IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cooney v. Purely Canadian Log Homes Ltd.,* 2023 BCSC 210

Date: 20230210
Docket: S123865
Registry: Kelowna

Between:

Dave Cooney

Plaintiff

And

Purely Canadian Log Homes Ltd.

Defendant

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	C.B. Flannigan
Counsel for the Defendant:	J.D. Metherell
Place and Date of Trial/Hearing:	Kelowna, B.C. February 8, 2023
Place and Date of Result Given:	Kelowna, B.C. February 10, 2023
Place and Date of Judgment:	Kelowna, B.C. February 10, 2023

Introduction

[1] The defendant seeks an order for the cancelation of a certificate of pending litigation registered by the plaintiff against property owned by the defendant and for a further order that the proceeds of sale of any of the property be held in trust pending agreement of the parties or further court order.

Background

[2] The defendant is a holding company that purchased a 40-acre parcel of land that is the subject of this litigation in 2007, with the intention of developing it into a series of 40 strata lots. The plaintiff is a 32.5% shareholder of the defendant.

[3] The other shareholders of the defendant as of April 1, 2022, are:

a) 1246209 Alberta Ltd., as to 15 percent;

b) Mr. Colin Haworth, as to 30 percent;

c) Mr. Brent Thors, as to 15 percent; and

d) 543063 Alberta Ltd., as to 7.5 percent.

[4] The property is legally described as:

PID 002-661-225,
Strata Lot 34, District Lot 2912, Kamloops Division Yale District
Strata Plan K116

(the “Property”).

[5] The Property is located on Fowler Point on the west side of Seymour Arm on Shuswap Lake and is the largest parcel of land within Strata Plan K116, comprising 34 strata lots. The other 33 lots are small residential lots the shore of Shuswap Lake.

[6] After the defendant purchased the Property, a dispute arose between the owners of Strata Plan K116 (the “Strata Corporation”) and the defendant culminating

in the Strata Corporation commencing an action against the defendant in 2009, seeking easements over the Property for road access and a septic system. The Strata Corporation also filed a certificate of *lis pendens* against the Property (the "Strata CPL"). The Strata Corporation's action has not been resolved and, although not much has happened, continues to be before the court (the "Strata Corporation Action"). The Strata CPL remains on title.

[7] Meanwhile, the defendant's shareholders, including the plaintiff, made an informal agreement between them whereby the plaintiff undertook to take the necessary steps to obtain approval to subdivide the Property into 40 strata lots. The plaintiff agreed to pay all costs associated with obtaining subdivision development approval, constructing a road on the Property, and, according to the plaintiff but denied by the defendant, building a log home on that portion of the Property that would eventually become his personal subdivided lot ("Log Cabin").

[8] Between 2009 and 2010, the plaintiff built a road on the Property at a cost of between $40,000 - $50,000. Between 2011 and 2012, the plaintiff built a 2100 square foot log cabin on the Property at a cost of approximately $110,000.

[9] The plaintiff was unsuccessful in obtaining development approval for a 40-lot subdivision of the Property. However, in 2014, he was successful in obtaining preliminary approval for a six strata lot subdivision.

[10] When the defendant learned that the plaintiff was in the process of constructing the Log Cabin, the majority of the defendant's directors removed the plaintiff as a director and he no longer had access to the defendant's bank accounts.

[11] The remaining directors propose to resolve the Strata Corporation Action by selling the Property to the Strata Corporation, but no formal offer to purchase has been presented and it is unknown whether the Strata Corporation would purchase the Property at a price and on terms acceptable to the defendant, albeit it has expressed an interest.

[12] When the plaintiff became aware of the defendant's proposal to negotiate a sale of the Property to the Strata Corporation, he launched this action and registered a Certificate of Pending Litigation, under number CA7546655, against the Property (the "CPL").

[13] Negotiations with the Strata Corporation have ceased because of its declared disinterest in continued negotiations with the defendant while the CPL remains on the Property's title. The Strata Corporation says it does not wish to be embroiled in any dispute between the plaintiff and defendant.

