

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mushy Roomy Products Inc. v. JACP Holdings Ltd.*,
2025 BCSC 345

Date: 20250303
Docket: 243877
Registry: Vancouver

Between:

**Mushy Roomy Products Inc., Hamed Samari, Anthony David Maclean
and Allan Patrick Rojas Maclean**

Plaintiffs

And:

JACP Holdings Ltd.

Defendant

Before: The Honourable Justice LeBlanc

Reasons for Judgment

Counsel for Plaintiffs:

K. Tutt, as Agent for
H. Sanandaji

Counsel for Defendant:

L. Babbitt

Place and Date of Hearing:

Vancouver, B.C.
February 6, 2025

Place and Date of Judgment:

Vancouver, B.C.
March 3, 2025

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Introduction

[1] The defendant applies to cancel a certificate of pending litigation filed by the plaintiff against lands owned by the defendant. Concurrently, the defendant seeks to have the plaintiffs’ claims to an interest in the lands dismissed pursuant to Rule 9-6(5), or alternatively pursuant to Rule 9-5(1). Alternatively, the defendant seeks cancellation pursuant to section 256 of the *Land Title Act*, RSBC 1996, c. 250 (the “*LTA*”) upon the posting of adequate security.

[2] The plaintiffs say they lawfully registered the certificate of pending litigation and rely on the role of the Registrar of Land Titles as the gatekeeper for registration to support the registration. Secondly, the plaintiffs say that the defendant has been unjustly enriched and their pleading of a constructive trust gives rise to the right to file the certificate of pending litigation.

[3] The plaintiffs submitted throughout the hearing that the continued registration of the certificate of pending litigation was required to secure the plaintiffs claim in damages.

The Underlying Dispute

[4] The certificate of pending litigation has been registered against the following lands:

- PID: 009-220-208
Legal Description: Lot 13, Block 28, District Lot 541, Plan 210
 - PID: 027-929-922
Legal Description: Lot A, District Lot 541, Group 1, New Westminster District, Plan BCP41025
 - PID: 009-220-232
Legal Description: Lot 12, Block 28, District Lot 541, Plan 210
- (collectively, the “Lands”).

[5] The Lands contain nine commercial rental units.

[6] The plaintiff, Mushy Roomy Products Ltd. (the “Tenant”), entered into a lease with the defendant on October 10, 2023 to rent one of the nine commercial units (the

“Lease”). The remaining plaintiffs are covenantors of the Tenant’s obligations under the terms of the Lease.

[7] After taking possession of the commercial unit and commencing renovations, the Tenant stopped paying rent to the Landlord and brought this action alleging that the defendant negligently misrepresented the zoning of the Lands. The defendant has counterclaimed against the plaintiffs for breach of the terms of the Lease.

[8] In April 2024, the defendant entered into a listing agreement to sell the Lands although has not entered into a contract of purchase and sale. The defendant says that the certificate of pending litigation is impeding marketing of the Lands.

The Pleadings

[9] The plaintiffs filed the notice of civil claim on June 11, 2024 and subsequently amended it on June 21, 2024.

[10] In their amended claim, the plaintiffs seek the following relief:

- a) a certificate of pending litigation against the Lands.
- b) From the defendant:
 - i. reimbursement for costs incurred for moving materials and equipment to the Lands;
 - ii. reimbursement for costs incurred to repair and upgrade the Lands for their intended use;
 - iii. reimbursement for the costs incurred for moving out of the Lands;
 - iv. return of all rent payments under the Lease resulting from the defendant’s failure to fulfil its obligations;
 - v. compensation for loss of use of certain fixtures installed on the Lands as they could not be utilized for their intended use;

- vi. damages for economic loss and lost business opportunities arising from the inability to use the Lands as intended.
- c) interest pursuant to the *Court Order Interest Act*;
- d) costs;
- e) such other relief as this court deems just and appropriate;
- f) damages to be assessed at trial;
- g) a declaration that the defendant holds such interest in the Lands pursuant to a constructive trust in favour of the plaintiffs, for funds invested into making improvements to the Lands by the plaintiffs;
- h) the equitable remedy of restitution.

[11] The plaintiffs amended claim provides no legal basis for its claim to a constructive trust.

