

CANADA / JUDGMENT

Harper KL Development Corp. v. 1131182 B.C. Ltd.

2022 BCSC 2078

COURT

Supreme Court of British Columbia

DECIDED

7 September 2022

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2022 BCSC 2078 Harper KL Development Corp. v. 1131182 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harper KL Development Corp. v. 1131182 B.C. Ltd.,

2022 BCSC 2078

Date: 20220907

Docket: S2110544

Registry: Vancouver

Between:

Harper KL Development Corp.

Petitioner

And

1131182 B.C. Ltd., Edgemont Hollingsworth

Heritage Revitalization Corporation,

Bancorp Balanced Mortgage Fund II Ltd.,

Bancorp Growth Mortgage Fund II Ltd.,

Bancorp Financial Services Inc.,

Fisgard Capital Corporation, and

Halifax Financial Corporation

Respondents

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

O. Ahmed

Counsel for the Respondent 1131182 B.C. Ltd.:

P. Roberts, Q.C.

Counsel for the Respondent Halifax Financial Corporation:

R. Defilippe

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 7, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 7, 2022

- [1] THE COURT: This is the written version of judgment I delivered in Court on September 7, 2022. It has been edited for clarity.
- [2] This is an application for a sale of property pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347 [Act]. I will explain some of the background, and I thank counsel for their materials, which have made that easier to do in short order.
- [3] The petitioner and the respondent the numbered company ("113") entered into a joint venture in July 2018 for the purpose of acquiring and developing a project located in the District of North Vancouver on Edgemont Boulevard. Pursuant to the terms of that agreement, on the same day, they created a corporation which purchased the property in its capacity as a "bare trustee and nominee of the Venturers" (for convenience, in this judgment any reference to the respondent means only 113 and no other respondent, and any reference to the "parties" means only the petitioner are 113).
- [4] Daman Lehal is the principal and sole director of the petitioner, and Ryan Deakin is the principal of 113. Both filed affidavit evidence.

- [5] There is a dispute between the parties as to whether sufficient effort has been made to have the development progress, but there appears to be no dispute that no permits have been issued, nor have documents been filed with the District, both of which would be necessary for the redevelopment or subdivision of the property.
- [6] In the meantime, there is no dispute that significant financial liabilities have continued to accrue. The major liabilities concern the mortgages. The first mortgage is held by a group of companies that the parties referred to as Bancorp, and the second is held by Halifax Financial Corporation ("Halifax"). Halifax appeared in court today and supported the petitioner.
- [7] As of August 31, 2022, the total balance on the Bancorp mortgage was just over \$3.9 million, and interest was accruing at a rate of 15 percent, which was a step-rate because the mortgage expired in July 2021. It has been in default since that time.
- [8] The Halifax mortgage has been in default since February 2020. Halifax has not been able to pursue foreclosure proceedings because of a standstill agreement it entered into with the Bancorp group of companies. However, Halifax has taken out personal judgments against Mr. Deakin and Mr. Lehal in their capacity of guarantors on the mortgage in the sum of just over \$1.7 million. Interest on that accrues at a rate of about \$500 a day.
- [9] The position of the petitioner and Halifax is that the property is under financial distress, and based on the evidence, there is no realistic prospect that the necessary permits can be acquired to permit development of the property. For those and a number of other reasons, they contend these factors favour allowing a sale of the property under the legislation.
- [10] The parties agreed that the balance of relief sought in the petition, namely, how the funds would be distributed, how creditors would be paid, and issues relating to relief under the Business Corporations Act, S.B.C. 2002, c. 57, will be adjourned to another date, if that is necessary.

