

CANADA / JUDGMENT

## Gill v. Gill

2022 BCSC 1143

### COURT

Supreme Court of British Columbia

### DECIDED

22 June 2022

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2022 BCSC 1143 Gill v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Gill,

2022 BCSC 1143

Date: 20220622

Docket: E202461

Registry: Vancouver

Between:

Harkaval James Gill

Claimant

And

Jiwan Kaur Jennifer Gill

Respondent

And

Perennial Developments Ltd.

Respondent by Counterclaim

Before: Master Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant and Respondent by Counterclaim (by video):

T.L. Jackson

Counsel for the Respondent (by video):

P. Cote

Place and Date of Hearing:

Vancouver, B.C.

June 21 & 22, 2022

Place and Date of Ruling:

Vancouver, B.C.

### June 22, 2022

- [1] THE COURT: I am going to give you a somewhat inelegant oral decision on the spot, because if I do not give you one now, the delay getting reasons out is probably more than you would want.
- [2] This is an application brought by the claimant, Mr. Gill, pursuant to ss. 256 and 257 of the Land Title Act (the "Act") for an order for the immediate release of the funds that are being held in trust from the sale of a property at 20031 53B Avenue in Langley (the "53B Property"). Alternatively, he seeks an order that the respondent provide an undertaking to pay damages and post security in the amount of \$68,500, should the court decline to release the funds.

### Background

- [3] The claimant is 43 years of age. The respondent is 40 years of age. Both indicate they have very substantial incomes; the claimant at \$330,000 per year and the respondent at \$147,000 per year. The parties were married and started cohabiting on August 20, 2010. They have no children. They separated on September 9, 2017, so they were together for seven years. The relationship described as tumultuous.
- [4] On June 5, 2017, which was two months prior to their separation date, they engaged in a process which resulted in a marriage agreement being signed. It provided for a specified division of property in the event the relationship did not last more than a year. It turned out that it did not last more than a year. The terms of the marriage agreement, were eventually performed by the claimant and payments made to the respondent, albeit not on the timeframe contemplated in the marriage agreement.

- [5] The claimant subsequently started an action seeking a divorce in November of 2020. The respondent counterclaimed, seeking to set aside the marriage agreement. That process is ongoing. In the course of that, the respondent filed certificates of pending litigation ("CPL") against four different properties, including the 53B Property and three others.
- [6] For the 53B Property, the claimant had an agreement in place to sell the property. The parties were able to agree to remove the CPL in consideration for the net sale proceeds being held in trust as security in place of the CPL. The net sale proceeds ended up being \$997,902.08.
- [7] The claimant subsequently sought accommodations or agreement from the respondent to allow him to use some of those funds for various purposes, including purchasing an RRSP which would allow him to reduce his capital gains liability associated with having sold the 53B Property and paying the balance of the capital gains tax owing.
- [8] There is some disagreement there, and the respondent ultimately did not agree to release funds for that purpose. I have evidence that the claimant subsequently had to borrow money for a lesser RRSP amount, and there is still an outstanding balance owing on the capital gains tax liability.
- [9] Relevant to this application, the claimant has also acknowledged he did not disclose in the marriage agreement that he owned shares in a company called Sophos Inc. I am told the marriage agreement has clauses which contemplate that these shares should have been treated as joint property, based on the non-disclosure. The claimant says he sold his shares for approximately \$163,000 in net sale proceeds and applied them to his property development business and possibly for other purposes that are not yet fully explained.
- [10] This is the claimant's application to release the \$997,902.08 that is being held in trust, on the basis that it is being treated as if it was still a CPL against the 53B Property. Authority for that is *Shively v. Poppy*, 2021 BCSC 2530, a decision of Justice Riley. It confirms that an application under the Land Title Act ss. 256 and 257 is still appropriate and that you treat the funds in trust as if they were still a CPL on the land.
- [11] On this application, the respondent has taken the position that she is content to have all of the sale proceeds released to the claimant, save for \$175,000. In argument it became apparent that the basis for the \$175,000 figure is the proceeds from the sale of Sophos shares. The respondent's concern is that those monies may have been used for the claimant's development activities on this and other properties that currently have her CPL registered against them. Due to a lack of financial disclosure, there is uncertainty as to whether some of those funds may have found their way into the 53B Property.
- [12] During submissions the respondent essentially conceded that she is generally in favour of development work being done on the other three properties that have her CPL registered against them. The claimant is acknowledged to be a successful developer and to have projects that are appealing in terms of increasing value of those properties.

