IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schneider v. Rothschild,* 2023 BCSC 1127

Date: 20230601
Docket: S-221907
Registry: Victoria

Between:

Chase Schneider

Petitioner

And:

Matthew Rothschild and Scotia Mortgage Corporation

Respondents

Before: The Honourable Madam Justice V. Jackson

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	D. Mulroney
Counsel for the Respondent Rothschild:	E. Clausen
For the Respondent Scotia Mortgage Corporation:	No appearance
Place and Date of Hearing:	Victoria, B.C. May 31 and June 1, 2023
Place and Date of Judgment:	Victoria, B.C. June 1, 2023

[1] **THE COURT:** These are my oral reasons for judgment. If a transcript is ordered, I may make changes for style or grammar, but the substance of my reasons will not change.

[2] The petitioner seeks an order that he is entitled to an undivided one-half interest in the property as described in the petition [the “Property"], as well as an order that the Property be sold on or after July 2, 2022, with the net proceeds being divided equally between himself and the individual respondent, Matthew Rothschild. Given the advice of counsel for the petitioner that the corporate respondent, Scotia Mortgage Corporation, takes no position on this petition and for ease of reference, I will refer to Mr. Rothschild as the “respondent", and to the petitioner and the respondent collectively as the “parties". The petitioner also seeks ancillary relief.

[3] The Property was acquired in the fall of 2009. The parties both took out a mortgage on the Property and were registered on title as joint tenants. The parties disagree as to their respective contributions to the deposit for the Property. However, that deposit was of nominal relative to the purchase price of the Property which was $475,750, and the value of the mortgage taken out and secured against the Property at the time of its purchase, which was $466,199.30. The respondent's evidence is that he asked the petitioner if he, the petitioner, would co-sign the mortgage with him as a temporary situation. I infer from this evidence that the respondent was unable to qualify for a mortgage on his own. The petitioner's evidence, which is supportive of this inference, is that the respondent had poor credit at the time and did not qualify for a mortgage. The respondent's evidence is that the petitioner "agreed to co-sign the mortgage gratuitously" because the parties had a very good relationship at the time and that the parties "agreed that while the petitioner would also be named on title temporarily, he would not be responsible for the property financially or otherwise, nor would he have any beneficial interest in the property". The respondent also deposes that in November 2009, "the petitioner and I" purchased the Property for $475,750 and that "they" obtained the mortgage.

[4] The Property has a three-level dwelling on it. At the time the Property was purchased, there was an unfinished basement with a toilet and sink, a main floor which included a sleeping quarters, and an upper level which was also suitable for someone to sleep in. At some time after the acquisition of the Property, the petitioner lived in the Property sleeping in the basement. The respondent had the main floor and, at some point, the respondent's father moved in and became a resident in the Property, sleeping on the upper floor living quarters.

[5] The parties agree that for at least some period of time, at least until 2012, the petitioner paid money to the respondent. The respondent characterizes these payments as rent whereas the petitioner characterizes these payments as an equal sharing of the mortgage payment. Both parties agree, with the petitioner conceding this point during submissions at the hearing, that the mortgage payments were made to the lender solely through the respondent's bank account. The petitioner says he continued to make payments until 2016 when he moved out of the Property and the parties agreed that he would no longer make a financial contribution, whereas while the respondent agrees that the petitioner moved out in 2016, he says the petitioner stopped making a financial contribution in 2012. However, again, there is agreement between the evidence of the parties that, whenever it was that the payments stopped, it was by agreement as between the parties. Although the respondent in submissions seemed to place significant emphasis on the fact that the petitioner made his financial contributions in cash and suggested that therefore the evidence of the petitioner about making those payments was unreliable, I note that the respondent acknowledges that the petitioner made monthly payments at least between 2009 and 2012.

[6] In 2014, there was still no equity in the Property and in 2015, the parties discussed the respondent buying out the petitioner's interest in the Property for $35,000. The respondent says these discussions resulted in an "oral agreement" which was never reduced to writing, and that the respondent was going to buy out the petitioner at that purchase price at a later date, because the respondent did not

have sufficient funds to make the payment at that time of the alleged oral agreement.

