraudulent conveyance and/or a fraudulent preference. The affidavits alone are not sufficient in this case. The allegation of fraudulent conveyance and/or fraudulent preferences necessarily involve a determination of the intent of the parties and it is difficult to see how such a determination would be made on the basis of affidavit evidence alone.

[23] In **MacMillan Bloedel Ltd. v. B.C. Hydro & Power Authority** (1992), 72 B.C.L.R. (2d) 243 (B.C.C.A.), it was said that it was appropriate to resolve proceedings under Rule 18A where the facts were fully set out in affidavits and the only issue was the inference to be drawn upon those facts. In this case, I cannot be satisfied that further examinations for discovery, further production of documents, and the calling of evidence at trial would only serve to confirm the facts which are not in dispute. While there are many facts which are not in dispute, it is the knowledge and the intent of the parties which are in dispute. I am satisfied that it would be unjust to proceed to have these matters heard pursuant to Rule 18A without running the potential of doing a grave injustice to the parties. Accordingly, the application of the defendant for judgment is dismissed as is the request for an order that the Certificate of Pending Litigation filed against the Walnut Grove Lands be cancelled.

[24] 545959 also applies for an order deleting paragraph 7 of the January 22, 1998 order of Mr. Justice Cohen so that the Trustees would be "personally liable for any damages or costs it or the Plaintiff is adjudged or ordered to pay to the Defendant, including by way of any counterclaim hereinafter commenced" and so that the liability of the Trustees would no longer be limited to the aggregate of the net cash proceeds realized by the Trustees after deducting its fees and disbursements and would no longer be limited to situations where the Trustees had shown gross negligence or wilful misconduct. Regarding that request and regarding the request that the plaintiff post the sum of \$20,000 as security for the costs of the defendant in this action, I

can make no finding at this time in support of the positions taken by 545959.

[25] The question of whether the plaintiff will be successful or unsuccessful will have to await the trial of this matter. It is only appropriate that the question of costs be raised at that time. While there is ample support for the proposition that the trustee of a bankrupt estate might be personally liable to pay the costs of a successful defendant, that consideration should only be made after the outcome of the trial is known and after submissions have been received regarding the question of costs. The consideration of the liability of either the Receiver and Manager or of the Trustees in Bankruptcy of TVL for the costs of the defendant must await a determination of the issues as between the parties.

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