
CANADA / JUDGMENT

Hedrick v. Graham

2012 BCSC 1760

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1760 Hedrick v. Graham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hedrick v. Graham,

2012 BCSC 1760

Date: 20121126

Docket: 33762

Registry: Penticton

Between:

Robyne Lynn Hedrick and

Garry Leonard Hedrick

Petitioners

And

Robert Calvin Graham and

Robert Oscar Garriott

Respondents

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Petitioners:

C. Albas

Counsel for the Respondents:

C. Schneiderat

Place and Date of Trial/Hearing:

Penticton, B.C.

February 21-24, 2012

Place and Date of Judgment:

Penticton, B.C.

November 26, 2012

Introduction

- [1] The parties are tenants in common who own a property located in Penticton, British Columbia. The petitioners seek to have a lien registered against the interests of the respondents in that property, pursuant to ss. 13 and 14 of the Property Law Act, R.S.B.C. 1996, c. 377.
- [2] The respondent, Mr. Garriott, having obtained leave from the court, applies for an order for sale of the property and for conduct of that sale pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347.
- [3] The respondent, Robert Graham, took no part in this trial.
- [4] The proceedings were commenced by way of petition, and by order dated May 2, 2011, the matter was referred to the trial list.

Background

- [5] The parties are related. The petitioners are husband and wife. The respondent, Mr. Graham, is the father of Robyne Hedrick and Robert Garriott.
- [6] Although not a party, Darcy Shaw is the sister of the petitioner, Ms. Hedrick, and the respondent, Mr. Garriott.
- [7] The property is approximately ten acres in size. Its purchase and intended use was the dream of Anna Johnson, the mother of the petitioner, Robyne Hedrick, and the respondent, Robert Garriott. It was intended to be a property where the entire family could reside. Ms. Johnson passed away on November 6, 2008. At the time of her death, the respondent, Mr. Graham, was her husband and he was a joint tenant with respect to Ms. Johnson's interest in the property.

- [8] The property was purchased as bare land on January 23, 1995. At that point, the owners were: the respondent, Mr. Garriott; Darcy Shaw and her husband; and Anna Johnson. The purchase price was \$110,000. Ms. Johnson contributed \$60,000. In addition, a mortgage of \$171,000 was obtained and registered against this property and another property which was the residence of Ms. Johnson.
- [9] On July 28, 1995, the Shaws transferred their one-third interest in the property to the petitioners. At the same time, a new mortgage in the amount of \$140,000 replaced the original mortgage. The monthly payments on that mortgage totalled \$1,130. The net mortgage proceeds were intended to finance the construction of a residence on the property. Mr. Garriott assumed responsibility for that construction. There was conflicting evidence about the extent of the petitioners' involvement in the construction, but a home was built. Mr Garriott and his family occupied that home.
- [10] The arrangement agreed to by the parties with respect to the mortgage payments was that Mr. Garriott would pay \$938 and the petitioners would pay \$262 per month. In recognition of Ms. Johnson's \$60,000 contribution to the purchase, she was not obligated by the arrangement to contribute to the mortgage payments or property-related expenses, such as taxes or insurance. The arrangement was not documented in any way.
- [11] The petitioners and Mr. Garriott disagree as to their respective responsibilities for other property expenses, including insurance and taxes.
- [12] On April 26, 1996, the mortgage was increased to \$179,520 and the payments were adjusted to \$1,307 per month. Again by agreement, the petitioners continued to be responsible for \$262 of that monthly obligation. Mr. Garriott was responsible for the balance.
- [13] In April 1998, Mr. Garriott was in arrears on the mortgage. As a result, he and the petitioners agreed to "flip positions" in respect to the property; they exchanged mortgage payment obligations, and the petitioners moved into the home. Again, there is some conflicting evidence about the costs of bringing the mortgage back into good standing.
- [14] On April 26, 1999, the mortgage was renewed at a lower interest rate, which reduced the monthly payments to \$1,240. No change was made to Mr. Garriott's obligation to contribute \$262 toward the monthly mortgage expense. The petitioners paid the remaining balance.
- [15] On February 18, 2004, Ms. Johnson married, the respondent, Mr. Graham, (for the third time) and transferred her one-third interest in the property into their joint names. At that time, there was no expectation by the petitioners or Mr. Garriott that Mr. Graham or Ms. Johnson would contribute to the monthly payments on the mortgage or otherwise contribute to the property-related expenses.
- [16] At the same time, a new mortgage of \$172,975 with monthly payments of \$1,285.98 was registered. As of that date, there were charges registered against the property in respect of debts or obligations of the respondent, Mr. Garriott. Exhibits entered indicate that these were paid from the mortgage proceeds. They totalled \$3,508.45. In addition, the petitioners

