

CANADA / JUDGMENT

Barbieri Estate v. White

2025 BCSC 19

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 19 Barbieri Estate v. White

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barbieri Estate v. White,

2025 BCSC 19

Date: 20250108

Docket: S04978

Registry: Abbotsford

Between:

Ricardo Joseph Barbieri,

on behalf of the Estate of Lily Diane Barbieri

Plaintiff

And

Teresa Diane White

Defendant

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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appearing as

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Place and Date of Hearing:

Chilliwack, B.C.

December 19, 2024

Place and Date of Judgment:

Abbotsford, B.C.

January 8, 2025

Table of Contents

I. Introduction.. 3

II. Factual Background.. 4

III. Legal Framework.. 8

IV. Discussion.. 11

A. Has Teresa demonstrated that the CPL is causing her hardship and inconvenience?. 11

B. Should the CPL be cancelled, and if so, on what terms?. 14

V. Conclusion.. 15

I. Introduction

- [1] The defendant in this action, Teresa Diane White ("Teresa"), brings this application under s. 256 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], seeking to cancel a certificate of pending litigation ("CPL") that has been placed on title to her property, located at 24467 54th Avenue in Aldergrove, British Columbia (the "54th Avenue Property"), on the basis that the CPL is causing her hardship and inconvenience. She says the plaintiff's claim is devoid of merit, and in any event compensable in damages, and therefore that the CPL is serving no useful purpose and ought to be removed from title immediately so that she can access her

equity to pay her current and anticipated expenses.

- [2] The plaintiff, Ricardo Joseph Barbieri ("Rick"), is Teresa's brother. He brought this action in his former capacity as executor of their late mother's estate, alleging that the estate holds a 75% beneficial interest in the 54th Avenue Property. However, Rick is no longer the estate's executor. On July 29, 2024, Tammien J. granted Teresa's application for an order to have Rick replaced as executor by the other application respondent, Solus Trust Company ("Solus"). The order of Tammien J. has yet to be entered because the parties have been unable to agree on its terms. Rick has filed an appeal from that order but has yet to comply with it by transferring the estate's assets and records to Solus.
- [3] Solus has filed a response to the application taking no position. Rick opposes the application in his personal capacity as an estate beneficiary. He argues that Teresa has failed to demonstrate that the CPL is causing her hardship and inconvenience, so as to justify the relief sought. However, he says he would not oppose an order cancelling the CPL to permit her to obtain financing in an amount of up to a quarter of the current assessed value of the 54th Avenue Property, or \$613,250, provided the remaining value was preserved for the estate pending the outcome of this action.
- [4] For the reasons that follow, I have concluded that the application should be allowed in part.

II. Factual Background

- [5] This action is one of several proceedings currently underway in this high-conflict litigation among Rick, Teresa and their brother, Steven Barbieri ("Steven"), concerning the estate of their late mother, Lily Diane Barbieri ("Lily"), who died on November 7, 2018.
- [6] Lily left a will dated December 14, 2007, that named Teresa and Rick as co-executors. The will divided the estate's residue into three equal parts, one for each of the three siblings. This court granted probate on May 1, 2019, in separate a proceeding indexed as Vancouver Registry Action No. P190661 (the "Probate Proceeding").
- [7] The first of many disputes to arise among the sibling beneficiaries concerned the extent of the estate's interest, if any, in the 54th Avenue Property.
- [8] On May 9, 2019, Teresa transferred title to the 54th Avenue Property into her name alone. Until Lily's death, title was held by Teresa and Lily as joint tenants. They and their then husbands had purchased the 54th Avenue Property in 1994 as an investment but more recently, it has become Teresa's primary residence. Teresa argues on this application that the estate has no interest in the 54th Avenue Property, and therefore this action is devoid of merit, because title passed to her alone by means of her right of survivorship. However, Teresa has acknowledged in previous affidavits and at her examination for discovery that the estate does indeed hold a beneficial interest in the 54th Avenue Property, although not to the extent alleged in this action. In particular, Teresa asserts that the estate's beneficial interest is limited to 50% of its value in 2014, which was \$830,000, whereas the plaintiff claims a 75%

interest on the basis that Lily also purchased Teresa's former husband's 25% interest when they separated. The 54th Avenue Property had an assessed value in 2024 of \$2,453,000 and is currently subject to a mortgage with a balance owing of approximately \$291,636.19.

