

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kingsgate Property Ltd. v. Vancouver
School District No. 39,*
2023 BCSC 1803

Date: 20230928
Docket: S-221885
Registry: Vancouver

In the Matter of the *Arbitration Act*, R.S.B.C. 1996, c. 55

Between:

Kingsgate Property Ltd. and Beedie Development LP

Petitioners

And

**The Board of Education of School District No. 39 (Vancouver),
formerly known as The Board of School Trustees of District No. 39
(Vancouver)**

Respondent

Before: The Honourable Mr. Justice Stephens

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

S.R. Schachter, K.C.
J.K. Lockhart

Counsel for the Respondent:

J.K. McEwan, K.C.
E.A. Kirkpatrick

Place and Date of Trial/Hearing:

Vancouver, B.C.
September 25, 2023

Place and Date of Judgment:

Vancouver, B.C.
September 28, 2023

[1] **THE COURT:** The petitioners apply to vary the order made July 13, 2023 in this matter which determined security terms as a condition of granting leave to appeal; see 2023 BCSC 1266 (the “RFJ”).

[2] In the RFJ I stated at para. 82:

[82] In addition, ..., I grant liberty to the petitioners to apply to the court in the event the registrar declines to provide a duplicate copy of the certificate of indefeasible title as that paragraph contemplates.

[3] In their notice of application filed August 15, 2023, the petitioners state in respect of the matter before me now:

At the time of the petitioners’ application in this matter heard on July 7, 2023, the petitioners believed that they could obtain a duplicate certificate of title of the Surrey Property. That belief continued until, following the Reasons for Judgment dated July 13, 2023, Craig Shirreff of McCarthy Tetrault was retained to assist in obtaining a duplicate certificate of title...

Based on his experience, Mr. Shirreff was aware that the petitioners could not obtain a duplicate certificate of title of the Surrey Property given the existing mortgage registered against title to that property. He consulted with the Registrar of Land Titles and obtained from the Registrar confirmation that a duplicate certificate of title could not be issued in this circumstance even with the consent of the mortgagee...

[4] On the basis that the petitioners are not able to obtain a duplicate copy of the certificate of indefeasible title to the Surrey property, they now apply to vary my July 13, 2023 order to provide further security in the form of a second mortgage on the Surrey property and a promissory note, both in favour of the Board of Education of School District No. 39 (Vancouver) (the “VSB”) and in the principal amount of \$80 million.

[5] The July 13, 2023 order has not been entered.

[6] The VSB consents to the varying of the condition for leave to appeal in the July 13, 2023 order as a threshold matter: application response, para. 11. I am satisfied I am not precluded from doing so by s. 17 of the *Court of Appeal Act*: RFJ, paras. 73 to 76.

[7] However, the VSB does not agree to the terms of the proposed second mortgage which was not negotiated by the petitioners in consultation with the VSB, nor does the VSB agree to the promissory note proposed by the petitioners. In its application response, the VSB submits that “the terms negotiated by counsel for the petitioners with RBC and others were not the subject of any input from the respondent [VSB]”.

[8] Among other things, the VSB has "numerous concerns with the proposed terms" of the proposed second mortgage. The parties have no less than seven disputes with respect to wording aspects of the proposed second mortgage.

[9] I note also that the proposed second mortgage terms would purport to name the VSB as lender but does not contemplate that the VSB would sign the mortgage. The petitioners state there is a risk the Registrar of Land Titles may require the VSB to sign the second mortgage in order to file it in the Land Title Office. In the event the Registrar of Land Titles were to not to accept the mortgage for filing on this basis, the petitioners propose to give the VSB the option to sign the second mortgage or not.

[10] The VSB opposes the relief sought by the petitioners on this notice of application. It takes the position that the July 13, 2023 order should be varied to provide for the full payment by the petitioners into trust of the outstanding arrears under the lease calculated pursuant to the award.

[11] At paras. 41 and 42 and 44 of the RFJ I stated:

[41] As security for the Disputed Amounts, the petitioners propose to undertake to not sell or further encumber certain real property which has current equity of approximately \$88 million pending the appeal, and to pay the Disputed Amounts within 60 days if the petitioners' appeal of the Award is not successful.

