IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wilson v. Batten,*
2024 BCSC 1309

Date: 20240722
Docket: S252668
Registry: New Westminster

Between:

Taunya Wilson and the Estate of Vance Harold Wilson

Plaintiffs

And

Ethel Melanie Batten and
James Redrick McCallum also known as Jim Redrick McCallum

Defendants

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiffs:	T.P. Harding
Counsel for the Defendants:	S.K. Patro
Place and Date of Hearing:	New Westminster, B.C. June 14 & July 5, 2024
	Vancouver, B.C. July 12, 2024
Place and Date of Judgment:	New Westminster, B.C. July 22, 2024

Introduction

[1] The defendants seek an order cancelling a certificate of pending litigation ("CPL") filed by the plaintiff, Taunya Wilson, against title to residential property at 4942 – 236 Street, Langley, BC (the "property").

[2] The plaintiff, Vance Wilson, is the brother of Melanie Batten and James McCallum. Taunya Wilson is Vance Wilson's wife. I will refer to the plaintiffs by their first names because of their shared surnames; I mean no disrespect in doing so.

[3] In April 2012, the defendants decided to purchase the property for Vance, who was not in a position to take title to the home at that time. The defendants advanced all funds necessary to purchase the property with the intention of one day transferring it to Vance.

[4] The defendants and Vance signed a letter of intent on April 5, 2012 outlining their intentions (the "Letter of Intent") which together with some oral terms formed an agreement (the "Agreement") under which Vance would acquire the right to obtain title to the property once he had paid all of the costs and expenses relating to it. The Letter of Intent provided that Vance could receive title to the property if he paid everything agreed to in the letter within ten years from the date of purchase of the property.

[5] The property was purchased on May 3, 2012, but the defendants contend Vance did not make all of the payments committed to under the Agreement including the Letter of Intent by May 3, 2022.

[6] Vance died on December 5, 2023. In December 2023, the defendants listed the property for sale and accepted an offer to purchase, scheduled to complete on February 3, 2024.

[7] The plaintiffs filed this notice of civil claim (the "NOCC") on February 26, 2024 outlining two claims for relief:

a) registration of a CPL against the property; and

b) vesting of title to the property in the sole name of the plaintiff (Taunya).

[8] The plaintiffs contend that the Letter of Intent resulted in an express trust for the defendant "Batten to hold them [the property] for the benefit of the Plaintiffs". The legal basis of the claim is that the defendants would be unjustly enriched if the defendants sell the property and that Ms. Batten owes them a fiduciary duty that will be breached if she transfers the property to the prospective purchasers.

[9] In the NOCC, the plaintiffs claimed a CPL against the property. The CPL was filed March 13, 2024 in Taunya's name, under registration number CB1209459.

[10] On February 3, 2024 the defendants accepted an offer to sell the property within original completion date of June 3, 2024.

[11] As a result of the litigation, the defendants have not been in a position to deliver clear title to the property to the prospective purchasers. After a number of adjournments of this application, the defendants obtained an extension setting the new completion date at August 29, 2024, with possession set for August 30, 2024.

[12] In addition to the cancellation of the CPL, the defendants seek ancillary relief to facilitate completion of the sale of the property.

The Evidence

[13] Ms. Batten provided two affidavits in support of the application to cancel the CPL; the first was made May 10, 2024, and the second made May 29, 2024. Taunya filed an affidavit sworn May 23, 2024.

[14] Ms. Batten said that the Agreement was made partly in writing and partly oral. The terms of the Agreement included the following:

a) The defendants would purchase a property in their own names and would pay a deposit, down payment, and all funds required to complete the purchase. The defendants would obtain a mortgage, pay all conveyancing

costs, and pay all property transfer tax costs associated with the purchase of the property;

b) Vance would be entitled to live and use the property as his principal residence so long as he continued to pay the defendants rent that would be equal to the total of their 12 monthly mortgage payments, property taxes, and insurance costs;

c) As long as Vance resided in the Property, he would pay rent and all utility costs associated with the property, obey the law in using the property, and maintain the property and not let it deteriorate;

d) Vance would have the opportunity to own the property as set out in the Letter of Intent:

> Vance agrees to make all mortgage payments, property taxes, house insurance, all utilities and interest on the money that James Redrick McCallum and Ethel Melanie Batten have had to borrow for the down payment of the purchase price of the home.
>
> In the future, it is intended that the title will be turned over to Vance after he has repaid James Redrick McCallum and Ethel Melanie Batten all of the monies that they put down on the house, including legal fees, disbursements, property transfer tax, taxes and interest owing on the mortgage. This will not happen until Vance is able to qualify for a mortgage on his own" If he "… has repaid James Redrick McCallum and Ethel Melanie Batten all of the monies they put down on the house, including legal fees, disbursements, property to transfer tax, taxes and interest on the mortgage. This will not happen until Vance Harold Wilson is able to qualify for a mortgage on his own".

e) During the ten-year term before expiry of the option, the defendants would not sell the property, would not lease or rent the property to others or borrow against the equity of the property for purposes unrelated to maintaining their ownership of the property. If Vance did not exercise the option before ten years, his right to ownership of the property would come to an end and the defendants would be free to sell the property and retain the proceeds of sale.