- [9] On July 11, 2019, Rick filed an application in the Probate Proceeding to remove Teresa as executor, complaining of the transfer of the 54th Avenue Property and other alleged improper dealings with estate assets. That application was resolved by way of a consent order made September 10, 2019, pursuant to which Teresa was removed, leaving Rick as the sole executor. One of the terms of that consent order required Rick to provide an accounting to the other beneficiaries every second month. In his recent decision allowing Teresa's subsequent application in this action to have Rick removed as executor as well, indexed as *Barbieri Estate v. White*, 2024 BCSC 1357, Tammien J. made the following observations about the state of the estate's accounts under Rick's management to that point in time:
- [16] I note the foregoing simply to flag what in my view are good reasons for Teresa to remain unsatisfied about the extent to which Rick has thus far accounted for his work as executor on behalf of the estate. I also note parenthetically that Rick appears to have utilized the services of in-house bookkeeping personnel at his privately held company to provide accounting services, as opposed to retaining an arm's length accounting firm.
- [10] Rick commenced this action on September 27, 2019 and caused the CPL to be placed on title soon after that.
- [11] Apart from whatever beneficial interest the estate might have in the 54th Avenue Property, the estate also held the following assets at the time of Lily's death:
- a) The following three pieces of real property:
 - i. 3223 2406 Street in Langley (the "240th Street Property");
 - ii. 23615 Old Yale Road, Langley (the "Old Yale Property"); and
 - iii. 23664 Fraser Highway Langley (the "Fraser Highway Property"); and
 - b) Various bank and investment accounts.
- [12] Pursuant to the will, Steven was given a life estate in the Fraser Highway Property, as long as he continued to operate a concrete business on the site. That life estate remains extant.
- [13] Rick's affidavit of assets and liabilities, sworn April 16, 2019, indicated that the estate held assets worth a total of \$5,080,145.33. More recently, he has produced an updated accounting suggesting that the assets in the estate are worth \$10,794,144, and that it has liabilities totalling \$3,857,294, for a net worth of \$6,936,850.

- [14] The main impetus for Teresa's application to have Rick removed as executor was his purchase on February 28, 2020 of the Old Yale Property from the estate for \$1,293,500, a price acknowledged by all to be below its fair market value. In the hearing before Tammen J., Rick acknowledged that "his plan to purchase estate property began to take shape after Teresa was removed as co-trustee" (at para. 64).
- [15] The parties continue to disagree about the size of the discount that Rick gave himself on that purchase. In May 2021, Teresa commissioned an appraisal suggesting that the Old Yale Property was worth approximately \$4.1 million as of the date of the transfer, while Rick maintains that its real value was much closer to what he paid for it.
- [16] In early March 2021, Rick allowed Steven to purchase the 240th Street Property from the estate for \$2,118,000. Teresa alleges that this too was below its fair market value, but both Rick and Steven dispute this.
- [17] In any event, more litigation followed.
- [18] On March 15, 2022, the parties were before Associate Judge Bilawich in the Probate Proceeding on Teresa's application to have Rick's accounts passed. The application was refused in reasons indexed as *Re Barbieri Estate*, 2022 BCSC 533, on the basis of the pending litigation that was underway.
- [19] On June 14, 2022, Rick filed an application in this action seeking to have certain documents pertaining to his payment of legal fees declared privileged. The application was refused by Blake J. in a decision indexed as *Barbieri Estate v. White*, 2023 BCSC 1176. Her decision was, for the most part, upheld by the Court of Appeal in a decision indexed as 2024 BCCA 225.
- [20] On July 22, 2022, Teresa commenced her own action, indexed as Vancouver Registry Action No. S225987, against Rick, both personally and in his capacity as Executor of the Estate, as well as companies controlled by him, alleging breach of fiduciary duty, breach of trust, unjust enrichment, conversion, and conflict of interest in relation to, among other things, the property transfers that I have just described.
- [21] No trial date is currently set in either of the actions.
- [22] Teresa says that as a result of all this litigation, she is in a precarious financial condition and cannot afford to continue to meet her expenses without access to her equity in the 54th Avenue Property.
- [23] On July 11, 2023, Teresa applied for an interim distribution of \$300,000. The application came on for hearing before Dley J., who ordered that she be paid an advance of \$6,000 per month, for the period from February 1, 2024 to September 16, 2024. Those payments have now run their course. During the hearing before me, Teresa's counsel, in the course of his oral submissions on this application, informally sought an order to extend those payments into the future but I refused to grant that relief in the absence of an agreement among the parties to do so, which was not forthcoming, or failing that, a formal application on notice to

those affected.

