IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reale v. Tooby,*
2024 BCSC 170

Date: 20240202
Docket: 22706
Registry: Nelson

Between:

Cosimo Reale

Plaintiff

And

Alex-Rae Tooby and Salvatore-Corrado Meli

Defendant

- and -

Docket: 22882
Registry: Nelson

Between:

Alex Rae Tooby and Salvatore Corrado Meli

Petitioners

And

Cosimo Reale

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

The Plaintiff/Respondent, appearing in person:	C. Reale
The Defendant/Petitioner, appearing in person	A.R. Tooby

The Defendant/Petitioner, appearing in person	S.C. Meli
Place and Date of Hearing:	Nelson , B.C. November 30, 2023
Place and Date of Judgment:	Nelson, B.C. February 2, 2024

Introduction

[1] These are my reasons for judgment in two matters. In *Reale v. Tooby and Meli*, Nelson Registry No. 22706, I have before me an application to strike the entirety of Cosimo Reale's claim against Alex Rae Tooby and Salvatore Corrado Meli, pursuant to *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], Rule 9-5(1). In *Tooby and Meli v. Reale*, Nelson Registry No. 22882, I have before me the petitioners' petition seeking an order for sale, and other orders, all related to a piece of property Ms. Tooby, Mr. Meli and Mr. Reale jointly own as tenants in common in Shoreacres, B.C. (the "Property").

[2] I will provide some background information to put the two matters in context. I will then consider the application to strike, followed by the petition seeking an order for sale.

[3] Mr. Reale styles himself in documents as ":Cosimo: Reale". I will refer to him as Mr. Reale.

[4] The three parties are the registered owners of the Property. They purchased it together on November 2, 2020 for $1,058,000.00. Mr. Reale paid the 30% down payment of $317,400.00. The remainder of the purchase price was paid from the proceeds of a mortgage obtained by the three parties. They are all listed as borrowers on the mortgage.

[5] The Property is a 33.5 acre lot. There are a number of structures on the Property, including two detached homes and a shop. Mr. Reale lives with his family in one of the homes (“1102”), and the petitioners live in the other (“1106”). There is a single driveway that provides the only access to both homes and the other structures.

[6] Relations between the petitioners and Mr. Reale have broken down, leading to the present litigation.

Application to Strike and Dismiss the Action

[7] Ms. Tooby and Mr. Meli apply to strike the notice of civil claim filed by Mr. Reale on May 2, 2023.

[8] It is difficult to describe Mr. Reale’s notice of civil claim, so I will attempt to reproduce its material parts. Mr. Reale has added to the heading “Claim of the Plaintiff(s)” the following: “:PARENTHESIS – SYNTAX.” The facts alleged in the notice of civil claim are as follows:

> 1.
>
> :WATER – SHUT – OFF ON AN AUTHORIZED – LICENCE – HOLDER. [SEE – TACHMENT]
>
> 2.
>
> :CONCEALMENT OF A MATERIAL – FACT.
>
> 3.
>
> FRAUD, THEFT AND MORE. [SEE – TACHMENTS.]

[9] There are “TACHMENTS” referred to but no materials are attached.

[10] The relief sought is ":SETTLEMENT – SOLUTIONS WITHIN THE FAULT – CLAIM." Again, a "TACHMENT" is referred to but not attached.

[11] The legal basis is ":CORRECT – LAWS WITHIN THE MARKET – TRADE – PORT: OPEN-FILE". Once again, a "TACHMENT" is referred to.

[12] Mr. Reale altered "Signature" on the form to be ":AUTOGRAPH:". He affixed a postage stamp to the form near his signature, and it is stamped, it would appear by Canada Post. There also appears to be a thumbprint near the signature.

[13] Mr. Reale has filed a number of documents, styled as affidavits, in this file. I will not attempt to reproduce them: they are lengthy and, frankly, nonsensical.

[14] Ms. Tooby and Mr. Meli filed this application to strike on November 8, 2023. Mr. Reale did not file a response. He appeared at the hearing, and I permitted him to speak in response to the application, despite the fact he had not filed a response. His oral submissions did not address the substance of the application to strike. He referred to himself as a "vessel". He said that the flags that are affixed to a number of the documents he has filed put him in a "neutral position". He alleged that the applicants had tricked him into collecting the mail by putting his correct name on the envelope. By this he meant the use of colons before his name, as I have already described. He asserted that this constituted mail fraud. He said he was present as a neutral witness, not a party, because the applicants had not used his correct name in the application.

[15] The applicants submit that the notice of civil claim should be struck in its entirety, and the action dismissed. The applicants rely on Rule 9-5(1) of the *Rules*, which provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> > (a) it discloses no reasonable claim or defence, as the case may be,

> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[16] I agree with the applicants. The notice of civil claim, and all of the materials filed by Mr. Reale in connection with it and the petition, are replete with concepts, terms and markings consistent with Organized Pseudolegal Commercial Arguments ("OPCA"), a term coined and explained by Associate Chief Justice Rooke, as he then was, in *Meads v. Meads*, 2012 ABQB 571 [*Meads*], and since adopted by this court in a number of cases, including *Herbison v. Canada (Attorney General)*, 2013 BCSC 2020 [*Herbison*]. In *Herbison*, Justice Saunders struck the notice of civil claim and dismissed the action on the basis that the pleadings were vexatious, disclosed no cause of action, and could not be amended to cure their deficiencies. The same is true here.