This litigation

[14] The plaintiff commenced this action on June 6, 2019. The CPL was registered the following day. The notice of civil claim seeks a declaration that the defendant holds a portion of the Property in trust for the plaintiff and seeks an order that the defendant transfer and convey to the plaintiff the interest in the Property that is held in trust for him. He also seeks an injunction restraining the defendant from selling or otherwise dealing with the Property.

[15] The notice of civil claim reads in part:

> 7. The agreement made as between the Shareholders, partly in writing and partly orally, was to subdivide the Property into 40 further lots. It was agreed that the Plaintiff would personally pay the costs associated with building a road on the Property, work on all the aspects of obtaining development approvals and that he could build a log home on the parcel that would eventually become his personal subdivided lot.
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> 8. At the time the Property was acquired, it was agreed amongst the Defendant and Shareholders that the Plaintiff would receive a subdivided lot and could build a cabin thereon.
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> . . .
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> 14. The Plaintiff has been advised by one of the Shareholders and Directors that the Property was to be sold imminently without the knowledge or consent of the Plaintiff.
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> 15. The Plaintiff claims an interest in the Property on the principal of unjust enrichment and pursuant to an express, or in the alternative, an implied or constructive trust.

[16] Neither the notice of civil claim nor the CPL were ever served on the defendant. The notice of civil claim expired on June 6, 2020, and no application to renew it has ever been brought.

[17] In any event, as part of its due diligence in considering a potential sale of the Property to the Strata Corporation, the defendant discovered the plaintiff's claim and the registration of the CPL in October 2020, some four months after the notice of civil claim expired.

[18] On November 17, 2020, the defendant filed a response to the claim, pleading at paragraph 3:

> 3. In specific response to paragraph 7of the Notice of Civil Claim, the Defendant says that the agreement between the Plaintiff, the Defendant and the Shareholders was that in exchange for the Plaintiff receiving a larger percentage interest in the Property as a shareholder, he would subdivide the Property into 40 smaller lots, and provide services to each subdivided lot (the "Agreement").

[19] The defendant alleges that the plaintiff breached the agreement by failing to obtain approvals to subdivide the Property and provide services to each subdivided lot.

[20] Despite filing the notice of civil claim on June 6, 2019, the plaintiff has taken no steps to prosecute the litigation. No application has been brought to renew the action, there has been no discovery of documents, no examinations for discovery have been arranged and no trial date has been secured.

[21] On November 25, 2020, the defendant filed an application seeking an order removing the CPL pursuant to s. 252 of the *Land Title Act*, R.S.B.C. 1996 c. 250 [*LTA*].

[22] Discussions between the parties ensued with the plaintiff making overtures that he wished to make an offer to purchase the Property from the defendant. The defendant's application was accordingly held in abeyance pending receipt of an offer from the plaintiff.

[23] Despite a number of requests and reminders from the defendant's counsel, and despite assurances from the plaintiff's counsel that an offer was imminent, no offer was received.

[24] On October 25, 2022, the defendant renewed its application and filed the notice of application now before me.

[25] Approximately one month later, the plaintiff and Mr. Thors delivered an offer to purchase the Property containing conditions the defendant considers unacceptable.

Discussion

[26] Section 252 of the *LTA* permits the court to cancel a certificate of pending litigation where no step has been taken in the proceeding for one year. The purpose of a s. 252 application is to keep property from being tied up in dormant litigation (*Dhillon v. Dasta*, 2019 BCSC 729).

[27] The granting of the relief under s. 252 is discretionary. Specifically, s. 252(1) states the following:

> **252** (1)If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

[28] The term "step" means a formal step in the litigation either required or permitted by the *Supreme Court Civil Rules* that moves the action forward towards trial or resolution. Exchanges of correspondence are not "steps" in a proceeding for the purposes of s. 252 (*Dhillon* at para. 15).

[29] The term "one year" in s. 252(1) refers to the year immediately preceding service of the notice of application to cancel the certificate of pending litigation (*Dhillon* at para. 15).

[30] In this case, the relevant notice of the application was filed October 25, 2022. As earlier mentioned, the plaintiff has taken no steps in this proceeding since filing the notice of civil claim on June 6, 2019. Accordingly, the threshold requirements of s. 252 have been met. However, that is not the end of the matter.

