COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Price Security Holdings Inc. v. Klompas & Rothwell,* 2023 BCCA 453

Date: 20231206
Docket: CA48573

Between:

Price Security Holdings Inc.

Appellant
(Plaintiff)

And

Klompas & Rothwell

Respondent
(Defendant)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated August 30, 2022 (*Price Security Holdings Inc. v. Klompas & Rothwell*, 2022 BCSC 1521, Victoria Docket S171140).

Counsel for the Appellant:	J.M. Aiyadurai
Appearing on behalf of the Respondent, Klompas & Rothwell, via videoconference:	S. Rothwell
Place and Date of Hearing:	Victoria, British Columbia September 15, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 6, 2023

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Abrioux

Summary:

The respondent has rented office space in a building in Victoria since 1985. The appellant was the beneficial owner of the property for a number of years, including a two-year period during which the respondent failed to pay rent despite occupying the premises. The issue is whether the appellant, as a beneficiary, has established the special circumstances necessary to allow it, rather than the trustee, to sue the respondent for the unpaid rent. At trial, the appellant relied on three special circumstances. First, the trustee's failure to pursue the respondent for the unpaid rent. Second, the trustee's conflicting obligations to another beneficiary who purchased the property from the appellant and also had a claim for outstanding rent. Third, equity and the interests of justice favoured granting the appellant standing to sue the respondent who had been unjustly enriched. The appellant contends the judge erred in concluding that none of these circumstances amounted to special circumstances.

Held: Appeal allowed. Consideration of the first and third of the special circumstances is sufficient to dispose of the appeal. Regarding the first, the judge erred in concluding that the trustee was no longer a trustee vis-à-vis the appellant and so owed it no duty to protect its beneficial interest. As to the third special circumstance, the judge erred in principle by concluding that the appellant's sophistication and conduct precluded it from relying on equity. The judge made no finding of misconduct such as fraud or deceit on the part of the appellant, and the respondent had been unjustly enriched at the appellant's expense. As special circumstances are established, the appellant has standing to sue and is entitled to judgment in the amount of the unpaid rent.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] This appeal turns on whether the appellant, who is a beneficiary under a trust, has established the special circumstances necessary to allow it, rather than the trustee, to sue a debtor of the trust.

Background

[2] The factual and procedural history of the case is somewhat complex—this is the second time the proceeding has reached the Court of Appeal. Fortunately, two summary trials and the earlier appeal have significantly narrowed the matters in dispute. I will review only the background necessary to address the remaining issues.

[3] Although this case turns on the distinct roles of trustees and beneficiaries, it is in essence an action brought by the appellant Price Security Holdings Inc. (“Price”) to recover rent from an accounting firm, the respondent Klompas and Rothwell (“K & R”).

[4] From 1985 to present, K & R has rented office space in a building located at 895 Fort Street in Victoria (the “Property”). The owner and landlord of the Property throughout has been Fort Quadra Holdings Ltd. (“Fort Quadra”). The appellant Price came into the picture on December 31, 2009 when it acquired the beneficial ownership of the Property and the shares of Fort Quadra. At that point, Fort Quadra was the trustee of the Property and related leases, and Price was the beneficiary of the trust and the rent paid by K & R.

[5] When Price acquired the beneficial ownership of the Property in 2009, the five-year term of K & R’s 2002 lease agreement with Fort Quadra (the “2002 Lease”) had expired two years earlier. Attempts by Fort Quadra to renew the lease had been unsuccessful. K & R was of the view that, at $14 per square foot, it had been paying over market for the space, since it had earlier agreed to that price to repay the landlord for leasehold improvements. In the absence of a lease renewal, the tenancy continued to be governed by the terms of the 2002 Lease; K & R therefore continued to pay rent based on $14 per square foot—until July 2014 when it stopped making payments altogether. K & R says it did so to force Fort Quadra to the negotiating table to address its demand for a reduction in rent. This strategy failed: Fort Quadra’s property manager pressed for payment in accordance with the terms of the 2002 Lease, and K & R fell farther and farther behind in its rent.

