IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jackson v. Vetter,* 2024 BCSC 2092

Date: 20241107
Docket: S251053
Registry: New Westminster

Between:

Christopher Peter Jackson

Petitioner

And

Ryan James Vetter

Respondent

Before: The Honourable Justice Doyle

Oral Reasons for Judgment

Counsel for the Petitioner:	G.S. Dulay
Counsel for the Respondent:	S. Mollema, as agent for E. Mollema
Place and Dates of Hearing:	Port Coquitlam, B.C. February 29 and March 1, 2024
Place and Date of Judgment:	Port Coquitlam, B.C. November 7, 2024

2024 BCSC 2092 (CanLII)

2024 BCSC 2092 (CanLII)

THE PETITION

[1] The petitioner seeks sale of a residential strata property (a condominium) in Kelowna (the "Property") pursuant to the *Partition of Property Act*, R.S.B.C. 1996, c. 347 [*PPA*], or alternatively, pursuant to Rule 13-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Also sought is a declaration of beneficial interest and orders ancillary to a sale.

[2] The respondent seeks that this petition be dismissed with regard to both the *PPA* and Rule 13-5 on various grounds. One of those was on the basis that is was premature based on an arbitration clause in the Agreement defined below, but that ground was abandoned and the respondent submitted to this Court's jurisdiction on this matter.

[3] Given the pleadings and materials, including the Bare Trust and Agreement defined below, there is no dispute that the parties each hold a 50% beneficial interest in the Property as tenants in common, and I make that declaration.

BACKGROUND

[4] The pleadings on this petition and materials disclose no dispute that:

1. The parties bought the Property in September 2020;

2. The parties, as owners, entered a bare trust agreement (the "Bare Trust") dated September 30, 2020 which includes, among other things, the following terms:

    a. The petitioner is the registered owner of the Property as bare trustee for the owners;

    b. The owners are beneficial owners as tenants in common, each holding a 50% interest in the Property;

    c. The petitioner, as agent for and at the direction of the owners, has full power to manage and make dealings regarding the Property;

3. The parties, as owners, entered a co-ownership agreement (the “Agreement”), also dated September 30, 2020. Its provisions include that:

    a. The owners will equally manage and control the Property, with all minor and major decisions requiring the written consent of the owners;

    b. The owners will equally share the carrying costs of the Property;

    c. The owners will cooperate reasonably and act in good faith in fulfilling their obligations under the Agreement; and

    d. The owners do not have authority to act for each other.

2024 BCSC 2092 (CanLII)

[5] Between September 2020 and late 2022, the owners co-owned the Property and matters proceeded unremarkably, including each party paying their respective share of the carrying costs for the Property.

[6] Since late 2022, the parties’ relationship has devolved into acrimonious disputes and dealings. This petition is one consequence of that.

[7] One of these is an allegation by the petitioner that the respondent accessed mortgage information in the fall of 2022, and changed login details for the account with the mortgagee. The respondent denies this allegation.

[8] Section 7, the “Compulsory Buy-Out” section of the Agreement is also the subject of competing allegations and differing interpretations of that section.

[9] The petitioner made an offer to sell his full 50% interest in the Property, which cites an appraised total value of $520,000. He did that by way of a November 7, 2022 offer from his lawyer to the respondent. The respondent’s lawyer replied on November 21, 2022, not accepting the offer to sell, but purporting to accept, “on a without prejudice basis”, an alleged offer by the petitioner to buy out the respondent.

[10] The “Compulsory Buy-Out” section, on the respondent’s reading, permits the offeree (referred to as the “Other”) to convert the petitioner’s offer to sell into an offer

to buy. The respondent says that as such, his November 21, 2022 response created a binding contract for the petitioner to buy the Property.

[11] The petitioner, as I understand it, submits that his offer to sell cannot be converted at the respondent's instance into an offer by the petitioner to buy out the respondent.

[12] I will say no more at this point than that this a matter in issue between the parties, in particular their respective interpretation of the nature and implementation of the "Compulsory Buy-Out" provisions.

[13] I note that the remedy for the respondent, if this was a completed, binding contract as he urges, is provided for in section 8. It requires the respondent to issue written notice of default if the petitioner does not complete his purchase from the respondent. It also provides a mechanism and timeline for the respondent to list the Property for sale if he chooses.

[14] The material filed does not disclose a default notice or any subsequent enforcement steps taken thus far by the respondent pursuant to section 8 of the Agreement.

[15] Rather, the evidence from the respondent's affidavit #1 reveals that on March 8, 2023, in a reply email to the petitioner, the respondent made it clear that he did not agree to sell the Property and confirmed his view that the petitioner was bound by the Agreement, and, as such, neither one of them could unilaterally sell the Property.