[12] The plaintiffs at paragraph 15 of the amended claim plead that they have invested approximately \$14,000 in making modifications and improvements. It is this expenditure that the plaintiffs say gives them an interest in the Lands.

Legal Framework

[13] Two similar, but distinguishable situations, concerning invalid certificates of pending litigation was discussed by the Court of Appeal in *Bilin v. Sidhu*, 2017 BCCA 429, at paras. 53 – 55, which I have summarized as follows:

- a) Where the pleadings filed in support of the certificate of pending litigation are incapable of supporting a claim to an interest in land, the certificate of pending litigation will have failed to meet the pre-conditions for registration under s. 215 of the *LTA* and the court may order it removed.
- b) Where there is no triable issue to support the claim for an interest in land, the proper approach is to bring an application under Rule 9-6(4) for

summary dismissal of the part of the claim that relates to land and if the application succeeds, the successful party may apply to cancel the certificate of pending litigation with the procedure set out in s. 254 of the *LTA*.

[14] The defendant relies on both scenarios in bringing this application.

[15] The point in time at which to assess the validity of a certificate of pending litigation and the pleading on which it rests is the time of filing with the Registrar of Land Titles and not on the pleadings as they may be amended: *Bilin* at para. 62. Although the amended notice of civil claim was filed subsequent to the filing of the certificate of pending litigation with the Registrar of Land Titles, I have assessed the plaintiffs' claims based on what is plead in the amended notice of civil claim, as the plaintiffs would have had the ability to file a new certificate of pending litigation when the amended notice of civil claim was filed.

[16] Section 215(1) of the *LTA* sets out who may register a certificate of pending litigation:

215 (1) A person who has commenced or is a party to a proceeding, and who is

- (a) claiming an estate or interest in land, or
- (b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the *Court Order Enforcement Act*, a copy of the notice of application or other document by which the claim is made.

[17] Section 254 of the *LTA* provides for cancellation of a certificate of pending litigation where the action is dismissed:

254 If an action in respect of which a certificate of pending litigation is registered has been dismissed, the registrar must cancel the registration as provided in the regulations, or, on

- (a) application, and

- (b) production of a certificate of the registrar of the court that issued the certificate of pending litigation, endorsed by the registrar of the Court of Appeal, certifying that
 - (i) the action has been dismissed and that the time limited for appeal has expired and no notice of an appeal has been filed with the registrar of the Court of Appeal, or
 - (ii) a notice of appeal has been filed and has been finally disposed of, and the dismissal of the action has not been set aside by the Court of Appeal or the Supreme Court of Canada.

[18] Section 256 and 257 of the *LTA* provides further grounds for cancellation based on hardship and inconvenience:

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

(2) An owner whose indefeasible title or charge is registered subject to a certificate of pending litigation under section 217 (2) (a) or (c) (ii) may, on setting out in an affidavit

- (a) that the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate contains no allegation that the owner is not a purchaser in good faith and for valuable consideration,
- (b) that the owner applied to register the owner's indefeasible title or charge before the certificate was received by the registrar, and
- (c) particulars of dates and times of receipt, application and registration of the owner's application and the certificate,

apply for an order that the registration of the certificate be cancelled.

(3) An application under this section must be made to the court in which the proceeding was commenced and must be brought

- (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
- (b) by petition, if the applicant is not a party.

...

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
 - (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
- (2) The form of the undertaking must be settled by the registrar of the court.
- (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.
- (4) On hearing the application referred to in section 256 (2) and on being satisfied that
- (a) the facts set out in the affidavit are consistent with the records of the land title office, and
 - (b) there is nothing in the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate that expressly or by necessary implication

alleges that the owner is not a purchaser in good faith and for valuable consideration,

the court may make an order declaring that the owner's indefeasible title or charge is not affected by the certificate of pending litigation or the outcome of the proceeding.

- (5) On receipt of an order made under subsection (4), the registrar must file it and cancel the registration of the certificate of pending litigation.

Does the Pleading Establish an Interest in Land?

Is the claim in unjust enrichment bound to fail?

[19] The plaintiffs do not seek specific performance of the Lease. The amended claim seeks monetary damages arising from the alleged breach of the Lease.

