

CANADA / JUDGMENT

Clarke v. Braich

2021 BCSC 121

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 121 Clarke v. Braich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clarke v. Braich,

2021 BCSC 121

Date: 20210128

Docket: H190818

Registry: Vancouver

Between:

Scott William Clarke

Petitioner

And

Herkenn Singh Kenny Braich, Prabhjot Paul Singh Brar,

Herbishan Singh Bobby Braich, Bond Capital GP Inc.

Respondents

Corrected Judgment: The text of the judgment was corrected on the front page, pages 2-15 and paragraphs 2, 5, 7 on February 18, 2021

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for the Petitioner:

J.R. Pollard

Counsel for Herkenn Singh Kenny Braich:

C. McKechnie

Counsel for Surjeet Kaur Braich Alter Ego Trust

H. Parsons

Counsel for 1055249 B.C.Ltd.:

M. Sennott

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

November 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2021

- [1] The respondent H.S.K. Braich ("Kenny Braich") brings an application to discharge the registration of a judgment held by the petitioner S.W. Clarke from certain trust lands. Mr. Clarke brings a companion application to appoint an equitable receiver of Kenny Braich's interest in a trust and an estate.

I. Underlying Facts

A. Estate of Herman Singh Braich

- [2] Kenny Braich's father, Herman Singh Braich, died in 1976. Pursuant to court order made in 1989, his wife, Surjeet Kaur Braich, received a life interest in the family homestead lands in Mission ("Homestead Lands") and a portion of the residue of the estate. The remainder of the residue devolved to their children. On the death of Surjeet Kaur Braich, her interest, including the Homestead Lands, would devolve to her children.
- [3] In 2017 Kenny Braich and brother H.S.B. Braich ("Bobby Braich") were appointed personal representatives of the estate of the deceased.
- [4] The administration of the estate of Herman Singh has been very complicated and is not finalized. There has been no passing of accounts since 1994, and the Homestead Lands remain unsold.

B. The Trust

- [5] In 2010 Kenny Braich's mother, Surjeet Kaur Braich, settled an inter vivos alter ego trust, pursuant to which she was the sole income and capital beneficiary during her lifetime (the "Trust"). She transferred to herself as trustee four parcels of lands in Mission (the "Trust Lands").
- [6] Kenny Braich and Bobby Braich became trustees in 2017, and the Trust Lands were transferred into their names as trustees in February 2017. Their mother died on July 11, 2018.
- [7] Surjeet Kaur Braich executed a Deed of Appointment ("Deed") on November 1, 2010, which was incorporated by reference into the Trust instrument. The relevant passages of the Deed are set out in the affidavit of Bobby Braich made on October 28, 2020. The Deed itself was not in evidence. On the hearing of this application, Mr. Clarke raised some concern with the fact the Deed was not attached to any affidavit. However, Mr. Clarke did not raise such a concern prior to the hearing, did not seek to cross examine Bobby Braich on his affidavit, and Mr. Clarke's affidavit material does not put into issue the content of the Deed as set out in Bobby Braich's affidavit. As such, I am satisfied that the excerpts of the Deed contained in the affidavit of Bobby Braich are accurate and reliable for the purposes of this application.
- [8] Pursuant to the Trust instrument, the Final Distribution Date is July 11, 2019. The Deed requires the capital of the trust to be held by the trustees and kept invested for any of the capital beneficiaries alive at the Final Distribution Date. Only Kenny and Bobby Braich are the capital beneficiaries of the Trust. The trustees are permitted to pay all or part of the income of the Trust to or for the benefit of the capital beneficiaries until the Division Date, which is the third anniversary of the Final Distribution Date. The Division Date is July 11, 2022.
- [9] On the Division Date, the Trust property is divided equally between the capital beneficiaries if they are alive. If a capital beneficiary is deceased on the Division Date, but leaves children, his children will receive his share. If his children are deceased by the Division Date, his share will pass to the other capital beneficiary.
- [10] The administration of the Trust is not complete, and the Trust Lands are still held by the trustees as part of the Trust property.

