IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ironwood Owners Enterprises Ltd. v. Elliots World, LLC,* 2024 BCSC 340

Date: 20240228
Docket: S234629
Registry: Vancouver

Between:

Ironwood Owners Enterprises Ltd. and each of the Individuals and Companies set out in Appendix "A" to the Petition

Petitioners

And

Elliots World, LLC
Bradford Iverson and
Tone Iverson

Respondents

- and -

Docket: S235452
Registry: Vancouver

Between:

Ironwood Owners Enterprises Ltd. and each of the Individuals set out in Appendix "A" to the Petition

Petitioners

And

Bradford Sander Iverson
Tone Lunde Iverson
Heather Maureen Bromley
Noel Power Dacanay
The Estate of Alma May Dacanay, Deceased

Respondents

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for Ironwood Owners Enterprises Ltd:	A.S. Dosanjh
Counsel for the petitioners other than Ironwood Owners Enterprises Ltd:	A.P. Hochhauser
Counsel for B.S. Iverson and T.L. Iverson:	J.V. Payne
Place and Date of Hearing:	Vancouver, B.C. February 7, 2024
Place and Date of Judgment:	Vancouver, B.C. February 28, 2024

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[1] There are two petitions before the Court. They are substantively identical, each dealing with a different strata lot in a residential condominium complex in Whistler, British Columbia (the "Condominium Complex").

[2] The petitioners seek an order for sale under the *Partition of Property Act*, R.S.B.C. 1996, c. 347 [*PPA*] in respect of two strata lots – referred to herein as unit 206 and unit 213. In these reasons, proceeding no. S234629 shall be referred to as the "206 Petition" and proceeding no. S235452 shall be referred to as the "213 Petition".

Background

[3] The petitioners each purchased, and is the registered owner of, an undivided fee simple interest in one of the strata lots as a tenant-in-common. The petitioners' fractional interests were purchased or acquired pursuant to a timeshare use program created by the Condominium Complex's original developer.

[4] The petitioner, Ironwood Owners Enterprises Ltd. ("Ironwood"), was created to administer the timeshare use program with respect to 28 strata lots in the Condominium Complex. Ironwood administers the timeshare use program by virtue of holding a 99-year lease that is registered as a charge against the lots.

[5] Ironwood has granted each owner one or more fractional subleases corresponding to the undivided fee simple interest in the strata lot owned by that owner. Each fractional sublease grants the respective owner a right to occupy that strata lot for a specific fixed or floating week each year.

[6] Two of the respondents, Bradford and Tone Iverson (the "Iversons"), allege that there is a second means by which the rights to use and possession of some of the strata lots have been allotted. They allege that there are some lots in respect of which Ironwood, as the fee simple owner of a fractional interest, has leased its interest directly to the respondents. This second means of allocating the possessory interests in the lots is referred to in the respondents' materials as the "Direct Lease Scheme" and the leases are referred to as "Direct Leases".

[7] The respondents submit that they previously possessed Direct Leases in respect of units 202, 212 and 308, but that on June 1, 2021, they entered into an agreement whereby they would lose their interests in those units and, in exchange, were granted a two-week Direct Lease interest (2/51) in unit 206 and a one-week Direct Lease interest (1/51) in unit 213.

[8] Due to the high costs and increasing expenses associated with the administration of the timeshare use program and ongoing maintenance of the strata lots, the petitioners wish to terminate the timeshare use program and permit the strata lots to be sold as a freehold property free of the head lease and subleases.

[9] The respondents have not agreed to give up their lease rights upon a sale and have not agreed that units 206 and 213 may be sold.

[10] Accordingly, the petitioners have advanced these petitions under s. 6 of the *PPA* to compel the sale of units 206 and 213. Section 6 of the *PPA* provides:

> 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.

[11] Ironwood held an annual general meeting on November 20, 2020, at which the requisite majority of owners approved resolutions to commence these petitions.

