

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gooder Holdings (1968) Ltd. v. Alsina*,  
2024 BCSC 463

Date: 20240312  
Docket: S235052  
Registry: Vancouver

Between:

**Gooder Holdings (1968) Ltd.**

Petitioner

And

**Lolita Alsina also known as Dolores Lolita Pilon as executrix of the Estate of  
Elsa Freda May also known as Elsie Freda May, Deceased**

Respondent

Before: The Honourable Mr Justice Crerar

## Oral Reasons for Judgment

Counsel for the Petitioner:

A.P. Bains

Counsel for the Respondent:

M.J. Gemmiti

Place and Dates of Hearing:

Vancouver  
December 1, 2023  
March 7 & 12, 2024

Place and Date of Judgment:

Vancouver  
March 12, 2024

**I. INTRODUCTION**

[1] These are my oral reasons for judgment in this matter. I make my usual reservation to edit or expand these reasons if a transcript is ordered or for any other reason.

[2] In this application, the Court must solve a historical mystery based on unusual facts, with limited evidence from documents and witnesses.

[3] The petitioner, Gooder Holdings (1968) Ltd. ("**Gooder**"), seeks a declaration that it has paid the full purchase price payable under a right to purchase registered on title to a four-unit apartment building located at 2217 St George Street in Port Moody, and that the property be conveyed to vest in the petitioner. The property is presently registered in the name of the late Elsa May.

[4] The petitioner argues that the evidence, while incomplete, indicates that all payments were made.

[5] The respondent, Ms Alsina, is the executrix of the estate of Mrs May. She is also the sole residual beneficiary under the will, and thus has an interest in this Lower Mainland property remaining as part of the estate.

[6] Mrs May died in April 1999. Mrs May was married to George May, who acquired the property in September 1952. In October 1969, George May transferred title in the property to Mrs May. George May died in June 1975.

[7] The respondent argues that the petitioner has failed to establish that it made all of the required payments, and that the property should continue to be registered in the name of Mrs May, to the benefit of the estate. She has refused requests to execute documents to transfer the property to the petitioner.

**II. LAW**

[8] The petitioner relies upon section 245(1) of the *Land Title Act*, RSBC 1996, c 250:

**Vesting order in favour of purchaser**

**245** (1) If it is proved to the satisfaction of the Supreme Court that

(a) land has been sold by a registered owner and the whole of the purchase money has been paid,

(b) the purchaser, being the registered holder of an agreement for sale of land or subagreement for sale of land, or a person claiming under the purchaser, has entered and taken possession under the purchase, and

(c) entry and possession have been acquiesced in by the vendor or the vendor's representatives, but

(d) a transfer cannot be obtained because the registered owner is dead, or out of British Columbia, or cannot be found, or, for any reason, it is impracticable to obtain the registered owner's signature within a reasonable time,

the court may make a vesting order to give effect to the sale and vest title to the land in the purchaser.

**III. FACTS**

[9] But for the proof of payment issue, the underlying facts are largely not in dispute, as is appropriate in a petition hearing.

[10] There are three steps from George May's ownership of the property to Gooder's purported acquisition of the property: a 1961 sale, and then two assignments of the purchaser's rights under the 1961 sale agreement, one in 1966 and a second in 1971, to Gooder. I will expand on each step.

[11] On October 13, 1961, George May sold the property to Olive Clitheroe through an agreement for sale of land. Ms Clitheroe agreed to pay the purchase price of \$18,700 as follows: \$3,500 upon execution of the sale agreement; and the balance of \$15,200, along with interest at seven percent per year, through monthly payments of \$100 on the 16<sup>th</sup> day of each month, from November 16, 1961 up to and including November 16, 1976.

[12] Under the sale agreement, the purchaser was responsible for paying all taxes and utilities for the property, and for keeping the property insured.

[13] Under the sale agreement, the vendor agreed to convey good and sufficient title to the property in fee simple upon payment of the full amount of the purchase price, including interest.