[15] The defendants purchased the property for $840,823 which included the $825,000 purchase price and other costs associated with the purchase. The defendants obtained the purchase price from a number of sources including $9,500 in borrowed funds, $50,000 from their resources for the down payment, a credit card advance of $10,000, $20,953 from Ms. Batten's mutual fund investment, $10,825 from Ms. Batten's tax-free savings account, $104,216 from Ms. Batten's savings, and $633,502.88 from an *inter alia* mortgage granted to V.W.R. Capital Corp. (the "V.W.R. Mortgage").

[16] The V.W.R. Mortgage was granted for a one-year term with interest at 9.25% securing $650,000. This mortgage required interest-only payments of $5,010.42 per month commencing June 2012.

[17] The defendants paid $16,497 in fees and costs for obtaining the V.W.R. mortgage.

[18] The defendants entered a residential tenancy agreement with the plaintiffs, for the plaintiffs to occupy the main house on the property commencing May 1, 2012 at $3,700 per month. They also entered a tenancy agreement with Jason Craig and Emma Hoskins for the secondary suite at the property also commencing May 1, 2012 with rent of $1,500 per month. Vance and/or Taunya collected the rents from these properties and delivered them to the defendants. These rents were applied to the payment of Vance's financial obligations under the Letter of Intent.

[19] In May 2013, the defendants obtained a new mortgage from First West Credit Union and used those funds to discharge the V.W.R. mortgage. This mortgage was for a principal debt of $950,000 with interest at prime +5% and secured a current and running account. The principal amount advanced under the mortgage was $655,085 and no additional funds were drawn on the mortgage notwithstanding the principal debt set out in the document.

[20] On April 21, 2016, the defendants obtained a new mortgage over the property permitted to $700,000 on a current or running account. CIBC advanced $628,969

under the new mortgage used to repay the principal owing on the First West Credit Union mortgage. The defendants did not draw any other funds under the current and running account. Each time the defendants re-mortgaged the property, they obtained better interest rates than the previous lender charged.

[21] The defendants also paid other expenses for maintenance of the home between 2012 and 2022.

Discussion

Legal Principles

[22] The application is brought pursuant to the provisions of ss. 256 and 257 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*]. The relevant sections of the *LTA* are:

> 256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
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> (a) particulars of the registration of the certificate of pending litigation,
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> (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
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> (c) the grounds for those statements,
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> apply for an order that the registration of the certificate be cancelled.
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> …
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> 257 (1) On the hearing of the application referred to in section 256 (1), the court
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> (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
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> (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
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> (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
>
> (b) may refuse to order the cancellation of the registration, and in that case may order the party
>
> (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner

> as a result of the registration of the certificate of pending litigation, and
>
> (ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
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> (2) The form of the undertaking must be settled by the registrar of the court.
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> (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

[23] The level of hardship and inconvenience that will warrant cancellation of a CPL was considered in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 [*Youyi*]:

> [28] As a preliminary matter the applicant must show that it is experiencing or likely to experience "hardship and inconvenience" as a result of the registration of the CPL. It appears that the degree of hardship required is the subject of disagreement in the Supreme Court of British Columbia. While some judges have proceeded on the basis that the hardship need not be "significant" (see, e.g., *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.* 2007 BCSC 1379, and *0966349 B.C. Ltd. v. Shell Canada Limited*, Reasons dated February 28, 2014, New Westminster Docket S151234), others have required "severe suffering" (see, e.g., the lower court decision in *Liquor Barn Income Fund v. Mather* 2009 BCSC 1092, at para. 7.) *The Shorter Oxford Dictionary* (6th ed., 2007) defines "hardship" to mean "the quality of being hard to bear" or "severe suffering or privation"; "significant" to mean "important, notable; consequential"; and "insignificant" to mean "of no importance; trivial, trifling" or "meaningless". To the extent that these or other decisions of the trial court suggest that "hardship" in s. 256(1) may be met by proof of hardship that is "insignificant" or "not significant", I would disagree. I doubt that the Legislature intended the threshold under s. 256 to be surmounted by proof of hardship that is only "trifling". On the other hand, I agree that a court should not be "exacting" in its analysis of hardship and inconvenience.