[16] In any event, the respondent resists the sale of the Property on this petition, setting out in his response that the Property is "worth substantially more than the averred $520,000" (Part 5, para. 11). That is the same amount as the appraisal cited when the petitioner offered to sell his interest in the Property to the respondent on November 7, 2022, and the amount for which the respondent purported that there is a binding contract.

2024 BCSC 2092 (CanLII)

2024 BCSC 2092 (CanLII)

[17] In or around March or April 2023, the parties did agree to sell the Property.

[18] The terms of the agreement to sell the Property are the subject of conflicting evidence (see, for example, affidavit #1 of the petitioner at paragraphs 27 to 39, affidavit #1 of the respondent at paragraphs 22 to 43, and affidavit #2 of the petitioner at paragraphs 11 to 24).

[19] The realtor chosen to sell the Property also provided an affidavit, paragraphs 4 to 6 of which respond to paragraphs 25, 30 and 31 of the respondent's affidavit #1.

[20] Portions of the affidavits filed contain hearsay evidence as well as bare statements of belief, raising admissibility issues pursuant to Rule 22-2(12) and (13). I need not address those issues given my findings below.

[21] Leaving aside the terms of the agreement to list the Property for sale, which are disputed, there is no dispute that it was listed for sale.

[22] By June 30, 2023, the Property had not sold. On that date, and into July 2023, matters between the parties further unravelled, including:

1. On June 30, 2023, the respondent emailed the petitioner, stating that the realtor would try to sell over the next month, but that the respondent would be seeking another tenant, and that a new tenant would be in place so that the mortgage could be paid using the rental income;

2. The petitioner replied on July 4, 2023 that the Property will remain listed until it sells, and that he is not interested in a new tenant;

3. The respondent replied a few hours later saying that "The [P]roperty will not remain on the market until it sells";

4. The respondent required the realtor to de-list the Property, by letter from his counsel dated July 6, 2023; and

5. The respondent completed a new lease with a new tenant, for a two year term commencing August 1, 2023. The respondent and the new tenant had fully executed that lease by July 6, 2023.

BREACH ALLEGATIONS

[23] Each party complains that the other breached one or more of the Bare Trust, Agreement and the agreement to sell the Property which led to the listing by the chosen realtor. These allegations include:

1. The respondent alleges that the petitioner committed a breach by unilaterally, without the respondent's consent, instructing the realtor to lower the listing price to $539,000. The petitioner responds that he recommended that new price, but was not in breach since he understood the respondent knew about the reduction from the realtor;

2. The petitioner alleges that the respondent committed a breach by unilaterally, without the petitioner's consent, instructing the realtor to de-list the Property. The respondent responds that he was not in breach, but was merely responding to the breach by the petitioner who unilaterally lowered the listing price; and

3. The petitioner alleges that the respondent committed a breach by unilaterally executing the new lease with a new tenant without the petitioner's consent and contrary to the Agreement and the petitioner's expressed position. The respondent says he was not in breach, but was responding to the petitioner's breach of failing to secure a new tenant to secure rental income to pay the mortgage.

[24] The rent under the new lease is $2,590 per month, an increase of $600 per month over the prior lease.

2024 BCSC 2092 (CanLII)

2024 BCSC 2092 (CanLII)

<u>LAW</u>

[25] With respect to section 6 of the *PPA*, the respondent raises the preliminary issue of the petitioner's standing to bring the proceeding for sale and distribution. In particular, the respondent relies upon *Benias v. Lee*, 2021 BCSC 2312, in asserting that the remedy is not available since neither party has a right to immediate possession due to the lease of the Property to the tenant.

[26] With respect to the law relating to section 6, the petitioner cites general principles outlined in *Harmeling v. Harmeling*, 90 D.L.R. (3d) 208, 1978 CanLII 1961 (B.C.C.A.), *Jenor Steel Incorporated v. 466372 B.C. Ltd*., 2023 BCSC 369 and other cases provided in the joint brief of authorities for the proposition that there is a presumption favouring a sale, absent a good reason not to sell. In addition to the preliminary standing issue, the respondent submits that there are good reasons not to order the sale.

[27] With respect to Rule 13-5, the petitioner cites the test for sale being necessity or expedience, noting that necessity may include one party not having the means to buy out the other (*Bunn v. Bunn Estate*, 2016 BCSC 2146) and that expediency may be determined if the sale is objectively determined to be advantageous to both parties, irrespective of their wishes (*Phoenix Homes Limited v. Takhar*, 2017 BCSC 699).

