

Court of King's Bench of Alberta

Citation: Cubbon Building Centre Ltd v Vrbanek, 2024 ABKB 570

Date: 20240926
Docket: 2303 10483
Registry: Edmonton

Between:

Cubbon Building Centre Ltd and Miramar Holdings Ltd

Plaintiffs

- and -

Darren Vrbanek also known as Drago Vrbanek, Darren Vrbanek also known as Drago Vrbanek carrying on business as Darren's Homes and Nancy Vrbanek

Defendants

**Memorandum of Decision
of the
Applications Judge B.W. Summers**

Introduction

[1] In a Special Chambers application the Plaintiffs sought summary judgment to impeach a transaction between a husband and his wife as a fraudulent conveyance. The husband is a judgment debtor of the Plaintiffs.

Facts

[2] The Plaintiff Cubbon Building Centre Ltd (“Cubbon”) obtained a judgment against Darren Vrbanek in Court of King’s Bench of Alberta action number 1503 06257. The judgment granted on February 14, 2020 was in the amount of \$120,946.12. Miramar Holdings Ltd (“Miramar”) is the assignee of the judgment from Cubbon.

[3] The Defendants Darren Vrbanek (“Darren”) and Nancy Vrbanek (“Nancy”) are husband and wife.

[4] In November of 2008 Darren gifted to Nancy a commercial property (“Parsons Road Property”). Nancy sold the Parsons Road Property in April of 2009. The proceeds of sale were deposited into an account solely in Nancy’s name (“Parsons Road Proceeds”).

[5] In 2010 Nancy used some of the Parsons Road Proceeds to purchase a home in Arizona (“Arizona Home”). Title to the Arizona Home was registered in the names of Nancy and Darren, as joint tenants. Nancy and Darren gave evidence that this was done to avoid probate issues in a foreign jurisdiction should Nancy die.

[6] Nancy was the primary resident of the Arizona Home as Darren was still working at the construction company that he operated. She paid for renovations required from time to time.

[7] The Arizona Home was sold in 2021. The proceeds of sale (“Arizona Home Proceeds”) were deposited into a joint account in the names of both Nancy and Darren. Nancy gave evidence that she thought that this was required since the Arizona Home was in both of their names. However, the Arizona Home Proceeds were immediately transferred into an account solely in Nancy’s name.

[8] The Vrbaneks were required to downsize their home in Edmonton. In late 2022 or early 2023 a condominium (“Edmonton Condo”) was purchased using \$136,986.19 from the Arizona Home Proceeds and \$25,000 from other savings that Nancy had. The balance of the purchase price (\$282,000) was financed by Nancy. The Edmonton Condo was registered in Nancy’s name alone. Both Nancy and Darren resided and continue to reside in the Edmonton Condo.

[9] Nancy also used approximately \$425,000 to purchase a small condominium in Arizona. The balance of the Arizona Home Proceeds was used for the Vrbanek’s living expenses as Darren is financially dependent on Nancy. Darren uses some of his pension money to assist with paying insurance and utilities.

Issues

[10] The Plaintiffs allege that the conduct of the Vrbaneks, viewed cumulatively as a scheme, amounts to a fraudulent conveyance contrary to the *Statute of Elizabeth, 1571* or the *Fraudulent Preferences Act* of Alberta. The remedy that they seek is for Darren to be added to the title of the Edmonton Condo as a joint owner, or alternatively a determination by the Court that there is a constructive trust or a resulting trust over the Edmonton Condo in favour of Darren.

[11] The Defendants say that there is a threshold issue as to whether Darren had any exigible interest in the Arizona Home or the Arizona Home Proceeds. The Defendants assert that Darren had no exigible interest and consequently there is no basis for a fraudulent conveyance claim.

Discussion

[12] I agree with the Defendants that the issue as to whether Darren had an exigible interest in the Arizona Home or the Arizona Home Proceeds is a threshold issue. I also agree with the Defendants that if Darren did not have any exigible interest in the Arizona Home or the Arizona Home Proceeds, the Plaintiffs' fraudulent conveyance claim cannot succeed.