[12] It appears that the petitioners in the 206 Petition are collectively the registered owners of 100% of unit 206, and the petitioners in the 213 Petition are collectively the registered owners of upwards of 49/51 of the legal interests in unit 213.

[13] It is not contested that the petitioners collectively constitute an ownership interest of more than 50% of the properties involved. However, the Iversons say that because of their possessory rights under the Direct Leases in the two lots in question, the petitioners are not entitled to seek partition.

Issues

[14] There are three primary issues to be determined on this petition:

1) Should the claims of the respondents regarding their interests under the Direct Leases be dismissed on the record before this Court?

2) Do the petitioners have standing to advance this claim for relief under the *PPA* in any event?

3) If the answer to (1) is no, but the answer to (2) is yes, should an order under the *PPA* nonetheless be made?

Analysis

The Amending Agreement

[15] Many of the submissions advanced by Ironwood on this hearing dealt with an "amending agreement" made between Ironwood and the Iversons in June 2021, and related email correspondence. Ironwood submits that the Iversons agreed that all of their leasehold rights are to be extinguished or will expire upon the sale of the Condominium Complex to the third party.

[16] In response to these arguments, the Iversons submit that whether an agreement was reached between the parties and whether that agreement will cause the Direct Leases to expire or to be extinguished upon sale cannot be decided on this petition.

[17] Subject to the possibility that "hybrid procedures" might be ordered pursuant to *Cepuran v. Carlton,* 2022 BCCA 76 at paras. 148, 160–162 and 166, proceedings brought by petition are to be referred to the trial list when they raise triable issues. For the purposes of R. 22-1(7) of the *Supreme Court Civil Rules*, a triable issue is an issue of fact or law that is not bound to fail: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 80.

[18] In my view, it is clear that the issue of whether an agreement was reached between the parties providing that the Iversons' Direct Lease rights would expire or be extinguished upon a sale of the Condominium Complex is a triable issue. In order to determine that issue, this Court would be required to make findings and reach conclusions in relation to a written agreement, various emails and at least one critical telephone call between the parties which is the subject of affidavit evidence.

[19] The respondents' case cannot be said to be bound to fail.

[20] It is to be noted that a separate action, proceeding no. S238321, has been commenced in this Court (hereinafter referred to as the "Action") in which the Iversons have claimed leasehold interests in a number of units in the Condominium Complex, including units 206 and 213, and have filed a certificate of pending litigation ("CPL") against the property. As the Action is extant, it would be duplicative and unnecessary to order any hybrid procedures in this proceeding, and neither party has sought an order requiring any such procedures.

Standing

[21] The respondents argue that in order to have standing to seek an order for partition or sale under the *PPA*, one must have the right to immediate possession of the property at issue. In support of this proposition, they cite the decision of this Court in *Benias v. Lee*, 2021 BCSC 2312.

[22] In broad terms, *Benias* does stand for this proposition. However, there is a question regarding the breadth of the ratio in *Benias* and whether it requires the petitions to be dismissed in this case.

[23] In *Benias*, the parties were spouses who had separated. They were registered owners of the subject property as joint tenants in fee simple. A tenant had been renting the entire property since 2014, and one of the spouses filed a petition for relief under the *PPA* in September 2020.

[24] In those circumstances, this Court held that the right to immediate possession was a necessary requirement for a co-owner seeking to make an application for sale under the *PPA*: para. 47. The Court refused the petition on the basis that the petitioner did not have standing: para. 72.

[25] In the course of its reasons, the Court referred to an earlier decision of this Court in *Bourgeault v. Walton*, [1998] B.C.J. No. 1957, 1998 CanLII 4611 (S.C.), wherein a group of dentists had developed a building in West Vancouver in 1961 for use as a dental clinic in which four separate dental practices could be run.