[7] In early 2020, the respondent had outstanding judgments for failing to pay MSP premiums for $1,200 and unpaid income taxes, $11,970.46, and needed loans. Once again, I infer that the respondent at that point, 2020, was unable to qualify for a loan on his own behalf. The petitioner agreed to co-sign loans with the respondent "in order to assist the respondent repay those debts". However, it then also became apparent that the property taxes and utilities on the Property had fallen into arrears. As a result, the respondent and the petitioner took out loans in the amount of approximately $70,000, or at least there was a promissory note in that amount, which were secured against the Property in order to enable the respondent to pay up his judgments and for the other financial accounts to be brought current.

[8] According to the respondent, the petitioner "had no issue signing the loan documents because I owned the property, the loan was only temporary, and the petitioner was not going to be financially responsible for repaying the loan". That evidence is inconsistent with the documents and the legal consequences of the fixed-credit agreement, which lists both parties as the borrowers, and the promissory note signed by the petitioner, both of which would have made the petitioner financially responsible at law for the repayment of the loans. The parties agree the loans have since been repaid.

[9] Approximately seven years after the 2015 discussion between the parties with respect to the respondent buying out the petitioner's interest in the Property, which interest the respondent characterizes as being the petitioner's "legal interest" and not a beneficial one, in February 2022, there were further discussions with respect to the respondent's purchase of the petitioner's interest, this time at a purchase price of $40,000. Again, nothing was put in writing. The respondent characterizes these discussions as an amendment to the oral agreement and says the increase in the price or payment amount was an act of kindness on the respondent's part, something to compensate the petitioner for "patiently waiting for me to pay him".

[10] As at December 30, 2020, the amount owing on the mortgage on the Property was $365,767.67. The assessed value of the Property as of July 1, 2021, was $921,000. Two market valuations were tendered in evidence which provide that the fair market value of the Property is between $700,000 and $1.2 million, in either case, significantly more than sufficient to discharge the mortgage. While the respondent's evidence is that "considering the value of the mortgage and the value of the property, there is little equity in the property" I would not describe at minimum approximately $350,000 as "very little equity". Much of the value of the Property is in the land with very little being attributed to the 700-square-foot dwelling on the Property, which the respondent acknowledges is in a state of significant disrepair.

[11] The mortgage on the Property is coming due on July 5, 2023. The petitioner no longer wishes to renew to pledge his credit towards the Property, on which he is neither living nor deriving rent. He wants to sell the Property before the mortgage renewal is required. The respondent points out that he and his father continue to live in the Property and that, if the Property is sold, they will have nowhere to live. However, the respondent's share of equity in the Property, should it be ordered to be sold, would undoubtedly allow him to ameliorate his living situation, and that of his father if he wished to do so.

[12] There is a *prima facie* right of a joint tenant to partition or sale and the court will compel such partition or sale unless justice requires such an order not be made: *Harmeling v. Harmeling*, 1978 CanLII 1961, a decision of our Court of Appeal, at para. 10; cited with approval in this court's decision of *Zackariuk Estate v. Chepsiuk*, 2005 BCSC 919, at para. 27, which was subsequently cited by Justice Crossin in *Ruskowsky v. Hadden*, 2021 BCSC 1141, at para. 13. A party who wishes to resist partition or sale bears the onus of demonstrating that the order should not be made: *Zackariuk* at para. 29. As long as it remains in force and uncancelled, subject to conditions which are not applicable in this case, an indefeasible title is conclusive evidence at law and in equity that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple, that is, to the legal and beneficial

interest in the land described in the title: *Freeland v. Farrell*, 2022 BCCA 99 at para. 25; *Land Title Act*, R.S.B.C. 1996, c. 250, s. 23(2).

[13] There are very good public policy reasons supporting the presumption of indefeasibility and good reasons for encouraging agreements respecting the sale of interests in real property to be reduced to writing. In *Suen v. Suen*, 2013 BCCA 313 at para. 34, the Court described three ways the presumption of indefeasibility can be rebutted:

> (i) the operation of a resulting trust which [can] be inferred where no value is given for a legal interest;
>
> (ii) the operation of an agreement between the parties that is contrary to the registered legal title; or
>
> (iii) taking into account the underlying equitable interests between the parties ([for example] considerations that arise [for] claims [of] unjust enrichment).