[17] The notice of civil claim does not disclose any claim known to law. It cannot reasonably be amended such that it could disclose a potential cause of action.

[18] Further, the notice of civil claim is scandalous, frivolous and vexatious. It is impossible for the applicants, and equally for the court, to determine the cause of action pled, or the facts and law on which it might be based.

[19] The notice of civil claim would prejudice and embarrass the fair trial of this matter. It is unintelligible. It is an abuse of the process of the court. Allowing this claim to proceed would only involve the parties in further useless time and expense, and be a waste of the resources of this court.

[20] The notice of civil claim is struck in its entirety, and the action is dismissed.

Petition

[21] Ms. Tooby and Mr. Meli filed the petition on October 12, 2023. They seek a number of orders, including an order for sale of the Property under the *Partition of Property Act*, R.S.B.C. 1996, c. 347 [*PPA*]. They seek a declaration of ownership of the Property, as follows: Mr. Meli as to an undivided 35% beneficial interest; Ms. Tooby as to an undivided 35% beneficial interest; and Mr. Reale as to an undivided 30% beneficial interest. They seek an order that the net proceeds of sale of the Property be divided in accordance with those percentages, subject to them being paid $8,467.47, being the amount owing to them by Mr. Reale for a default judgment granted by the Provincial Court on March 17, 2022. They seek further orders related to the sale of the Property, which I shall address later.

[22] Mr. Reale did not file a response to the petition. I nonetheless permitted him to respond to it at the hearing.

Facts

[23] The only evidence before the court on the petition is contained in the affidavits of the petitioners, as well as additional affidavits from Ms. Tooby's father and his wife. The following facts are gleaned from those affidavits.

[24] The petitioners were searching for a property to purchase starting in or about July 2020. They identified the Property as a possible candidate. Because of the size of the Property and the number of houses on it, they thought it would be desirable to have another co-owner. To that end, they contacted Mr. Reale. They knew Mr. Reale and his wife, Alaina Brckovic, and thought they might be suitable partners.

[25] Ms. Tooby and Mr. Meli both say that by August 13, 2020, the parties appeared to be in sufficient agreement concerning co-ownership of the Property that they were prepared to move forward with making an offer. The petitioners did all the work necessary to prepare and submit an offer.

[26] On August 13, 2020, the petitioners entered into a contract of purchase and sale for the Property.

[27] On August 23, 2020, the petitioners put together some proposals for a co-ownership agreement between the parties, based on their recent discussions with Mr. Reale and his wife. They sent the proposals to Mr. Reale and Ms. Brckovic to review. That same date, Mr. Reale put the proposals into a Google document and shared it with the petitioners. Between then and August 25, 2020, the parties collaborated on the Google document.

[28] Ms. Tooby and Mr. Meli both say that they believe that by August 25, 2020, the parties had reached consensus on the key terms of the co-ownership agreement. These key terms are stated in Ms. Tooby's affidavit as follows:

> 18. I verily believe that by August 25, 2020, the Parties had reached a consensus on the following key terms (the "**Key Terms**"):
>
> a) the Respondent would:
>
> i. take a 30% interest in the Property;
>
> ii. have the right to use and possess 1102;
>
> iii. have sole responsibility for maintaining 1102;
>
> iv. have shared use, with Mr. Meli and me, of the pool, hot tub, shop, and Driveway;
>
> v. share maintenance, with the Petitioners, of the pool, hot tub, shop, Driveway, and other shared areas of the Property;
>
> vi. pay a down payment of 30% of the purchase price on closing;
>
> vii. pay 50% of any closing costs for the purchase of the Property; and
>
> viii. pay 50% of certain joint expenses, such as property tax, property insurance, and shared utilities (the "**Joint Expenses**");
>
> b) Mr. Meli and I would:
>
> i. take a 70% interest in the Property;
>
> ii. have the right to use and possess 1106;
>
> iii. have sole responsibility for maintaining 1106;
>
> iv. have shared use, with the Respondent, of the pool, hot tub, shop, and Driveway;
>
> v. share maintenance, with the Respondent, of the pool, hot tub, shop, Driveway, and other shared areas of the Property;
>
> vi. pay 50% of any closing costs for the purchase of the Property;
>
> vii. be responsible for paying the mortgage and any interest charged thereon; and

viii. pay 50% of the Joint Expenses; and

c) a cabin, trailer or structure would be installed near 1106 at some future time as a permanent residence for my father, Stephen Tooby ("**Mr. Tooby**") and his wife, Preeti Gahlot ("**Ms. Gahlot**"). In the interim, Mr. Tooby and Ms. Gahlot would be residing at 1106 intermittently. Once Mr. Tooby and Ms. Gahlot moved to the Property permanently, the Respondent's share of the Joint Expenses would be reduced to one-third, and my and Mr. Meli's share would be increased to two-thirds.

[29] Ms. Tooby and Mr. Meli both say that between August 25, 2020 and November 2, 2020, the parties further discussed the key terms and the rest of the Google document. However, no changes resulted. They also say that they attempted to address in that period how the co-ownership agreement might terminate, but they never reached consensus on that point.