[42] I do not accept the respondent VSB's position that this would not constitute security for the purposes of this appeal and for the purposes of my RFJ...

[44] Having considered the circumstances of this case, including the magnitude of the Disputed Amounts directly relating to the Award and the potential harm to the petitioners if that sum were paid now, and the

approximately \$88 million in equity in the real property to which Beedie's proposed undertaking relates, I find that what the petitioners propose constitutes satisfactory security for this arbitration appeal, and is just in all the circumstances.

[12] In the RFJ I stated at para. 69 that: "I find the petitioners' undertaking to not sell or encumber real property with equity in it of \$88 million and their undertaking to pay the Award within 60 days if the appeal is dismissed (or at such other date as the court may require) is sufficient protection for the VSB." In his affidavit #6 in support of this application, Mr. Bennett deposes that the full amount of the face amount of the first mortgage on the Surrey property "has already been advanced."

[13] The evidence before me indicates that the petitioners have the ability, at least on certain terms, to borrow against the Surrey property with a second mortgage in the amount of \$80 million.

[14] However, I do not consider it prudent to adjudicate the various disagreements as to the wording of the proposed second mortgage terms, and in effect consider imposing on the VSB a mortgage and promissory note on terms that it has concerns with, does not agree to, nor consent to. I decline to adjudicate these wording disputes and to do so.

[15] I do nevertheless find that the provision of a filed duplicate copy of the certificate of indefeasible title is not necessary for the existence of satisfactory security for the purposes of the condition imposed on the order granting leave to appeal. Accordingly, I will order that paras. 1(b) and 2(b) of the July 13, 2023 order (an unentered form of which was attached as Appendix A to the petitioner's written submissions; see also paras. 1(b) and 3(b) of Schedule A to the RFJ), will be deleted, and make consequential deletions to the wording in paras. 1(c) and 2(c) of the order to remove references to a duplicate certificate to duplicate indefeasible title (see paras. 1(c) and 3(c) of Schedule A to the RFJ).

[16] What will remain in the order will include the petitioners' undertaking to not sell or encumber the Surrey property and to pay the disputed amount within 60 days

if the appeal is dismissed (or such other date as the court may require): see paras. 41, 42, 44 and 69 of the RFJ.

[17] I consider it just and appropriate to vary my July 13, 2023 order to grant a condition pursuant to s. 31(3) in respect of security with these terms, as varied.

[18] But there has been a further issue brought forward by the parties at this hearing which did not arise at the July 7, 2023 hearing which led to the RFJ. Specifically, the VSB wishes to file a notice of civil claim against the petitioners in respect of the dispute which is the subject of this arbitration appeal. The VSB contends this is not precluded by the stay provision in the July 13, 2023 order. The petitioners take the opposite position and contend that doing so would contravene the July 13, 2023 stay order. The VSB submits a limitation period for such claims expires in January 2024.

[19] Though not raised in their notice of application, in their proposed relief sought at this hearing, the petitioners sought to vary the July 13, 2023 order to, it contends, in effect toll the limitation period for a claim by the VSB from the date of any variation order to the determination of a petitioners' appeal. Specifically, the petitioners propose a term of an order, as follows:

The petitioners will provide an undertaking that if after the stay referred to in paragraphs 1 and 2 of the order made July 13, 2023 expires, a future action is brought by the respondent based upon the Disputed Amount, as defined in that order, the petitioners will not raise any defences based upon the passage of time between the date of the order made on September 25, 2023 and the determination of the petitioners' appeal in this proceeding.

However, the VSB does not consent to such a term.

[20] In oral submissions before me on this application, counsel for the VSB sought clarification from the court as to whether the July 13, 2023 order permits or precludes the VSB from filing a notice of civil claim against the petitioners, and if necessary sought to vary the July 13, 2023 order in order to file a notice of civil claim.

