

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Roberts v. Kassam*,
2023 BCSC 1111

Date: 20230518
Docket: S245109
Registry: New Westminster

Between:

Donovan Roberts

Petitioner

And

**Izaam Kassam, Minaz Kassam,
Moez Badrudin Hasham Kassam, Shelina Dhanani**

Respondents

Before: The Honourable Justice Francis

Oral Reasons for Judgment

Counsel for the Petitioner
(Via video conferencing):

G. Allen

Counsel for the Respondents
Izaam Kassam and Minaz Kassam
(Via video conferencing):

B. Carpenter

Counsel for the Respondent Shelina
Dhanani (Via video conferencing):

J. You

Place and Date of Trial/Hearing:

New Westminster, B.C.
May 10-11, 2023

Place and Date of Judgment:

New Westminster, B.C.
May 18, 2023

[1] **THE COURT:** I am giving oral reasons for judgment this morning. If a transcript is ordered of these reasons, I may edit them somewhat for grammar and clarity and complete case citations, but the substance will not change.

[2] The petitioner applies for the following items of relief:

- a) a declaration that the Form A freehold transfer (the “Transfer”) filed in the New Westminster Land Title Office under registration CB37925 against title to the property located at 115 - 5155 Watling Street, Burnaby, British Columbia (the “Property”), has priority over both a caveat registered against title to the Property under registration CB40268, and certificates of pending litigation registered against title to the Property under registration numbers CB40913, CB52012, and CB52478;
- b) orders pursuant to s. 289 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA] discharging the caveats;
- c) an order directing the Registrar of Land Titles to proceed with registration of the Transfer notwithstanding certificates of pending litigation registered against the Property remaining on title to the Property; and
- d) an order the title to the Property shall vest in the petitioner.

Background Facts

[3] On June 16, 2022, the petitioner entered into a contract of purchase and sale to purchase the Property from the respondent Shelina Dhanani. The completion date contemplated by the parties was June 28, 2022.

[4] The petitioner has deposed in this proceeding that he has never met Ms. Dhanani and that he has no relationship with her. He has also deposed that prior to June 30, 2022, he had no knowledge of any claims made by the respondents who oppose this petition to beneficial ownership in the Property.

[5] The events and the timing of Mr. Roberts' purchase of the Property are important, so I will review them in some detail.

[6] On June 28, 2022, at 2:34 p.m., the petitioner's conveyancing solicitor filed the Transfer with the New Westminster Land Title Office. The Transfer was accepted for filing and given a document number CB37925.

[7] Prior to the filing of the Transfer, the petitioner's conveyancing solicitor checked the state of title to the Property and did not see any charges which could impede the transfer.

[8] As of the afternoon of June 28, 2022, there were two expired caveats registered on title to the Property: one in the name of the respondent, Moez Kassam, and one in the name of the respondent Minaz Kassam.

[9] At 8:51 p.m. on June 28, 2022, counsel for the respondent, Izaam Kassam, wrote a letter to the petitioner's realtor claiming that Izaam Kassam was the beneficial owner of the Property and that Ms. Dhanani did not have authority to sell the Property.

[10] The next day, on June 29, 2022, at 10:32 a.m., counsel for Izaam Kassam filed a caveat against the Property.

[11] Also on June 29, 2022, at 11:36 a.m., counsel for Moez Kassam filed a certificate of pending litigation against the Property.

[12] On June 30, 2022, counsel for Izaam Kassam wrote a letter to the petitioner's conveyancing solicitor and others and took the position that the Transfer was a breach of trust by Ms. Dhanani and he demanded that the petitioner withdraw the Transfer.

[13] On July 4, 2022, counsel for Izaam Kassam filed a certificate of pending litigation against the Property.

[14] Also on July 4, 2022, counsel for Minaz Kassam filed a certificate of pending litigation against the Property.

[15] On July 8, 2022, the registrar issued a notice advising the petitioner's conveyancing solicitor that the Transfer had been placed on hold.

[16] On July 12, 2022, the registrar issued a notice declining to register the transfer pursuant to sections of the *LTA*. The rejection notice stated:

1. CB37925

REASON: The title is subject to a caveat registered under CB40268 which restricts dealings.

REQUIREMENT: The caveat CB40268 must be dealt with.

REFERENCES: *Land Title Act*, section 288, 289, and 290.

2. CB37925

REASON: The title is subject to a certificate of pending litigation registered under CB52012, which restricts dealings.