[30] The Google document was a living document, which changed with the input of the parties. It does not reflect all of the key terms asserted by the petitioners. Ms. Tooby made submissions about who contributed some of the entries, but authorship is not indicated on the copy of the Google document entered into evidence. It can sometimes be inferred.

[31] For example, the Google document appears to indicate that the petitioners (or one of them) wrote that, in order to justify covering the full mortgage and interest, they needed Mr. Reale to contribute at least 30% down, but that closer to 50/50 would be ideal. Mr. Reale responded that 30% was all he had to contribute to the Property, and the sooner he was removed from the mortgage the better. He said that if that meant subdividing, he was okay with that, to which the petitioners responded that that "sounds good". It appears that Mr. Reale also said that he thought the most fair approach would be splitting things one-third each, rather than 50/50. He noted that he would be taking the smaller, older house. The petitioners responded that this seemed fair and would be adjusted to one-third each when they moved in permanently. It is not clear who "they" is a reference to.

[32] Overall, the Google document suggests that the parties were each to take a one-third ownership interest, not the 35%, 35% and 30% interests asserted by the petitioners.

[33] The Google document does not explicitly address who had the right to use and possess each of the two residences, but it seems clear that Mr. Reale and his family were to have use and possession of the older home, 1102, and the petitioners were to have use and possession of the newer home, 1106.

[34] The Google document appears to contemplate that Mr. Reale would be responsible for maintaining and paying utilities for 1102, and the petitioners for 1106. The parties would have shared use of the other structures on the Property, such as the pool, hot tub and shop. The suggestion was that each of them would be responsible for one-third of the hydro for the pool and hot tub, and that other expenses, such as other maintenance expenses and property taxes, were to be split 50/50.

[35] So far as Ms. Tooby's father and his wife are concerned, the petitioners appear to have asked Mr. Reale for his thoughts on them eventually living on the Property, and having a cabin in the woods. Mr. Reale does not appear to have answered that question.

[36] The first statement in the Google document is that "the goal is to complete this document before finalizing the sale and either have it re-written by a lawyer or just notarized (and share the expense)". That never occurred. The Google document standing alone is not a complete co-ownership agreement. It does not contain all the terms which the petitioners assert the parties agreed to.

[37] Prior to November 2, 2020, the petitioners secured approval for the parties to obtain a mortgage with CIBC. They say that they confirmed with their mortgage broker the 35/35/30 ownership split which they assert, and that they understood that their broker would convey that to the lawyer assisting them with the purchase. However, they assert that the intended ownership split was mistakenly left out of the

registration particulars and the parties were registered as tenants in common on title to the Property without any ownership interests being specified. The mortgage was registered against the Property. As mentioned earlier, Mr. Reale paid the 30% down payment, and the remainder of the purchase price was paid from the mortgage proceeds. The petitioners say that sometime after the purchase they discovered the error in the registration, and Ms. Tooby reached out to the law firm that assisted with the purchase about correcting it, but received no reply.

[38] There is no evidence from the mortgage broker or lawyer involved. I cannot conclude, on the evidence before me, that the error asserted occurred.

[39] The petitioners say that the parties split the remaining closing costs; they do not say on what percentage basis.

[40] Mr. Reale and his family moved into 1102 on November 2, 2020, and the petitioners moved into 1106 on December 3, 2020.

[41] Following the purchase, the petitioners managed the expenses for the Property. Ms. Tooby says it was her expectation, based on the key terms and the parties' previous discussions, that Mr. Reale would reimburse the petitioners for his share of the expenses.

[42] On June 30, 2021, Ms. Tooby emailed Mr. Reale and his wife to request that Mr. Reale reimburse them for his share of the expenses incurred to date. By Ms. Tooby's calculation, Mr. Reale owed a total of $2,904.99. The largest single item was property tax, and there were various items related to things such as maintenance of the pool and hot tub. The petitioners say that on July 7, 2021, Mr. Reale sent Mr. Meli an e-transfer in payment of a portion of the funds he owed them. The e-transfer from Mr. Reale to Mr. Meli indicates he sent them $1,868.75 for property taxes and Fortis. The petitioners say that following this payment Mr. Reale continued to owe them $936.24.

[43] The petitioners say that between July 7 and September 7, 2021, they had several in-person conversations with Mr. Reale about the remaining funds owing.

They say that, during those conversations, Mr. Reale disputed the terms of the co-ownership agreement, accused them of fabricating some of the terms, stated he had not agreed to pay 50% of the joint expenses, stated the co-ownership agreement was void, accused them of extortion, and refused to pay the outstanding amounts. The petitioners say that in an effort to maintain their relationship with Mr. Reale, they decided to reduce and remove some of the outstanding items. On September 7, 2021, Ms. Tooby sent an email to Mr. Reale, his wife and Mr. Meli providing a revised balance owing of $412.19.

[44] The petitioners say that between September 7 and 23, 2021, they had several further conversations with Mr. Reale in which he stated he would not pay this revised balance, did not owe them any money, and did not think there were any issues between the parties.

[45] By September 23, 2021, the petitioners had come to believe that it was no longer desirable to continue the co-ownership agreement with Mr. Reale, because they did not agree on its key terms and it seemed increasingly unlikely they would be able to resolve their disputes.