[6] In February 2016, Price entered into an agreement (the “Purchase Agreement”) to sell its beneficial and legal interests in the Property to PC Urban (Acquisitions) Corp. (“PC Urban”). PC Urban then assigned the agreement to Pacific Arbour Six Residences Ltd. (“Pacific Arbour”). The transaction closed on July 15, 2016.

[7] On appeal, as in the court below, K & R concedes that it owed Fort Quadra $144,094.29 for unpaid rent (the "Unpaid Rent") as of the closing date. Indeed, it had acknowledged as much and repeatedly promised to pay that sum in the months leading up to the sale.

[8] When K & R refused to make good on the debt after the sale, Price relied on a clause in the Purchase Agreement pursuant to which Pacific Arbour had agreed to cooperate in collecting rents. However, Pacific Arbour was not inclined to assist Price because Price had sued Pacific Arbour over the purchase price and it had paid a substantial sum to resolve that dispute. In addition, Price had not told Pacific Arbour prior to the purchase that K & R were in significant arrears. As a result, Pacific Arbour had its own claim against K & R for Unpaid Rent accruing after July 2016**.** It pointed to clause 3.3 of the Purchase Agreement which, after memorialising the parties' agreement to cooperate in rent collection, provided that Price's "sole remedy, in any event, will be to sue a defaulting tenant in a debt action for recovery of rent arrears".

[9] Price eventually filed a notice of civil claim against K & R for the Unpaid Rent, contractual interest of prime +3%, as well as solicitor-own client costs of collection as per the terms of the 2002 Lease. By the time the parties reached the second summary trial, Price had conceded that it was not a party to the 2002 Lease between Fort Quadra and K & R, and therefore could not sue K & R in contract. It relied instead on the beneficial interest it held in the Unpaid Rent and the right of a beneficiary to sue a debtor of the trust directly in special circumstances.

[10] It may be helpful at this point to explain in more detail Price's status as a beneficiary of the chose in action (right to sue) for the Unpaid Rent, despite the sale of Fort Quadra to Pacific Arbour. Under clause 3.3 of the Purchase Agreement, and an Assignment of Lease(s) Agreement, Price retained the right to arrears of rent up to and including the closing date. A "Direction to Trustee & Transfer of Beneficial Ownership" acknowledged and confirmed the transfer to Pacific Arbour of Price's entire beneficial interest in and to the Property. In other words, the Direction

addressed only the beneficial interest in 895 Fort Street, but did not address the beneficial interest in the leases held in trust by Fort Quadra. The cumulative effect of these documents was to transfer the beneficial interest in the real estate, (i.e., the Property) and the leases after July 15, 2016, to Pacific Arbour as the new beneficiary of the trust. This left the former beneficiary, Price, with the benefit of the leases and arrears of rent up to the closing date. In short, Fort Quadra continued to be the trustee of the legal title to all of the trust property which included 895 Fort Street, the leases, and the right to collect the Unpaid Rent. But, after the closing date, Fort Quadra had two beneficiaries (Price and Pacific Arbour) with beneficial interests in the rents due, albeit for different periods of time.

[11] K & R conceded that the chose in action in respect of the Unpaid Rent belonged to the trust at the time of the sale of the Property, and that PC Urban had not acquired that chose in action when it purchased the shares in Fort Quadra. But K & R relied on the general principle that Price, as a beneficiary, had no right to sue a debtor of the trust—only the trustee, Fort Quadra, could do that. K & R argued there were no special circumstances to justify a departure from this general rule. In other words, K & R defended on the basis that Price did not have standing to sue for the Unpaid Rent.