[14] The respondent argues the matter should be referred to the trial list because there are triable issues which cannot be resolved without at least some of the procedural trappings that accompany an action, in particular, *viva voce* evidence on cross-examination and discovery of documents. In the alternative, the respondent relies on an alleged agreement between the parties that the petitioner would not receive a beneficial interest in the Property when he became one of the registered owners on title in order to rebut the presumption of indefeasibility. The respondent also argues that there are underlying equitable interests between the parties which should preclude the orders the petitioner seeks in this case.

[15] As Justice Schultes noted in *Ross Estate (Re)*, 2023 BCSC 467, and I quoting now from paragraphs 53 through to 56, starting at paragraph 53:

> [53] Until the decision of the Court of Appeal in *Cepuran v. Carlton*, 2022 BCCA 76, a petition was required be converted into an action and sent to the trial list if there was a "*bona fide* triable issue" – that is, there were disputes of fact or law - unless the party requesting the trial was "bound to lose" … Put another way, before proceeding by petition, the judge hearing the matter had to be satisfied that there is "no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried" … The test is the same as the one that is applied on an application for summary judgment.

[54] That is still the definition of a triable issue, but in *Cepuran* a five-justice division of the Court reconsidered the requirement in *Saputo* that a petition has to go to the trial list whenever that definition is met. Instead, the Court concluded that:

> 158 It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the Rules contemplate that a summary procedure will be appropriate... This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.
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> 159 The modern approach to civil procedure… is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. …R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.
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> 160 … [A] judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.
>
> …
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> 166 At a minimum, when considering whether to order the use of hybrid procedures within the petition proceeding itself, or to refer the matter to trial, the court will need to be mindful of the object of the Rules set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.

[55] At para. 165 the Court “commended” a list of factors that may be relevant when deciding to convert a petition proceeding to an action [those being take from] *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, at para. 39. This list was in turn drawn from *Haagsman v. British Columbia (Minister of Forest)* … [and] Those factors are:

> (a) the undesirability of multiple proceedings;
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> (b) the desirability of avoiding unnecessary costs and delay;
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> (c) whether the particular issues involved require an assessment of the credibility of witnesses; and

> (d) the need for the Court to have a full grasp of all the evidence; and
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> (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.
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> [56] The Court added at para. 166 that "[t]he factors that may be relevant will evolve with time and the circumstances of a particular case."

[16] I have considered those factors and, in particular, I have considered the Court of Appeal's comments with respect to the Legislature's choice of statutory scheme. In this case, the statutory scheme established under the *Partition of Property Act*, R.S.B.C. 1996, c. 347, contemplate a summary procedure by way of petition. Although there are some differences in the facts, to my mind, they do not rise to the level of establishing a triable issue on whether the respondent has succeeded in rebutting the presumption of indefeasibility that arises from registration on title. There is adequate evidence before me to enable me to have a full grasp of the evidence I need to determine the issues that arise in this petition. Therefore, I will not refer the petition to the trial list.

[17] The petitioner's evidence is that he expected to be bought out by the respondent within a few years. The evidence, including evidence of affiants relied on by the respondent, satisfies me that, at some point around 2015, there was a discussion between the parties with respect to the respondent acquiring the petitioner's interest in the Property by buying him out as soon as possible, including a discussion of when (as soon as possible) or for how much (the amount discussed beng $35,000). But that never occurred. Nonetheless, the evidence about those discussions does provide evidence of the parties' mutual understanding and intention that the petitioner had an interest in the Property that, absent acquisition by the respondent, was his own. That evidence is consistent with and supports rather than rebuts the presumption at law that the petitioner as registered owner is indefeasibly entitled to an estate in fee simple to the Property.

[18] I reject the respondent's position that there was an agreement between the parties whereby the petitioner would not acquire a beneficial interest in the Property.

There was no such agreement in writing and the evidence about the alleged oral agreement satisfies me there was no closing date or payment date agreed to. To be enforceable, a contract requires certainty of essential terms and where the contract is for the purchase and sale of land, the closing date or payment date is an essential term: *Ko v. Hillview Homes Ltd.*, (A.B.C.A.) 245; *Murphy v. McSorley*, 1929 S.C.R. 542.