[21] A notice of application for such relief has not been filed by the VSB, and this issue was not addressed in either the petitioners' notice of application before me-- nor was the VSB's request for clarification or variation relief addressed in the VSB's application response. The evidence before me indicates that the disagreement between the parties over whether a notice of civil claim could be filed by the VSB commenced in August 2023, but due to a misunderstanding between counsel the VSB only understood the petitioners' position late last week. I attribute no fault to any party for any confusion which appears to may have existed about the petitioners' position prior to last week.

[22] However, I am not persuaded I have the power on this application brought by the petitioners to give clarification or provide an opinion to the parties about the implications or operation of the stay in my July 13, 2023 order as it might relate to a claim the VSB wishes to bring against the petitioners. Nor, absent a notice of application brought by the VSB, would I consider variation of my July 13, 2023 order to address the VSB's limitation period concern.

[23] The VSB does already have the right to apply under the existing terms of the July 13, 2023 order for "leave to apply to court to vary or discharge the stay in the event of a material change in circumstances": see para. 2(d) from the form of order (and para. 3(d) of Schedule A to my RFJ).

[24] However, in addition, given the expression of concern by the VSB as to this limitation issue, and that the VSB's understanding as to the petitioners' position about the effect of the stay and the filing of a notice of civil claim appears to have crystallized only last week, I consider it just and appropriate to vary my order to provide the VSB with liberty to apply to the court for an order to vary or lift the stay for the limited purpose of filing a notice of civil claim.

[25] I observe parenthetically that albeit in a different context a form of model stay order exists which includes liberty for a party to commence a proceeding to protect rights that might otherwise be barred or extinguished by the effluxion of time: see para. 17(iv) of the *Model Companies' Creditors Arrangement Act Initial Order*,

August 1, 2015 [*Model CCAA Order*] available on the BCSC website. I mention this *Model CCAA Order* provision for the information of the parties, and express no view as to its merit or applicability if any in the present context.

[26] Returning to my decision, I will therefore amend my order to add a term that the VSB be at liberty to apply for an order to vary or lift the stay for the limited purpose of filing and serving a notice of civil claim related to the dispute which is the subject of this arbitration appeal and to this extent. Such an application can be brought by the VSB on two days notice to the petitioners, and must attach any form of notice of civil claim proposed to be filed. If the VSB brings such an application, I will consider such a request for relief.

[27] In adding this term to my order, I express no view at this time as to whether the existing July 13, 2023 stay order would operate to prevent the VSB from filing a notice of civil claim, or not, nor whether I would grant any particular form of relief which may be sought by the VSB.

[28] I consider it just to add such a new term to my July 13, 2023 order given the issue which has surfaced after the July 13, 2023 RFJ and in order to do justice between the parties pending the determination of this arbitration appeal.

[29] I have not been persuaded that any other variation of my order should be made.

[30] The variations I make to my order are in my view available and justified pursuant to para. 82 of the RFJ and since the July 13, 2023 order is unentered and to prevent a miscarriage of justice: *Harrison v. Harrison*, 2007 BCCA 120 at paras. 42 to 43.

Order

[31] I vary my order made July 13, 2023 as follows:

1. Paragraphs 1(b) and 2(b) of my order are deleted.

2. Paragraphs 1(c) and 2(c) are varied to delete the words "and the petitioners will return the duplicate indefeasible title for the Property to a land title office for cancellation"; and the rest of those paragraphs 1(c) and 2(c) shall remain.
3. I further add a term to my July 13, 2023 order that the VSB be at liberty to apply for an order to vary or lift the stay for the limited purpose of filing and serving a notice of civil claim related to the dispute which is the subject of this arbitration appeal and to this extent. Such an application can be brought by the VSB on two days notice to the petitioners and must attach a form of any notice of civil claim proposed to be filed.

[32] Are there any submissions on costs?

[33] CNSL S. SCHACHTER: In the cause.

[34] THE COURT: Yes, Mr. McEwan?

[35] CNSL J. MCEWAN: Agreed. Same position as Mr. Schachter.

[36] THE COURT: All right. Costs of this application shall be in the cause.

"Stephens J."