[24] Although the interim advances that Teresa received pursuant to the order of Dley J. allowed her to pay off some of her debts, she says that she is now running out of money again. Her current and future expenses are said to include the following:

- a) approximately \$14,000 in postponed dental work;
- b) a new roof for the pumphouse on the 54th Avenue Property, for which she has received a quote for \$9,058;
- c) unpaid 2023 and 2024 property taxes totalling \$17,623.31;
- d) tree removal work on the 54th Avenue Property, for which she has received a quote for \$6,090;
- e) approximately \$30,000 in credit card debt;
- f) approximately \$6,000 per month in living expenses;
- g) approximately \$15,000-\$20,000 in annual maintenance for the 54th Avenue Property;
- h) her wish to give her son \$25,000-\$30,000 for his wedding; and
- i) legal fees for this and the related litigation.

[25] Teresa is 65 years old. She says that she is single, retired and disabled. She has declared a monthly income of \$1,707 per month, consisting of rental revenues and a government pension.

III. Legal Framework

[26] Sections 256 and 257 of the LTA state as follows:

Cancellation of certificate of pending litigation on other grounds

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

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

(2) An owner whose indefeasible title or charge is registered subject to a certificate of pending litigation under section 217 (2) (a) or (c) (ii) may, on setting out in an affidavit

- (a) that the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate contains no allegation that the owner is not a purchaser in good faith and for valuable consideration,
- (b) that the owner applied to register the owner's indefeasible title or charge before the certificate was received by the registrar, and
- (c) particulars of dates and times of receipt, application and registration of the owner's application and the certificate,

apply for an order that the registration of the certificate be cancelled.

- (3) An application under this section must be made to the court in which the proceeding was commenced and must be brought
 - (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
 - (b) by petition, if the applicant is not a party.

Power of court to order cancellation

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (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
 - (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.
- (2) The form of the undertaking must be settled by the registrar of the court.
 - (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.
 - (4) On hearing the application referred to in section 256 (2) and on being satisfied that

- (a) the facts set out in the affidavit are consistent with the records of the land title office, and
- (b) there is nothing in the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate that expressly or by necessary implication alleges that the owner is not a purchaser in good faith and for valuable consideration,

the court may make an order declaring that the owner's indefeasible title or charge is not affected by the certificate of pending litigation or the outcome of the proceeding.

- (5) On receipt of an order made under subsection (4), the registrar must file it and cancel the registration of the certificate of pending litigation.

[27] In *Save-A-Lot Holdings Corp. v. Christensen*, 2023 BCCA 35, Fisher J.A., writing for the Court, summarised the principles to be applied on an application under s. 256 in determining whether hardship and inconvenience have been shown, as follows:

- [30] As a threshold requirement for obtaining an order under s. 257(1), a person applying to cancel a CPL under s. 256(1) must show hardship and inconvenience that is causally connected solely to the registration of the CPL. The evidence of hardship must include particulars that demonstrate real hardship; general allegations of inconvenience are not sufficient: *Liquor Barn* at para. 37. The degree of hardship must be more than "trifling" or "insignificant" but a court is not required to be exacting in its analysis: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 28.
- [28] Assuming the applicant is able to show hardship inconvenience, the Court must then decide whether to exercise its discretion to cancel the CPL, and if so, on what terms, particularly as to the amount of security to be ordered in its stead: *Wosnack v. Ficych*, 2022 BCCA 139. In the exercise of its discretion, the court should be guided by equitable principles, including the strength of the plaintiff's claim to an interest in the affected land and the degree to which damages might serve as an adequate remedy: *Instafund Mortgage Management Corp. v. Garrow*, 2020 BCSC 1017, citing *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388.

IV. Discussion

A. Has Teresa demonstrated that the CPL is causing her hardship and inconvenience?

[29] Teresa asserts that the CPL is causing her hardship and inconvenience because:

- a) her present and future financial needs exceed her income; and
- b) she must therefore gain access to her equity in the 54th Avenue Property in order to make ends meet.

[30] Rick disputes both of these assertions.