C. Mr. Clarke and Kenny Braich

- [11] Mr. Clarke owned 42 acres of land in Mission, B.C. on Ferndale Avenue ("Mission Property") upon which he built a luxury home. Kenny Braich and Mr. Clarke have known each other since they were young, and Kenny Braich expressed an interest in purchasing the Mission Property.

- [12] Mr. Clarke deposed that he and Kenny Braich discussed the assets held by the estate of Mr. Braich, Sr. and the Trust, and that Kenny Braich told him that when the Homestead Lands sold, Kenny Braich would have the funds to purchase the Mission Property. Mr. Clarke deposed that he agreed to sell the Mission Property to Kenny Braich because of Kenny Braich's assurance that sufficient funds would be forthcoming from the sale of the Homestead Lands.
- [13] Kenny Braich disputes the facts as stated by Mr. Clarke. Kenny Braich deposed that he and Mr. Clarke had discussed the purchase and sale of the Mission Property for many years going back to 2011. Kenny Braich says that he owns and controls lands adjacent to the Mission Property, known as the Grace Mtn. Lands. The Grace Mtn. Lands consist of 62 acres, 6 titles, and two homes. Five of the Grace Mtn. Lands titles are owned by Grace Mtn. Land Company Ltd., and one of the titles is owned by Kenny Braich personally (the "Ferndale Lands"). Kenny Braich owns the Grace Mtn. Land Company Ltd.
- [14] Kenny Braich says that in the summer of 2018 Mr. Clarke approached him asking him to purchase the Mission Property. Kenny Braich says at that time the Grace Mtn. Lands project was under contract for \$45 million with a backup offer of \$35 million, and he and Bobby Braich had entered into contracts for the sale of the Homestead Lands for \$17,000,000.
- [15] Mr. Clarke agreed to sell the Mission Property to Kenny Braich for \$4,325,000, with a closing date for the sale on December 3, 2018.
- [16] In the fall of 2018, Mr. Clarke says Kenny Braich asked for an extension on the closing date because the Estate was not yet settled and the Homestead Lands were not sold. Kenny Braich disputes the rationale for the extension as stated by Mr. Clarke. However, by agreement, in late September 2018 the closing date was extended to March 1, 2019.
- [17] Mr. Clarke deposed that in February 2019 he granted Kenny Braich vendor financing because of Kenny Braich's assurance that he would be able to repay the loans from the sale of Homestead Lands, which were close to being sold.
- [18] Kenny Braich denies that Mr. Clarke relied on any statements by Kenny Braich as to the pending sale of the Homestead Lands. Kenny Braich says that throughout the fall of 2018 and spring of 2019, Kenny Braich was relying on the sale of the Grace Mtn. Lands and/or mortgage financing to pay the financing on the Mission Property, all of which was known to Mr. Clarke. Kenny Braich says that Mr. Clarke at no time stated he was relying on Kenny Braich's statements about the upcoming sale of the Homestead Lands as a source of funds for the purchase or financing of the Mission Property.
- [19] Mr. Clarke agreed to provide \$1,650,000 in vendor financing for a six month term, and was granted a second mortgage.