[46] On September 23, 2021, Ms. Tooby sent an email on behalf of both petitioners, to Mr. Reale, his wife and Mr. Meli. They proposed two possible solutions. The first was that the Property be subdivided, with Mr. Reale to be responsible for the associated costs. If subdivision was not obtained within six months, Mr. Reale and his wife would accept a buyout of $317,400 (being 30% of the purchase price), less prorated property tax and insurance. The second alternative was that the petitioners buy out Mr. Reale for $317,400, with some adjustments. $217,400 was to be paid on the agreement being signed, with the remaining funds to be paid on last day of residence. If Mr. Reale did not accept either option, then the petitioners proposed that they retain an arbitrator to determine fair buy-out terms, the cost of which was to be split 50/50.

[47] Mr. Reale responded by email dated October 4, 2021. He declined the proposals. In doing so, he stated:

> As you know, under Title 42 Section 1986: Knowledge of the Contract, I can no longer contract with the fraudulent syntax grammar sentence structure. Your offer is void of any facts, and proves that you lack the capacity for the writing of a contract.
>
> …
>
> Attached you will find our final offer in correct sentence structure, free of charge. You have 10 days from receiving the contract to correspond.
>
> …

[48] It is not clear what Mr. Reale was proposing in response. What is clear is that he was proposing that he and his family would stay on the Property at a minimum until May 2025. He raised a number of complaints about the petitioners' behaviour. It is also clear that he took the position that the Google document was a list of goals and topics of discussion. He stated that "No signatures, no authorization, no word-term-meanings, no finalization of that document was ever made." The petitioners say that they discerned that Mr. Reale was offering to purchase their interest in the Property for the principal they had repaid on the mortgage to date, which they say was approximately $20,000 at that time.

[49] The parties exchanged further email correspondence on the subject until October 23, 2021. In her October 10, 2021 email, Ms. Tooby sought to persuade Mr. Reale of the reasonableness of the petitioners' proposal to buy him out. She noted that the parties did not have a signed contract, and did not see eye-to-eye on what the "true 'agreement'" is, which she stated would continue to be a point of contention. In his October 15, 2021 email, Mr. Reale stated that "Our house is not for sale."

[50] Mr. Reale attached a counter proposal to one of his emails in this exchange, likely the October 4, 2021 one. The counter offer has a flag and postage stamp on it. It refers to the petitioners as "vessels", and to Mr. Reale and his wife as "postmasters". It makes little sense. It states in part:

> FOR THE **BUY-OUT** OF THE **HOUSE-A** IS WITH THE **PAY-OUT** OF THE **[PRI]NCIPLE-*PAID*** ON THE **MORTGAGE** *UN*TIL THE **DATE-SALVATORE: MELI/ALEX: TOOBY-VACATE-HOUSE-A** WITH THE **PEACEFUL-TRANSITION** BY THE **CLAIMANT-POSTMASTERS: Cosimo: Reale &: Alaina: Brckovic.**

[51] Ms. Tooby replied on October 16, 2021, rejecting Mr. Reale's suggestions and reiterating the petitioners' previous proposal. This email exchange ended with Mr. Reale's October 23, 2021 email. The parties were clearly at an impasse.

[52] On October 26, 2021, Ms. Tooby wrote Mr. Reale and his wife an email marked as "without prejudice". She raised issues with respect to payment of insurance for the Property and a permit for 1102 that Mr. Reale was apparently applying for. She sought to make Mr. Reale responsible going forward for dealing with such issues, and in particular dealing with renewal of the insurance.

[53] On November 10, 2021, the petitioners received a multi-page registered letter from Mr. Reale. It has flags, postage stamps, finger prints and a lock of hair attached. Mr. Reale has handwritten notations on some of the pages of this and other documents he has sent the petitioners. They appear to be intended "to correct" the documents to comply with an arcane grammatical system which Mr. Reale adheres to. They resemble hieroglyphics. Ms. Tooby aptly describes the registered letter they received as "unintelligible".

[54] On November 15, 2021, Mr. Meli sent Mr. Reale an email setting out Property-related expenses they had paid to date, of which they said Mr. Reale should have paid 50%. In total, they stated that the outstanding amount was $4,597.27, plus one-half of the Property insurance, for a total of $9,352.27.

[55] On November 22, 2021, the petitioners received a letter from Mr. Reale, demanding payment of $12,334.00 for assistance he provided to the petitioners prior to the breakdown in their relationship and the replacement of several appliances in 1102. He did not respond to Mr. Meli's November 15, 2021 email.

[56] On November 25, 2021, the petitioners retained counsel to assist them in resolving this matter. On December 14, 2021, their counsel wrote to Mr. Reale demanding payment of $12,672.59 in outstanding expenses related to the Property. He told Mr. Reale that, failing payment by December 17, 2021, he anticipated filing legal action to seek payment of this amount. On December 20, 2021, the petitioners

filed a notice of claim in Provincial Court seeking payment of $12,340.53 plus filing and service fees. Mr. Reale was duly served that same date.

[57] On December 9, 2021, Mr. Reale sent Mr. Meli an email purporting to impose new rules regarding the common driveway and its plowing, and imposing a $500 fine if those rules were breached.