[12] The summary trial judge agreed. She dismissed Price's claim for Unpaid Rent saying:

> [41] In all of the circumstances I find [Price] has failed to establish special circumstances exist and as a result it does not have standing to sue K & R. The result may seem like a harsh outcome for [Price] and a windfall for K & R. However, with respect to both I point out that after the Tenant stopped paying rent in July 2014, until July 15, 2016, when [Price] transferred the shares in [Fort Quadra] and beneficial interest in the Property to Pacific Arbour, [Price] had remedies available through [Fort Quadra], which it then controlled. [Price] could have caused [Fort Quadra] to take steps to collect the Unpaid Rent. It also could have disclosed the Unpaid Rent to PC Urban and sought to negotiate terms to address the chose in action as part of the sale of its beneficial interest in the Property. It did neither. If it is left without remedies now, it is the product of earlier choices it made.
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> [Emphasis added.]

[13] I respectfully conclude that the judge made errors in principle in so finding, and would accordingly allow the appeal.

Analysis

[14] Determining whether a beneficiary should be allowed to sue the debtor of a trust directly raises a question of mixed fact and law because it requires the court to identify the "test" or relevant factors, and apply that test to the facts as found. It is thus a decision reviewable on the deferential standard of palpable and overriding error, unless there is an extricable error of law, in which case the standard of review is correctness.

[15] Although this case turns on one component of the test—whether special circumstances exist—it is helpful to begin by considering the test as a whole. Here we are assisted by the review of the jurisprudence conducted by Tysoe J.A. in the first appeal: *Price Security Holdings Inc. v. Klompas & Rothwell*, 2019 BCCA 36 at paras. 48–69.

[16] Justice Tysoe began by observing that the question of whether a beneficiary can sue a third-party debtor of a trust engages both trust and privity of contract principles. It is a general principle of the privity doctrine that only a party to a contract may sue on the contract. It is also a general trust principle that it is the trustee of the trust, not its beneficiaries, who is the appropriate party to sue to enforce rights of the trust. He then turned to the general principle that it is the trustee and not a beneficiary who may sue a debtor of the trust, noting that, although it is not the earliest authority, *Sharpe v. San Paulo Railway Co.* (1873), L.R. 8 Ch. App. 597, is generally cited as authority for this principle. He went on to quote from *Hayim v. Citibank N.A.*, [1987] A.C. 730 (P.C.), a case in which the Privy Council summarized the jurisprudence saying:

> [56] …
>
> These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty [owed] by the trustees to the beneficiary to

> protect the trust estate or to protect the interests of the beneficiary in the trust estate.
>
> [Emphasis in original.]

[17] Justice Tysoe then moved to more recent cases which he observed have largely come out of Alberta. In *Vogel v. Hall*, 2001 ABCA 188 (*sub nom. Remmers v. Lipinski*) [*Remmers*], leave to appeal ref'd [2001] S.C.C.A. No. 502, the Alberta Court of Appeal summarized the law as follows:

> [57] … Generally, while beneficiaries have an *in personam* action against trustees for breach of trust, they cannot sue the debtor of a trust fund. *Sharpe v. San Paulo Railway* (1873), L.R. 8 Ch. 597. Although beneficiaries may sue to recover trust property, this is not a trust property action but a claim for damages based on gross negligence. D.W.M. Waters, *The Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 984. …

[18] In *Kwinter v. Metrowest Development Ltd.*, 2007 ABQB 713, the plaintiff was a beneficiary under a family trust which held the common shares of a corporation. The defendants applied to strike the statement of claim for want of standing. In holding that it was not plain and obvious that the beneficiary lacked standing, the court in that case relied on *Sharpe*, *Waters' Law Trusts in Canada* and *Halsbury's Laws of England* in connection with the general proposition that beneficiaries cannot directly sue third parties, noting at para. 36 a number of exceptions to that rule:

> 1. Where there is alleged to be fraud or collusion between the trustee and the third person (*Halsbury's*),
>
> 2. Where by reason of conflict of interest or duty it is impossible or difficult for the trustees to sue (*Halsbury's*),
>
> 3. Where there is a failure by the trustees in performing their duties as trustees to protect the trust estate or to protect the interests of the beneficiary in the trust estate (*Hayim v. Citibank N.A.* [[1987] A.C. 730 (P.C.)])
>
> 4. Where the beneficiaries are suing to recover trust property (as opposed to suing debtors of the trust) (*Remmers v. Lipinski* (2001), 293 A.R. 156 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 502).