[24] The measure of hardship and inconvenience should not be overly exacting. For example, the registration of a CPL that interferes with an owner's ability to sell property or complete a sale of property can be evidence of hardship and inconvenience. In *Kaur v. Chandler*, 2018 BCSC 1283, Justice Fitzpatrick discussed examples informing the court on this question:

> [44] It is not enough to show "insignificant" or "trifling" hardship or inconvenience; on the other hand, the court is not to be "exacting" in its analysis: *Youyi Group* at para. 28.
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> [45] Examples of hardship and inconvenience will vary from case to case and require an analysis of the particular circumstances before the Court. Examples of hardship and inconvenience caused by CPLs can generally include: impeding the ability to close a sale (*Marrello* and *Enigma*); impeding a sale process where the CPL is dissuading persons from making an offer (*Watson Island Development Corp. v. Prince Rupert (City)*, 2015 BCSC 1474 at paras. 37-41); and impeding the ability to obtain financing for the continued development of the lands: *Syed v. Randhawa*, [1993] B.C.W.L.D. 1899 at paras. 15-19 and 23 (S.C.) (WL).

[25] Once hardship has been established the court must exercise its discretion as to whether the CPL should be cancelled. In *Bilin v. Sidhu*, 2017 BCCA 429, the Court summarized the test to merit cancellation of a CPL:

> [41] This Court discussed the proper approach to applications made under s. 256 in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388. At para. 28 of that case, Justice Newbury held that "[a]s a preliminary matter the applicant must show that it is experiencing or likely to experience 'hardship and inconvenience' as a result of the registration of the CPL. Once hardship and inconvenience are shown, cancellation does not automatically follow; s. 257 of the *Land Title Act* provides that the application remains a matter of some discretion: *Youyi Group Holdings* at paras. 29, 39; see also *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at para. 26.
>
> [42] Justice Newbury also clarified that, where an application is brought under s. 256, and the action underlying the challenged CPL involves a claim for specific performance, the applicant must satisfy the court it is plain and obvious the party seeking specific performance would not succeed on that claim at trial. In so holding, she drew on a long line of cases recognizing that cancelling a CPL absent this assessment would effectively determine the plaintiff's cause of action, and that "the right to sue for specific performance should not be denied on an interlocutory application": see *Mercedez Benz of Canada Ltd. v. SAS Properties Ltd.* (1974), 10 B.C.L.R. 19 at 20 (S.C.), aff'd (1975), 10 B.C.L.R. 19 (C.A.); *Towne v. Brighouse* (1898) 6 B.C.R. 255 (S.C.).

[26] It is important to keep in mind that the plaintiffs' claim in this case is not for specific performance but made on the basis of unjust enrichment, breach of fiduciary duty and an express trust.

[27] Once hardship is proven, I must consider whether damages would provide adequate relief and whether security should be posted.

The Defendants' Position

[28] The defendants' goal in purchasing the property was to enable Vance to achieve homeownership at a time when he was not financially able to acquire land. The plan was that Vance would occupy the property (as a tenant) and pay rent equal to the monthly mortgage payments. He was also responsible to pay property taxes, house insurance, utilities and interest on all of the money the defendants had used for the down payment on the purchase of the property. In total, they paid $840,823 to complete the purchase.

[29] This proceeding was commenced February 28, 2024 but the CPL was not filed until March 13, 2024. The NOCC and CPL were served on the defendants on March 18, 2024.

[30] The defendants contend they will suffer hardship if the CPL is not discharged based in part on the outstanding contract of purchase and sale they made in February 2024 to sell the property.

[31] The defendants contend they will be prevented from delivering clear title to the property to the prospective purchasers. If this occurs they will be delayed in receipt of funds which they will rely on to support themselves in their retirement. Moreover, the defendants face the prospect of a specific performance claim and claim for damages from the prospective purchasers.

[32] The prospective purchasers have paid a $299,000 deposit which will be reclaimed by the purchasers if the sale falls through.

[33] The defendants argue they obtained $650,000 in mortgage financing requiring payment of interest at 9.25% over a term of one year with interest-only payments of $5,010.42 each month. They also paid $14,000 for lender fees, broker fees and legal fees.