took cash totalling \$6,909.36 from the mortgage proceeds. A further \$4,133 went into an account and was later withdrawn. No party has acknowledged being the recipient of those latter funds.

- [17] In September 2006, a new mortgage of \$320,000 was registered against the property with monthly payments of \$2,047.91. As with the other refinancing arrangements, the existing mortgage was paid out. On this occasion, each of the parties received a portion of the mortgage proceeds as cash. Those amounts were \$40,000 to the respondent, Mr. Graham; \$24,000 to Mr. Garriott; and \$11,500 to the petitioners.
- [18] The balance of the available funds, approximately \$90,000, was designated as a building line of credit. It was to be used to construct a second residence on the property for Ms. Johnson and the respondent, Mr. Graham.
- [19] The respondents assumed responsibility for the construction. The petitioner, Ms. Hedrick, was a required signatory for cheques that were to be drawn on the building line of credit. She signed cheques at the request or demand of the respondents, which ultimately depleted the building line of credit. The parties did not create or maintain a mechanism to track or account for the utilization of those funds.
- [20] Excavation, installation of a water line and concrete work were carried out, but no building was completed, although the entire building line of credit was used.
- [21] When the new \$320,000 mortgage was taken out, Robert Graham calculated the respective responsibilities of the parties for the new mortgage payments. They were \$840 by Robert Graham, \$123 by Robert Garriott, and \$1,085 by Robyne Hedrick. There is no evidence as to how that calculation was done, but the parties proceeded on the basis of it.
- [22] Ms. Hedrick travelled to Victoria in 2010 and acquired documents from Mr. Graham relating to the property and, specifically, the expenditures from the building line of credit.
- [23] The B.C. Assessment Authority valuations of the property for 2010-2012 were \$539,000, \$461,000 and \$542,000 respectively.
- [24] While the Shaws were on title with Mr. Garriott and Ms. Johnson, the petitioners loaned \$20,000 to the Shaws and \$10,000 to the respondent, Mr. Garriott, based on a promissory note from him.
- [25] I note here that additional affidavit evidence was filed by the petitioners with their written submissions. No consent was obtained from the respondents to file additional evidence, and no application for leave to introduce it was made. It is inappropriate for additional evidence to be tendered in such a fashion, and it will not be considered in this decision.

Law

- [26] Sections 13 and 14 of the Property Law Act read:

Remedy of co-owner

13 In addition to the owner's other rights and remedies, an owner who, because of the default of another registered owner, has been called on to pay and has paid more than the owner's proportionate share of the mortgage money, rent, interest, taxes, insurance, repairs, a purchase money installment, a required payment under the Strata Property Act or under a term or covenant in the instrument of title or a charge on the land, or a payment on a charge where the land may be subject to forced sale or foreclosure, may apply to the Supreme Court for relief under section 14 against the other registered owners, one or more of whom is in default.