[19] Justice Tysoe observed that although the court in *Kwinter* did not use the term "special circumstances" or "exceptional circumstances", at least three of the four exceptions identified in that case constituted such circumstances. At para. 60 of

his judgment, Tysoe J.A. cited with approval the characterization of the special circumstances' assessment adopted in *Stoney Tribal Council v. Imperial Oil Resources Limited*, 2012 ABQB 557:

> [67] Exceptions to this general rule [that beneficiaries cannot sue a third party debtor of a trust] require that the beneficiary first meet certain prerequisites and that there be special circumstances: *Kwinter v. Metrowest Development Ltd.*, 2007 ABQB 713, para. 36.
>
> [68] Imperial argues that it is plain and obvious these prerequisites have not been met nor are there the requisite special circumstances, with the result that there is no genuine issue for trial.
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> [69] There are three prerequisites to a beneficiary's action against a third party owing money to a trustee that could be an impediment to the Stoney bringing this action: the beneficiary must first ask the trustee to bring the action and be refused; the beneficiary must name the trustee as a defendant if it sues the third party; and, the beneficiary must exhaust its remedy against the trustee, in this case the Crown.
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> [Bold emphasis in original omitted; underline emphasis added.]

[20] An appeal from the decision in *Stoney Tribal Council* was dismissed: *Stoney First Nation v. Imperial Oil Resources Limited*, 2014 ABQB 408. However, Tysoe J.A. questioned whether the third prerequisite—that the beneficiary must exhaust its remedy against the trustee—was sound, saying:

> [73] Finally, I wish to comment on the third prerequisite mentioned in *Stoney Tribal Council* and *Stoney First Nation* that the beneficiary must have exhausted its remedies against the trustee before suing the third party in its own name. No authority was cited in either of those decisions for this prerequisite, and it is my view that in introducing it, Master Hanebury may have conflated the situation of the beneficiary suing in its own name and the situation of the beneficiary taking steps to sue in the trustee's name. If there are special circumstances, the beneficiary may sue in its own name, and there would not seem to be any need for the beneficiary to first take steps against the trustee, especially in view of the second prerequisite that the trustee be named as a defendant in the action against the third party. But, in the absence of special circumstances, the above-quoted passage from *Sharpe* explains the avenue open to the beneficiary of obtaining an order to sue in the trustee's name or to have a receiver appointed to use the trustee's name. Another potential avenue is an application for the appointment of a new trustee or a judicial trustee under ss. 30 and 97 of the *Trustee Act*, R.S.B.C. 1996, c. 464. In my view, these avenues are what may be envisaged by a requirement for the beneficiary to pursue remedies against the trustee in the absence of special circumstances. In *Bearspaw*, Poelman J. almost totally discounted this prerequisite, and I consider it to be an open

> question whether it is an appropriate prerequisite of general application when there are special circumstances.
>
> [Emphasis added.]

[21] In the present case, the summary trial judge also noted the absence of binding judicial authority supporting the proposition that a plaintiff must exhaustively pursue an action solely against a trustee before initiating a claim against a third-party debtor of the trust. She agreed with Justice Poelman in *Stoney Tribal Council v. Shell Canada Limited*, 2017 ABQB 314, that doing so would be highly inefficient, particularly where the trustee is named as a defendant in the action along with the third-party debtor. She noted that the prerequisite would not support "securing the just, speedy and inexpensive determination of the proceeding on its merits, proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding": at para. 29.