[14] The agreement was administered by the Royal Bank of Canada (“**RBC**”) at its Port Moody branch, and was assigned the identification number of A/S #165.

[15] In December 1966, Ms Clitheroe sold her rights in the property to Jim Montalbetti, by way of an interim agreement and an assignment agreement.

[16] Under the assignment agreement, the assignee Mr Montalbetti agreed to pay the purchase price of \$22,500, including assuming the payment of the balance of \$13,092 under the agreement, with seven percent interest, through making the monthly payments of \$100 up to and including November 16, 1976. He paid \$9,407 to Ms Clitheroe for the assignment.

[17] In January 1967, this first assignment of agreement of sale was registered at the New Westminster Land Title Office.

[18] As part of that transaction, Ms Clitheroe provided Mr Montalbetti a statement confirming the annual revenue and expenses for the four residential apartment units on the property, and confirmed the payments of \$100 a month to RBC.

[19] In October 1969, before all of the monthly payments had been made, Mr May transferred his title in the property and assigned his interest in the sale agreement to his wife, Elsie May.

[20] In December 1971, Mr Montalbetti assigned his rights to the land sale agreement to his family corporation Gooder, under a purchaser’s assignment of agreement for sale. Under that second assignment, the petitioner agreed to assume payment of the balance of \$11,362 due under the original land sale agreement.

[21] As with the first assignment agreement, in December 1971, the petitioner registered the right to purchase as a charge on the property in the Land Title Office.

**IV. DISCUSSION AND DECISION**

[22] I first heard this petition on December 1, 2023.

[23] The petitioner's case was largely advanced through the affidavit of Anthony Donnelly, Gooder's present principal. Anthony Donnelly has been a director, the president, and a shareholder of Gooder since 1991.

[24] The petitioner provided contemporaneous evidence of some but not all of the \$100 monthly payments, as well as other evidence consistent with Mr Montalbetti and the petitioner having completed the payments, and treating the property as their own, but for the failure of Mrs May to transfer the property.

[25] The respondent was not in a position to affirmatively rebut the petitioner's case. Ms Alsina had no direct knowledge of the purported payments or agreements and, indeed, only came to know Mrs May in 1985, just before the purported completion of the payments.

[26] The respondent's response thus focused primarily on evidentiary gaps and frailties in the petitioner's case.

[27] First, the respondent noted that, in his affidavit providing the bulk of the evidence in support of the petition, Anthony Donnelly fails to set out how or whether he has direct knowledge of the payments referred to and attached to his affidavit. While Mr Donnelly referred to the actions of Mr Montalbetti and an Edward Donnelly with respect to the property, and specifically with respect to the monthly payments, he did not establish his relationship to those individuals; the relationship of those individuals to Gooder; or whether Anthony Donnelly could reliably present hearsay evidence of the actions and documents attributed to those individuals.

[28] Second, the respondent noted that there was no evidence from RBC or otherwise that the records of payments and other bank records were generated in the ordinary course of business.

[29] Third, the respondent generally argued that the petitioner has failed to connect the dots to establish that the RBC and other records provided as purported evidence of the monthly payments and standing balance did in fact reflect those payments. For example, the respondent queries whether it is appropriate to accept the petitioner's unfounded contention that payments ostensibly made to "A/S #165" were payments made on account of the land sale agreement.

[30] Fourth, the respondent points to what it says are internal inconsistencies between the documents and the description of those documents in the Donnelly affidavit.

[31] Fifth, the respondent argues that on its own evidence, the petitioner did not complete the payments as required by November 16, 1976, as contemplated under the land sale agreement, which includes a time of the essence clause.

[32] Finally, in what it describes as the most glaring hole in the petitioner's narrative, the petitioner failed to take steps between its purported final payment in 1987 and the start of these proceedings in July 2023 to force the transfer of the property.