REQUIREMENT: Certificate of pending litigation CB52012 must be dealt with in one of the manners prescribed in the *Land Title Act*, sections 216(2)(b) and 252 to 258.

REFERENCES: *Land Title Act*, sections 216(2)(b) and 252 to 258.

[17] The result of the registrar's refusal to register the Transfer is that the petitioner has paid the full purchase price for the Property but does not have title. The purchase funds paid by the petitioner were released to Ms. Dhanani and they have been spent.

Positions of the Parties

[18] In essence, the petitioner comes before this Court asking the Court to do what the registrar refused to do and allow the Transfer of the Property he has purchased to go through. Ms. Dhanani consents to this relief and to the completion of the sale of the Property she sold to Mr. Roberts.

[19] The respondents Izaam Kassam, Minaz Kassam, and Moez Kassam submit that the Property was never beneficially owned by Ms. Dhanani. She held it in trust pursuant to a declaration of trust dated June 15, 2018 wherein she purported to

declare that six parcels of real property, two corporations, and two vehicles were held by her in trust with the following beneficial interests: 10 percent to Moez Kassam (her then husband); 50 percent to Minaz Kassam (her then husband's brother); and 40 percent to Izaam Kassam (her son).

[20] Ms. Dhanani and Moez Kassam are presently engaged in high conflict litigation under the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*] in which all six parcels of real property, including the Property at issue in this petition, are claimed to be family property. While there is some dispute about the amount at issue in the *FLA* proceeding, it is notable that five of the six properties that are enumerated on the declaration of trust, and are at issue in the *FLA* proceeding, are multi-million dollar houses on the west side of Vancouver. The beneficial ownership of these assets and the extent to which any or all of them are family property is a matter that remains to be determined in the *FLA* proceeding.

[21] The respondents Izaam and Minaz Kassam oppose the relief sought by the petitioner on the basis that the only remedy available to the petitioner when the registrar declined to register the Transfer was via the statutory appeal mechanism set out in the *LTA*. They also submit that the matter is unsuitable for summary trial. When pressed on this position, counsel conceded that this being a petition, no one was seeking a summary trial, and he modified his position to say that the petition ought to be referred to the trial list.

[22] Izaam and Minaz Kassam also raised jurisdictional concerns about this Court's power to grant the petitioner the relief he seeks and submit that even if the Court could grant the relief sought, the Court should not do so because Mr. Roberts has engaged in equitable fraud.

[23] The respondent Moez Kassam submits that any interest Ms. Dhanani had in the Property was family property and, as a result, Ms. Dhanani's sale of the Property to Mr. Roberts was a fraudulent conveyance.

Discussion

[24] The Torrens system of land registration codified by our *LTA* is a “first in time” system. Under that system, the priority of interest in land is determined according to the time of the application for registration, with some exceptions.

[25] Under the *LTA*, an instrument or an application is deemed to be registered as of the date and time when the application for registration was received by the registrar. Section 153(2) of the *LTA* sets out that:

For the purposes of priority among purchasers, transferees, mortgagees and others, and for all purposes of this Act, the date and time recorded under subsection (1)(a) is the date and time when the application was received by the registrar and a true copy of that record must be received in all courts as conclusive proof of the date and time the application was received by the registrar.

[26] Section 31(a) of the *LTA* makes clear that a certificate of pending litigation or a caveat takes priority over any application to register a transfer or charge made after the lodging of the caveat or registration of the certificate of pending litigation. This is consistent with the “first in time” nature of our Torrens system of land title and the *LTA*.

[27] Although indefeasible title does not fully vest in the petitioner until an application for transfer has been registered, it is a well accepted principle of our Land Title registration system that the petitioner's pending rights are not defeated by subsequent applications.

[28] In *Rudland v. Romilly*, 1958 CanLII 577 (B.C.S.C.) at para. 9, this Court held that the filing of a valid application to transfer title by a bona fide purchaser grants the filing party a “clear right to have that interest registered,” which cannot be defeated by a party who files a charge while the application remains pending because of “the delays inevitable in a busy land registry office.”

[29] This Court recently addressed a similar problem to the one faced by the petitioner in *1122792 B.C. Ltd. v. 1230310 B.C. Ltd.*, 2021 BCSC 715 [112]. In 112, the petitioner filed a Form A application for a freehold transfer. It was accepted for

filing by the Land Title Office. After the Form A was accepted but before the transfer of title was registered, a third party filed a caveat against the subject property claiming a beneficial interest in the subject property. The Land Title Office declined to register the transfer due to the existence of the caveat. The petitioner applied to this Court to register the transfer.