Court may order lien and sale

14(1) On hearing an application under section 13, the court may do one or more of the following:

- (a) order that the applicant has a lien on the interest in land of the defaulting owner for the amount recoverable under subsection (2);
 - (b) order that if the amount recoverable under subsection (2) is not paid by the defaulting owner, within 30 days after the date of service of a certified copy of the order on the defaulting owner or within another period the court considers proper, the defaulting owner's interest in the land be sold under the Supreme Court Civil Rules governing sales by the court;
 - (c) make a further or other order, including an order that the applicant may purchase the interest in the land of the defaulting owner at the sale.
- (2) The amount recoverable by the applicant is the amount the defaulting owner would, at the time the application is made or repayment is tendered, have been liable to contribute to satisfy the defaulting owner's share of the original debt if it had been allowed to accumulate until that time.
- (3) If there is a sale under this section, the transfer to the purchaser must be executed by the registrar of the court, and, on registration, passes title to the interest in land sold.
- (4) Surplus money received from the sale must be paid into court to the credit of the defaulting owner.

[27] In *Bernard v. Bernard* (1987), 12 B.C.L.R. (2d) 75 (S.C.) at pp. 79-80, Madam Justice Huddart (as she then was) considered these Property Law Act provisions, finding that:

Sections 13 and 14 do not create any new obligations; they are merely procedural...Whenever one person discharges more than his or her proportionate share of liability to a common demand a right to contribution arises...

In my opinion the determination of the extent of the right to contribution is analogous to the accounting between co-owners which takes place on partition and sale. The same principle should apply...

[28] After considering a variety of authorities, Madam Justice Huddart concluded at p. 84 with regard to occupational rent:

In summary, I am persuaded that the correct view is that, in a partition action, outside of ouster and bailiff cases, an occupying owner will not be charged for his occupation unless he claims an allowance for his expenses. The latter exception to the general rule is well established and, to the extent British Columbia cases fail to recognize it, they should not be followed.

[29] Section 13 of the Property Law Act only applies to the specific categories of expenses noted in it, and a lien under s.14 can only be for amounts charged under those categories.

[30] Sections 2, 5, 6, 7 and 8 of the Partition of Property Act read:

Parties may be compelled to partition or sell land

2 (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.

- (2) Subsection (1) applies whether the estate is legal or equitable or equitable only.
- (3) In order to achieve partition, special timber licences may be assigned to any of the interested parties.
- (4) Despite subsection (3), a special timber licence must not be partitioned and any special timber licences left over after the others have been assigned, must be ordered to be sold and the proceeds distributed among the interested parties in order to achieve partition.

...

Proceedings if parties cannot be served

5 (1) If in a proceeding for partition it appears to the court that a copy of an order under section 4 cannot be served on the interested parties, or cannot be served without expense disproportionate to the value of the property involved, the court may, if it thinks fit, on the request of any of the interested parties and despite the dissent or disability of any of them

- (a) dispense with service on any person or class of persons specified in the order, and
 - (b) order that notice of the order be published at the times and in the manner the court thinks fit, calling on all persons interested in the property who have not been served to apply to establish their claims before the court within a period specified in the order.
- (2) After the period specified in an order under subsection (1),

- (a) all persons who have not applied to establish their claims, whether they are in or out of the jurisdiction of the court, including persons under any disability, are bound by the proceedings as if on the day of the date of the order dispensing with service they had been served with a copy of the order under section 4,
- (b) the powers of the court under the Trustee Act extend to the interests of persons referred to in paragraph (a) in the property involved as if they had been parties, and
- (c) the court may order a sale of the property and give directions.

...

Sale in place of partition

7 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if it appears to the court that because of the nature of the property involved, or of the number of parties interested or presumptively interested in it, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the interested parties than a division of the property, the court may

- (a) on the request of any of the interested parties and despite the dissent or disability of any other interested party, order a sale of the property, and
- (b) give directions.

Purchase of share of person applying for sale

8 (1) In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, then if any party interested in the property involved requests the court to order a sale of the property and a distribution of the proceeds instead of a division of the property, the court may order a sale of the property and give directions.

- (2) The court may not make an order under subsection (1) if the other parties interested in the property, or some of them, undertake to purchase the share of a party requesting a sale.
- (3) If an undertaking is given, the court may order a valuation of the share of the party requesting a sale in the manner the court thinks fit, and may give directions.