[34] The Letter of Intent and the oral terms of the Agreement contained reference to the payments Vance was required to make. It also included the following:

> In the future, it is intended that the title will be turned over to Vance Harold Wilson after he has repaid James Redrick McCallum and Ethel Melanie Batten all the monies they put down on the house, including legal fees, disbursements, property transfer tax, taxes and interest on the mortgage. This will not happen until Vance Harold Wilson is able to qualify for a mortgage on his own.
>
> In the event that Vance Harold Wilson does not honour his commitment to pay everything we have agreed to in this Letter of Intent within ten (10) years from the date of Purchase of the said property, this agreement shall be null and void and the property will then be sold in favour of James Redrick McCallum and Ethel Melanie Batten.
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> [Emphasis added.]

[35] The defendants argue that Vance made payments from May 2012 until his death in December 2023 but did not reimburse the defendants for their down payment or conveyance costs as set out in the Letter of Intent. Vance did not obtain a mortgage in his own name to pay out the secured mortgage against the property that had been obtained by the defendants.

[36] There has been no complete accounting of Vance's payments to the defendants from May 2012 until 2018 but from 2018 to 2023, the defendants' records confirm that Vance paid $158,100 and they provided $61,400 of their own money to make mortgage payments.

[37] The defendants contend that by May 3, 2022, Vance had failed to obtain mortgage financing to pay out the existing first mortgage and to become entitled to a transfer of title in the property.

[38] The defendants say that all of the funds advanced by the three lenders under their mortgages were used to pay out the prior mortgages. Notwithstanding changes in the maximum amount of the second and third mortgages, the defendants did not receive any funds from these mortgages other than funds used to purchase the property or maintain the indebtedness.

[39] The defendants show that payments under the three mortgages resulted in a reduction in the total indebtedness to $513,000 as at 2024, which represents a

reduction in the mortgage balance from $633,502 (in 2012) by approximately $120,500.

[40] Taunya alleges that Vance paid $505,000 from 2012 until his death. However, the defendants contend that Vance did not pay all of the required amounts as set out in the Letter of Intent. I do need to reconcile this possible inconsistency in the evidence; even if Taunya's assertion that $505,000 was paid is correct, this amount would not be sufficient to pay all of the mortgage payments and expenses to be reimbursed. In my view, there is an unresolved issue in the evidence whether Vance paid all of the commitments required of him and his claim to a transfer of the property would have been extinguished.

[41] Moreover, the defendants claim that Vance's intestate death frustrated any possibility that he could secure a mortgage for the outstanding mortgage balance that would have entitled him to receive title to the property.

[42] Thus, if Vance did not fail to meet his commitments within the ten years followed by his death dictate that it is not plain and obvious his claim to an interest in the property by way of an unjust enrichment finding will fail. As noted herein, Vance's mortgage payments to the defendants decreased the amount owing on the mortgage and created equity in the land in the defendant's favour. It is not plain or obvious that Vance would be denied an interest to the extent of his contributions to equity.

[43] Interestingly, the NOCC names Taunya as "the plaintiff" and she makes the only claim in the NOCC for title to be vested in her name. This is problematic to the plaintiffs' claims because Taunya was not a party to the Agreement and did not sign the Letter of Intent.

[44] Both parties recognized she had failed to comply with s. 151 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 requiring leave of the court to commence this proceeding in Vance's name. However, the defendants did not oppose the application due to this defect. I was asked to ignore the question of

whether commencing the action in the name of Vance, prior to the granting of probate, might constitute a nullity or an irregularity.

[45] Vance was, at all times, aware of the ten-year deadline for him to meet his obligations under the Letter of Intent and the Agreement. When confronted by the defendants' intentions to list the property for sale, he did not object to their right to do so nor did he make any effort to prevent the listing or sale of the property.

[46] The defendants began to pursue the sale of the property in September 2023.

[47] The defendants contend that Taunya cannot succeed in a specific performance action in part because there is no assertion that the property is unique and that damages would not be an adequate remedy. They contend that Taunya is not a party to the Agreement and cannot advance a claim for specific performance. In fairness, counsel for the plaintiffs advised they are not making a specific performance claim. The only remaining claim as set out in the NOCC is a claim for unjust enrichment and breach of trust.

[48] On this point, I note that the plaintiffs do not assert in the NOCC that monetary damages would be inadequate. Although this is not a specific performance case, the plaintiffs' claim for a remedy in unjust enrichment is not clearly laid out in the pleadings. Nevertheless, it is not necessary that the plaintiffs specifically plead that damages will be an insufficient or inappropriate remedy: see *Treasure Bay HK Limited v. 1115830 B.C. Ltd*., 2024 BCSC 294 at paras. 106–116.