[33] Given the incomplete evidence, the Court directed the parties to seek to obtain further evidence to illuminate some of these mysteries. These steps included asking the notary who assisted Ms Alsina with the probate of the will to see if she possessed any further documents in her file. The Court also directed the petitioner to provide further information about the individuals involved in Gooder, to address some of the respondent's concerns about the degree of Anthony Donnelly's direct knowledge, as well as to explain the relationship of the two Messrs Donnelly with each other and with Mr Montalbetti.

[34] The first potential avenue of illumination proved unhelpful: the notary professed to have no information about the transactions or payments.

[35] Anthony Donnelly has provided a second affidavit that better sets out the relationship between the two Messrs Donnelly and Mr Montalbetti and Gooder, as

well as greater information about the payments and documents on which the petitioner bases its case. Specifically, Anthony Donnelly confirmed that Mr Montalbetti is his uncle and that Edward Donnelly is his father, and that all three of them have been involved in the operations of Gooder. While Anthony Donnelly's mother had some involvement, these three individuals represent the three main directing minds of Gooder throughout its history.

[36] As of 1972, Mr Montalbetti, Edward Donnelly, and his mother Evelyn Donnelly, each owned one-third of Gooder. In 1991, as part of their retirement planning, the mother and father transferred their shares in the company to Anthony Donnelly and his sister.

[37] Anthony Donnelly has been a director, the president, and a shareholder of Gooder since 1991. Anthony Donnelly has been involved in the company, however, since at least as far back as 1982, when he himself made some of the monthly payments at the RBC Port Moody branch pursuant to the agreement.

[38] Anthony Donnelly also sets out that none of Mr Montalbetti, his mother, or his father are able to provide affidavits because of their advanced age. Mr Montalbetti suffers from dementia and is in long-term care. His mother and father are 89 and 90 years old, and in the process of being assessed for long-term care.

[39] As a preliminary evidentiary matter, the Court may receive the evidence of Gooder payments pre-dating Anthony Donnelly's involvement in the company. It is appropriate that the Court receive from Anthony Donnelly documents and evidence related to actions performed by his father and uncle on behalf of Gooder.

[40] First, the cheque records, receipts, and balances are business records properly adduced under both the common law and s. 42 of the *Evidence Act*, RSBC 1996, c 124:

42 (1) In this section:

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"document" includes any device by means of which information is recorded or stored;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

(a) the document was made or kept in the usual and ordinary course of business, and

(b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

(3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.

(4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.

(5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

[41] The records were made contemporaneously. They were made by individuals having a personal knowledge of the matters being recorded, by individuals who had a duty himself to make a record as part of the usual and ordinary course of their business (that is, Mr Montalbetti or the senior Mr Donnelly). The matters recorded were of the kind that would ordinarily be recorded in the usual and ordinary course of that business.

[42] Under the *Evidence Act*, s. 42(3), the witness need not have personal knowledge of the record: such lack of knowledge goes to weight, not admissibility.

As summarised by Justice Giaschi in *Oswald v Start Up SRL*, 2020 BCSC 205:

[20] An apparent distinction between the common law exception to the hearsay rule for business records and s. 42 of the *Evidence Act*, concerns the personal knowledge of the maker of the record. The common law exception appears to strictly require that the maker have personal knowledge whereas under the *Evidence Act*, pursuant to s. 42(3), such lack of knowledge merely goes to weight. However, even under the common law



exception lack of personal knowledge is not fatal to the admission of the record. In *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2013 BCSC 2193, business records were admitted where the maker of the record did not have personal knowledge.

[30] Double hearsay is likewise not a barrier to admissibility at common law. The court in *Monkhouse*, at 104, held that clerks preparing records based on information supplied to them by others need not have personal knowledge of that information, finding it “sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records.”

[21] Although the elements of the business records exception are often proved by the maker of a record, this is not always necessary. In *Mohamed v. Intransit BC Limited Partnership*, 2015 BCSC 1300, control room log entries were admitted as business records notwithstanding that the author of the entries was not identified and did not give testimony. (see also: Lederman et.al., *The Law of Evidence in Canada*, (5th ed.), at para. 6.209).