[31] In *Virk v. Pannu*, 2006 BCSC 921, aff'd *Bajwa v. Pannu*, 2007 BCCA 260, the B.C. Supreme Court addressed the unequal division of proceeds from sale by partition. The court reasoned (at paras. 21-24):

[21] Even if the statutory presumption of indefeasibility is upheld and the parties are found to have equal interests in the property, the equal division of the proceeds of sale to which the parties are entitled may be subject to their respective financial contributions.

[22] In *Farrar v. Walker*, [1982] B.C.J. No. 965 (Q.L.) (S.C.), the petitioner sought an order for partition and sale of a jointly-held property. The Court recognized that joint tenants are presumed to hold equal interests. However, as a result of the parties contributing unequally to the property in question, the Court awarded the petitioner one-third (as opposed to one-half), of the proceeds from sale.

[23] Similarly, in *Aleksich v. Konradson* (1995), 5 B.C.L.R. (3d) 240 (C.A.), the parties purchased a property in joint tenancy. The respondent contributed a total of \$257,000 to the purchase and construction of the property whereas the appellant made no direct financial contribution. The appellant's non-monetary contributions consisted mainly of her own labour in the construction of the home. Upon their separation, the appellant was awarded \$109,000, representing one-half of her interest in the property after the respondent's financial contributions and her non-monetary contribution had been deducted. The award was upheld on appeal.

[24] Consequently, in spite of parties having equal interests in a property as reflected by the face of the title, the Court may take into account their respective contributions to the property when calculating the exact amount to which they are entitled upon partition and sale.

[32] In *Zackariuk v. Chepsiuk*, 2005 BCSC 919, Madam Justice Smith (as she then was) established the test to determine if the court should order a sale in lieu of or partition, holding at para. 33:

[33] Where a party or parties requesting an order for sale hold a 50% or greater interest in the property, s. 6 requires the court to grant an order for sale instead of a partition, unless the opposing party or parties establish "good reason" why such an order should not be made. Where a party or parties hold less than a 50% interest in the property, s. 7 places the burden on the party or parties to establish why a sale and distribution of the proceeds would be more beneficial to the interested parties than a partition of the land. [Citation Omitted]

Analysis

[33] This case is challenging for several reasons.

[34] First, the parties seek to address a long history of dealings with the property about which documentary and other objective evidence is far from complete. As I note below, non-disclosure by Mr. Garriott may have contributed to the problem. In order to complete a proper accounting, records of all payments and who made them, and the source of the funds (i.e., if payment was made from personal accounts or withdrawn from mortgage proceeds) would be needed. That information simply does not exist, or at least it has not been fully presented in evidence.

[35] Second, the relevant responsibilities and obligations of the parties were never clearly documented, often only discussed superficially, and frequently changed.

- [36] Third, the parties' presentation of the evidence and the argument has left many gaps for this court to deal with.
- [37] The petitioners rely solely on the Property Law Act when it clearly does not encompass a large portion of the amounts they say should be included in the liens sought.
- [38] The respondent, Mr. Graham, has chosen not to participate at all in relation to either of the competing claims.
- [39] Further, Mr. Garriott, who testified that he had repeatedly demanded an accounting in relation to the depletion of the construction line of credit, opposes the lien claims on the basis that the petitioners have not proved the claims. His testimony, however, indicates that he possesses relevant records that have not been produced.
- [40] Fourth, the legislation in this area is difficult. In its March 2012 Report on Accounting and Contribution Between Co-owners of Land, Report No. 69 (BCLI: Vancouver, 2012) at p. 1, the British Columbia Law Institute's Real Property Law Reform (Phase 2) Project Committee noted:

The body of law that governs rights with respect to accounting and contribution between co-owners is surprisingly unclear and archaic. It also contains some relatively serious deficiencies.