The Plaintiffs' Position

[49] The plaintiffs overall contend that Ms. Batten's affidavit evidence is either inaccurate or unreliable in proving that Vance was not entitled to a transfer of the property by the end of April 2022. They cite gaps in documentary evidence presented by the defendants in circumstances where they bear the burden to establish a claim to the cancellation of the CPL.

[50] The plaintiffs also contend that Vance paid the entire amounts due under the Agreement before April 5, 2022 and title should accordingly be transferred. In the alternative, they contend the Agreement was modified December 5, 2022 such that each of the three parties signing the Letter of Intent would receive one third of the net sale proceeds.

[51] Lastly, the plaintiffs contend that by selling the property the defendants breached the Agreement and they have been unjustly enriched. They say the Letter of Intent resulted in an express trust, as mentioned above. In the result, the defendants have breached a fiduciary duty to the plaintiffs by transferring (or more correctly, threatening to transfer) the property. They plead that title to the property should be vested in Taunya's name (the defined plaintiff) alone.

[52] The plaintiffs' first argument turns on Ms. Batten's evidence that the Agreement was partly oral and partly written. The plaintiffs say there is no evidence concerning the oral terms of the Agreement, notwithstanding the details set out in the Letter of Intent.

[53] As mentioned above, the plaintiffs contend that Vance paid $505,000 between May 2012 and his death in December 2023.

[54] The plaintiffs say that the burden of proof on this application rests entirely with the defendants as applicants, to prove the accounting of all of the defendants' expenses and Vance's contributions.

[55] Taunya argues that because she was a party to the residential tenancy agreement on the property, she became a beneficiary of Vance's entitlements under the Letter of Intent.

[56] Since Vance's death, Taunya has made all of the rental payments tied to her occupancy of the property.

[57] The plaintiffs relied on various authorities suggesting that this CPL in this case ought not to be cancelled and addressing questions about security:

a) *Jacobs v. Yehia*, 2015 BCSC 267, rev'd on other grounds 2016 BCCA 38: if hardship and inconvenience are proved, a CPL may be cancelled. Notwithstanding a finding of hardship, the court retains discretion to dismiss an application for cancellation in any event;

b) *Wosnack v. Ficych*, 2022 BCCA 139: the amount of security can be tied to the strength of the claim at issue. In this case, after assessing the strength of the claim, 50% of the sale proceeds that would be received after cancellation of the CPL were held in trust;

c) *Youyi*: the court should be cautious when cancellation of a CPL deprives the plaintiff of a possible remedy at the pre-trial stage. The availability of specific performance may raise a genuine issue for trial. In specific performance cases, the court must find that it is plain and obvious that a specific performance case would not succeed at trial;

d) *Wood v. Zaepernick*, 2023 BCSC 1046: in that case, petitioners who were aware of a CPL before signing a contract of purchase and sale were unsuccessful in achieving cancellation of that CPL. The petitioners were found to have suffered hardship as a result of their own actions and were guilty of irresponsibility in signing the contract of purchase and sale without legal advice and relying on a real estate agent's comments; and

e) *Grewal v. Grewal*, 2022 BCSC 784: in a case barely begun and where complex triable issues needed to be decided, the Court refused to cancel a CPL; the prejudice to the losing party was outweighed against the prejudice to the defendants who would experience an inability to complete a sale of the property because of the filing of the CPL.

Analysis

[58] In April 2012, the defendants offered to purchase the property in their own names, using their personal financial resources and mortgage financing to complete the acquisition of the property. They did this without an intention of receiving any

profit and to enable their brother to acquire the property within ten years, provided that he had made all of the payments that would make the defendants whole.

[59] It was always contemplated that Vance would pay for all of the costs, charges or expenses incurred by the defendants to acquire the property and to hold it until Vance was able to secure financing and extinguish his obligations to the defendants.

[60] Taunya was never a party to the Agreement. She does not plead that she was, and makes no assertion that the defendants are or might be unjustly enriched at her expense.

[61] The plaintiffs informed the Court they do not seek a remedy in specific performance of the Agreement. Notwithstanding a claim in the NOCC that the defendants were in breach of the Agreement, the plaintiff did not argue this application on this basis either. Rather, the plaintiffs opposed the application on the basis that Vance would be deprived of his interest in the property if title was not transferred to him (or his estate) and that he had fully satisfied all of his obligations that were prerequisites to obtaining title from the defendants.