[22] I leave for another day the question of whether the third prerequisite is necessary where special circumstances exist. Although I agree with Tysoe J.A. that this remains an open question, it will be for another division to provide the answer in a case which turns on the point. The third prerequisite is not in issue on this appeal because the parties do not challenge the judge's finding that, assuming all three prerequisites apply, they have been met in this case. As I have earlier noted, the issue before us is whether the appellant has established special circumstances.

[23] Price relies on three special circumstances:

1. Fort Quadra had failed to perform its duties as trustee by refusing to pursue K & R for the Unpaid Rent;

2. Fort Quadra had conflicting obligations to the two beneficiaries of the Trust, since Pacific Arbour and Price were both trying to recover overdue rent from K & R; and

3. Equity or the interests of justice favoured relaxation of the doctrine of privity of contract.

[24] On appeal, Price submits the judge erred in finding that none of these circumstances sufficed. It contends to the contrary that each constitutes a special circumstance sufficient to support Price's standing to sue K & R. I intend to address here only the first and third of the special circumstances relied on by Price, because in my view either is sufficient to dispose of the appeal.

[25] I turn now to the first of the special circumstances asserted by Price.

1. Fort Quadra failed to perform its duties as trustee

[26] Price submits that Fort Quadra failed to perform its duties as trustee when it refused to pursue K & R to recover the Unpaid Rent. The judge correctly stated that a mere refusal by the trustee to sue does not constitute a special circumstance entitling a beneficiary to sue a third-party. As stated in *Hayim* at 748:

> [A] beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty [owed] by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate.

Price argues that there was more than a mere refusal here. The trustee was in exactly the situation described in *Hayim*—whether excusable or inexcusable, Fort Quadra had failed to sue on the chose in action to protect Price's beneficial interest in the Unpaid Rent.

[27] I agree with that submission. In my view, the refusal of the trustee to recover the Unpaid Rent was a failure to protect the interests of one of the trust beneficiaries, and the judge erred in finding that this did not amount to a special circumstance. The error in reasoning is evident at para. 39 where the judge concluded that "[s]ubsequent to the 2016 Purchase Agreement, [Fort Quadra] was no longer a trustee vis-à-vis [Price] and so owed no duty to [Price] to protect the trust." Respectfully, that finding was inconsistent with the judge's adoption of the first summary trial judge's conclusion that Price had not transferred its beneficial interest in the Unpaid Rent: *Price Security Holdings Inc. v. Klompas & Rothwell*, 2018 BCSC 129 at paras. 80, 88–90, adopted in *Price Security Holdings Inc. v. Klompas &*

Rothwell, 2022 BCSC 1521 at para. 10. Further, the first appeal and the second summary trial below proceeded on the basis that K & R was a beneficiary of the trust and in particular of the Unpaid Rent. The live issue was not whether Price was a beneficiary of the trust, but was rather whether special circumstances existed to enable Price as a beneficiary to sue a third-party debtor of the trust directly.

[28] In summary on this point, the judge erred in concluding that Fort Quadra did not owe a duty to Price as a beneficiary of the trust, and as a result failed to characterize the failure to sue for the Unpaid Rent as a special circumstance.

2. Equity and the interests of justice constitute special circumstances

[29] The judge recognized that the list of what might constitute special circumstances is not closed and could encompass concerns in equity and the interests of justice. However, she concluded that Price could not rely on these factors because it was a sophisticated corporate party which found itself in a bind of its own making flowing from the "corporate structuring it chose to [effect], and the contractual terms with which it freely agreed": at para. 33. The judge was alive to the "harsh outcome" of her conclusion and the "windfall for K & R": at para. 41. But she expressed little sympathy for Price, noting that it could have sued to collect the arrears when it still controlled Fort Quadra, or could have contracted to address the arrears as part of the Purchase Agreement with PC Urban.