- [41] The petitioners submitted calculations as to the amount of the lien to which they say they are entitled in respect of the interests of each of the respondents in the property. One version of those calculations is set out in the petition. Since the commencement of the proceedings, the amounts claimed have varied to some extent as the petitioners have collected evidence and refined their position. Their position at trial is summarized in written submissions as follows:

Calculations for proposed lien against Mr. Garriott

June, 1998 to December, 2006

=

103 months at

\$262.00 per month

=

\$ 26,986.00

January, 2007 - March, 2012

=

63 months at

\$125.00 per month

=

\$ 7,875.00

\$ 34,861.00

Less cash payment in 2004 by Garriott

(-2,250.00)

Less other payments made by Garriott

(-550.00)

Less payment made by Anna

(-3,062.00)

Less payments made by Graham

(-1,875.00)

Total mortgage payments owing to March, 2012

\$ 27,124.00

Benefits from Mortgage

24,000.00

Benefits from Feb 19, 2004 Mortgage payout

Paid to Valley First - Discharge Judgment

1,192.13

Paid to Kelly Rusinko

2,316.32

Cash from Building Fund

12,000.00

Promissory Note

10,000.00

House Insurance Arrears excluding 2012

7,143.73

Property Tax Arrears excluding 2012

4,628.73

Grand Total Owing by Garriott

\$ 88,404.91

Calculations for proposed lien against Mr. Graham

Payments required from November, 2006 to

March, 2012 - 66 x \$840.00

\$ 55,440.00

Less payments made to December, 2008

-(20,270.00)

\$ 35,170.00

Plus Mortgage proceeds received

40,000.00

Plus cash from building line received

60,400.00

Total owing as at March 1, 2012

\$135,570.00

[42] Before dealing with the substantive issues, I will make some comments on the credibility of the parties. At trial, I heard evidence from both of the petitioners and Mr. Garriott. Each had difficulties addressing some issues because of the long history and the absence of complete and clear records. That is relevant to reliability, a feature of credibility, but distinct from other features of credibility that include honesty.

[43] It is my observation that the petitioners generally were straightforward and did their best to accurately describe what had occurred. However, each, on occasion, tended to find fault in one or the other of the respondents whenever the opportunity presented itself, even if there was no specific evidence to support their suspicions. While in the circumstances that tendency may be understandable, it was not helpful. As a result, their objectivity must be viewed cautiously. On the whole, however, each was credible.

[44] The same cannot be said of Mr. Garriott.

[45] During his testimony, there were numerous examples where he gave evidence contradicting the petitioners, but the contradiction had not been put to the petitioners in cross-examination. It is a matter of fairness to witnesses that, if a party intends to contradict them, those contradictions should be put to the witness in cross-examination so that they may comment. When that is not done, the weight given to the contradicting evidence may be affected. Here, the frequency of this happening causes me to generally view Mr. Garriott's

evidence with scepticism, except where it can be independently verified. Examples of this conduct include:

- He testified that there had been discussion and agreement about what would occur if one of the family members could not afford their contribution to the property.
- As noted above, he testified that he had repeatedly demanded an accounting in respect of the use of the building line funds. He said that the failure of the petitioners or his father to cooperate with that demand is the justification for his refusal to make any payments after November 2008.
- He suggested that the petitioners routinely received mortgage proceeds to pay out personal obligations. While the evidence detailed two examples of this, the inference from Mr. Garriott was that there were others, although he did not specify any.
- He said that he paid some portion of the property taxes through his parents; that is, they paid it for him and he then paid them back.
- In addition, there are numerous other features of Mr. Garriott's evidence that cause me to doubt his credibility. They include:
 - With respect to the construction of the second residence on the property, he alleged that he had worked with his father on the job and that his father was primarily responsible for the finances. Mr. Garriott said that it was his job to track the hours of labourers or contractors on the job and asserted that he gave that information to his father. He would, however, pay those entities in cash, and stated that he always dealt in cash from the building line of credit. He indicated that he kept cash on hand in order to make payments. Not only are there no records to support this, but he did not call any of the alleged recipients of those payments to prove they had been made. Ironically, he then said that he asked for a "forensic accounting" of the use of the money from the building line.
 - He testified that one of his personal debts paid from the mortgage proceeds amounting to \$3,508.45 was not, in fact, paid and that he refused to sign the payout documents prepared by legal counsel. He did not present any independent evidence at the trial to support the assertion. The only documentary evidence that was presented at trial clearly indicates the payment was made. That evidence is the "order to pay" signed by Mr. Garriott dated February 19, 2004 (Exhibits 1-7).
 - During his cross-examination, he said that he had "boxes and boxes and boxes" of documents relevant to the property or payments with respect to it. When asked why they had not been produced, he said that he could not even get through the documents the petitioners had produced. This received surprisingly little attention in the submissions of counsel. The disclosure obligations of parties are clear. In a case where records and accounting are the central focus, such failures are unacceptable. A party cannot in one breath use the lack of documents to advance an argument while at the same time withhold documents.