[22] Examples of the categories of documents that are admitted under the business records exception are set out in para. 41 of *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.*, (1977) 76 DLR (3d) 741, as including: “ledger accounts, time-cards, pay-roll records, and other routine commercial records”. Other examples include: ledger cards recording amounts received from debtors: *Iaci v. DiSalvo*, 2012 BCCA 474; ledgers describing order and payment information: *Fill-More Seeds Inc. v. Victoria Seeds Inc.*, 2009 BCSC 1732; and bank deposit slips: *Samra v. Guru Nanak Gurdwara Society*, 2008 BCCA 202.

[43] The records and evidence are also admissible under the principled approach to hearsay established in *R. v. Khan*, [1990] 2 SCR 531, and related jurisprudence, as well as the pre-*Khan* approach to historical documents, as described in *Cowichan Tribes v. Canada (Attorney General)*, 2021 BCSC 235.

[44] The key documents and actions relied upon in this case are historical: they range in age from 37 to 63 years old. As stated in *Cowichan Tribes* at para 5:

a) Historical documents are hearsay evidence and presumptively inadmissible. Historical documents may be admissible under a traditional exception to the hearsay rule or the principled approach. While traditional exceptions may still be used, they have been augmented by the principled approach: *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1922 (“Turner Documents Ruling”) at para. 76.

b) The court will take a flexible approach to the rules of evidence regarding admission of historical documents: *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 29; Turner Documents Ruling at para. 67.

[45] Given the state of the elderly affiants who might have more direct knowledge of the pre-1982 agreements and payments, it is necessary that such evidence be received through Anthony Donnelly. Anthony Donnelly's evidence stands in contrast to that of some employee affiants who are permitted to adduce ancient corporate documents, notwithstanding their lack of any direct knowledge of those transactions or the individuals involved in those transactions, often in a large corporate entity with many historical employees. Anthony Donnelly does have some knowledge of the agreements and payments, including direct knowledge of specific payments. While he was not involved with the company during the entire span of the agreements and payments, he did work directly with his uncle and father in this small, closely-held family company for many years, including during a quarter of the time that the monthly payments were made. Anthony Donnelly had direct knowledge of and involvement in many of those payments, between 1982 and 1987. He received direct confirmation of earlier payments from his father and uncle.

[46] I am also satisfied that the evidence, read as a whole, possesses sufficient reliability, being business documents generated and kept contemporaneously in the usual and ordinary course of business. These documents do not solely emanate from the corporate petitioner, but are in many instances corroborated by and consistent with RBC documents, as well as with the actions of the petitioner and its principals, as well as with other circumstantial evidence. The RBC bank books, in written and then electronic form, the many RBC receipts, the RBC Payment Record: Agreement for Sale of Mortgage referring to A/S #165 are all on official RBC printed stationery. There is no plausible suggestion that these documents are inauthentic or have been doctored.

[47] In reaching this conclusion, I echo the findings of Justice Germain in the more exacting criminal context of *R. v. MacMullin*, 2013 ABQB 741, a *voir dire* decision in a mortgage fraud trial, where the Court permitted the Crown to adduce a large number of historical bank and business records (see paras 13, 135-136):

[153] These documents are necessary as a foundation for the proposed misconduct. They are the kinds of records about which individual memories are unlikely to remain, both because of the age of these transactions but also

their commonplace and mundane character. There is a logistical issue as well; the volume of the paper trail in this case would simply preclude from a pragmatic point of view ever conducting this trial if all of the individuals who created the documents were each called to authenticate them and to confirm their legitimacy, if indeed they recalled these items at all. It is therefore necessary and appropriate that this evidence will be introduced in a documentary form.

[154] I have elsewhere alluded to the inherent reliability of these materials, and the observation that these documents will simply not change, no matter how old they may be. While this kind of documentary evidence may be destroyed and lost forever, while in existence (and provided it is duplicated by a proper and complete process) any copies are as good as the original for most purposes. Since we are seeking only the information contained in these documents they are reliable, and unlike a witness that reliability does not diminish with time.