[30] In 112, Justice Saunders helpfully set out the relevant legal framework at paras. 11 to 13:

[11] The Registrar had no discretion to process the Application and transfer title in the face of the Caveat. This is because the *LTA*, by operation of s. 37(1), only deems an instrument to have been registered as of the date and time the application for registration was received by the registrar, once it is registered. Section 288 of the *LTA* states explicitly that, with certain exceptions, the Registrar must not register another instrument affecting the land described in a caveat lodged with the Registrar while the caveat remains in force.

[12] However, s. 31 of the *LTA* provides that a caveat or certificate of pending litigation has priority only over an instrument for which application for registration has been made after the caveat or certificate of pending litigation has been lodged...

[13] Section 289 of the *LTA* provides a mechanism for an owner obtaining discharge of a caveat. It says:

289 (1) An owner or other person claiming an estate or interest in land or a charge, in this Act referred to as the "caveatee", may, before the expiry of the caveat, apply to the Supreme Court and notify the caveator to attend before the court to show cause why the caveat should not be discharged,

(2) the court may,

(a) on proof that the caveator has been served with the notice, and

(b) on such evidence as the court may require,

make such order as the court may consider proper. ...

[31] In 112, Saunders J. considered the statutory scheme and held that since the Form A in that case was filed before the caveat, the caveat could have no effect on whether title should be registered. He ordered that legal title must vest in the petitioner.

[32] While this case appears to be very similar on its facts to *112* and *Rudland*, the Kassam respondents say that there are two significant distinguishing factors in this case: First, according to these respondents, in this case the registrar made a determination under s. 288(2) that the claim of the caveator, if successful, would destroy the root of title of the person against whose title the caveat was lodged. In such circumstances, these respondents submit that the registrar's determination is, subject to an appeal, binding. In other words, the jurisdiction of this Court under s. 289 to discharge a caveat and to make other orders is limited to circumstances where the registrar has not opined pursuant to s 288(2) that the claim of the caveator would destroy the root of title.

[33] There is nothing in the legislation from which I could infer that this Court can only remove a caveat under s. 289 if s. 288(2) is not invoked. It appears to me that the petitioner has properly taken the steps required under s. 289. Just as in *112*, as the Form A was filed before the caveat, the caveat can have no effect on whether title should be registered. I am not persuaded that the registrar's comments with respect to s. 288(2) change the analysis in any meaningful way.

[34] The other distinguishing factor raised by Izaam and Minaz Kassam is that in *112*, the CPL was not part of the relief initially sought in the petition, although the parties in that case agreed that Saunders J. should deal with it. These respondents submit that there is no section in the *LTA* that gives the Court jurisdiction to order a transfer of title in the face of a CPL. Where the registrar refuses the registration of a transfer under s. 208 because there is a CPL registered on title, the only recourse, according to these respondents, is an appeal under s. 309. These respondents argue that the Court lacks jurisdiction to order that the Transfer be registered subject to the CPL in the face of the refusal by the Registrar of Land Titles to do so.

[35] This submission overlooks s. 216(2)(b) of the *LTA*, a section cited by the registrar in the rejection notice as one of the options for how the petitioner could deal with the CPL should he wish to proceed with the registration of the Transfer. Section 216 states:

- (1) After registration of a certificate of pending litigation, the registrar must not make any entry in the register that has the effect of charging, transferring or otherwise affecting the land described in the certificate until registration of the certificate is cancelled in accordance with this Act.
- (2) Subsection (1) does not apply to the lodging of a caveat or to the registration of
 - (a) an indefeasible title or a charge, if the instrument supporting the application is expressed to be subject to the final outcome of the proceeding,
 - (b) an indefeasible title or a charge in respect of which the applicant, in writing,
 - (i) elects to proceed to registration subject to the final outcome of the proceeding, and
 - (ii) authorizes the registrar to register the title or charge claimed subject to the certificate of pending litigation,

[36] In this case, the petitioner does not seek to remove the CPLs but, rather, seeks to have title registered in his name subject to the CPLs which will stay on title. This is consistent with s. 216(2)(b) as cited by the registrar in the rejection notice.

[37] Counsel for Izaam and Minaz Kassam repeatedly made the submission that the petitioner had two options: bring an appeal of the registrar's determination under s. 309 of the *LTA*, or comply with the registrar's requirements.