[20] In *Water Street Profile Services Inc. v. Kelowna Sustainable Innovation Group Ltd.*, 2018 BCSC 925, Justice Baker considered, in similar circumstances as here, whether the plaintiff could maintain its claim for unjust enrichment and constructive trust.

[21] The plaintiffs, to succeed at trial on their claim for unjust enrichment, must plead and prove the following:

- a) The defendant fundamentally breached the Lease;
- b) As a result of the breach, the defendant has been unjustly enriched by the work conducted by the plaintiffs; and
- c) Monetary damages are not adequate to compensate the plaintiffs, such that an equitable proprietary remedy is necessary.

[22] The plaintiffs have pleaded the material facts necessary to support a claim that there was a fundamental breach of the Lease. I make no findings on the merits of this claim as that will be a matter for trial.

[23] The amended claim falls short of making out a claim for unjust enrichment. While the plaintiffs have plead a deprivation, the plaintiffs have not established the facts necessary to support an enrichment of the defendant without juristic reason.

The unjust enrichment claim was added to the relief sought in the amended claim without corresponding facts to support the same.

[24] Even if the facts plead in the amended claim could be construed in a manner that supports a claim for unjust enrichment, there is insufficient evidence to establish a connection between the plaintiffs' deprivation and the Lands. I have no evidence of what the \$14,000 alleged to be invested into the property represents. The plaintiffs rely on an affidavit of Mr. Samari wherein he deposes that he personally spent 275.5 hours performing upgrades to the leased space to bring it to the standard to showcase the retail store and products. This is the limited evidence that I have to assess. It is not known how the \$14,000 was arrived at and whether any of the \$14,000 represents improvements remaining on the Lands.

[25] The Lease provides at clause 9.5 that except for business and trade fixtures which may remain with the plaintiffs, any leasehold improvements will immediately become the property of the defendant without further compensation. If there were leasehold improvements, they would not have become the property of the plaintiffs in any event. Under the lease, the plaintiffs had the ability to remove only business and trade fixtures when they left and there is no evidence that the defendant prevented them from doing so.

[26] Although the evidence in this case falls short of establishing the plaintiffs constructed leasehold improvements, it would not be unjust for a landlord to retain the benefits of the leasehold improvements if the tenant was contractually obligated or permitted to provide them: *Water Street*, at para. 36.

[27] The Court of Appeal in *676093 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at paras. 50 – 51, considered when claims in contract and unjust enrichment can be plead concurrently and concluded that there are two broad categories where claims in contract and unjust enrichment can be plead concurrently: (1) where a benefit is conferred beyond the scope of the negotiated terms of the contract; and (2) where some issue in relation to the validity of

enforceability of the contract in question is raised (including, for example, issues of illegality, capacity, or frustration).

[28] The plaintiffs rely exclusively on the terms of the Lease in bringing this claim. This is not a case where the contract claim can co-exist with the claims for unjust enrichment.

[29] For the reasons stated above, I find that the plaintiffs claim in unjust enrichment discloses no reasonable cause of claim (Rule 9-5) and alternatively would otherwise be bound to fail as there is no genuine issue for trial (Rule 9-6(5)).

[30] Rule 9-5 provides, in part, that the court may order the whole or a part of a pleadings to be struck out if (a) it discloses no reasonable cause of claim.

[31] Rule 9-6(5) provides, in part, that the court can dismiss a claim on finding there is no genuine issue for trial.

Is the claim in constructive trust bound to fail?

[32] If I am wrong in my assessment of the plaintiffs claim for unjust enrichment, would the remedy of constructive trust be available to the plaintiffs?

[33] This same question was before Justice Baker in *Water Street*, where she found that the granting of a proprietary interest would put a plaintiff in a better position than it was as a tenant:

[44] If a proprietary remedy were to be awarded in this case, it would have the effect of putting the plaintiff in a far greater position than it could have possibly enjoyed as a tenant under the sublease. Rather than being a tenant under a lease, a constructive trust would elevate the tenant to an owner with rights under the lease similar to or equal to the landlord. As found by the court in *Idle-O Apartments*, at paragraph 281:

A constructive trust is not the appropriate remedy in this case. There is no connection between the unjust enrichment and the land itself. Moreover, granting Charlyn a trust interest in the land would give it a better interest than it was entitled to as lessee, since as holder of an unregistered interest in land it was vulnerable to third-parties.