[48] With the additional evidence provided by Anthony Donnelly, and the totality of the evidence, I am satisfied well beyond a balance of probabilities that all payments were made, and that the petitioner is entitled to the transfer of title to the property. I will summarise some but not all of the evidence on which I base this conclusion.

[49] The first set of evidence comes from the respondent. By her June 1999 executrix affidavit, Ms Alsina attached a statement of assets, liabilities, and distribution for the estate of Mrs May. That document expressly set out that the St George Street property had “nil (no value)” to the estate, and that “the monies owing on the right to purchase have all been paid and subsequently there is no value to the deceased.” Her affidavit indicates that she took some care in considering the status of the assets of the May estate. In contrast to the nil value sworn with respect to the St George Street property, she listed a Columbia Street Port Moody duplex worth \$232,200 at the time of Mrs May’s death. The Part Two listing of personal property is long and detailed, setting out multiple bank and investment accounts, with precise dollar figures.

[50] In response, Ms Alsina argues that she swore that affidavit of assets based on the suggestions of the notary. She said that she did not receive proper legal advice. She had not seen the right to purchase that was registered against title to the lands, and had no direct knowledge of any payments allegedly made by the

petitioner to Mrs May. While this may be true and may be regrettable, that is an issue between Ms Alsina and the notary.

[51] In any case, Ms Alsina swore her affidavit in the course of fulfilling her important and serious duties as executrix of the estate. She specifically swore that she had made a diligent search and inquiry to ascertain the assets and liabilities of Mrs May. She could have made further inquiries, including to RBC and to the petitioner, to obtain further information and develop the positions she now advances. Apart from the records that she would have found in the possession of Mrs May and her advisors, the land sale agreement as well as the two assignments were all registered on title to the property: she knew or ought to have known that both Gooder and RBC might have more information. In swearing that affidavit, Ms Alsina confirmed her understanding that those payments had been made in full, based on her actual and potential inquiries. In any case, her subsequently obtained knowledge of the specific wording of the agreements, as well as potential evidentiary frailties in the petitioner's case, are litigation argument points developed recently, rather than any affirmative evidence counteracting the body of evidence that the payments were made pursuant to the agreement.

[52] Further, there is no evidence from Mrs May's end that Gooder failed to make the anticipated payments, or that the transaction did not proceed as anticipated. There are no demand or default letters or communications, through law firms or otherwise. There are no internal or external complaints or communications about failed payments, or assertions of continued ownership of the property that would indicate any contemporaneous assertion by Mrs May either that the property remained hers, or that the petitioner had failed in its obligations to make or complete the payments. There is no evidence of any court proceedings flowing from a disagreement about payment or entitlement. It is granted that these documents would have been generated in the last century and may no longer survive. But Ms Alsina in her role as an executrix, was obliged to conduct a thorough search of Mrs May's documents and records after her death: she swore that she had done so. It is likely that such documents would have been kept, given the importance and value of

this real estate holding. It is also likely that the importance of such a document would have been clear to Ms Alsina in her executrix search and duties. Again, the details of the other investments set out in the probate affidavit indicate that Mrs May did keep thorough records about her assets, and that Ms Alsina was able to comprehensively locate and summarise those records and assets in her executrix role.

[53] Finally, I note that Mrs May's 1998 will makes no specific reference to the property. I acknowledge that this point is of limited utility, as the will itself is not specific with respect to her assets, and does not mention her other real estate holdings.

[54] I turn to the petitioner's records. Mr Donnelly has attached to his affidavit company records indicating that the purchase monies due under the right to purchase agreement were paid in full by 1987. While these records are not complete in terms of evidencing every payment, they provide a compelling long-term pattern of compliance with the monthly payments, albeit with a gap in payments, and a gap in evidence. Mr Donnelly was unable to locate any records for payments made between September 1973 and June 1976. That said, all but \$835.93 of the amount owed is supported by contemporaneous records of payments. Despite those gaps, and despite the fact that the payments are completed by 1987 rather than the anticipated 1976, the payments eventually pick up again, and continue until 1987.