Standing pursuant to the *PPA*

[28] In *Benias*, the petitioner sought sale of a property rented to a residential tenant. The respondent contended that the petitioner did not have standing to bring proceedings under the *PPA* since she did not have a right to immediate possession.

[29] Mr. Justice Veenstra, after a comprehensive review of the standing issue, including the extensive history underlying the *PPA* and an analysis of *Bourgeault v. Walton*, 1998 CanLII 4611 (B.C.S.C.), *Pallot v. Douglas*, 2017 BCCA 254 and *Lennox v. Lennox*, 2018 BCCA 412, concluded at para. 47:

> [47] Having reviewed the sequence of cases, including a careful consideration of the facts in *Bourgeault*, I conclude that there is no uncertainty with respect to the status of co-owners who have leased their property. The right to immediate possession remains a necessary requirement for a co-owner seeking to make an application for sale under the *PPA*. *Bourgeault* does not purport to change the requirements for standing under s. 4(1) of the *PPA*. The requirement of an immediate right to possession of the land has been reaffirmed in two recent judgments of the British Columbia Court of Appeal.

[30] Having reached that conclusion, Veenstra J. proceeded to consider whether the parties, as landlords, continued to have a right to immediate possession.

[31] The lease at issue was in standard *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*] form, and included the tenant's right to quiet enjoyment, reasonable privacy, freedom from unreasonable disturbance and exclusive use of the rental unit. The landlord was allowed access for limited purposes. The lease was fixed term that did not require the tenant to vacate at the end of the tenancy, in which case the agreement was renewed on a month to month basis on the same terms as the lease until the tenant gives notice to end the tenancy.

[32] Justice Veenstra noted that these terms essentially mirrored sections 28 and 29 of the *RTA*, concluding in that case that:

> [55] In my view, the rights of a landlord under s. 29 of the *RTA* (and s. 13 of the Residential Tenancy Agreement) are limited and transitory in nature. They cannot be considered to constitute an immediate right to possession of the Property for purposes of s. 4(1) of the *PPA*.

[33] With respect to the consequence of a sale of the property, Veenstra J. noted that due to the *RTA*'s protection of a tenant's rights in such circumstances, including sections 44(1) and 49:

> [61] Thus, the parties as co-owners of a tenanted property are not in a position to terminate the tenancy unless they have entered into an agreement to sell to a purchaser who intends to actually live in the property.
>
> [62] In light of the tenant's right – both by agreement and under the *RTA* – to exclusive possession of the Property, and the lack of any identified basis on which the tenancy could be terminated, I conclude that neither of the parties has a right to immediate possession of the Property.

2024 BCSC 2092 (CanLII)

[34] He concluded that the petitioner did not have standing to bring the proceeding under the *PPA* and dismissed the petition.

[35] In this case, the respondent entered a new lease with a new tenant, fully executed as of July 6, 2023. The new lease is still in effect. It is not in the "Residential Tenancy Branch form", as in *Benias*, but:

1. It is entitled "Residential Lease Agreement (Herein "Lease")";

2. Term 1 rents the "condo" to the tenant for use as a "private single-family residence only", with Terms 5 and 6 further providing the tenant exclusive use of the parking and storage locker designated to the unit;

3. Term 10 states: "Any notice to terminate the tenancy must comply with the applicable legislation of the Province of British Columbia (the "Act")" (the applicable legislation of this Province is the *RTA*).

4. Term 9 provides that the lease term is August 1, 2023 to August 1, 2025, to convert automatically to a month to month lease on the same terms if not renewed or at the extension of the lease by agreement, the exception being a new lease between the parties;

5. Term 23 provides the tenant an option to renew for an additional term upon notice no later than 60 days before expiration of the current term; and

6. Term 20 provides that the tenant "will peacefully and quietly have, hold, and enjoy" the condo for the term, and Term 22 provides for the landlord or its agents to reasonably make inspections or repairs, or to show the condo to prospective tenants or purchaser in compliance with the *RTA*.

[36] The terms of the new lease are very similar to those in *Benias*. Indeed, the new lease not only provides for a month to month lease to follow the end of the new lease term, but also provides the tenant an option to renew for an additional term.