[13] The Plaintiffs do not allege any impropriety with respect to the transfer of the Parsons Road Property from Darren to Nancy. As that transfer occurred in 2010, attacking it now would be beyond any limitation provision.

[14] Consequently, there is no doubt that Nancy provided all funds for the purchase of the Arizona Home. That Nancy paid for all renovations to the Arizona Home is not disputed by the Plaintiffs.

[15] The critical question is: What was the legal effect of the registration of ownership of the Arizona Home in the names of Nancy and Darren as joint tenants? Was Nancy the sole *beneficial* owner, as contended by the Defendants; or were Darren and Nancy equal owners, as contended by the Plaintiffs?

[16] During oral argument I asked counsel for the Plaintiffs if there was a credibility issue regarding the testimony of Nancy and Darren as to what their intentions were with respect to the Arizona Home. He said that he did not think that there was any credibility issue. He said that it is irrelevant as to what their intention was. He says that the legal effect of the registration of ownership into the names of Darren and Nancy was to give Darren an exigible interest in the Arizona Home.

[17] The Defendants say that the decision of Master Hanebury in *Drebert v Coates*, 2008 ABQB 684 ("*Drebert*") is on point. In that case the mother entered into a trust agreement with her son and transferred property into their joint names. This was done for estate planning purposes. A judgment was obtained against the son and a writ of execution was filed against the title to the property. The trust agreement provided that the son was to transfer the property as directed by his mother and pursuant to her direction, he transferred the property back to her. As the writ remained on title, the mother applied to have it removed. The writ holder applied to have the property transferred back to joint names.

[18] Master Hanebury ruled that as the son's title to the land was subject to a prior equitable interest, being the trust agreement with his mother, the son had no exigible interest in the property to which the writ could attach.

[19] Counsel for the Plaintiffs says that *Drebert* is distinguishable as there was a written trust agreement. He acknowledges that the Plaintiffs could not succeed in this case if the Vrbaneks had committed their stated intention to a written instrument.

[20] The Defendants say that the consequence of Nancy putting her funds into the Arizona Home, though in joint names, is a resulting trust in her favour. They refer to the following statement in the case of *Mitchell v Misener*, 2011 ONSC 6600 ("*Mitchell*):

69 ... It has long been the law that when one person contributes the funds, but title is joint or in the name of the other person, title is held in trust unless it can be established to the contrary: see for example, *Gulf Oil Canada Ltd v. O'Rourke* (1978), 21 OR (2d) 30 (Ont. CA).

[21] In *Mitchell* the issue was whether the proceeds of sale of a jointly held property (called the Jarvis property), should be split equally between the estranged couple, as contended by Mr. Misener, or whether there was a resulting trust in favour of Ms. Mitchell with respect to her original investment. The Court followed the Supreme Court of Canada in *Kerr v Baranow*, 2011 SCC 10 in ruling that only the intent of the donor, Ms. Mitchell was relevant. The Court stated at paragraph 73:

There is no evidence to suggest Ms. Mitchell intended to gift half of her investment to Mr. Misener. The handwritten note...indicates long term planning. So too was the joint tenancy with the Jarvis property. Ms. Mitchell's intent was to confer a benefit on Mr. Misener on her death...".

[22] In this case there is no evidence that Nancy intended to gift one half of the Arizona Home to Darren. It was Nancy's evidence that the only reason that the Arizona Home was put into joint names was for estate planning purposes—to avoid probate in a foreign jurisdiction.

[23] With respect, I disagree with the contention of counsel for the Plaintiffs that intent of the parties (and Nancy in particular) is irrelevant. Just as was the case in *Mitchell* there is no evidence that Nancy intended a gift. There is no challenge to the credibility of Nancy as to her stated intent.

[24] As Darren had no exigible property in the Arizona Home or the Arizona Home Proceeds, there was no fraudulent conveyance by him. The Plaintiffs' application is dismissed.

Heard on the 5th day of September, 2024.

Dated at the City of Edmonton, Alberta this 26th day of September, 2024.

B.W. Summers
A.J.C.K.B.A.

Appearances:

Cohen Mill
Bishop & McKenzie LLP
for the Plaintiffs

Paul Greep
Reynolds Mirth Richards & Farmer LLP
for the Defendants