[26] There were four fee-simple owners of the property, with each having a ¼ interest as tenants-in-common. The first petitioner, Dr. Bourgeault, acquired a ¼ interest in 1969 and used one part of the building to practice as a dentist. The second petitioner, Dr. Mielke, had sold his practice and leased his ¼ interest to the party who had purchased his practice. In *Bourgeault*, Justice Low commented:

> [15] Much was said during argument about status to seek an order for sale under s. 6. It seems to me that the statute is clear that if half or more of the "parties interested, individually or collectively, to the extent of 1/2 or upwards in the property" requests it, the court must order sale of the property in the absence of good reason not to. In the present case, three of the four owners who collectively have title to 75% of the property want a sale. If the lessees are to be included as "parties interested" they cannot have a greater interest in the property for the purposes of s. 6 than their respective lessors. In that event, Dr. Bourgeault with a 1/4 interest, Dr. Mielke with a 1/8 interest and Dr. Walton with a 1/8 interest, all as owners wanting sale, represent a 50% interest in the property. Opponents to the sale would also represent a 50% interest - Denka (Dr. Balogh) with a 1/4 interest as owner, Balogh Inc. with a 1/8 interest as a lessee and Coyle Inc. with a 1/8 interest as a lessee.
>
> [16] Any way you look at the threshold provision of s. 6 is met. Interest parties having at least 1/2 interest in the property wish sale of it. I reject the argument the respondents make that the owners who have given up possession by way of lease are no longer interested parties. No case supports that proposition. There is nothing in the statute restricting interested parties to those who have physical possession. It makes no sense that an owner, by granting a lease, gives up his rights under the statute. There is nothing in any of the contracts between the parties, including the 1991 agreement among the owners, that amounts to a contracting out of rights the owners have under the statute.
>
> [Emphasis added.]

[27] In *Benias,* the Court undertook a review of the jurisprudence, including *Bourgeault*, and then concluded at para. 47:

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

[28] On their face, the decisions in *Benias* and *Bourgeault* appear to conflict. However, it is my view that the two decisions are distinguishable on their facts. I note that in *Benias*, the Court held at para. 34:

> … Of course, Dr. Bourgeault was both an owner and in possession of the premises. He would have had standing in any event. While objection could have been taken to the standing of Dr. Mielke as a petitioner, it appears that no such objection was made.
>
> [Emphasis added.]

[29] Dr. Bourgeault was in possession of one part of the dental clinic from which he ran his dental practice. It seems clear that he did not have an immediate right to possession to other parts of the clinic, at least one of which had been leased to a third party by Dr. Mielke.

[30] In those circumstances, despite the broad proposition stated by the Court that the right to immediate possession remains a necessary requirement for a co-owner seeking to make an application for sale under the *PPA*, the Court had no difficulty in *Benias* acknowledging that Dr. Bourgeault had standing when he was in possession of only part of the dental clinic.

[31] In my view, *Benias* and *Bourgeault*, read together, stand for the proposition that each petitioner under the *PPA* must have an immediate possessory right to *some* portion of the subject property, but each petitioner does not have to have an immediate possessory right to the entire property.

[32] This means of distinguishing *Benias* and *Bourgeault*, and construing the decision in *Benias*, is supported by the decision in *CGT Management Corp. v. Mackenzie-Moore*, 2022 BCSC 2195 [*CGT Management*], which seems to be the only decision of this Court to have considered *Benias* to date.