- [20] Kenny Braich completed the purchase of the Mission Property on March 4, 2019. In addition to the Clarke second mortgage, Kenny Braich granted a first mortgage in the amount of \$2,800,000, a third mortgage in the amount of \$75,000, and a fourth mortgage in the amount of \$4,000,000.
- [21] In May 2019 Kenny Braich defaulted on the third mortgage, and foreclosure proceedings were commenced under that mortgage on July 30, 2019.
- [22] By late July 2019, Mr. Clarke was served with a foreclosure petition filed by the first mortgage holders on the Mission Property.
- [23] Kenny Braich failed to repay the Clarke vendor mortgage on its maturity date of September 1, 2019. Mr. Clarke had his lawyers issue a formal demand for payment to Kenny Braich on September 4, 2019. Mr. Clarke says he followed up with Kenny Braich in October 2019 to find out if the Homestead Lands had sold, and Kenny Braich replied that the sale was close to being concluded and if it collapsed Kenny Braich would refinance the Mission Property in January 2020.
- [24] In October 2019 the first mortgagees were granted an order nisi with a redemption period expiring April 17, 2020, and the third mortgagees were granted an order nisi with a redemption period expiring February 22, 2020, and conduct of sale effective February 23, 2020.
- [25] In November 2019 Mr. Clarke began foreclosure proceedings.
- [26] Mr. Clarke deposed that on February 18, 2020 Kenny Braich advised that refinancing had been arranged, but the lenders would walk away from the deal if Mr. Clarke went ahead with his application for conduct of sale. On this basis, Mr. Clarke says he did not proceed with his application. Kenny Braich denies that he made such a statement to Mr. Clarke. Kenny Braich says that he told Mr. Clarke he was going to pay out the third mortgagee but Mr. Clarke should not worry because Mr. Clarke would get his money before the third mortgagee.
- [27] By March 2020 the third mortgagee had listed the Mission Property for sale for \$4,000,000, which did not appear to Mr. Clarke to be sufficient to repay all of the mortgages against the title.
- [28] Mr. Clarke asked Kenny Braich, in June 2020, to execute an assignment of Kenny Braich's interest in the Estate as security for the money owing to him. Kenny Braich refused to execute the assignment. Kenny Braich deposed that he told Mr. Clarke why he could not sign the assignment, including the fact that he had assigned his interest in his father's estate to Bobby Braich in 1999.
- [29] In July 2020 Mr. Clarke obtained an order nisi against Kenny Braich.

- [30] In July 2020 the third mortgagees asserted that they could not gain access to the Mission Property in order to arrange for its sale, and filed a motion to compel entry to the Mission Property.
- [31] In August 2020 Mr. Clarke obtained judgment for the full amount of the second mortgage.
- [32] On September 10, 2020 Mr. Clarke registered his judgment against all properties in the name of Kenny Braich, including the Ferndale Lands, the Homestead Lands, and the Trust Lands.
- [33] On September 23, 2020 the third mortgagee obtained an order determining the process for potential buyers to view the Mission Property. Mr. Clarke submits that Kenny Braich was obstructing the sale of the Mission Property, which necessitated the order. Kenny Braich deposed that he did not impede the sale of the Mission Property. He says that the first time he received a request to view the property, the COVID-19 protocols were in place, and suggested that video showings were preferred to in-person showings. The order made September 23, 2020 requires potential buyers to view the video first before requesting an in-person showing. As of the end of November 2020, Mr. Braich had received no requests for in-person showings.
- [34] Mr. Clarke asserts that Kenny Braich has encumbered the Ferndale Lands with charges in excess of \$9,000,000, while the assessed value of such lands is only \$1,364,000. Mr. Clarke argues that this shows that there will be no equity left against which he recover his judgment.
- [35] On this application, counsel for Kenny Braich noted that the charges on the Ferndale Lands relate to the six titles which make up the Grace Mtn. Lands, all of which are encumbered with the same charges totalling over \$9,000,000. Kenny Braich points to the two sales he had in place in 2018 for the Grace Mtn. Lands for \$35,000,000 and \$45,000,000. As such, Kenny Braich argues that there is ample equity in the Grace Mtn. Lands to repay the charges, including the Clarke judgment.
- [36] In addition, Kenny Braich points to an appraisal he obtained in 2019 for the Mission Property, which established a value of \$8,900,000. On the basis of this appraisal, Kenny Braich argues that there is sufficient equity in the Mission Property alone to repay all the current mortgages and the Clark judgment, notwithstanding the fact that the third mortgagee has listed it at \$4,000,000.

D. Litigation involving the Homestead Lands

- [37] In 2016 a creditor of a different brother, who had been a trustee of the father's estate and remained on title to the Homestead Lands as trustee, registered certificates of pending litigation against the Homestead Lands. These were removed pursuant to the order of Maisonville, J. (Braich Estate, 2017 BCSC 1140) in July 2017 on the basis that the son's interest as a residual beneficiary in the estate had not crystalized since the administration of the estate was not complete. The court confirmed that a residual beneficiary cannot make a

claim against the underlying assets of the estate.

- [38] That brother had actually passed away before the certificates were registered, but he remained on title at the time of the registration. In January 2017 Kenny Braich was appointed trustee of his father's estate, along with Bobby Braich, and in May 2017 title to the Homestead Lands was registered in their names as trustees.