[31] At paragraphs 17 and 18 of *Dhillon*, the Court stated:

> [17] The court retains a discretion not to cancel the CPL even if the statutory conditions have been met (*Lawn Genuis Manufacturing (Canada) Inc. (Drainmaster)* at paras. 12 and 22). However, once the statutory conditions are met, prejudice to the landowner is presumed and the respondent must show that the prejudice is either not serious or outweighed by other factors that suggest that cancellation of the CPL would be unjust (*Motz* at para. 12; *Lawn Genuis Manufacturing (Canada) Inc. (Drainmaster)* at para. 12; *West Harbour Electric Ltd.* at para. 30). Factors relevant to exercise of the court's discretion include: whether an acceptable explanation has been given for the delay, whether no prejudice would in fact be incurred, and whether the plaintiff's claim for an interest in land has a reasonable prospect of succeeding (*Motz* at para. 12).
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> [18] In this case, it was over a year since the plaintiff progressed on the matter. The defendant's earlier application which was withdrawn is not a step in the proceedings. Neither is correspondence between counsel. There has not been any explanation offered for the delay, except that correspondence was sent. This is insufficient in face of the defendant's inability to obtain financing because of the CPL in order to progress with business plans for the property. While the plaintiffs' claims in constructive and remedial trust have a reasonable prospect of succeeding, specific performance is not claimed.

[32] Given that the plaintiff has taken no steps in the litigation since June 6, 2019, prejudice to the defendant is presumed. The plaintiff must therefore show that the prejudice to the defendant is either not serious or is outweighed by other factors that suggest the cancellation of the CPL would be unjust.

[33] Factors relevant to the exercise of the court's discretion to cancel the CPL include, but are not limited to:

a) whether the plaintiff has given an acceptable explanation for the delay in prosecuting its claim;

b) whether despite the presumed prejudice, no actual prejudice will be incurred by the defendant if the CPL remains on title; and

c) whether the plaintiff's claim in an interest in the land has at least a reasonable prospect of succeeding.

[34] The plaintiff says he wished to make an offer to purchase the Property and placed the claim on the back burner pending his ability to do so. He says that he needed to first sell other properties in order to do so. That, he says, combined with the Covid-19 pandemic delayed his ability to present an offer.

[35] Meanwhile the defendant's shareholders, save the plaintiff and Mr. Thors, have injected cash into the defendant to pay taxes, strata fees, insurance and other expenses. Despite cash calls being made, the plaintiff has not contributed any funds to the defendant.

[36] The defendant says that but for the CPL it would be in a position to sell the Property to the Strata Corporation which would resolve the litigation commenced by the Strata Corporation in 2009. Further, all shareholders, save the plaintiff and Mr. Thors, continue to fund the costs associated with the Property. Accordingly, in addition to the presumed prejudice, the defendant asserts that actual prejudice has been shown.

[37] The plaintiff argues that he has an interest in the Property on the basis of unjust enrichment and pursuant to an express, implied or constructive trust. He also argues that he is making a claim for specific performance in the notice of civil claim. He says that paragraph 8 of the notice of civil claim is, in effect, a plea for specific performance and therefore an order removing the CPL would be tantamount to a final determination of the claim because he was to receive the lot where he built the Log Cabin and, without the CPL remaining on title, the defendant could sell the Property and he would be without a remedy. He argues that orders on interlocutory applications that would effectively remove a remedy for specific performance claims are to be avoided: (*Towne v. Brighouse*, (1898), 6 B.C.R. 225 (S.C.)*; Cloverlawn-Kobe Developments Ltd. v. Tsogas*, (1979), 104 D.L.R. (3d) 279 (B.C.S.C.); *Mercedes-Benz of Canada Limited v. SAS Properties Ltd.* (1975), 10 B.C.L.R. 19 (S.C.) appeal dismissed (1975), 10 B.C.L.R. 19 (C.A.)).