· There was an overall impression left by his evidence that he would criticize the absence of documents when it suited his cause and then use their absence to support his position on other points.

[46] On the whole, I do not find Mr. Garriott credible. This affected my decision in ways that will become apparent. Generally, where there is conflicting evidence, I prefer the evidence of the petitioners over that of Mr. Garriott.

Partition and Sale

[47] Mr. Garriott takes the position that the petitioners did not prove their lien claims, and he is therefore entitled to be paid for his one-third interest in the property with one adjustment that he acknowledges is appropriate. That adjustment is for unpaid mortgage payments totalling \$4,797.00. He has brought an application to partition and sell the property to receive that payment.

[48] The petitioners have opposed any partition or sale.

[49] The British Columbia Court of Appeal in *Dosanjh v. Singh*, 2011 BCCA 179, at para. 10 established that the court will grant either partition or sale in lieu of partition on the application of an eligible co-owner "unless there is some good and sufficient reason to the contrary".

[50] Mr. Garriott is an eligible co-owner, and in these circumstances, I see no good reason not to grant the order for sale. Partition gives the court a broader discretion to craft an equitable solution for the parties than a lien granted under s. 14 of the Property Law Act. Included under the umbrella of that broader discretion are all of the claims advanced by the petitioners under the Property Law Act.

[51] Since Mr. Garriott's ownership interest is less than 50 percent, s. 7 of the Partition of Property Act places the burden on him to establish why a sale and distribution of the proceeds would be more beneficial to the parties than a partition of the land.

[52] Given the long and troubled history of the parties' dealings with this property and the fact that the respondent, Mr. Graham, has chosen not to participate, it is obvious that a sale would be appropriate in these circumstances. Partition alone would simply force a dysfunctional family into an unhappy proximity.

[53] Next, I must determine if and how I should adjust accounts between the co-owners in order to achieve an equitable sharing of expenses and revenues in accordance with the applicable law as set out above. The law is clear that on sale in lieu of partition, the court may "make all just allowances and...give such directions as will do complete equity between the parties" (*Dacyshyn v. Semeniuk*, 2007 BCSC 71 at para. 43, citing *Baker v. Baker*, [1976] 3 W.W.R. 492 at p. 495).

[54] As indicated above, some of the items I will consider in making any such adjustments could be addressed in the context of a lien under s.13 of the Property Law Act. I will deal with those first. These include mortgage payments, insurance and property taxes.

i. Mortgage Payments

[55] All parties here have presumed that their mortgage payment obligations are based on the agreements made between the parties rather than amounts which would be proportionate to their interests in land. In *Batard v. Hawes* (1853), 118 E.R. 775 at pp. 778-779, the English Court of Queen's Bench and Exchequer Chamber address the interplay between equity and contract in the context of joint contracts. The decision, as it applies to this case, can be summarized in this way: if the parties agree on an arrangement for their debt or payment scheme, no action can be made for equal payment; even if based on general legal rules, they are obligated to equally contribute to the mortgage. I will therefore hold the parties to their agreements with respect to mortgage payments.

[56] As noted in the background section, there was an initial arrangement where Mr. Garriott was paying the majority of the mortgage and the petitioners paid \$262 per month. Anna Johnson was making no payments under this arrangement. There were two subsequent changes.

[57] The first was when the petitioners and Mr. Garriott exchanged obligations as a result of the petitioners assuming residency. The second was when the \$320,000 mortgage was taken out to facilitate construction of the second residence.