E. Registration of Clarke Judgment against Homestead Lands

- [39] An agreement has been reached between the parties prior to this application being heard, with Mr. Clarke agreeing to discharge the judgment registered on the Homestead Lands, in accordance with the reasoning in the decision of Maisonville, J. in the prior litigation.

II. Issues

- [40] These applications gives rise to the following issues:

- a) Is a judgment against Kenny Braich in his personal capacity capable of being registered against the Trust Lands?
- b) Should an equitable receiver be appointed over the interests of Kenny Braich in the Estate of Herman Singh Braich, Sr. and the Surjeet Kaur Braich Alter Ego Trust?

A. Is a judgment against Kenny Braich in his personal capacity capable of being registered against the Trust Lands?

- [41] In Braich Estate, the court confirmed that capital beneficiaries of a trust do not have any beneficial interest in the underlying assets of the trust: para. 53.
- [42] Mr. Clarke argues that the beneficial interest in the Trust property passed to the capital beneficiaries on the Final Distribution Date, and only the legal title passes on the Division Date. He submits that because the capital beneficiaries are entitled to the income from the Trust property in the interval between the Final Distribution Date and the Division Date, they must also have the beneficial interest in the Trust property.
- [43] Mr. Clarke relies on *Ben 102 Enterprises Ltd. v. Ben 105 Enterprises Ltd.*, 2007 BCSC 1069 to argue that where lands are held in trust by a nominee title holder, those lands can be the subject of an equitable mortgage and, therefore, would also be subject to attachment. However, *Ben 102* did not deal with contingent future interests. In *Ben 102* the beneficial owners held a present beneficial interest in the lands which were held in trust for them.
- [44] In the case at bar, the Trust Deed requires the trustees to hold the Trust property in trust for the capital beneficiaries until the Division Date. If a capital beneficiary does not survive until the Division Date, his interest in the Trust property does not pass to the capital beneficiary's estate. If the capital beneficiary dies before the Division Date, his interest passes to his children if he has any. If he does not have children, his interest passes to the other capital beneficiary. The interest of the capital beneficiaries in the Trust property is

contingent on them surviving until the Division Date.

- [45] Therefore, while Mr. Clarke argues that Kenny Braich's interest in the Trust is more like a specific bequest than a residual interest, he is wrong. By the terms of the Deed, Kenny Braich's current interest is in the income from the Trust property only. His interest in the Trust property itself, including the Trust Lands, is a contingent future interest that cannot be ascertained until the Division Date.
- [46] In *Minister of National Revenue v. Bickle*, [1966] S.C.R. 479, as cited by Voith, J. in *Deutschmann (Guardian Ad Litem of) v. Fallis*, 2010 BCSC 952 and relied on by Maisonville, J. in *Braich Estate*, the Supreme Court of Canada held:

It is not disputed that until the trusts under a will have been performed, a residuary beneficiary cannot put his hands on a specific piece of property and claim ownership with all the consequences of ownership.

- [47] The trust created under this alter ego trust is no different from the trust created under a will. Pursuant to the Trust at issue before me, Kenny Braich cannot claim ownership of any of the Trust property until the Division Date has passed. It is only at that point in time that his share of the Trust property can be ascertained and transferred to him personally. Until the Division Date, it cannot be known if he will be a surviving capital beneficiary entitled to a share of the Trust property.
- [48] Section 83 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 [COEA] allows for the registration of a judgment against a judgment debtor's interest in land. Mr. Clarke argues that both subsections 83(3)(a) and (b) are applicable to the registration of his judgment against the Trust lands.
- [49] Mr. Clarke relies on s. 81 of COEA for the proposition that Kenny Braich's present interest in the Trust as a capital beneficiary is sufficient to allow for the registration of the judgment. Section 81 does employ broad language in the definition of "land" against which a judgment may be registered. However, in *Hollebone v. Paterson*, (1982), 42 B.C.L.R. 132 Lander, J. conclusively determined that this language did not include the interest of a residual legatee. He stated, with reference to the section which at that time was numbered s. 74:
- [14] Counsel for the judgment creditor submitted that s. 74 [am. 1981, c. 10, s. 18] of the Court Order Enforcement Act counters the common law position as to the interest of a residual legatee. The definition appears to be very broad, purporting to cover executory or future interests "whether the object of the gift be ascertained or not". The examples included in the section are, however, enforceable interests at common law: for example, the right of redemption of a mortgagor, the legal title of a mortgagee or the interest of a joint tenant. Thus it is open to argument that the sections do not intend to create new forms of interest where none existed before. As stated above, a residual legatee has never had an interest in an unadministered estate at law or in equity. I have concluded, in the absence of clear wording to the contrary contained within s. 74 that the legislature did not intend to extend

an interest in land to parties whose interests have traditionally been strictly in personam.