[19] The respondent relies on the decision of this court in *Costa v. Costa*, 2022 BCSC 704. However, the facts before Justice Punnett in that case were distinguishable from the facts of this case. In that case, Justice Punnett found there was equity in the Property and that the parties' signature on the mortgage was not necessary. Here, I am satisfied that, but for the petitioner signing the mortgage and assuming the financial responsibility for that debt, the purchase of the Property by the respondent and the petitioner would not have been possible.

[20] A party alleging unjust enrichment must establish that the opposing party was enriched without juristic reason and that they were correspondingly deprived. I am not satisfied the respondent has established there was an unjust enrichment or that the underlying equities of the situation, such as the factors that would be considered in unjust enrichment, are applicable here. Given that the petitioner stopped making payments, whenever that occurred, by agreement between the parties, that would seem to be a juristic reason for any deprivation. Further, even if the respondent did make significant financial investments into the dwelling on the Property, the evidence satisfies me that those investments have not translated into an increase in the value of the overall Property, given the value of the dwelling on the Property is nominal and does not contribute significantly to the overall value of the Property.

[21] Further, even assuming any claim for unjust enrichment was not statute-barred, a co-tenant claiming for reimbursement for mortgages, taxes, and maintenance expenses is liable to assessment for occupational rent: *Szuba v. Szuba*, 1950 CarswellOnt 115; *Mastron v. Cotton*, [1926] 1 D.L.R. 767. Given that the respondent and his father have had exclusive use and possession of the

Property at least since 2016, and the respondent has had the exclusive benefit of any rent paid by his father, it is certainly less than clear to me that there is any basis for denying the petitioner the relief that he seeks based on the underlying equities of the circumstances.

[22] In summary, the respondent has failed to rebut the presumption of indefeasibility. Considering the evidence, the applicable legal principles, and the submissions of the parties, I grant the relief sought by the petitioner in his petition at Part 1, paragraphs 1 through 7 inclusive and paragraphs 10 through 13 inclusive.

[23] The petitioner was the successful party and is entitled to his costs at Scale B, payable by the respondent Rothschild. I make that point just to make clear that Scotia Mortgage Corporation has no obligation to pay costs to the petitioner of this petition.

[24] Subject to the parties' views to the contrary, it seems to me that the relief sought in Part 1, paragraph 9 of the petition duplicates the relief sought at paragraph 6 which I have already ordered, and it also strikes me, again, subject to the parties' submissions, that paragraph 15 is unnecessary. Those would be my reasons subject to comments of counsel on those two last points, but before I hear from you, I do want to make sure that I convey my thanks to both counsel for their very helpful submissions. Any comments with respect to those two orders, with respect to the duplication I see between nine and six and 15 being unnecessary?

[25] CNSL D. MULRONEY: Nine and six are intended to be sequential. So the sale, we would have to come back to the court to obtain approval of the sale --

[26] THE COURT: Yes.

[27] CNSL D. MULRONEY: -- but the order is made now that a sale be subject to approval of the court unless otherwise agreed which triggers the obligation to come back and get approval if we can't agree on a sale.

[28] THE COURT: All right.

[29] CNSL D. MULRONEY: Okay, so that's -- the normal process is to make the order that is in paragraph 6 at this time and that gives the parties the option to either agree on a sale or come back for approval of sale --

[30] THE COURT: All right.

[31] CNSL D. MULRONEY: -- which would -- so paragraph 9 would -- is -- the approval of the sale of the lands on the terms and conditions to be set out in the contract of purchase and sale to be presented to the court. That's --

[32] THE COURT: But does that need to happen if the parties agree?

[33] CNSL D. MULRONEY: No, but --

[34] THE COURT: Yes, so that is why I thought it was redundant.

[35] CNSL D. MULRONEY: Well, nine is not necessary, I think, at this time because six covers --

[36] THE COURT: Yes.

[37] CNSL D. MULRONEY: -- the point.

[38] THE COURT: All right, and with respect to 15:

> [SUBMISSIONS AND DISCUSSION RE ORDERS SOUGHT AT PART 1, PARAGRAPH 15]

[39] THE COURT: All right. On the understanding and expressly stating that it does not have to be me, I will make the order sought at Part 1, paragraph 15, of the petition. The parties shall have liberty to apply for such further directions as may be necessary to carry out the orders of the Court.

"V. Jackson J."