

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harper KL Development Corp. v.*
1131182 B.C. Ltd.,
2023 BCSC 1263

Date: 20230724
Docket: S2110544
Registry: Vancouver

Between:

Harper KL Development Corp.

Petitioner

And

**1131182 B.C. Ltd., Edgemont Hollingsworth Heritage Revitalization
Corporation, Bancorp Balanced Mortgage Fund II Ltd., Bancorp Growth
Mortgage Fund II Ltd., Bancorp Financial Services Inc., Fisgard Capital
Corporation and Halifax Financial Corporation**

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraphs 12, 27,
and 33 on July 27, 2023.

Before: Master Bilawich

Reasons for Judgment

Counsel for the Petitioner

O. Ahmed

Counsel for the Respondent 1131182 B.C.
Ltd.:

B. Brock

No other appearances.

Place and Date of Hearing:

Vancouver, B.C.
July 6, 2023

Place and Date of Judgment:

Vancouver, B.C.
July 24, 2023

Introduction

[1] This proceeding involves an application for sale of property pursuant to the *Partition of Property Act*, R.S.B.C. 1996, c. 347. The petitioner (“Harper”) and the respondent 1131182 B.C. Ltd. (“113 BC”) entered into a joint venture to acquire and develop a property located on Edgemont Boulevard in the District of North Vancouver. They created the respondent Edgemont Hollingsworth Revitalization Corporation to hold title to the property as their bare trustee and nominee. The development ran into difficulties and did not progress as the parties intended.

[2] On September 7, 2022, Justice Sharma ordered that the subject property be listed for sale, with the parties initially having joint conduct of sale. On May 4, 2023, Master Robertson approved an offer to purchase the property. Both orders specify how proceeds from the sale were to be paid out. Neither order addresses payment of the seller’s legal expenses arising from the conveyance.

[3] On this application, the respondent 113 BC applies under the “Slip Rule”, R. 13-1(17) of *Supreme Court Civil Rules* to correct Master Robertson’s order by adding a sub-paragraph directing that the legal expenses incurred by the seller for the conveyance be paid from the proceeds of sale.

[4] Harper opposes the application.

Background

[5] On September 7, 2022, Justice Sharma made an order (the “Sharma Order”) granting Harper and 113 BC joint conduct of sale of the subject property, 3712 - 3718 Edgemont Blvd., North Vancouver (the “Property”). It provides that the Property be listed for sale by September 21, 2022 for a minimum marketing period of 45 days, after which either party could apply for approval of an offer to purchase which had not been agreed to by the other. It further provides that either party or their nominee could offer to purchase the Property, subject to court approval if the parties could not agree.

[6] Paragraph 6 of the Sharma Order specifies how sale proceeds were to be paid out:

- a) Firstly, payment of taxes, arrears of taxes, interest, and penalties on arrears of taxes owing in respect of the Property, including Property Transfer Tax Lien WX2114972;
- b) Secondly, payment of selling commission and applicable taxes thereon;
- c) Thirdly, payment of the amount due to the Bancorp respondents (collectively, “Bancorp”) in satisfaction and discharge of their first mortgage and assignment of rents under CA6935183 and CA6935184;
- d) Fourthly, payment of the amount due to Halifax Financial Corporation Incorporated. (“Halifax”) in satisfaction and discharge of its [second] mortgage under CA6936087;
- e) Fifthly, payment of the amount due and owing in satisfaction and discharge of the certificate of pending litigation (“CPL”) registered against the Property by Shannon McGreevy under CB58131;
- f) Lastly, the balance was to be paid to [Harper’s counsel] until further order or written agreement of the parties.

[7] This clause does not address payment of the seller’s legal expenses relating to the conveyance of the Property.

[8] Paragraph 7 of the order provides that the parties or Halifax may apply to court for directions, and that in any such application they were at liberty to file further evidence, including but not limited to evidence relevant to how the balance of sale proceeds should be allocated and paid out.

[9] On May 4, 2023, Master Robertson made an order (the “Robertson Order”) approving sale of the Property pursuant to a contract of purchase and sale dated April 4, 2023, (the “Contract”) between Black Creek Group Inc. (the “Purchaser”) and Edgemont Hollingsworth Revitalization Corporation (the “Seller”). The Purchaser subsequently assigned its interest in the Contract to a newly created affiliate, BCG Edgemont GP Inc. (the “Assignee”).