[58] On January 5, 2022, the petitioners' counsel advised them he had received what he called a two-page nonsensical response from Mr. Reale. The petitioners applied for default judgment. On March 17, 2022, the Provincial Court ordered default judgment in the amount of $8,546.68, plus service and filing fees and prejudgment interest, for a total judgment of $8,796.63 (the "Default Judgment"). Mr. Reale has not made any voluntary payments on the Default Judgment. The petitioners filed garnishing orders, as a result of which they have received a total of $400.17 towards payment of the Default Judgment.

[59] On January 6, 2022, Mr. Meli wrote Mr. Reale and his wife a brief email stating that the situation on the Property was obviously not working, and stating that, when they were ready to discuss possible solutions, the petitioners were ready and willing.

[60] On January 7, 2022, the petitioners' counsel advised them that, due to public attacks directed at him, his firm and its employees on social media by Mr. Reale's wife, he could not continue to represent the petitioners in this matter.

[61] By January 11, 2022, Ms. Tooby's father and his wife were residing at 1106 with the petitioners. On that date, there was an altercation involving the petitioners, Mr. Tooby and Mr. Reale's wife. This started as an argument involving Mr. Reale and his wife having piled snow up on the driveway on the Property, which descended into a physical altercation between Ms. Tooby and Mr. Reale's wife, with Mr. Reale's wife throwing the keys to the petitioners' ATV, which was used to plow the driveway, into a snowbank. The police were called and a police officer attended.

No charges were laid regarding what the police are stated to have termed a "consensual fight".

[62] Mr. Meli sent Mr. Reale three emails on February 2, 9 and 16, 2022 raising a number of issues, including damage to the ATV and reiterating the petitioners' desire to discuss a plan to move forward.

[63] On March 21, 2022, the petitioners received a letter from Mr. Reale. Its purpose and meaning are not clear, but in it he states that he made a 30% down payment on the Property, the petitioners took full responsibility for the mortgage, and the petitioners and Mr. Reale were each entitled to 50% of the shop and the land.

[64] Also on March 21, 2022, the petitioners received a second letter from Mr. Reale. In it, he appears to accuse the petitioners (styled the "vassalees") of trespass and harassment. He appears to demand that the petitioners cease communicating with him and maintain a minimum distance of 100 metres from him, breach of which would result in a fine of $5,000.

[65] Lastly on March 21, 2022, the petitioners received a third letter from Mr. Reale. In it he appears to allege that the petitioners shut off the water to his home. He again demands that they cease and terminate such conduct, failing which he would charge them $5,000. He drafted something entitled a "Joint Works Contract" which appears to relate to water usage on the Property. He appears to purport to impose fees and fines on the petitioners for water use.

[66] The petitioners did not agree to or reply to any of Mr. Reale's March 21, 2022 correspondence.

[67] On June 13, 2022, Mr. Meli sent Mr. Reale a copy of the 2022 property tax notice and asked if he would be applying for the Home Owner Grant. On June 20, 2022, Mr. Meli received a letter from Mr. Reale which appears to demand payment of $5,000 for Mr. Meli having contacted him about the property tax. Mr. Reale's letter stated that if Mr. Meli failed to pay, then the Trail Armoury and Mr. Meli's professional regulator would be notified. Mr. Meli did not respond. On July 11, 2022,

Mr. Meli received a follow-up communication indicating that he now owed $10,000. Mr. Meli again did not respond.

[68] On July 5, 2022, the petitioners received a letter from Mr. Reale. In it he appears to demand payment of $38,000 for his share of the shop and its contents. The petitioners also received a second letter on that date, this one related to water usage. The petitioners did not agree to or reply to Mr. Reale's July 5, 2022 correspondence.

[69] On August 1, 2022, Mr. Meli sent Mr. Reale an email setting out the parameters of a proposed permanent solution. In effect, the petitioners would buy out Mr. Reale and each party would be able to go forward without having to deal with the other ever again.

[70] On August 12, 2022, Mr. Reale responded. He demanded that the petitioners pay him $658,000 and ten ounces of gold for his interest in the Property, and various alleged damages. They were given three days to respond, failing which they would be summoned to a court hearing. Mr. Meli replied on August 21, 2022. He did not agree to Mr. Reale's proposal, but did suggest that it was worth discussing the value of Mr. Reale's 30% interest. He suggested hiring a mediator to assist the parties in negotiating an agreement.

[71] On August 30, 2022, the petitioners received a lengthy document from Mr. Reale purporting to summons them to a hearing at the local Canada Post office on November 4, 2022. It has what appears to be a notary's stamp on it. It is impossible to make sense of this document, but Mr. Reale appears to claim that the petitioners owe him various large sums of money (referred to as "Canadian-Dollars-Worthless-Things") for various forms of alleged wrongdoing. The petitioners did not respond to this document, nor did they attend the so-called hearing at the Canada Post office.

[72] On November 9, 2022, Ms. Tooby received a letter from Mr. Reale for "Breach of the Contract: Passing-Ticket in the Market-Trade-Post". He claimed she owed him $5,000. I am unable to discern why. Ms. Tooby did not respond.

[73] In late December 2022, Mr. Meli unexpectedly ran into Mr. Reale at a local store. They discussed the possibility of one party buying out the other. On January 6, 2023, Mr. Meli sent Mr. Reale an email following up on this discussion. Mr. Reale did not respond. Mr. Meli sent a second follow-up email on March 8, 2023. Mr. Reale did not respond.