- [31] First, he argues that Teresa has failed to adduce adequate evidence to show that she is suffering financial hardship. For example, he says, she has not accounted for the proceeds of sale of real property that she sold in December 2020. Rick asserts that the real reason for her constrained financial circumstances is her predilection for gambling. He says this case is, in that sense, similar to *Reddy v. Ram*, 2022 BCSC 2208, in which Taylor J. refused a similar application on the basis that the applicant had made inadequate disclosure of her financial situation, in circumstances suggesting that her financial difficulties were attributable to poor lifestyle choices, rather than the CPL.
- [32] I disagree that this case is similar to *Reddy*. Unlike the applicant in that case, Teresa has adduced evidence showing the details of her monthly income and expenses. This court has already found that she requires an advance of \$6,000 per month in order to meet her expenses, in view of her limited means. The order of Dley J. granting her that relief has now expired, and Rick is unwilling to agree to an extension. The dispute shows no sign of a resolution in the near future.
- [33] Given those circumstances, I am satisfied that the evidence before me establishes that Teresa is suffering hardship and inconvenience, particularly her inability to access a source of funding to pay legal fees in this litigation. Her situation in that regard is to be contrasted with that of the other beneficiaries, who, as a result of their own independent means, coupled with what Tammen J. found to be Rick's preferential treatment of them while he was managing the estate, have access to their own valuable assets, some of which formerly formed part of the estate. For that reason, the playing field in this litigation is not level.
- [34] The more difficult question posed is whether the hardship and inconvenience are attributable to the CPL. Rick also argues that Teresa has adduced insufficient evidence to show that it is the CPL itself that is preventing her from obtaining financing.
- [35] I agree that Teresa's evidence in this area is meagre at best. In her Affidavit #4, sworn on November 14, 2023 in support of her application to obtain a \$300,000 advance, she deposed as follows:
47. I am unable to sell or take a mortgage against the 54th Avenue Property as Rick, on behalf of the Estate, has registered a Certificate of Pending Litigation on the 54th Avenue Property
49. I have attempted to obtain private financing by borrowing money from a friend but I have been unsuccessful. I am currently without funds to cover my monthly expenses.
- [36] In her most recent affidavit, sworn on August 28, 2024, she deposed that:
26. I need to pay my bills and address ongoing expenses. The only way I can do this is to borrow against the equity of the 54th Ave. Property. I cannot borrow against the equity as long as there is a certificate of pending litigation on the 54th Avenue Property.

- [37] There is no assertion, let alone direct proof, that she has approached a financial institution, or any other lender, to obtain financing and been refused because of the presence of the CPL on title. That is problematic, given the evidentiary standard that an applicant is normally required to meet on an application such as this. For example, in *Grant v. Sandhu*, 2019 BCSC 2236, Norell J. refused to cancel a CPL because the evidence adduced by the applicant in that case was seen to be deficient. Among the deficiencies identified by Norell J. were the following:
- [34] The affidavits contain vague conclusory statements, such as the "bank is not pleased" with the CPL. There is no correspondence from the bank or accountants appended to the affidavits, nor are there affidavits from Ms. Diaz or the accountant. There is no evidence that would establish that it is the CPL as opposed to the litigation over the easement that may be impeding re-financing. The comments regarding the position of the Bank of Montreal and the opinion of the accountant are hearsay (without the required specific reference to the source) and possibly double hearsay. It is not clear that either of the adult children have personal knowledge of some of the matters stated. The way the affidavits are worded leaves me in doubt that they have personal knowledge of some of the matters stated. Mr. Sandhu, who is the owner of the property, did not swear his own affidavit.
- [38] Although Teresa's evidence on this application suffers from many of the same deficiencies, there is one unusual feature in this case that supports the conclusion that the CPL is indeed standing in the way of a refinancing here.
- [39] Currently, the estate cannot speak or act for itself. Rick has been removed as executor and has yet to deliver the records and other materials needed for Solus to take on that role. Any lender that Teresa may approach for a new loan secured on the 54th Avenue Property will be unable to engage with the plaintiff to discuss terms until that situation is resolved. That is particularly problematic because the pleadings do not allow for a reliable assessment of the degree to which Teresa's equity in the 54th Avenue Property would be available to a lender on a default if the action were to succeed. In addition to the uncertainty surrounding the extent of the estate's beneficial interest in the 54th Avenue Property, it is unclear whether and to what extent Teresa might be entitled to a greater share of the final distribution to compensate her for the diminution in the value of the estate flowing from Rick's dispositions of the Old Yale Property and the 240th Street Property to himself and Steven at less than fair market value.
- [40] It is noteworthy in this context that Tammen J. attributed that uncertainty mostly to Rick. In rejecting Rick's submission (similar to the one that Teresa makes on this application) that there are sufficient assets in the estate to make all of the beneficiaries whole if they prevail in the litigation, he stated as follows:
- [76] I cannot at this juncture accept the submission that irrespective of who is executor, there are sufficient assets in the estate to make all three beneficiaries whole at the end of these proceedings. That is so for various reasons, most of them within Rick's control. First of all,