[10] The Robertson Order states at paragraph 9 that proceeds of sale after adjustments be paid out in accordance with the priorities set out in paragraph 6 of the Sharma Order. The specific payout provisions from the Sharma Order are also duplicated, but with some modifications which are not relevant to the issues raised in this application. Once again the payout clause does not address payment of the Seller's legal expenses relating to the conveyance. Paragraph 10 tracks paragraph 7 of the Sharma Order, granting the parties liberty to apply for further orders, directions or an accounting with respect to the balance of the sale proceeds.

[11] MLT Aikins LLP ("MLT") is counsel for 113 BC. It also acted for the Seller on the conveyance of the Property to the Assignee. The sale proceeded successfully, save that the Land Title Office initially declined to register title to the Property in the Assignee's name because it was not referred to in the Robertson Order.

[12] 113 BC addressed this by applying under the Slip Rule to "correct" the Robertson Order, to expand the definition of "purchaser" to include an affiliate of the Purchaser, to whom the Contract had been assigned, and to add a new subparagraph directing the Registrar of Titles to transfer title of Property to the Assignee.

[13] 113 BC says a copy of an Order to Pay was provided to Harper's counsel in the course of the conveyance process. It identified the Assignee as purchaser, that MLT was acting as lawyer for the Seller on the conveyance and it showed that MLT was charging fees and disbursements for its services for the conveyance.

[14] 113 BC complains that Harper improperly tried to obstruct efforts to correct the Robertson Order, including by insisting that proof be provided to establish that the Assignee was an "affiliate" of the Purchaser, as that term is defined in the *Business Corporations Act*, S.B.C. 2002, c. 57 ["Act"]. 113 BC argued the Contract did not adopt the Act's narrow definition of "affiliate".

[15] On June 22, 2023, the Seller's application came before Master Muir. Harper requested and was granted a brief adjournment. 113 BC says it was at this hearing

that Harper first took the position that MLT was not entitled to have its conveyancing account paid from proceeds of sale of the Property.

[16] On June 27, 2023, I granted what ended up being an uncontested order correcting the Robertson Order to expand the definition of “purchaser” and add a sub-paragraph directing the Registrar of Titles to transfer title of Property to the Assignee. The sale completed successfully.

[17] MLT decided to hold back \$17,500 from the net sale proceeds that it forwarded to Harper’s counsel in trust. It has advised that it claims a solicitor’s lien against those funds in respect of its unpaid account related to the conveyance.

[18] Harper objected to the holdback and takes the position that it breaches paragraph 9 of the Robertson Order. It demanded that MLT immediately pay the holdback to Harper’s counsel.

[19] On July 6, 2023, the present application came before me.

Applicable Law

[20] Rule 13-1(17), sometimes referred to as the “Slip Rule”, is as follows:

Correction of orders

(17) The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

[21] In *Chand v. Insurance Corporation of British Columbia*, 2009 BCCA 559 at para. 44, the court of appeal indicated that the two potential uses for the rule are as follows: “to rectify a slip in drawing the order which, if unamended, would produce a result contrary to the intention of the court or of the parties”; or “to provide for a matter which should have been but was not adjudicated upon”.

[22] In *Pankiw v. Pankiw*, [1986] B.C.J. No. 1167, 32 D.L.R. (4th) 53 (S.C.) at para. 25, McEachern CJSC, as he then was, found that the slip rule gives one judge jurisdiction to make an order supplementary to the order of another judge for the

purposes of dealing with a matter which is necessary to express the first order that was actually made.

[23] The “Legal Basis” in 113 BC’s application also refers to the “inherent jurisdiction of the court”. I informed counsel that because Masters do not have inherent jurisdiction, I could not deal with that aspect of the application, so it would have to be heard by a judge. Counsel for 113 BC indicated he was content to proceed without relying on inherent jurisdiction.

Position of the Parties

[24] 113 BC argues that payment of the Seller’s legal fees and disbursements for a conveyance arising from the court-ordered sale is, or ought to be, an implied term of the Robertson Order. It says Harper was aware MLT was acting for the Seller on the conveyance and was charging for those services.

[25] Harper argues that the court has already adjudicated the priority of payments from sale proceeds before Justice Sharma and Master Robertson. Their orders express the court’s intention and this is not an appropriate case for using the Slip Rule to change their orders. The court is now *functus officio* and has no further jurisdiction to address this issue.

[26] Harper says it does not take the position that MLT is not entitled to charge legal fees and disbursements for the conveyance. Rather, it says MLT and 113 BC are not entitled to claim priority for payment of MLT’s account over the Seller’s and the joint venture’s other unsecured creditors, having failed to seek such relief at the two earlier hearings at which priority issues were addressed.