The same can be said of the plaintiff in this case.

[45] The argument of the plaintiff before me made it clear that a constructive trust is being sought as a form of priority and security against other unsecured creditors for its monetary claims.

[46] A constructive trust and the certificate of pending litigation are not available as security for monetary claims. ...

[34] The amended claim does not explain why a monetary award is inappropriate or insufficient. The plaintiffs are not seeking specific performance and are looking for alternative space to rent.

[35] The plaintiffs submit that the certificate of pending litigation is required to secure the monetary claims being advanced. The plaintiffs appear to be using the certificate of pending litigation to gain a tactical advantage in the litigation which is not to be permitted: *Seville Properties Ltd. v. Coutre, et al*, 2005 BCSC 1105. A certificate of pending litigation is an extraordinary pre-judgment mechanism to provide a valid claim to an interest in land until the issues in dispute can be resolved and its purpose is not to provide pre-judgment security: *Samji (Trustee of) v. Chatur*, 2013 BCSC 1915 at para. 53 and *Berthin v. Berthin*, 2018 BCCA 57 at para. 32.

[36] Counsel for the plaintiffs was unable to distinguish *Water Street* from this case or otherwise provide me with any authorities supporting the remedy of constructive trust following a finding of unjust enrichment in the context of a commercial lease.

[37] Based on the facts before me, a monetary remedy is the only remedy available to the plaintiffs. The claim for a constructive trust is bound to fail.

Should the Certificate of Pending Litigation be removed?

[38] As the plaintiffs concede, their claim is monetary in nature and not arising out of an interest in the lands.

[39] The plaintiffs have pleaded no facts which would support the creation of a property interest in the Lands and have failed to meet the pre-conditions under s. 215 of the *LTA* for registration. The certificate of pending litigation was not valid when the amended notice of civil claim was filed and it must be cancelled.

[40] The plaintiffs argue that once the Registrar of Land Titles accepts the certificate of pending litigation for registration, the court does not have the ability to cancel registration. I was not provided with case authority or legislation to support this argument and find this argument to be unsupported. The authorities before me clearly demonstrate this court routinely cancelling filed certificates of pending litigation where there is no basis for their registration.

Removal Based on Hardship

[41] As an alternative, the defendant seeks removal of the certificate of pending litigation based on hardship. Although I found that the certificate of pending litigation is not supportable by the pleadings, I would have exercised my discretion to remove the certificate of pending litigation based on hardship.

[42] I accept that the presence of the certificate of pending litigation is creating a barrier to marketing the Lands and after considering the positions of the parties, I would lean in favour of the defendant and cancel the certificate of pending litigation. The Lands, I am told, are valued in the millions of dollars with ongoing carry costs; whereas the plaintiffs seek to protect a judgment of \$14,000. A balancing of these factors favours the defendant.

Summary of Orders Made

[43] The amended notice of civil claim in its present form, is inadequate to support a claim to an interest in land, based on unjust enrichment or a constructive trust, and I conclude that the certificate of pending litigation was not valid when it was filed, as required by s. 215 of the *LTA*. As the claim does not support an interest in the Lands, I strike those parts of the amended claim pleading unjust enrichment and constructive trust pursuant to Rule 9-5(1).

[44] I make the following orders:

- a) The certificate of pending litigation filed by the plaintiff in the Land Title Office under registration number CB1394444 (the "CPL") is cancelled from title to Lands;

- b) The Registrar of Land Titles at the Vancouver/New Westminster Land Title Office shall cause the CPL to be wholly cancelled against the Lands upon receipt of a certified copy of this Order;
- c) I strike Part 2, paragraphs 1, 7 and 8, Part 3, paragraph 10 of the amended notice of civil claim;
- d) The defendant as the successful party, is entitled to its costs of this application, in the cause;
- e) The parties are at liberty to seek further direction in relation to the enforcement of this order, if necessary.

“LeBlanc J.”