

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20111019
Docket: H110656
Registry: Vancouver

Between:

Mark Manastyrski

Petitioner

And:

**Grace Residences Ltd, Brendan James Schouw, 0803153 B.C. Ltd.,
The Crown in Right of Canada, First Island Financial Services Ltd.,
and Cooper Pacific Mortgage Investment Corporation**

Respondents

Before: The Honourable Mr. Justice B. MacKenzie

Oral Reasons for Judgment

(In Chambers)

Counsel for Petitioner:

Brent D.M. Loewen

Counsel for Respondent the Crown in Right
of Canada:

David A. Gagnon
Christine N. Matthews

Place and Date of Hearing:

Vancouver, B.C.
October 19, 2011

Place and Date of Judgment:

Vancouver, B.C.
October 19, 2011

[1] This is an application in chambers by the applicant for orders as outlined in the notice of application. The respondent for the Crown in Right of Canada does not oppose the order sought in paragraph 1 of the notice of application. It does oppose the order sought in paragraph 2 which reads:

An order that the Crown in the Right of Canada and/or Customs Revenue Agency have no claim in the monies paid by the petitioner to People's Trust Company in satisfaction of the amount owing pursuant to the mortgages.

[2] The application today, and whilst I have had the benefit of very able oral submissions by all counsel, was without written submissions, is based on the wording of this order absolute that forms the subject matter of the application.

[3] At the outset of this application all counsel agreed that it was a novel issue and one with inherent complexities and difficulties. After hearing submissions I agree wholeheartedly with those comments.

[4] I am also of the opinion it is not necessary for the purpose of determining this application to review all of the legislation and authorities that have been presented, primarily by the Crown respondent, because I accept all of the principles outlined in all of the authorities and the analysis put forward by the Crown with respect to the relevant provisions of the *Excise Act* and the *Income Tax Act* regulations.

[5] What is novel in these circumstances is the interaction between counsel for the petitioner, counsel for People's Trust Company, and counsel and representatives of the Crown.

[6] The Crown's position is that irrespective of the specific wording of the order absolute, and irrespective of the significant interaction that took place shortly before September 12, 2011, when the order absolute was made, and indeed the morning of September 12, that the relevant legislative provisions require a conclusion that the potential deemed trust as alleged by the Crown has a "super" priority and supersedes any of the specific wording of the order absolute.

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[7] The potential deemed trust centres around the issue of non-payment of GST pertaining to the actions of the respondents in the order absolute, Grace Residences Ltd. and Brendan James Schouw.

[8] The Crown submits, and Mr. Loewen on behalf of the petitioner does not argue, that a very large amount of money is potentially owed by those respondents to the Crown as a result of development of a large condominium project in downtown Vancouver.

[9] Mr. Loewen, however, on behalf of the petitioner says that, notwithstanding the provisions of the *Excise Act* and the relevant authorities, in these particular circumstances the specific wording of the order absolute should allow this application to be granted.

[10] The circumstances here are unique. They include the fact that both counsel for People's Trust Company, Mr. Bury, and Mr. Loewen on behalf of the petitioner had communicated with the Crown as to whether or not the Crown was taking any position with respect to the order absolute with which it was served, and the specific wording of the order absolute that was sought by the petitioner. Representatives for the Crown and counsel for the Crown submitted by letter on September 6 that they would not be opposing the application. Another correspondence or communication was received by Mr. Loewen late Friday, the Friday before the Monday application.

[11] The affidavit material that is filed today confirms Mr. Loewen's submission that he had discussions with Ms. Chow for the respondent in this application which centred around the specific wording of the order absolute and Mr. Loewen's position that the specific wording of the absolute order that he was seeking would, in his opinion, extinguish the potential trust claim that the Crown alerted Mr. Bury and Mr. Loewen of.

[12] Notwithstanding that discussion and the other correspondence I have already referred to, no one appeared for the Crown on the morning of September 12 to make any submissions, or to oppose the application for an order absolute, in the

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terminology that Mr. Loewen canvassed with Ms. Chow who was acting on behalf of the Crown in Right of Canada. As a result, I am satisfied that the order absolute, given its specific wording and the circumstances that I have referred to, does preclude the Crown in Right of Canada from preventing the application that is sought today.

[13] Whilst I appreciate it is a very specialized remedy and in other circumstances might not be affected by the order absolute, in these specific circumstances I am satisfied this specific order absolute does preclude the Crown from resisting the application.

[14] The application that is sought in the notice of application is granted with respect to paragraphs 1 and 2 and the order sought in paragraph 3 is adjourned generally.

[15] With respects to costs, costs on Scale B.

(Submissions)

[16] THE COURT: I am of the opinion that costs on this application forthwith should not present any difficulties between counsel.

(Submissions)

[17] MR. GAGNON: It was my understanding that my friend was not proceeding in respect to element 1 of his application if I understood him correctly at the outset.

[18] MR. LOEWEN: That is correct. I certainly do not mind the order being granted other than ...

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[19] THE COURT: The order absolute takes care of paragraph 1 in any event. So I will delete that from the specific order, Mr. Gagnon. Thank you for bringing that to my attention.



The Honourable Mr. Justice B. MacKenzie