Analysis

[27] Counsel for 113 BC did not direct me to any authority for the proposition that payment of the Seller’s legal expenses for conveyance of the Property from the sale proceeds is properly considered an “implied term” of either the Sharma Order or the Robertson Order.

[28] Turning to the first of the two branches of the Slip Rule, the evidence tendered does not establish that the failure to address payment of legal expenses for the conveyance arose due to an accidental slip or omission in the drawing of either order. There is no evidence this issue was expressly addressed or decided in either hearing.

[29] The second branch appears to be more likely. The real issue here is whether payment of the Seller's legal expenses relating to conveyance from sale proceeds qualifies as a matter which should have been but was not adjudicated upon. Put another way, is it a matter which is necessary to express the Robertson Order and by extension the Sharma Order?

[30] I have reviewed Justice Sharma's reasons for judgment, *Harper KL Development Corp. v. 1131182 B.C. Ltd.*, 2022 BCSC 2078. They focus primarily on whether the Property should be sold. She did not address payment out of sale proceeds in any detail. She concluded that the Property should be sold and granted the relief sought in part 1, paragraph 1 of the petition, with the terms of the order to be settled by the parties and/or in front of her. The specific language in the formal order appears to have been settled as between the parties.

[31] 113 BC's application dated April 12, 2023 seeking approval of sale did not expressly seek a direction that the Seller's legal expenses for the conveyance be paid from sale proceeds. This issue appears to have been overlooked.

[32] This is a court-ordered sale. Justice Sharma's order initiated the sale process and addresses distribution of sale proceeds. Master Robertson's order approved sale of the Property and likewise addresses distribution of sale proceeds. In order for there to be any sale proceeds to distribute, it is a practical necessity that the Seller retain legal counsel to handle the conveyance and facilitate completion of the sale. It is unlikely that any counsel would agree to take on such a task on the basis that they would not be paid for their services, or that they would be left to compete with the Seller's broader pool of unsecured creditors and hope that their account might eventually be paid or partially paid. In these circumstances, it is necessary and

appropriate that the Seller's reasonable legal fees, disbursements and applicable taxes relating to the conveyance of the Property be paid from proceeds of sale. This is a matter which should have been but was not adjudicated upon in the Robertson Order and arguably Sharma Order.

[33] In the event I am found to have erred in reaching that conclusion, I also note that the Sharma Order and Robertson Order both grant the parties leave to apply for further directions and to tender further evidence regarding how the balance of sale proceeds should be allocated and paid out. The court is accordingly not *functus officio* and can address this issue. For the same reasons set out above, I conclude that it is appropriate that MLT's account for reasonable legal fees, disbursements and applicable taxes relating to the conveyance of the Property be paid out of the proceeds of sale of the Property.

[34] During submissions, Harper's counsel expressed concern about the reasonableness of MLT's account. As Harper and 113 BC are described as beneficial owners of the Property and their interests are affected, they are each granted leave to review, or to cause the Seller to initiate a review of MLT's account for the conveyance of the Property, under Part 8 of the *Legal Profession Act*, S.B.C. 1998, c. 9, as amended.

[35] Regarding costs, 113 BC seeks special costs of this application from Harper based on its unreasonable efforts to obstruct efforts to correct the Robertson Order so that the sale of the Property could complete and subsequently in relation to payment of MLT's account. The former issue was addressed in my order made June 27, 2023. The form of that order was requested by 113 BC. It did not include any order as to costs. It would not be appropriate to revisit that decision here. I am also not persuaded that Harper's conduct in relation to MLT's account rises to the level of being "reprehensible", which is necessary to warrant imposing an award of special costs. This application was arguably necessary due to oversight on the part of both parties in failing to address payment of legal expenses. Counsel for 113 BC also acted unilaterally in holding back a portion of the sale proceeds. In my view, it is

appropriate in the circumstances that the parties bear their own costs of this application.

Decision

[36] The Robertson Order is corrected by adding the following immediately after paragraph 9(e):

- f. Sixthly, in payment of Edgemont Hollingsworth Heritage Revitalization Corporation's conveyancing legal fees, disbursements and applicable taxes for the sale of the Property;

[37] Harper and 113 BC are each granted leave to review, or to cause the Seller to initiate a review of MLT's account for the conveyance of the Property, under Part 8 of the *Legal Profession Act*.

[38] The parties will each bear their own costs of this application.

"Master Bilawich"