2024 BCSC 2092 (CanLII)

2024 BCSC 2092 (CanLII)

[37] *Benias* was referred to in two subsequent cases: *CGT Management Corp. v Mackenzie-Moore*, 2022 BCSC 2195 and *Ironwood Owners Enterprises Ltd. v. Elliots World, LLC*, 2024 BCSC 340 [*Ironwood*]. As explained in *Ironwood* by Justice Loo:

> [35] *Bourgeault* and *CGT Management*, as well as the discussion regarding *Bourgeault* in *Benias*, all lead me to the conclusion that where petitioners have immediate rights of possession collectively amounting to 50% of the ownership interest in the property, they are entitled to advance a petition under s. 6. A petitioner who has no immediate right of possession to any part of the subject property does not have standing to bring a petition for partition.

[38] The evidence of the parties is in conflict regarding the new lease. The petitioner says the respondent did not have the authority to enter that lease. The respondent says he did, and had to do so, in order to secure the funds for both parties to continue to pay the mortgage. The validity of that lease is not an issue on this matter and cannot be resolved in this proceeding, particularly not on the conflicting material before me.

[39] On the materials before me, I find that the tenant has the right, pursuant to both the lease and the *RTA*, to exclusive possession of the Property and there is no identified basis upon which the tenancy could be terminated. Neither party has an immediate right of possession to any part of the Property.

[40] Accordingly, I find that the petitioner has no standing to pursue a sale and disposition pursuant to the *PPA*, and that aspect of the petition is dismissed.

Rule 13-5

[41] Regardless of the *PPA* remedy, the petitioner seeks the remedy of a sale of the Property pursuant to this Court's Rule 13-5.

[42] Rule 13-5(1) states:

> **Court may order sale**
>
> (1) If in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale

> and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

[43] The petitioner says that one or both of the conditions of necessity or expediency are met in this case.

[44] He cites *Bunn*, which notes, at para. 38, a trial judge's "broad and sweeping discretion to order a sale". In that matrimonial action, the Court noted the word "expedient" meant advantageous to both parties, and that necessity exists where neither party has the financial means to buy out the other.

[45] The petitioner also cites *Phoenix Homes Limited* at para. 10 for the proposition that expediency is satisfied if the sale is objectively determined to be advantageous to both parties, irrespective of their wishes.

[46] With regard to necessity, the petitioner says that he cannot financially afford to maintain this Agreement. With respect to expediency, I understand the submission to be that the parties agreed to sell the Property, and that it was listed for sale until the respondent had the realtor de-list it, leading to further acrimony and a need to end this relationship between the parties by a sale.

[47] The respondent submits that this matter be referred to trial. He challenges the financial plight alleged by the petitioner, citing the increased rental income from the new tenant. The respondent does not want to sell the Property, though he concurrently notes the petitioner's alleged obligation under the Agreement to buy him out.

[48] In *Ostrikoff v. Ostrikoff*, 2023 BCSC 77, Mr. Justice Schultes dealt with a petitioner's application for a sale pursuant to Rule 13-5, or in the alternative, pursuant to the *PPA*. At para. 38, he noted that:

> [38] Although the petition refers to both Rule 13-5 and the *Partition of Property Act*, I think it is the latter that applies here. Rule 13-5 applies when the issue of sale of property arises in the course of a proceeding, for example in a family action, whereas the *Act* provides a direct and specific remedy that can be the subject of a petition in itself.

2024 BCSC 2092 (CanLII)

2024 BCSC 2092 (CanLII)

[49] *Ostrikoff* is mentioned in *Nguyen v. Pham*, 2023 BCSC 1246, by Justice Norell as follows:

> [51] In my view, considering all of the circumstances here, where the admissible evidence shows that there are triable issues regarding the specific performance claim, the existence of the specific performance claim is a good reason to the contrary. I have considered the petitioner's other arguments that the respondent is not paying her share of the mortgage payments and expenses, and co-owning the property is no longer desirable. However, in my view, circumstances have not yet come to the point where they outweigh the determination of the specific performance claim on its merits. As these petitioner's arguments overlap the arguments advanced under Rule 13-5, to avoid duplication, I will discuss them when addressing that basis of the petition.
>
> [52] In the alternative, the petitioner relies on Rule 13-5 of the *SCCR*. In my view, s. 6 of the *PPA*, rather than Rule 13-5 is the more applicable provision. While Rule 13-5 applies to a "proceeding" which includes a petition, the wording of that Rule appears to contemplate that it applies when "the issue of the sale of property arises in the course of a proceeding, for example in a family action, whereas the *PPA* provides a direct and specific remedy that is itself the object of a petition": *Ostrikoff v. Ostrikoff*, 2023 BCSC 77 at para. 38; *Phoenix Homes Limited v. Takhar,* 2017 BCSC 699 at para. 16 [*Phoenix*]. Regardless, I will address this basis for an order for sale as well.