[33] That case involved a residential complex governed by an ownership structure created through the filing of individual titles for "undivided fractional interests" in the lands at issue. This ownership structure has since been prohibited by s. 73(4) of the *Land Title Act*, R.S.B.C. 1996, c. 250. In that case, the Court held:

> [26] … Relying upon the recent decision of this court in *Benias v. Lee*, 2021 BCSC 2312, the Mackenzie-Moore Respondents argue that an owner who has rented their property to a tenant under a residential tenancy agreement no longer has an immediate right to possession of the land and therefore does not have standing to bring an application for partition and sale under the *PPA*.
>
> [27] The Mackenzie-Moore Respondents argue that of the 99 named individual petitioners, many are known to be renting their units, and others are corporations or owners of multiple units, and it should be inferred that they do not all currently personally occupy each of those units. Instead, they argue that I should infer that they are likely rented to tenants. They seek an adverse inference in this regard due to the failure of these petitioners to produce their tenancy agreements prior to the hearing, despite requests to do so. When these units are excluded from the listed petitioners, the Mackenzie-Moore Respondents say that the individual petitioners actually account for less than 50% of the ownership, and that therefore s. 7 of the *PPA* should apply to this petition, rather than s. 6.

[34] In other words, the respondents alleged that many of the 99 petitioners should not be included in the calculation of the 50% threshold under s. 6 because they had rented their units out. However, it was uncontested that a petitioner who had a right to immediate possession to some portion of the property had standing to advance the petition, notwithstanding that there were parts of the property to which none of the petitioners had an immediate right.

[35] *Bourgeault* and *CGT Management*, as well as the discussion regarding *Bourgeault* in *Benias*, all lead me to the conclusion that where petitioners have immediate rights of possession collectively amounting to 50% of the ownership interest in the property, they are entitled to advance a petition under s. 6. A petitioner

who has no immediate right of possession to any part of the subject property does not have standing to bring a petition for partition.

[36] In this case, the petitioners' interests are allotted temporally (by time) rather than by space. In other words, the petitioners have possessory rights for certain weeks of the year, rather than having possessory rights to certain parts of a building as in *Bourgeault*. Nonetheless, the same principles apply.

[37] The petitioners in this case collectively have possession of at least 49/51 of each unit by time. They are therefore in a better position than Dr. Bourgeault who had possession of ¼ of the space in the dental clinic (or than the petitioners in *Bourgeault* who owned 50% of the clinic), and they are unlike the petitioners in *Benias* who had ceded all of their possessory rights in the subject property to their tenant.

[38] Accordingly, the 50% threshold is readily surpassed in this case. The petitioners therefore have standing to bring a partition application under s. 6.

What Order Ought to be Made?

[39] For the reasons set out above, I have concluded that the issue of whether the Direct Lease interests claimed by the respondents are valid cannot be decided on this petition.

[40] I have also concluded that the petitioners have standing to seek partition of the Condominium Complex.

[41] Both parties concede that in such circumstances, it would be open to the Court to grant the orders for sale sought by the petitioners but without prejudice to the respondents' claims. In my view, this is the appropriate course and I so order.

[42] This order will allow the registered owners to proceed with the sale of the Condominium Complex while preserving the respondents' rights to advance claims in respect of their alleged Direct Lease interests at a later date, in the Action or otherwise.

[43] If a sale of the Condominium Complex is achieved, and the parties cannot agree on the proper course of action at that time, the Court will have to decide whether the CPL filed in the Action shall be cancelled to permit the sale and, if so, on what terms.

[44] As the petitioners' argument on the amending agreement and the respondents' argument on standing have both failed, there shall be no costs of these petitions payable to any party.

Other Orders

[45] In the 213 Petition, the petitioners have also sought two additional orders that are unopposed. Those orders are granted in respect of unit 213 (the "Strata Lot"):

1) An order transferring to Ironwood an undivided 1/51 interest in week 32 of the Strata Lot, currently registered in the name of the respondent, Heather Maureen Bromley, as represented by Title GD107947, prior to the sale of the Strata Lot; and

2) An order transferring to Ironwood an undivided 1/51 interest in week 46 of the Strata Lot, currently registered in the name of the respondents, Noel Power Dacanay and Alma May Dacanay, as represented by Title BP27372, in exchange for forgiveness of the debt owed by the said respondents, prior to the sale of the Strata Lot.

"The Honourable Justice Loo"