[38] While I agree in principle with that premise, I am not persuaded that it applies in this case. Firstly, I am not persuaded that the notice of civil claim makes even a vague plea for specific performance. Secondly, even if it did, it is not possible for the plaintiff to obtain specific performance when the Property has not been subdivided into lots. Thirdly, there is no dispute that the plaintiff took on the obligation of obtaining the necessary subdivision approvals and he has failed to do so. I do not accede to his suggestion that the Strata CPL prevented him from obtaining the necessary approvals for a subdivision. While it may have prevented the registration of a subdivision plan, it would not have prevented him from taking the necessary steps, short of registration, to have the proposed subdivision approved.

[39] I will next deal with the plaintiff's claim that the defendant holds the Property in trust for him, by way of an express trust, a resulting trust or constructive trust.

[40] In *Sohi v. Sohi*, 2022 BCSC 434, the Court helpfully introduced and distinguished between these three kinds of trusts:

> [21] The law recognizes three kinds of trust. Express trusts are intentionally created by settlors. Resulting trusts arise by operation of law in the absence of an intention to confer full rights of ownership on a recipient of property. Constructive trusts are created by the court to vindicate a plaintiff's right. Any of these trusts gives rise to equitable rights for the beneficiary that may overcome the usual presumption under s. 23 of the *Land Title Act*, R.S.B.C. 1996, c. 250, that a certificate of title is conclusive evidence of entitlement; *Suen v. Suen*, 2013 BCCA 313 at para. 34.

[41] Here, there is no evidence of any express trust or that a resulting trust was created and, in my view, based on the material before me, those claims have no chance of success.

[42] Respecting his claim that the defendant has been unjustly enriched and that a constructive trust should be imposed, it must be remembered, first of all, that the plaintiff holds a 32.5% interest in the defendant. At best, the plaintiff may have a valid claim that, by virtue of him paying the cost of constructing a road and Log Cabin on the Property, the defendant has been enriched and he correspondingly deprived.

[43] To have a successful unjust enrichment claim, however, the plaintiff must also show that there was no juristic reason for the defendant's enrichment. The evidence is clear that, by agreement, the plaintiff took on the responsibility of attending to the subdivision of the Property and that he has failed to do so. While the plaintiff's unjust enrichment claim is not bound to fail, and while I am not deciding the issue, the agreement he made with the defendant could certainly be a juristic reason for the defendant's enrichment. Even if the plaintiff is successful in proving an unjust enrichment claim, the courts typically only impose a constructive trust as a remedy where a monetary remedy would not be adequate: *Sohi* at paras. 21 and 24.

[44] In the circumstances, and again without deciding the issue, a monetary remedy would probably suffice if the plaintiff was successful.

Conclusion

[45] In this case, the plaintiff took no steps in the proceeding since the filing of the notice of civil claim on June 6, 2019, and the CPL on June 7, 2019, some three-and-a-half years before this application was filed. Indeed, the notice of civil claim has never been served on the defendant, no application to renew it has been made and although not necessary to decide the matter, it is likely a nullity.

[46] Regardless, the statutory prerequisites of s. 252 are met and prejudice to the defendant is therefore presumed.

[47] The onus is therefore on the plaintiff to show why it would be unjust to cancel the CPL.

[48] I am not persuaded that he has met that onus. He has not provided an acceptable explanation for the delay in prosecuting his claim. If the CPL remains on title, the defendant will be prejudiced by being unable to negotiate with the Strata Corporation for the sale of the Property. Further, the Property is not subdivided and the plaintiff has not pled specific performance. While he may succeed with an unjust enrichment claim and be given a monetary remedy, the plaintiff's claim for an interest in the Property has, in my view, little prospect of success.

[49] If he is successful and a monetary award is made, that award would be adequately protected if the Property is sold and the funds are held in trust pending agreement or court order.

Decision

[50] It is evident that the parties are stalemated. Considering the equities between the parties, weighing the merits, the factors to be considered and balancing their respective interests, I am exercising my discretion and conclude that the defendant's application must be allowed and the CPL cancelled.

[51] Should the defendant be successful in negotiating an acceptable offer for the sale of the Property, I order that the net sale proceeds of the sale be held in trust by Pushor Mitchell LLP, the defendant's solicitors, pending agreement of the parties or further order of this Court.

[52] As the defendant is the successful party, it will be entitled to its costs of the application at Scale B.

"G.P. Weatherill J."