[58] Prior to the \$320,000 mortgage, the disproportionate payment obligations of the petitioners and Robert Garriott were in recognition of who was resident on the property. Ms. Johnson was not required to make monthly contributions because she made the \$60,000 down payment.

[59] When the \$320,000 mortgage was obtained and the building line of credit was created, monies were disbursed to each of the parties. At that time, the respondent, Mr. Graham, formulated the amount that each of the parties would be required to contribute to the \$2,074 monthly mortgage payment. The amounts are set out in paragraph 21 above.

[60] In her evidence, Ms. Hedrick indicated that she and her husband did not challenge the calculation and noted "we just agreed upon it and that is what we paid".

[61] Upon receipt of the funds from the \$320,000 mortgage, occupation continued to be the essential basis for the difference between the contribution obligations of the petitioners and the respondent, Mr. Garriott.

[62] While the specific calculations used to identify how these payment obligations were determined at any given point in time are unclear, I conclude that all parties accepted the objective behind the different payment obligations. That objective was to recognize the benefit each was enjoying from the property at any given time.

- [63] The \$840 monthly obligation on the part of Mr. Graham appears to be reflective of his receipt of funds from the mortgages, and the fact that the building line of credit was taken out to facilitate the construction of a home for he and Ms. Johnson.
- [64] The petitioners acknowledge that Mr. Graham only began to be obligated to make contributions to the mortgage in November 2006 and that he made all of those payments until December 2008. Accordingly, the amount Mr. Graham is alleged to be in default is \$35,170. The calculation is straightforward based on the number of payments that should have been made since December 2008. There will be an adjustment in that amount against the interest of Mr. Graham.
- [65] The petitioners have put forward a calculation of the amounts they say the respondent, Mr. Garriott, failed to pay by reviewing bank records. That amount as set out in the table reproduced above from their submissions is \$27,124. In cross-examination, some flaws in that calculation were identified. The evidence does not allow for an accurate recalculation in recognition of those flaws, but it does establish that some payments were not credited to Mr. Garriott. Mr. Garriott's submission is that the petitioners' calculation should therefore be ignored. He appears to suggest that if the petitioners cannot prove a precise amount, no adjustment should be made. I do not agree with that proposition.
- [66] The authorities above confirm that the court has a broad discretion to achieve equity. Here, there are deficiencies in the documentation, but Mr. Garriott by his own admission is at least partially to blame for that.
- [67] Mr. Garriott acknowledges having made no payments from January 2009 to March 2012 for a total of \$4,797. I do not accept his evidence that he has made all other payments.
- [68] In my view, the proper adjustment based on the available evidence is \$15,000.
- [69] Mr. Garriott seeks an adjustment to these amounts for occupational rent. In my view, the agreements regarding the mortgage payments resolve any issue or entitlement by Mr. Garriott to occupation rents. The purpose of accounting for occupation rent is to balance the benefits received by the parties' variable use of the property. When that has already been accounted for by the parties in the context of agreements for contribution to the mortgage, there is no basis to seek further adjustment.

ii. Insurance and Property Taxes

- [70] As with mortgage payments, it is my conclusion that where there are agreements between the parties dealing with these issues, those agreements must govern.
- [71] The petitioners acknowledge that by agreement, Mr. Graham was not obligated to contribute to insurance and property taxes.

[72] However, they say that there was an agreement that Mr. Garriott pay one-half of both of these expenses. Again, the petitioners prepared calculations of the amounts they said that they have paid for each and seek contribution from Mr. Garriott based on that agreement. The petitioners' claim for the home insurance component only goes back to 2003 because they were unable to find any records earlier than that. According to the petitioners, the total amounts paid are:

- Home Insurance (since 2003): \$14,287.46
- Taxes: \$9,257.46

[73] In his written argument, counsel for Mr. Garriott said that there was an agreement between Mr. Garriott and the petitioners that there would be no sharing of taxes and insurance costs. However, on at least one occasion in his evidence, Mr. Garriott indicated that taxes were to be shared equally with the petitioners, but insurance costs were not. He says that he gave monies to his mother, father or sister to fulfill that obligation, but he produces no records to support this.