[74] The petitioners retained a second lawyer to assist them in attempting to resolve their ongoing issues with Mr. Reale. On April 17, 2023, their lawyer wrote Mr. Reale a without prejudice letter proposing that the petitioners buy out Mr. Reale's interest in the Property, or alternatively that he buy out theirs. The proposal was based on the 35/35/30 ownership split in the Property that the petitioners maintain reflects the parties' agreement. Mr. Reale replied on May 11, 2023 with a 75-page nonsensical document, similar in style and content to those I have described previously.

[75] Ms. Tooby provided first-hand evidence about an incident that occurred on June 6, 2023. She says that she was driving on a nearby road when she saw Mr. Reale driving towards her. She pulled over and waved at him in order to get his attention as she wished to have a conversation with him. She says that Mr. Reale's vehicle then began to accelerate towards her, and that just before the two vehicles collided, Mr. Reale's vehicle swerved away. Ms. Tooby says that this incident left her shaking and afraid, so she called the police.

[76] On June 19, 2023, Mr. Meli sent Mr. Reale a reminder that the 2023 property tax was due, and that the petitioners had paid the entirety of the 2022 property tax. Mr. Reale did not pay any portion of the 2023 property tax.

[77] In her affidavit, Ms. Tooby provides some hearsay information she received from Superior Propane and an appraiser about difficulties they allegedly had in dealing with Mr. Reale and attempting to come onto the Property. In the absence of first-hand evidence from the people allegedly having these problems, I do not consider this evidence on this petition.

[78] The petitioners wish to terminate their relationship with Mr. Reale due to the ongoing and escalating conflict between the parties, Mr. Reale's lack of interest and reasonableness in negotiating a resolution, and the lack of any possibility of reconciliation. They do not wish to subdivide the Property for a number of reasons, mostly centred around the proximity of the two residences and the shared driveway, as well as the necessity of finding a second water source. They are willing to buy Mr. Reale's interest, or to sell theirs to him, for fair market value.

Analysis

Ownership

[79] The petitioners seek a declaration that Mr. Meli owns an undivided 35% beneficial interest, Ms. Tooby owns an undivided beneficial 35% interest, and Mr. Reale owns an undivided 30% beneficial interest in the Property. They base those percentages on the co-ownership agreement that they submit is reflected in the Google document.

[80] I am unable to find on the evidence before me that the parties ever reached an agreement, in the Google document or otherwise, as to their percentage interests in the Property. Suggestions were made and responded to, but a final agreement was never reached on this and a number of key terms, including the percentage each party was to contribute to various expenses, or what would happen on termination.

[81] In *Suen v. Suen*, 2013 BCCA 313 [*Suen*], the Court of Appeal summarized what is necessary to constitute a contract as follows:

> [40] A contract is promissory in nature, that is, it is an undertaking by the promisor to do something for the promisee in exchange for something. The exchange of promises is enforceable only if there is an agreement or consensus on the "existence, nature and scope of their [respective] rights and duties" (G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Ontario: Carswell, 2011) at 6).

[82] At its most basic, an enforceable contract requires a meeting of the minds, with the parties agreeing to the essential terms of the agreement. That never

occurred in this case, a fact reflected by the parties' ongoing disagreement as to what the key terms of their agreement are.

[83] In *Suen* at para. 44, the Court went on to consider s. 59(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which applies to agreements involving real property and provides:

> A contract respecting land or a disposition of land is not enforceable unless
>
> > (a) there is, in a writing signed by the party to be charged ... both an indication that it has been made and a reasonable indication of the subject matter ...

[84] The alleged co-ownership agreement contained in the Google document respects land. However, the Google document was never signed by any of the parties, nor was any other agreement reduced to writing and signed by any of the parties.

[85] Despite having failed to reach a final agreement among themselves, the parties purchased the Property as tenants in common. Each of them is listed on the title. There is no indication on title of any percentage interests.

[86] Section 23(2) of the *Land Title Act*, R.S.B.C 1996, c. 250 creates the statutory presumption of indefeasible title. This presumption was discussed in *Virk v. Pannu*, 2006 BCSC 921 , aff'd *Bajwa v. Pannu,* 2007 BCCA 260 [*Virk*]:

> [12] The section operates to create a statutory presumption that persons registered on title of a property are presumed to hold the legal and equitable interest conveyed by the registrar and in so doing, presumes they are indefeasibly entitled to an estate in fee simple. As noted, the burden is on the party seeking to challenge the state of title to prove otherwise.

[87] The statutory presumption can be rebutted. As stated by the Court in *Suen* at para. 34:

> The central issue to be determined by the trial judge was whether the statutory presumption of indefeasible title as to the joint ownership of Capstan Way was rebutted by either of the parties. This Court has endorsed three considerations for determining this issue:
>
> > (i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;

> (ii) the operation of an agreement between the parties that is contrary to the registered legal title; or
>
> (iii) taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).
>
> See *Bajwa v. Pannu*, 2007 BCCA 260, paras. 12-14, 18, and 23; and *Aujila v. Kaila*, 2010 BCSC 1739, paras. 31-36.

[88] Section 11 of the *Property Law Act*, R.S.B.C. 1996 c. 377 provides, in part, that "[i]f the interests of tenants in common are not stated in the instrument, they are presumed to be equal." The burden is on a party that seeks to prove otherwise: *Virk* at para. 27.