[38] In this petition, the petitioner has sought to remove the caveat under s. 289 and to have title transferred subject to the CPL pursuant to s. 216(2)(b). Both sections were cited in the rejection notice. The petitioner, in bringing this application, is doing precisely what is necessary to comply with the specific sections cited by the registrar in the rejection notice. I therefore reject the submission of the respondents that the Court lacks jurisdiction to order the relief sought by the petitioner.

[39] The Kassam respondents also argue that the relief sought by the petitioner should be denied because the petitioner engaged in equitable fraud and is not a bona fide purchaser for value. They submit that the petitioner is a straw buyer and that something else is going on that they need to investigate. They invoke s. 29 of the *LTA* and say that in the face of what appears to be equitable fraud, the Transfer of the petitioner should be defeated.

[40] Most of the suspicious circumstances referred to by the Kassam respondents in support of this submission are not particularly suspicious. Counsel pointed to the fact that the agreement of purchase and sale, like almost all agreements of purchase and sale (which are generally completed by realtors and not lawyers), contains typos. Counsel also made much of the fact that the agreement contains a provision that says the buyer will take title subject to non-financial charges. This is not an unusual provision in an agreement of purchase and sale. Counsel also pointed out that Mr. Roberts can't recall whether his father or his brother, both of whom are realtors, located the property. I do not find this to be particularly suspicious.

[41] In my view, the only unusual circumstance surrounding the sale of the Property is the fact that the Property appears to have been sold for less than fair market value. There are many reasons why a vendor might sell a property for less than fair market value, including being in desperate financial circumstances, which it appears on the evidence before me, Ms. Dhanani is. She is disabled, unable to work and, if the declaration of trust relied on by the Kassam respondents is valid, tens of millions of dollars worth of property to which she may lay claim is beneficially owned by her son, her brother-in-law, and her ex-husband, leaving her with nothing. It is hardly surprising that a person left in such disadvantageous position vis-a-vis their family members would seek to liquidate whatever assets were available to her to sell.

[42] In saying this, I am not commenting in any way on the fraudulent conveyance allegations that were made against Ms. Dhanani in other proceedings. It may be that the Property ought not to have been sold by her. If that is the case, the CPLs that remain on title to the Property will protect the rights of those claiming a beneficial interest in the Property to advance their claims.

[43] However, to the extent that the Kassam respondents argue that the low sale price of the Property supports a finding of equitable fraud against Mr. Roberts, I am not prepared to make such a finding on the evidence before me, particularly given the other non-fraudulent explanations for the low sale price.

[44] Counsel for the Kassam respondents has also submitted that this matter is not suitable for proceeding by a petition. They have not specifically asked that the petition be referred to the trial list. Their written submissions are premised on the basis that the Court must be satisfied on the petition that the matters are suitable for summary determination, applying *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) and other cases that deal with the suitability of a summary trial in an action.

[45] Counsel was directed by the court to *Cepuran v. Carlton*, 2022 BCCA 76, a five-member decision of the Court of Appeal that considered the issue of when it is appropriate to convert a petition to an action and refer it to the trial list. It has never been the case in British Columbia that a petitioner was required to satisfy a court that a petition was suitable for summary determination. Rather, when the petition raises triable issues, the judge has discretion to refer the matter to the trial list or to use hybrid procedures within the petition to assist in determining the issues pursuant to Rule 16-1(18) and Rule 22-1(4), of the *Supreme Court Civil Rules*.

[46] Counsel for Izaam and Minaz Kassam did not propose any hybrid procedures, they simply submitted that they did not have all the documents they want to see, they are suspicious that something untoward has happened, and they want the chance to prove equitable fraud, so they want the matter converted to an action.

[47] I have no cogent evidence before me to support the allegation that Mr. Roberts is not a bona fide third party purchaser for value. I am not satisfied that in this very straightforward case, where a bona fide purchaser for value has paid for a property and duly registered his Transfer in the Land Title Office, there is any basis to refer the matter to the trial list on the basis of the speculative suspicions of the Kassam respondents.

[48] Mr. Roberts has waited long enough to receive the property he paid for almost a year ago and he shall have the orders that he seeks in this petition.

[49] I will say a brief word about costs. The parties may wish to make further submissions. It is my preliminary view that, as the successful party, Mr. Roberts should have his costs of the petition. However, should the parties wish to address the Court with respect to costs, they may arrange a one-hour application before me through Supreme Court Scheduling.

[50] With the exception of costs, the relief sought in the petition is granted.

“Francis J.”