Background

- [11] On July 16, 2018, the parties entered into a joint venture.
- [12] Some of the more relevant provisions of the joint venture agreement are set out in para. 12(a)-(g) of the petitioner's written argument:
- (a) The Property would be acquired by Edgemont, which would hold the Property as a bare trustee and nominee for Harper KL and 182 (together, the "Venturers"). This is what occurred, and on the same date the Property was registered in Edgemont's name.
 - (b) The purpose of the joint venture would be to:
 - (i) Acquire the property;
 - (ii) interim rental of the residential units on the Property;

- (iii) seek and obtain the necessary municipal approvals for the project;
 - (iv) arranging for financing and subdivision of the Property;
 - (v) redevelopment of the Property;
 - (vi) building strata units on the Property; and
 - (vii) selling the strata units on the Property in accordance with the municipal approvals obtained.
- (c) Each of the Venturers would have a 50% interest in the joint venture and would each own 50% of the shares of Edgernont. This is what occurred.
- (d) 182 would be responsible for:
- (i) negotiations in respect of purchasing the Property;
 - (ii) obtaining the necessary permits and approvals for the project from the Corporation of the District of North Vancouver (the "District") and;
 - (iii) filing and completing all documents necessary for the subdivision and redevelopment of the Property.
- (e) the petitioner would be responsible for negotiations with the lenders and all financing and capital transactions;
- (f) the Venturers would share the costs of the Project equally;
- (g) In the event of a default by a Venturer with respect to its obligation to contribute towards the project's expenses, the other Venturer is entitled to pay such contribution itself and this additional contribution is treated to the first Venturer bearing interest at a rate of 5% plus prime.
- [13] The joint venture agreement also had a provision that the petitioner was supposed to pay a profit advance of just over \$960,000. That payment was supposed to be made by December 2018. There is no dispute that that payment was not made at that time. Instead, it was made in about June 2019. The parties dispute whether there was a verbal agreement between them to extend that deadline for the payment.
- [14] The petition was filed in November 2021. It was originally set down to be heard in January 2022, but was adjourned by consent, and the parties agreed that it would be heard during a week in February 2022. However, at that hearing date, 113 sought and was granted an adjournment. My understanding is that the adjournment had to do with the amount of time needed to hear the matter. It was then eventually set down to today's date.

- [15] In its initial response to the petition, 113 refers offers it made to purchase the property and shares in the company. The petitioner accepted an offer made February 18, 2022, but the parties were unable to agree on the specific terms of the land purchase agreement and releases. My understanding is that the petitioner sought to enforce the agreement with the application under the Law and Equity Act, R.S.B.C. 1996, c. 253, and wanted to have that heard in mid-May, but, unfortunately, there were no judges available.
- [16] Subsequent to that, the parties engaged in further discussions which, unfortunately, did not result in a settlement. However, the petitioner says that the fact of those discussions and some of the content may be relevant.
- [17] There was a dispute at one time about the standing of the petitioner, but I understand that has been resolved and the parties agreed that the petitioner has the right under s. 2 of the Act to pursue the remedies.
- [18] The question is whether it has established it is entitled to remedies under the Act. The parties do not appear to disagree that if an order is granted, it ought to be one for sale and not partition given the nature of the property and the fact that there are currently residential tenancies on it.
- [19] The disagreement amongst the parties has to do with whether a sale could be ordered or should be ordered under one of ss. 6, 7, or 8 of the Act. Each of those sections have different provisions that the parties say are important.
- [20] Specifically, the respondent says that s. 8 applies, which has two important consequences: (i) it does not bear the burden to persuade the court that a sale should not be ordered, which might be the case otherwise; and (ii) the court is precluded from making an order because there has been an undertaking to purchase the property.
- [21] With regard to the latter point, to the extent the respondent says the court might be precluded, I do not agree. The wording of s. 8 uses the phrase, "may not." That is permissive and not mandatory. Also, I note the comments in *Pelikan v. Quarry et al.*, 2006 BCSC 269, where the court refers to there being a discretion whether to order the sale. I do not disagree, however, that where there is an undertaking given, in appropriate circumstances the strong preference is that the court not to order the sale, but, instead, give directions on valuation.
- [22] It is important to understand how the Act operates. I find the comments of Justice Grauer in *Haigh v. Kent*, 2016 BCSC 333, to be particularly useful, starting with para. 34:

- [34] The words "may be compelled" bear repeating. Orders for partition or for sale are discretionary. The onus is on the parties (in this case the Kents) who do not wish to "suffer partition or sale" to demonstrate to the court that the interests of justice are such that the order for partition or sale should not be made. The fact remains that the discretion is broad and unfettered, and will turn on whether justice requires that such an order not be made: [Citations omitted.]
- [23] He continues addressing the other sections. The ones regarding partition are not relevant, but at paras. 36-37 and 39, he addresses in sequence the methods by which a sale may take place.
- [36] The first available process is an order for division of the property. In the context of this case, the result of such an order would be to divide the Property into two separate lots, so that the parties' respective interests are no longer undivided. Mr. Haigh would then be free to deal with his property as he sees fit. He could mortgage it, lease it or sell it without worrying in any way about the Kents. The Kents would be similarly free to deal with their remaining property without having to worry about Mr. Haigh.
- [37] The second is an order for sale and division of the proceeds at the request of the majority interest. By section 6 of the Act, a party interested to the extent of $\frac{1}{2}$ or upwards in the property (in this case, only the Kents would qualify) may request the court to direct a sale and distribution of the proceeds instead of a division of the property, and the court must do so unless it sees good reason to the contrary. The Kents have made no such request in this case, and it is not available to Mr. Haigh.
- [39] The fourth arises under section 8 of the Act. Section 8(1) permits the court to order a sale and a distribution of the proceeds instead of a division of the property at the request of any party interested in the property. But, by subsection (2), the court may not do so if one of the other parties interested in the property undertakes to purchase the share of the party requesting a sale. By subsection (3), where such an undertaking is given (Leonard Kent has given one in this case), the court may order a valuation of the share of the party requesting a sale in the manner it thinks fit, and may give directions.
- [*Italic emphasis in original.*]
- [24] As I said, the respondent relies on s. 8 and says that an order for sale cannot issue in these circumstances because he has given an undertaking to purchase. The petitioner's position is that the undertaking is either spent or not compliant with the provisions of the Act.
- [25] The petitioner also raised an issue about whether proper notice of this issue was given. The respondent replies that s. 8 is clearly referred to in the amended response to the petition at para. 28.

- [26] As I understood it, the petitioner's concern about whether the respondent was relying on an undertaking arises from an affidavit filed by the respondent in February which pointed to paragraph 22 of the amended response to petition, where the words referencing that undertaking had been crossed out.
- [27] The petitioner asked for the leave to file further written submissions to address to this issue. I do not find that necessary to resolve this dispute. As I am going to explain, I do not find that there has been an undertaking that is effective to invoke s. 8 of the Act. However, even if there had been an undertaking, it has been spent.
- [28] As I just noted, I am not convinced it is an undertaking that would comply with s. 8. The nature of an undertaking, especially to the court, is that it is not conditional. The words of the undertaking that the respondent wants to rely on made the undertaking subject to the terms, presumably, that he preferred.
- [29] The facts are clear that the parties disagreed on the terms of the February 18 agreement . Also, that was not simply an offer to purchase the property, but also shares in the company. There is a question about whether that technically complies with the particular wording of the Act.
- [30] More importantly, the parties do not agree on their proportionate share of ownership in the company. That would seem to me to be a fundamental term of any agreement. It is difficult to see how an undertaking could be binding on or persuasive to this Court to prevent a sale when the parties themselves cannot agree on how much of the disputed property they own.
- [31] Furthermore, and probably determinative, the material makes clear that the respondent repudiated any kind of offer in settlement negotiations, and it would not be fair or reasonable to suggest in those circumstances that the undertaking still remained open. In my view, there is no undertaking and, therefore, s. 8 has no application.
- [32] Given that finding, I find it unnecessary to address Halifax's submission that because it did not receive an undertaking, s. 8 would not apply. That interesting issue can be addressed at another time if necessary.
- [33] That leads to a consideration of the basic test about whether the sale should be ordered. The wording in the caselaw talks about whether there is a good reason not to order the sale. Halifax relied on the wording in s. 7 which talks about the nature of the property, the number of parties, and other circumstances which makes the court conclude that a sale is more beneficial than a partition.
- [34] In my view, it does not matter whether the analysis proceed under s. 6 or s. 7. My analysis and conclusions would be no different regardless of who bears the burden.