[62] The application to cancel the CPL is made under ss. 256 and 257 of the *LTA* and is limited to questions of hardship. The defendants did not bring an application under s. 215 of the *LTA* that the claimant does not possess an interest in the land.

[63] I accept that the defendants informed Vance in the spring of 2022 that he had failed to make all of the payments set out in the Letter of Intent and that his right to acquire title to the property had come to an end. They explained to him that they would be attempting to sell the property in 12 to 14 months.

[64] In recognition of Vance's failure to make all of the payments required and to obtain a mortgage, the defendants discussed the possibility of sharing some of the sale proceeds with him. No commitments were made at that time and Vance did not assert he had performed all of his obligations under the Letter of Intent and retained a continuing right to acquire title to the property.

[65] In the result, in September 2023 the defendants began planning to sell the property. They then listed it for sale after Vance had died. They entered into the contract of purchase and sale with a completion date that has now been extended to August 29, 2024.

[66] I am satisfied that the defendants bound themselves to sell the property and will be prevented from delivering clear title under that contract unless the CPL is removed from title. In addition to being deprived of the sale proceeds, the defendants are exposed to a claim for specific performance and/or damages if the sale cannot complete. I am satisfied that this prospect is, in itself, evidence of hardship and inconvenience that will befall the defendants if the CPL remains on title.

[67] Being forced to abandon the existing sale contract, the defendants will be at risk of volatility in the real estate market; this may or may not materialize but represents a risk to them.

[68] In the result, I am satisfied that I must now consider whether to cancel the CPL and require the defendants to post security or decline to cancel the CPL and order the plaintiffs to give security.

[69] As permitted under s. 257(3) of the *LTA*, I may take into consideration "the probability of the party's success in the action in respect of which the certificate of pending litigation was registered".

[70] Of particular concern with regard to the merits of the claim and Taunya's filing of the CPL, is that she was not a party to the Agreement or to the Letter of Intent. Counsel for Taunya suggests that because she was a lessee of the property under the residential tenancy agreement, she somehow acquired an interest in the property or status as a beneficiary under a trust relationship with the defendants.

[71] While I recognize that this proceeding was commenced quickly in order to protect the estate of Vance in the property, the facts as pleaded do not support Taunya's claim. In the NOCC, the plaintiffs contend that Vance and the defendants

entered the Agreement. She contends that Vance paid all of the money required of him under the Letter of Intent. She also framed the legal basis of the claim based on the defendants' breach of the Agreement.

[72] In my view, the outcome of this dispute will largely turn on an accounting and involve little in the way of conflicting evidence. It does not appear to be in dispute that if Vance had paid all of the money to fully reimburse the defendants, title would not be transferred to Vance unless he had been able to obtain mortgage financing to discharge the CIBC mortgage.

[73] The plaintiffs contend that if the defendants complete on the proposed purchase and sale of the property entered into before the commencement of this proceeding and before the filing of the CPL, the defendants will be unjustly enriched.

[74] Although the NOCC alleges that Vance paid $505,000 and completely repaid the whole of the sum owing under the Agreement, this allegation is unsupportable even on the facts alleged by the plaintiffs. Based on Taunya's assertion that Vance had paid $505,000 since the defendants purchased the property and that he was responsible for mortgage payments and other expenses, it is unlikely that he had actually met his commitments during the ten years after purchase. In the first year, the interest payments alone were in the order of $60,125. Between 2013 and 2022, the interest rates set out in the mortgages were 5% above the lender's prime rate from May 16, 2013 until April 21, 2016 ($32,754per year) and 6% above the bank's prime rate ($37,738 per year) from April 21, 2016 to the present.

[75] There was no evidence concerning that actual bank rate after 2013 but if prime rates had been zero, the interest on the mortgages would have been in the order of $360,000 over ten years. In addition, the principal owing on the mortgage was reduced by approximately $143,000 as at December 2023. Thus, the accumulated interest and principal reduction would have been in the order of $503,000; this amount would not include the actual costs incurred by the defendants and the existing CIBC debt associated with the purchase of the property.

[76] I appreciate this litigation is in its early stages, but in my view, the issues in this case to present will likely not be complex or difficult. I am satisfied that the plaintiffs will not have a strong case in suggesting that the defendants will be unjustly enriched if the plaintiffs are deprived of the right to obtain an interest to the property.

[77] The plaintiffs relied on *Grewal* as an example of a case where the prejudice of losing an interest in property outweighed the prejudice associated with the applicant's loss of the sale of the land. Justice Milman concluded that there were complex triable issues in the action, the plaintiff was willing to give an undertaking as to damages and the prejudice to the defendants could be cured by a damages award.