[55] The primary source of these company records are:

- a) hand-printed Gooder RBC bank books showing payments from December 1966 to August 1973;
- b) computer-printed Gooder RBC bank books showing payments from July 1976 to January 1982; and
- c) multiple stamped and annotated RBC receipts for Gooder payments, including for payments from September 1982 to March 1987.

[56] These sources evidence a regular pattern of \$100.30 payments regularly made on the 16<sup>th</sup> of each month, consistent with the agreement. There are also some larger payments for \$200, \$250, \$300, and \$500, from time to time. On many of the handwritten receipts, the RBC teller annotated the balance of account of A/S #165: the RBC account dedicated to receipt of the monthly payments. Many of these receipts are also annotated with references to Mrs May, and/or to an “Agreement for Sale”. The receipts are stamped with RBC stamps evidencing the dates of the payments.

[57] Anthony Donnelly confirms that from 1982, either Jim Montalbetti, Edward Donnelly, or he himself, made monthly payments on behalf of company at the Port Moody RBC branch. Anthony Donnelly specifically confirms that he made some of the monthly payments at the Port Moody RBC branch between 1982 and 1987, and that on occasion he personally witnessed the teller writing the balance of account A/S #165 on the receipt.

[58] The treatment of the property by the petitioner and the Mays during the relevant period also evidences a collective understanding that the petitioner was fulfilling the terms of the agreements, towards eventually obtaining title in the property.

[59] The petitioner has rented out the four residential units contained in the property throughout the period, since 1967. The petitioner has collected rent from those tenants. Consistent with the sale agreement, the petitioner has also maintained and paid for business licenses, property insurance, property taxes, and utilities for the property since 1967. Mr Montalbetti in his personal and the Gooder capacity has done so since the agreement for sale was assigned to Mr Montalbetti in 1967. These receipts and payments are well documented in the evidence, and are not disputed by the respondent.

[60] Again, there is no evidence that Mr or Mrs May ever collected these rents, or made these considerable payments during the period.

[61] The actions consistent with compliance with the agreements went beyond collection of rents and payment of expenses related to the apartment property. Mr Montalbetti looked after many of the day-to-day affairs of maintaining the apartment from 1969 to 1991. Mr Montalbetti himself lived at the property and managed the rental units from 1991 to 2001. Mr Montalbetti continued to live at the property until 2022.

[62] In December 1979, a mudslide caused damage to the bottom two apartment units on the property. The Province settled with Gooder, rather than with Mrs May, paying \$33,411. The settlement document is signed by Edward Donnelly. It confirms that Gooder owned the property, and stated that the sole encumbrance was that of “Mrs May, Royal Bank of Canada”.

[63] Anthony Donnelly affirmatively swears that at no point did anyone advise him that the right to purchase was invalid, void, or not fulfilled. I am satisfied that given his lengthy involvement in the company, and given that his uncle and father were the only other principals of that small, closely held company, and given his searches of company records generally and for this proceeding, he would have learned of any such documents or issues that would undermine Gooder’s entitlement to the property.

[64] Before concluding, I will address three arguments raised by the respondent.

[65] First, the respondent questions why the petitioner delayed in bringing this application, when the payments were complete by 1987. Apart from this rhetorical point, no argument of estoppel or *laches* or otherwise is advanced.

[66] In his affidavit, Anthony Donnelly sets out that Jerome Alley, the original real estate agent on the transaction and a Donnelly family friend, told him that around the end of 1987 or early 1988, he tried to have Mrs May sign over title to the property, but that she refused to do so. Mrs May indicated to Mr Alley that she believed that her husband had given her the property, and that it belonged to her.

[67] Ms Alsina’s own affidavit indicates that Mrs May was confused and ambivalent about her potential ownership interest in the property:

Periodically, while out on errands, Elsie would ask me to drive by the Property. At times she would say “I think that I own that property” and at other times she would say, “George might have sold that property, but I don’t know because George is dead.” I did not take much stock in her comments as things transpired a long time ago.