- [35] I am not satisfied that the evidence establishes a good reason that the sale should not proceed. The respondent argues that the caselaw makes it clear that the court would not order a sale if doing so would do violence to the contractual agreement between the parties. The respondent's position is that there is nothing in the joint venture that precludes the petitioner from offering to third parties a sale of its interest in the property.
- [36] However, I find that caselaw distinguishable in a very important respect. In my view, in almost all cases where the court refused to order a sale, there were specific mechanisms and provisions in the contract dealing with a sale of the interest in the property. For instance, the cases mention in *Ben102 Enterprises Ltd. v. Ben 105 Enterprises Ltd.*, 2007 BCSC 1071 at paras. 15-17, all mention mechanisms within the contract where the parties could transfer or sell their interest. The cases discussed by Justice Barrow in *Ben102* at para. 18 dealt with a right of first refusal.
- [37] In *Cooper v. Deggan*, 2002 BCSC 1749, there was a very specific clause that was relevant, which stated that the owners could, by unanimous agreement, sell the interest in the property. The respondent suggested that Clause 4 in the joint venture in this case was akin to this particular clause. I disagree.
- [38] In Clause 4 deals with the term of the joint venture - "term" meaning how long the venture lasts and whether and how it can be terminated. It does not address the sale or disposal of anyone's interests. In order to accept the respondent's interpretation, I would be reading a new meaning into the contract, essentially re-writing that clause.
- [39] Clause 4 is not a term that addresses sale or disposal of interests and no other provision in the joint venture speaks to either of those. Therefore, I do not agree with the respondent that the petitioner was obligated to show that he had made efforts to sell to other people.
- [40] I also note that the logic of that seems contrary to the term itself because it talks about a withdrawal. Presumably the petitioner, if it wanted to walk away from all its money, could have simply withdrawn from the joint venture. That is contrary to what the respondent said the provision meant.
- [41] The respondent's position is that s. 4 sets out that the parties agreed to be involved in a long-term joint venture until both of them agreed to end it. That is not, in my respectful view, consistent with the actual words of that section.
- [42] In any event, I do not find that it is operative to dictate mechanisms of sale or disposal of an interest. Therefore, it cannot operate to invoke s. 8 of the Act.
- [43] In terms of considering the overall justice of ordering a sale, I agree with the petitioner and Halifax that the financial situation as revealed in the evidence is relevant to whether a sale is beneficial, and whether there is good reason not to order the sale. I find those factors favour ordering the sale.

[44] Also, there is an inherent contradiction in the respondent's submission to the Court that there exists an undertaking that the property can be sold to it, but at the same time it does not want a sale to proceed. Parties are free to take positions that are most advantageous to them, but I find that inconsistency favours the petitioner's position.

[45] For all these reasons, I do find that there is no good reason not to order the sale. To be clear, even if that was not the test, and it was a different test, I would conclude that a sale is appropriate and just in all the circumstances.

(DISCUSSION ABOUT POSSIBILITY OF RETURNING TO ADDRESS TERMS OF THE ORDER
COUNSEL'S AVAILABILITY)

(SUBMISSIONS ON COSTS)

[46] THE COURT: Yes, costs are awarded to the petitioner and Halifax.

[47] The relief under paragraph 1 of the petition is granted; the terms to be settled by the parties and/or in front of me. The relief sought in all other paragraphs is adjourned generally.

"Sharma J."

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