[78] There are other distinctions in the factual matrix between *Grewal* and this case, namely that the defendants in this case listed and sold the property nearly six weeks before the CPL was filed.

[79] Although Taunya alleged that she had been told the property would be put up for sale in March or April 2024, she was unaware of the listing until a for-sale sign was observed on the property on January 30, 2024. Moreover, the defendants served her with the Two Month Notice to End Tenancy form on February 21, 2024.

[80] It is not disputed that the defendants spoke to Vance in the middle of May 2022 and informed him they were planning to sell the property in about 14 months' time. Taunya was present at this discussion and expressed concerns about relocating their business, which they ran on the property. She said that they discussed selling the property at this meeting and discussed how much money they would receive from the sale. It was apparently agreed that Vance and Taunya might still be able to acquire the property although the defendants might sell the property between May 2023 and November 2023.

[81] Nothing in the evidence indicated that before his death Vance had attempted to or obtained financing sufficient to pay out the CIBC mortgage. Nor does the

evidence suggest that Taunya would be in a position to source the additional funds necessary to pay out the mortgage.

[82] The defendants contend that the plaintiffs' claim would also be undermined if they were seeking specific performance on the basis that there was no evidence that it was unique or specially suited to the plaintiffs: see *Aulakh v. Nahal*, 2016 BCSC 1362 at para. 23.

[83] The plaintiffs also relied on comments in *Youyi* suggesting that where specific performance claims are made, cancellation of a CPL extinguishes this remedy and leaves the owner free to sell the property. The Court of Appeal indicates that the "plain and obvious" standard reflects the caution that should be exercised in depriving a plaintiff of a possible remedy at an early stage in the proceeding. Justice Newbury said:

> [39] In my respectful opinion, these cases confirm the principle that where specific performance is being sought and the court is considering an application to order the cancellation of a CPL under s. 256 of the *Land Title Act*, it is for the applicant (here, the Vendor) to satisfy the court that it is plain and obvious the person seeking specific performance would not succeed on that claim at trial. If there is a triable issue as to whether damages would provide an adequate (or appropriate) remedy, the application should be dismissed and the matter proceed to trial. The chambers judge does not, then, decide on the merits whether damages will be adequate – only whether specific performance can be eliminated as having no reasonable chance of success. The fact that *Semelhago* and *Southcott Estates Inc. v. Toronto Catholic District School Board* 2012 SCC 51 have discontinued the presumption of uniqueness of land does not in my opinion change this principle; it means only that courts are likely to find that applications under ss. 256-7 are likely to succeed more often than they did pre-*Semelhago*. I will return to *Semelhago* and *Southcott* below.
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> [Emphasis in original.]

[84] In this case, the plaintiffs do not seek a remedy in specific performance but rather claim "breach of the agreement" and" unjust enrichment". The plaintiffs did not address the question concerning how the unjust enrichment allegation supports the claim to an interest in the land. On the face of the NOCC, there are no facts pled to support the unjust enrichment claim other than the broad statement and assertion concerning the alleged enrichment and trust. Presumably, she relies on the

Agreement as the basis for the unjust enrichment claim but did not plead this connection.

[85] To establish a claim in unjust enrichment the claimant must be able to prove: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding deprivation; and (3) the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason: *Kerr v. Baranow*, 2011 SCC 10 at paras. 36–41; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para. 149; *Moore v. Sweet*, 2018 SCC 52 at para. 37.

[86] In *Jacobs*, Justice Dickson, as she then was, discussed the principles surrounding unjust enrichment and cancellation of CPLs. She said:

> [25] Where funds are obtained through wrongful means and can be traced to the acquisition or improvement of land, the court may impose a remedial constructive trust sufficient to sustain a CPL. In addition, the claim for tracing may, in and of itself, justify an equitable charge on land for purposes of supporting a CPL: *Meola*, para. 9; *Drucker, Inc. v. Hong*, 2011 BCSC 905, paras. 19, 22 and 36; *Samji (Trustee) v. Chatur*, 2013 BCSC 1915, paras. 60-64; *Lament v. Constantini*, [1985] B.C.J. No. 2988.
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> [26] Constructive trusts are equitable remedies available for acts such as fraud and unjust enrichment. In *Ibbotson v. Fung*, 2013 BCCA 171, Garson J.A. commented that the distinction between a value survived monetary remedy and a constructive trust largely dissipates in some unjust enrichment claims, except to the extent that a constructive trust encompasses additional property rights over an asset until it is sold. Remedies for unjust enrichment retain a large measure of remedial flexibility to deal with differing circumstances according to principles rooted in fairness and good conscience. However, a plaintiff must establish that a monetary award would be an insufficient remedy before a constructive trust will be imposed. One of the factors for consideration is whether a monetary award will be paid: *Drucker*, para. 30; *Ibbotson*, para. 28; *Kerr v. Baranow*, 2011 SCC 10, paras. 53 and 72; *Wilson v. Fotsch*, 2010 BCCA 226, at para. 47.
>
> [27] Where an interest in land is claimed based on a constructive trust, the question on an application to cancel a CPL is not whether the plaintiff will be successful in proving entitlement to a constructive trust. It is enough to establish that a constructive trust is a possible remedy to sustain the CPL: *Samji,* para. 61.