[68] Mr Donnelly explains that it appears to have been an oversight that no one took any steps on behalf of the company to have the property conveyed to Gooder. This is perhaps understandable, given Mrs May’s stated position and her advanced age, on one side, and given the intergenerational transfer within Gooder around this time. In some ways, however, the oversight and the continuation of business as usual by Gooder are consistent with the understanding and practices, again, that Gooder was complying and had complied with the agreements, and was in fact the owner of the property.

[69] Second, the respondent hypothesises that the petitioner’s failure to take any steps between 1987 and 2022 to transfer the property indicates that “the petitioner knew or ought to have known that the balance was unpaid. There is no other rational explanation for its total inaction for 35 years.” The respondent essentially accuses the petitioner of tactically lying in the weeds and only bringing this proceeding after the death of Mrs May and possibly other relevant parties and witnesses, and the destruction and loss of documents.

[70] There is no basis for this urged inference. It would be bizarre for the company to stop the monthly payments with only \$835.93 owing (the unaccounted amount). The monthly payments were far from onerous: \$100 a month. Gooder was receiving an income stream in the form of rents that exceeded this amount owed. There is no evidence of any inability on the part of Gooder to pay the monthly amounts, and it would be surprising if it could not. Gooder has existed for at least 56 years, and survives as a company to this day.



[71] Third, the respondent points to a “time of the essence” provision in the 1961 purchase agreement. She notes that on the petitioner’s own recitation of the facts, the payments were not made by the anticipated date of November 16, 1976, but rather a decade later, and that thus the petitioner and its predecessors breached the agreement.

[72] That provision, however, does not go so far. Rather, it states that if the payments are not made punctually:

...the Vendor may at his option and in addition to his other remedies hereunder, give to the Purchaser thirty days’ notice in writing, demanding payment thereof, and in case any such default shall continue these Presents shall at the expiration of such notice be null and void and of no effect... Upon default as aforesaid, after the receipt of thirty days’ notice the full balance together with interest shall forthwith become due and payable.

[73] In short, a delayed payment by the purchaser or its assigns does not automatically stand as a default, but rather provides the vendor an option to put the purchaser on notice of default. Again, there is no evidence that the purchaser ever exercised this option: no letter of default or otherwise. To the contrary, there is affirmative evidence that Mrs May continued to receive the payments without protest. In these circumstances, she would waive any rights to the time of the essence clause, even if she hypothetically did send a notice of default letter, of which there is no proof, and, given the overall evidence, would be extremely unlikely. *Werner v. Bell* (1976), 1 BCLR 373 (SC) and *Devonshire Hall Ltd. v. Hollyburn Properties (Alberta) Ltd.*, 1982 CarswellBC 2060 (SC), where the payees were barred from strict enforcements of payment provisions, provide useful precedents in this regard.

**V. CONCLUSION**

[74] I grant the order sought by the petitioner, in the form sought.

[SUBMISSIONS ON COSTS]

[75] In these unusual circumstances, I will exercise my discretion not to order that the unsuccessful party pay the costs of the successful party. Gooder’s long delay in

seeking the transfer of the property, from 1987 to 2023, is partly to blame for this proceeding, and its evidentiary challenges. Even after starting the petition, Gooder did not provide at the time of its filing its best proof that the payments had been made. Rather, Gooder provided the Anthony Donnelly affidavit two months after the petition filing. Even then, as noted above, the petitioner's evidence was incomplete: Gooder only provided the evidence necessary to convince the Court in its favour in January 2024, after the Court's directions.

[76] I agree that the petitioner should receive its costs thrown away for last week's scheduled 9am hearing. By the time Mr Gemmiti received the unusual directions from his client not to appear remotely, the petitioner had already filed the record, and the parties and the Registry had confirmed the date, thus necessitating a court appearance, if only to speak to an adjournment. I will order that those costs be fixed in the nominal amount of \$500, to be paid forthwith by Ms Alsina, to allow this ancient matter to be finally put to rest.

"Crerar J"