[50] Other cases provided in the joint book of authorities support the principle that Rule 13-5 is an available remedy when the issue of sale of a property arises in the course of a proceeding, including:

- *Dhillon v. Dhillon*, 2014 BCSC 2366, which addressed an application pursuant to Rule 15-8(1) of the *Supreme Court Family Rules*, B.C. Reg. 169/2009, which is in essence the same as Rule 13-5, in the underlying context of a family proceeding;

- *Moody Estate*, 2008 BCSC 786, which was an appeal from a Master's ruling that a manufactured home be sold pursuant to Rule 43(1), the predecessor to Rule 13-5. The petition was brought for sale in the context of an underlying action under the former *Wills Variation Act*, R.S.B.C. 1996, c. 490;

- *Phoenix Homes Limited*, in which an interlocutory application was made for a sale of property pursuant to Rule 13-5 in the context of an underlying derivative action; and

- *Schnurr v. Baldwin*, 2017 BCSC 1894, an application for sale of a property pursuant to Rule 13-5 in the context of an underlying claim by the plaintiff that the defendant held title to lands in a resulting trust for the plaintiff.

2024 BCSC 2092 (CanLII)

[51] This proceeding arises because the petitioner sought a declaration of a beneficial interest in circumstances where there is no dispute that the petitioner and the respondent each have a beneficial interest, such that I ordered the declaration that both parties have a 50% beneficial interest as tenants in common.

[52] Earlier, for the reasons stated, I found that the petitioner does not have standing to bring the *PPA* application for sale and distribution.

[53] Aside from relief ancillary to an order for sale, and costs, the only remedy still outstanding for determination in this petition is the order for sale pursuant to Rule 13-5. I have some reservation that there remains a “proceeding” as an underlying foundation for the application of that Rule.

[54] That issue was not argued before me. Since the respondent does not contest that Rule 13-5 is applicable, and given the order I will make below, I will not address that issue further.

[55] The respondent does seek that the matter be transferred to the trial list pursuant to Rule 22-1(7)(d).

[56] I addressed earlier the various conflicts in the affidavit evidence. Those conflicts relate to the provisions and interpretation of the Bare Trust and the Agreement, including the various breaches of the Agreement alleged by both parties.

2024 BCSC 2092 (CanLII)

[57] Further, there was an agreement to list the Property for sale, but the terms of that agreement are in dispute. Whatever those terms are found to be will bear on the consideration of the various actions taken by both parties in June and July 2023 (including the petitioner lowering the list price and the respondent executing a new lease with a new tenant).

[58] With regard to whether the matter should be referred to the trial list, I must bear in mind the principles set out by a five-member panel of our Court of Appeal in *Cepuran v. Carlton*, 2022 BCCA 76. Paragraph 160 provides a concise summary of the discretion to use hybrid procedures pursuant to Rules 16-1(18) and 22-1(4).

[59] Paragraph 165 commends consideration of the reasoning of Justice Ballance in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 [*Boffo*] and Justice Dardi in *Terasen Gas Inc. v. Surrey (City),* 2009 BCSC 627 [*Terasen Gas*].

[60] The disputes above must be resolved to determine the main issue of an order sought for sale of the Property. As Ballance J. found in *Boffo*, at para. 75, I find it is amply established that there is a *bona fide* triable issue.

[61] I am mindful of the various considerations set out by Dardi J. in *Terasen Gas*, including the undesirability of multiple proceedings. In that regard, I note that these parties raised various contractual issues related to, but also independent of, the order for sale issue. I have considered whether pleadings and discovery are in the interests of justice. This is a case where credibility will need to be assessed. I have considered whether it would be appropriate for me to provide for cross-examination and discovery of documents or other measures pursuant to Rules 16-1(18) and 22-1(4).

[62] I am particularly mindful of the comments of Ballance J. at para. 50 of *Boffo* that “At some point, the process that looks like a trial, should be a trial”.

[63] I find that in these circumstances, upon consideration of the above, this matter should be converted to a conventional trial.

2024 BCSC 2092 (CanLII)

<u>CONCLUSION</u>

[64] I make the following declaration and orders:

a) I declare that in relation to the Property, the petitioner and the respondent are beneficial owners as tenants in common, each holding a 50% interest.

b) I order that the petitioner does not have standing to pursue a sale and disposition pursuant to the *PPA*.

c) I order a trial of the Rule 13-5 issue on the petition, and order pleadings to be filed by the parties.

d) In the event the parties cannot agree on a timeframe for filing the pleadings, or if they require further directions pursuant to Rule 22-1(7), they have leave to apply to address such matters before me.

e) I order costs to be in the cause.

“Doyle J.”