[50] Kenny Braich is in no different position than the residual legatee in the case of Hollebhone. Until the Division Date, his interest in the Trust is strictly in personam. He has no rights against the Trust Lands before the Division Date, and neither do his creditors.

[51] As such, I do not agree with Mr. Clarke when he argues he is entitled to register his judgment against the Trust Lands pursuant to COEA s. 86. Until the Division Date, Kenny Braich does not have a beneficial interest in the Trust property, which includes the Trust Lands, against which Mr. Clarke is entitled to register his judgment.

B. Should an equitable receiver be appointed over the interests of Kenny Braich in the Estate of Herman Singh Braich, Sr. and the Surjeet Kaur Braich Alter Ego Trust?

[52] Pursuant to Rule 10-2, and s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253, a court may appoint an equitable receiver whenever it appears just and convenient. Such an order will generally only be made where ordinary attachment proceedings cannot be used, unless special circumstances exist which make an equitable receivership more convenient: *Re Down*, 2002 BCSC 1023.

[53] In *Re Down*, the court adopted and summarized the description of special circumstances set out in *Pacific West Systems Supply Ltd. v. Fehr Dri-Wall Ltd.*, 2001 BCSC 354 as follows:

[9] Master Joyce (as he then was) has recently described the type of special circumstances that will support a finding that equitable execution is more convenient. In *Pacific West v. Fehr Dri-Wall Ltd.*, 2001 BCSC 354, he said at para 9:

- (a) the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment;
- (b) where the assets are exigible, the applicant could benefit by the appointment, and there is an impediment to the applicant's recovery by legal process or special circumstances exist that warrant the intervention of a receiver; and
- (c) the likelihood that a receiver will be able to realize upon very considerable assets that would otherwise remain sheltered.

[54] In *Quest Capital Corp. v. Osoyoos Sands Joint Venture*, 2011 BCSC 1817, the court addressed a situation where a debtor sought to appoint an equitable receiver over a beneficiary's interest in a trust. The court originally granted an equitable receiver on an ex parte basis. However, when the parties returned to court, it was determined that the beneficiary was a discretionary beneficiary. The court then refused to continue the equitable receivership for the follow reasons:

- [13] The petitioner has not provided me with any authority to the effect that a discretionary beneficiary has the ability to cause a trust to distribute assets. There would be no purpose in appointing an equitable receiver unless the equitable receiver, stepping into the shoes of the discretionary beneficiary, had the ability to compel the trustee to distribute assets to him.
- [55] On appeal, while the Court of Appeal upheld the chambers judge's decision, it clarified that a discretionary beneficial interest is not a bar to an equitable receivership order. The fact that the interest is discretionary is relevant to the exercise of judicial discretion, but is not determinative: *Quest Capital Corp. v. Osoyoos Sands Joint Venture*, 2012 BCCA 49 at para. 37.
- [56] Mr. Clarke points to a number of factors which he says favour the appointment of an equitable receiver. He says that Kenny Braich has not taken steps to repay the mortgages in a timely way, has obstructed the third mortgagee's sale of the Mission Property, has been delinquent in resolving the Trust and the Estate in his role as trustee and executor, and has encumbered the Ferndale Lands with charges far in excess of its assessed value. Mr. Clarke says there are insufficient assets in Kenny Braich's name personally to satisfy the mortgage, and that the only way he can be satisfied is through a receivership of Kenny Braich's interest in the Estate and the Trust.
- [57] While the fact that Kenny Braich is a discretionary beneficiary is not a bar to the appointment of an equitable receiver over his interest in the Trust, I find that there would be no practical benefit in such an appointment as Kenny Braich's interest will not crystalize until July 2022. It is premature to consider whether a receiver should be appointed with respect to Kenny Braich's contingent future interest in the Trust property. Kenny Braich's interest in the Estate was assigned to his brother 20 years before the Clarke mortgage was granted. As such, there is no practical benefit in a receiver being appointed with respect to Kenny Braich's interest in the Estate.
- [58] I am not convinced that Kenny Braich held out the sale of the Homestead Lands as an inducement for Mr. Clarke to sell him the Mission Property. While Mr. Clarke argues that Kenny Braich told him the Homestead Lands would be a source to repay the mortgage, I accept the explanation given by Kenny Braich that he was expecting the sale of the Grace Mtn. Lands to finance the purchase of the Mission Property. Even if I was to accept the evidence of Mr. Clarke on this point, the evidence as presented is far too weak to establish the sale of the Homestead Lands as an inducement to sell or finance the Mission Property, and does not support the appointment of a receiver. I do not accept that the circumstances around the sale of the Homestead Lands created the kind of special circumstances which would justify the appointment of an equitable receiver over Kenny Braich's interest in the estate.