the accounting done at Rick's behest by his staff reveals a broad fluctuation in the value of the estate. There has never been, to my knowledge, any independent third-party accounting done. Moreover, Rick has not passed his accounts, nor provided Teresa with sufficiently detailed and organized accounting data to make an assessment possible. One major variable is the fair market value of the Old Yale Property at time of transfer. Based on one appraisal obtained by Teresa, there remains a possibility that Rick has already received more than one-third of the total value of the estate. All the accounting data relied on by Rick at this hearing was obviously biased, assuming a good deal of success by him in the litigation, and failing to account for other possibilities.

- [41] Given these unusual circumstances, I am prepared to infer that the CPL is indeed preventing Teresa from accessing her equity in the 54th Avenue Property, thereby satisfying the threshold requirement to show hardship and inconvenience.

B. Should the CPL be cancelled, and if so, on what terms?

- [42] Teresa argues that, assuming I find that the CPL is causing her hardship and inconvenience, as I now have, it should be cancelled outright, without any security to replace it, because the claim:
- a) is devoid of merit; and
 - b) even if it succeeds, can be compensated in damages through an unequal distribution of the estate's residue, of which one third belongs to her.
- [43] As I have already noted, however, Teresa appears to have acknowledged in the past, despite her position on this application, that the estate has at least some beneficial interest in the 54th Avenue Property. Her admissions to that effect suffice to justify treating the claim as *prima facie* meritorious, at least to that extent.
- [44] Like Tammen J., I am unable to conclude on the record before me that there is sufficient value in the estate to compensate all three beneficiaries from the residue, regardless of the outcome in the litigation on the merits. It is possible, if Teresa fails on all or most issues, that at least some of the equity in the 54th Avenue Property could be called upon to make the estate whole, given Teresa's acknowledged lack of other assets to satisfy any judgment.
- [45] However, the CPL serves to protect only the estate's claim to an interest in the land, and not the other claims that are advanced against Teresa in this action. I therefore disagree with Rick's premise that the CPL, if it is to be cancelled temporarily, or replaced with other security, should be reinstated over all but the 25% that clearly belongs to Teresa. If the estate is ultimately found to own a 75% beneficial interest in the 54th Avenue Property, then Teresa would be entitled to a credit for the estate's share of the associated expenses she has been paying alone, as well as for her own one-third share of the estate's residue. Having said that, I also disagree with Teresa's premise that she can expect to retain no less than 50% of the equity in the 54th Avenue Property (i.e., her own 25% plus her 25% share of the estate residue), given that her entitlement is to one third of the residue, as opposed to a one-third

interest in every asset in the estate.

[46] Having weighed the competing interests at stake, I have concluded that the CPL should be cancelled to allow Teresa to access and encumber up to one third of the current assessed value of the 54th Avenue Property, or \$813,666.67. Accordingly, I am ordering that the CPL be cancelled on the condition that Teresa provide security in the form of an undertaking to the court that she will:

- a) not encumber the 54th Avenue Property with total mortgage security in excess of that amount;
- b) not otherwise dispose of the 54th Avenue Property or any portion of it without the consent of the beneficiaries or leave of the court; and
- c) abide by any order the court may make as to damages flowing from the cancellation of the CPL.

V. Conclusion

[47] The application is allowed in part. I am ordering the CPL cancelled on the terms set out in the preceding paragraph.

[48] Given that success was divided, I am inclined to order that the costs of the application be payable in the cause. If any one or more of the parties wishes to seek a different order as to costs, they may do so by delivering to the registry (directed to my attention and copied to the other parties) supplemental written submissions on that issue, not to exceed five pages in length. Any such submissions must be delivered within 30 days. The other parties will have 10 days after receiving those submissions to submit, in the same manner, a brief reply of no more than two pages.

"Milman J."

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