## Applicable Law

[13] Sections 256 and 257 of the Land Title Act allow a party to apply for a cancellation of a CPL if there is hardship and inconvenience being experienced or likely to be experienced by registration:

### 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.

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.

- [14] The leading authority dealing with these sections is *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388, at para. 28, in which the Court of Appeal held that a party seeking to cancel a CPL must show it is experiencing or likely to experience hardship as a result of the registration of the CPL that must be more than trifling, but the court need be exacting in its analysis of the hardship and inconvenience:

### Hardship and Inconvenience

- [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.

### Analysis

- [15] In this case, there is no serious dispute that the claimant has significant hardship and inconvenience and that he still has a very substantial capital gains tax liability arising from the sale of the 53B Property that must be addressed and is attracting interest and potentially penalties.
- [16] There is also evidence from the claimant that he wants to use net sale proceeds that are available in the development of another property on which he has a joint venture. It is one of the properties that the respondent already has a CPL registered against. So, in that sense, anything done to increase the value of that other property is adding to the effective security that the respondent has already in place.
- [17] I will just pause here and say that I am satisfied that there is evidence of hardship and inconvenience that would warrant an order cancelling the CPL. As far as the evidence of whether it is appropriate to order security under s. 257 of the Land Title Act, the respondent's opposition rests solely on where the net sale proceeds of the Sophos shares were applied to the 53B Property. There is a lack of any evidence connecting those funds to the 53B Property. The respondent argues that is because the discovery process is at a very

early stage and she has not had an opportunity to get documents that would help trace where these funds went.

- [18] On the claimant's evidence, he says that he used funds he had available to put into this active joint venture, where he has had cash calls on a development of property the respondent has a CPL on already. That seems more likely to be where the Sophos proceeds went. It also may have increased the security the respondent has.
- [19] I am not persuaded there is a strong case presented for the Sophos funds being used on the 53B Property. In any event, even if there was a prospect of establishing that, in circumstances where the claimant is putting funds into a joint venture that is enhancing the value of other properties the respondent's CPL is registered against, warrants there being no additional security posted for the CPL on the 53B Property. In my view, it is sufficient for the claimant to provide an undertaking as to damages.
- [20] I am going to grant the order that the funds being held in trust from the sale of the 53B Property be released to the claimant. The claimant is to provide an undertaking as to damages from the release of the CPL from the 53B Property to the respondent, in the event there are damages arising from the release of the CPL.

## Costs

- [21] THE COURT: All right. This strikes me as an issue at that really should never have come up in a case where there is this much security being held, where issues such as using net sale proceeds to pay a capital gains obligation should have been an obvious thing to allow, when the funds that have been generated are from the same sale that created the tax obligation. To hold up allowing those funds to be used to service that tax obligation is in my view an unreasonable approach.
- [22] I also did note the respondent's email reference to "go ahead and make an application and send your client the bill" suggests a certain level of intransigence. That predated Mr. Cote's involvement, so that does not reflect on him.
- [23] In the circumstances, I think the approach that the respondent has taken overall has been somewhat obstructive, unproductive and that this would be an appropriate situation for the respondent to pay the claimant special costs of this application only. I am not ordering that those special costs be assessed forthwith. They are payable to the claimant in any event of the cause and assessed at the conclusion of the proceedings.

"Master Bilawich"

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