[30] In my respectful view, the judge erred in principle by concluding that Price's sophistication and conduct precluded it from relying on equity as a special circumstance. As I have noted, K & R conceded that it owed the rent sought. Pacific Arbour and PC Urban disclaimed any right to the Unpaid Rent and acknowledged that it was due to Price. There is an unjust enrichment when one party is enriched at the expense of the other, without a juristic reason: *Insurance Corp. of British Columbia v. Dragon Driving School Canada Ltd.*, 2006 BCCA 584 at para. 35. As the judge implicitly recognized, K & R was enriched by not paying rent for the premises it occupied for two years from July 2014 to July 2016, and Price suffered a corresponding deprivation of the loss of rent payments. There was no juristic reason

for that deprivation, a state of affairs that continued because the trustee would not or could not act to protect Price's beneficial interest in the Unpaid Rent.

[31] Equitable relief is available to litigants who come to court with "clean hands", meaning that they have not committed misconduct in the transaction for which they seek relief: *DeJesus v. Sharif*, 2010 BCCA 121. In *DeJesus*, this Court quoted with approval from *Principles of Equitable Remedies* as follows:

> [86] In *The Principles of Equitable Remedies*, 6th ed. (UK: Sweet & Maxwell, 2001) I.C.F. Spry states at pp. 169–170:
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> > …it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief. … So it was once emphasised "that general fraudulent conduct signifies nothing; that general dishonesty of purpose signified nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which the transaction took place, and must have given rise to this contract".
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> [Emphasis in original omitted.]

It is apparent from this passage that the type of misconduct that bars equitable relief is in the nature of fraud and deceit. The judge made no such finding about Price's conduct in this case. Corporate structuring to minimize tax consequences or to maintain existing contractual relationships on the sale of property does not amount to misconduct; "taxpayers are entitled to structure their affairs and enter transactions to minimize their tax liability": *Collins Family Trust v. Canada (Attorney General)*, 2020 BCCA 196 at para. 69. Nor is the sophistication of the party seeking relief in equity a bar to that relief.

[32] It is true that Price could have acted earlier to collect the Unpaid Rent. But Price's forbearance was, if anything, the result of misplaced trust in K & R's promise to settle its debt. K & R had been the accountant for a company closely related to Price. It had also been a long-standing tenant of Fort Quadra and thus indirectly of

Price, and had a history of being late in paying its rent but ultimately making good on its obligations. In these circumstances, and in light of K & R's acknowledgement of its debt and promise to pay right up to the week before the sale in July 2016, Price did not anticipate a problem in collecting the Unpaid Rent. Forbearance from pursuing legal remedies against a debtor who has made repeated promises to pay may be imprudent, but it is not a bar to equitable relief for unjust enrichment—to the contrary, it weights in favour of granting such relief.

[33] In summary, both the trustee's failure to protect Price's beneficial interest in the Unpaid Rent, and the unjust enrichment of K & R at Price's expense, constitute special circumstances in this case which support Price's standing to sue K & R to collect the trust debt.

[34] Before concluding, I wish to recognize that K & R was self-represented on this appeal. It did not file a factum, but in oral submissions sought to uphold the judgment below on the basis of "standing operating practice" when a company is sold. K & R asserts that the sale of the Property amounted to a clean break, and that any right Price had to rent from the Property was lost when it sold the Property without contractually reserving to itself the right to sue. Respectfully, although that may be a common approach to the sale of commercial real estate, it was not the nature of the transaction entered into in the present case.

[35] I conclude that Price has standing to sue to recover the Unpaid Rent directly from K & R. Since K & R concedes the debt owed, Price is entitled to judgment in the amount of $144,094.29. As the 2002 Lease continued to apply to K & R's occupation of the premises after the end of the initial lease term, Price is entitled to interest on the Unpaid Rent from July 15, 2016 at a rate of prime +3% pursuant to article 15.1(c) of the 2002 Lease, and to solicitor-own client costs incurred in connection with the default or efforts to enforce its rights pursuant to article 15.1(d).

Disposition

[36] I would allow the appeal on the terms set out in the preceding paragraph.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Abrioux"