[87] I do not need to decide the impact of a specific performance claim on this application, as the plaintiffs do not advance a claim for specific performance of the

Agreement. I am instead concerned about the strength of the unjust enrichment claim and Taunya's claim that she is entitled to title to the property.

[88] One possible interpretation of the Agreement could be that if Vance has made all of the required payments within ten years, he would remain entitled to acquire title to the property once he has been able to qualify for a mortgage on his own after the 10 years to meet his commitments expired. It seems that a possible interpretation of the Letter of Intent may lead to a conclusion that his right to receive title may have continued on or after the ten years provided he had paid everything owed and could at some time in the future obtain mortgage financing. It must be remembered that having paid the mortgage payments for ten years, the defendants have received the benefit of a substantially reduced mortgage debt owing on the property. That reduction in debt came about as a result of Vance's payments and might represent an enrichment of the defendants.

[89] This part of my concern regarding Vance's claim stems from the terms of the third paragraph of the Letter of Intent which sets out Vance's agreement to make the payments. Termination of the Agreement is set out in the seventh paragraph of the Letter of Intent which triggers the end of Vance's right to obtain title to the property if he had not honoured his commitment to make payments. If Vance has made all of those payments but has been unable to obtain mortgage financing to take out the outstanding mortgage debt, he may have honoured his commitment to make payments but has additional time to obtain mortgage financing.

[90] Although there is a strong case that Vance did not pay the full amounts required by the third paragraph of the Letter of Intent, it is not plain and obvious his claim will fail without a fulsome accounting from both sides that this conclusion is correct.

[91] Thus, if Vance was entitled to maintain the right to acquire the property after the ten years expired, that right may very well have passed to his estate. No argument has been advanced that Vance's estate could not claim the right to the interest in the property notwithstanding his death. It is apparent on the affidavit

evidence provided, that any unjust enrichment of the defendants would have been brought about by Vance's contractual obligations to make the payments set out in the Agreement. Otherwise, the basis of the unjust enrichment set out in the NOCC is unclear.

[92] I am satisfied that it is plain and obvious that Taunya's claim is likely to fail. However, while I am satisfied the defendants have a strong case against Vance's claim, I am not satisfied that Vance's claim to an interest in property is plainly and obviously destined to fail.

[93] Subject to the following concern, I would not order cancellation of the CPL.

[94] Neither party addressed the question of the fact that the CPL was filed only in Taunya's name and not Vance's estate. On the basis of this factor, my view regarding the strength of the plaintiffs' claim might be different. This point was not argued and I will not decide the point without further submissions if the parties choose.

[95] This point could be significant because under s. 257(1)(b) of the *LTA*, I cannot order the Estate of Vance Harold Wilson to post security or give an undertaking to abide by any order as to damages; this order can be made only against Taunya.

[96] Subject to any further submissions, the defendants' application will be dismissed and I will order Taunya to give an undertaking to abide by any order the court may make as to damages properly payable to the owner as a result of the registration of the CPL, and to give security in the amount of $25,000. The form of the undertaking must be settled by the registrar of the court.

Conclusion

[97] The application to cancel the CPL with registration number CB1209459 is dismissed.

[98] within ten days Taunya must give an undertaking to abide by any order the court may make as to damages properly payable to the owner as a result of the

registration of the certificate of pending litigation, and give security in the amount of $25,000. The form of the undertaking must be settled by the registrar of the court.

[99] In setting this amount of security to be given, I have taken into account the probability of Vance's success in the action is weak and there was little evidence concerning the circumstances of the plaintiffs. The evidence concerning Taunya's current use of the property is sparse but leads me to conclude that a more substantial level of security would likely be unattainable by her.

[100] The parties did not address the question of costs. If either party wishes to make submissions on costs, the first party will provide written submissions within 14 days and the responding party will provide written submissions within seven days after.

"Armstrong J."