[89] The evidence before me does not provide any basis upon which I could hold that the statutory presumptions that the parties hold indefeasible and equal interests in the Property have been rebutted. The petitioners say that their lawyer or real estate agent made a mistake in not ensuring that the title reflected the 35/35/30 ownership split they assert, but I do not find that evidence persuasive, particularly in the absence of any evidence from the lawyer or real estate agent to support it. There is no basis to find that any of the parties hold their legal interest in the Property, or some part of it, in trust for the others. I have already found that the evidence does not support that the parties entered into an agreement that is contrary to the registered title.

[90] I find and declare that each of the three parties owns an undivided 33 and one-third percent beneficial interest in the Property.

[91] As discussed in *Virk* at para. 21:

> Even if the statutory presumption of indefeasibility is upheld and the parties are found to have equal interests in the property, the equal division of the proceeds of sale to which the parties are entitled may be subject to their respective financial contributions.

[92] Any concern with respect to respective contributions of the parties to the Property can be addressed by the orders I will make with respect to the sale of the Property: *Virk* at para. 24.

Order for Sale

[93] The petitioners seek an order for sale of the Property. They seek an order that the net proceeds of sale be distributed amongst the parties in proportion to their respective beneficial interests. They seek a number of other orders related to the sale, including that each of the parties of record are entitled to purchase the Property.

[94] Section 2 of the *PPA* provides that a co-owner of land may be compelled to partition or sell the land:

> **Parties may be compelled to partition or sell land**
>
> **2** (1)All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.
>
> (2) Subsection (1) applies whether the estate is legal or equitable or equitable only.
>
> (3) In order to achieve partition, special timber licences may be assigned to any of the interested parties.
>
> (4) Despite subsection (3), a special timber licence must not be partitioned and any special timber licences left over after the others have been assigned, must be ordered to be sold and the proceeds distributed among the interested parties in order to achieve partition.

[95] Section 6 of the *PPA* sets out the requirements for obtaining an order for sale:

> **Sale of property where majority requests it**
>
> 6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

[96] Section 10 of the *PPA* provides that the court may allow any of the parties to bid on the resulting sale:

> **Court may allow interested parties to bid**
>
> 10 On a sale under this Act the court may allow any of the interested parties to bid at the sale on the terms as to nonpayment of deposit, or

> setting off or accounting for the purchase money instead of paying it, or as to any other matter that seems reasonable to the court.

[97] In *Tseng v. Tseng*, 2021 BCSC 27 at para. 21, the Court summarized the requirements for an order for sale under s. 6:

> Unless there is good reason not to do so, the sale of property under s. 6 of the *PPA* must be ordered if a petitioner has at least a 50% ownership interest in the property. The court retains a broad and unfettered residual discretion under s. 6 of the *PPA* to refuse a sale of the property when required by the ends of justice: *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 24. While the respondents do not technically bear the burden of proof, for all practical purposes, they should adduce evidence to establish a good reason why the Property should not be sold: *Bradwell v. Scott*, 2000 BCCA 576 at para. 35.

[98] The petitioners have met the statutory prerequisites for an order for sale under s. 6 of the *PPA*. The petitioners together have a 66 and two-thirds percent ownership interest in the Property. Mr. Reale has provided no evidence on this petition, and certainly no evidence of a good reason why the Property should not be sold. The evidence that is before the court amply supports that it is necessary that the Property be sold. These parties purchased the Property without having a final agreement in place about how they would finance, maintain and deal with the Property. Relations between the petitioners and Mr. Reale are abysmal. The petitioners have, both personally and through counsel, attempted to negotiate some sort of agreement to bring this matter to resolution with Mr. Reale. Mr. Reale has rebuffed those efforts, and seeks, both in his communications with the petitioners and before this court, to rely on pseudolegal gibberish to support his positions.

[99] The petitioners are entitled to an order for sale of the Property, and I so order.

[100] Both the petitioners and Mr. Reale have, at various junctures, expressed an interest in purchasing the Property. I order that any party of record may purchase the Property.

[101] The petitioners seek sole conduct of sale. The court has the authority to grant sole conduct of sale. In considering whether to do so, the court should, as stated in *Dhillon v. Kumar*, 2014 BCSC 2366 at para. 34, “consider all factors including the

willingness of a party to facilitate sale, the inability of the parties to agree on routine aspects of sale and the inability of the parties to cooperate." It is obvious that the petitioners and Mr. Reale are unable to cooperate with one another. On the evidence before me, I find that Mr. Reale is unlikely to cooperate in the process of conducting the sale. I therefore order that the petitioners shall have sole conduct of sale, subject to the following conditions:

i. the petitioners shall promptly retain a qualified real estate appraiser to appraise the Property and shall initially pay the associated costs;

ii. promptly upon receiving the appraisal, the petitioners shall:

    1. provide Mr. Reale with a copy of the appraisal; and
    2. retain a realtor to list the Property at a price determined by the realtor to be reasonable but no lower than the appraised value, provided that any such listing shall include the condition that no commission is payable if the Property is sold to any of the parties of record in this proceeding;

iii. the realtor shall be entitled to show the Property between the hours of 9 a.m. and 9 p.m. on 24 hours' notice to Mr. Reale, such access not to be unreasonably withheld;

iv. Mr. Reale shall:

    1. not be on the Property during a showing;
    2. not otherwise interfere with any showing; and
    3. ensure anyone residing with him or anyone that he has invited onto the Property, is not on the Property during a showing;

v. if an offer is made on the Property by a person other than Mr. Reale:

    1. the petitioners shall inform Mr. Reale promptly of the offer and provide him with a copy of same; and
    2. the petitioners shall not accept the offer or make a counteroffer until the passage of three clear business days from the time the petitioners notify Mr. Reale of the offer; and

vi. If an offer is made on the Property by a third party, the petitioners or Mr. Reale may make a higher, unconditional offer or offers. Any such offer must be accompanied with a deposit in the amount of 10% of the amount of the offer, which is returnable to the offering party if the offering party is ultimately outbid or the offer is not approved by the court, but is forfeited to the other party if the offer is accepted and approved by the court (unless such approval is

> waived by Mr. Reale) but the offering party is unable to complete the purchase.

[102] The sale of the Property shall be subject to the approval of the Court unless otherwise agreed to by the parties in writing.

[103] It remains to be determined what, if anything, needs to be done to address the parties' respective contributions to the Property. In *Ryser v. Rawlings*, 2008 BCSC 1050 at para. 37, Justice Williams held, in the context of an application for sale, that:

> The equal division of the proceeds of sale to which the parties are entitled may be subject to an accounting of their respective financial contributions to the property, according to the principles of fairness: *Bajwa v. Pannu*, *Smith v. Davis*, [1987] B.C.J. No. 54 (S.C.), *Farrar v. Walker*, [1982] B.C.J. No. 965 (S.C.); *Aleksich v. Konradson* (1995), 5 B.C.L.R. (3d) 240 (C.A.). The court can and will order that Mr. Rawlings be reimbursed for his contributions to the property, out of the proceeds of the sale.

[104] In *Virk*, the Court held that there was no evidence upon which the statutory presumption of indefeasibility was rebutted. There was no agreement that the parties did not have equal interests in the property in issue. An order for partition and sale was ordered. However, the Court held at para. 43 that there needed to be a fair and equitable division of the proceeds that included all mortgage and other payments made to improve and maintain the property. To that end, at para. 45, the Court ordered an accounting.

[105] In the recent decision of *Ostrikoff v. Ostrikoff*, 2023 BCSC 77, Justice Schultes dealt with a similar situation. At para. 48 he made directions, including that the parties obtain an appraisal and the respondent provide certain financial information. That was to occur prior to an order for sale being made, in order to give the respondent the opportunity to buy out the petitioner, after the court had made a determination of the respondent's contributions.

[106] In the present case, it is neither necessary nor advisable to delay the order for sale to permit such a process to occur in advance. This intolerable situation has already gone on too long, and needs to be brought to an end. It is necessary,

however, that the parties' respective contributions to the Property be taken into account in order to ensure that all parties are treated fairly.

[107] I therefore order that, subject to a final adjustment between the parties to take into account the parties' contributions to the Property, they are each entitled to an undivided one-third interest in the net proceeds of sale. For greater certainty, the parties are entitled to have their contributions related to the Property taken into account, including: the purchase of the Property, including Mr. Reale's down payment; the petitioners' mortgage payments; expenses related to the maintenance of the shared aspects of the Property, such as the pool, hot tub, driveway and shop; property taxes; property insurance; the cost of the appraisal, and property improvements. This also includes the amount owing by Mr. Reale on the Default Judgment.

[108] The final adjustment can be accomplished by way of a referral to the Registrar or written agreement of the parties. As in *Virk* at para. 45, I direct that the parties are at liberty to make further submissions as to an equitable distribution of the proceeds in the event further direction from the court is required. Pending the conclusion of the final adjustment to take into account the parties' respective contributions, the net sale proceeds are to be paid into Court or held in trust by the petitioners' solicitor. Following compensation for the parties' respective contributions to the Property, the remaining net sale proceeds, if any, are to be paid out to the parties in equal thirds.

[109] The petitioners are at liberty to apply for further directions with respect to carrying out the terms of this order.

Conclusion

[110] The petitioners sought special costs of both the petition and the application to strike. Special costs may be awarded when a party has engaged in reprehensible conduct during the course of the litigation: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (C.A.). Special costs are not to be ordered to punish a person's behaviour outside of the litigation process.

[111] In my view, special costs are warranted against Mr. Reale with respect to the application to strike. The notice of civil claim that Ms. Tooby and Mr. Meli successfully applied to strike was an abuse of the court's processes. Filing such a document is reprehensible conduct, deserving of the court's rebuke. This order is consistent with the discussion in *Meads* at paras. 594–600 that special costs will often be appropriate when dealing with litigation initiated by OPCA litigants. The petitioners are entitled special costs of the action.

[112] I come to a different view with respect to the petition. Mr. Reale did not initiate the petition. He did not file a response to petition. He did file a document within the petition proceeding, styled as an affidavit but having no relevant, responsive or intelligible content. Such an affidavit is an insult to the court. But I do not view it as sufficiently reprehensible to warrant an award of special costs. The petitioners were substantially successful on the petition, and they are entitled to their ordinary costs of the petition at Scale B.

[113] The requirement for the signature of Mr. Reale on both of these orders is dispensed with. The orders are to be directed to me for my approval and signature.

"L.M. Lyster J."

LYSTER J.