- [59] I find that Kenny Braich has not placed himself out of reach of Mr. Clarke. Kenny Braich deposes that he has never denied his indebtedness to Mr. Clarke nor his intention to repay him. Mr. Clarke has not attempted to obtain conduct of sale of the Mission Property himself, has taken no action against the Ferndale Lands, and has not conducted an examination in aid of execution of Kenny Braich.
- [60] I am satisfied with the explanation given by Kenny Braich in relation to showing the Mission Property during COVID-19, and I accept his statement that he has received no requests to show the Mission Property since the order was made in September 2020. I do not accept that he has impeded the sale of the Mission Property.
- [61] Kenny Braich deposed that he is actively attempting to sell or refinance the Grace Mtn. Lands. Kenny Braich says he has been transparent with Mr. Clarke about his efforts.
- [62] I am satisfied with the explanation given by Kenny Braich regarding the charges on the Ferndale Lands. I find that the only plausible explanation for charges amounting to \$8,000,000 more than the assessed value of the Ferndale Lands is that the charges relate to the whole of the Grace Mtn. Lands. I accept that there is sufficient equity in the whole of the Grace Mtn. Lands to satisfy these charges, and that there is sufficient equity to satisfy Mr. Clarke's judgment.
- [63] I am satisfied that there is equity in the following assets of Kenny Braich which are available for execution by Mr. Clarke:
- a) the Ferndale Lands as part of the Grace Mtn. Lands,
 - b) the Mission Property which, although it has been listed for sale at \$4,000,000, has also been appraised at \$8,900,000, and
 - c) Kenny Braich's interest in the Grace Mtn. Land Company Ltd.
- [64] Mr. Clarke has not proven that these assets are not exigible at common law, or that there is some legal or practical impediment to execution against these assets. Mr. Clarke has not conducted an examination in aid of execution, the results of which show that there are impediments to execution against assets held by Kenny Braich.
- [65] In addition, if he lives until the Division Date, Kenny Braich will have an interest in the Trust Lands which is likely sufficient to pay the Clarke judgment. While there is a legal and practical impediment to execution against this contingent interest, namely that Kenny Braich's interest will not crystalize until July 2022, the appointment of a receiver will not assist Mr. Clarke. A receiver cannot obtain Kenny Braich's future interest in the Trust property any sooner than Kenny Braich can himself.

III. Disposition

- [66] The application of Kenny Braich to require the petitioner to discharge his registration of judgment against the Trust Lands is allowed.

[67] The application of the petitioner for the appointment of an equitable receiver of the interest of Kenny Braich in the Estate and the Trust is dismissed.

IV. Costs

[68] Kenny Braich argues that these applications are ill founded and a special costs order should be made against Mr. Clarke. While I agree that the applications were ill founded, and I agree that there was no basis for Mr. Clarke to register his judgment against the Trust Lands, I do not agree that his conduct is so egregious as to attract an order for special costs. I find that Kenny Braich is entitled to his costs of both applications, in any event of the cause.

"Baker J."

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