[74] He does, however, acknowledge that he made no contribution directly or indirectly to taxes after 2008.

[75] In the circumstances and given my observations about Mr. Garriott's credibility, I conclude that Mr. Garriott is obligated by agreement to contribute one-half of both of these expenses. Mr Garriott has, however, established again that there are problems with the calculations. There is at least some indication that taxes in more recent years were paid monthly with the mortgage payments. The records in relation to insurance are incomplete. Also, at least some of the insurance costs would have related to the petitioners' personal property.

[76] As a result, I am left to carry out an assessment. I fix this amount to be \$8,000 for both taxes and insurance.

[77] I turn next to the revenues and expenses that cannot properly be the subject of a lien under s. 14 of the Property Law Act. The broad power to do complete equity on partition, however, allows the court to consider these items.

iii. Advances from Mortgage

[78] The parties' proceeds of sale should be adjusted based on the advances received by each of the parties from mortgage proceeds. There is no dispute as to these amounts taken when the \$320,000 mortgage was obtained. The petitioners received \$11,500, Mr. Garriott \$24,000 and Mr. Graham \$40,000. In addition, the petitioners received \$6,909.36 on February 18, 2004, as noted above. Each of the respondents' interests in any proceeds must be adjusted to effectively equalize this. This is calculated by taking the difference between the lowest amount received (\$18,406.36 by the Hedricks) and each of the higher amounts.

iv. Allegations of Misappropriation of Building Line of Credit

- [79] Next are the allegations of misappropriation of mortgage monies by the respondents from the building line of credit. The product of the expenditure of those monies (the partially built house) appears to be of limited, if any, value. The work product consists of concrete (that may be or perhaps has deteriorated to the point of being a liability not an asset) and a water line. Further, Mr. Garriott introduced no evidence to establish that there is any value from the work performed.
- [80] The respondent, Mr. Garriott, says that he paid cash to tradesmen and gave any records to Mr. Graham. He alluded to having documents that were not produced. He called no evidence from those tradesmen or otherwise in order to justify the expenditure of funds.
- [81] The petitioners are now bearing the expense of repaying those funds, and there is little to show for it. It is not possible on the evidence to conclude whether the expenditure of the monies is a product of mismanagement or deliberate abuse.
- [82] The petitioners' position is that \$22,000 was legitimately spent. They arrive at this figure by reviewing the records obtained from Mr. Graham that verify payments to third parties. Accordingly, I will proceed on the basis that the balance of the \$90,000 building line of credit, \$68,000, must be addressed.
- [83] It must be noted that both Mr. Garriott and Mr. Graham were paid from the line of credit for the time they say they spent, as well as expenses in relation to the project.
- [84] The challenge here is not deciding whether the respondents need to be responsible for the line of credit, but how to distribute that responsibility and how to quantify it.
- [85] Mr. Garriott blames Mr. Graham for the poor money management, saying that it was Mr. Graham who was ultimately responsible for the project. Despite my reservations about the credibility of Mr. Garriott, it is my conclusion that, in these proceedings, Mr. Graham must bear the responsibility for the \$68,000. There is nothing to contradict Mr. Garriott's evidence. In addition, it was a project for Mr. Graham and Ms. Johnson's benefit.

v. Mr. Garriott's Personal Debts

- [86] There is no doubt that Mr. Garriott must be responsible for his personal debts that were paid totalling \$3,508.45. While he tried to challenge the fact that they were paid, the order for payment regarding the mortgage payments says they were, and that was confirmed by Ms. Hedrick. I accept that the payments were made. The charges were registered against the title and were personal obligations of Mr. Garriott. There is no basis in equity to burden the petitioners or Mr. Graham with those amounts.

vi. Promissory Note

- [87] The petitioners' claim for the repayment of the \$10,000 promissory note referred to above is not recoverable in this context. Its connection to the property is simply too remote.

vii. Improvements to the Residence

[88] I have considered the petitioners' evidence about improvements to the residence. It is not an amount for which they sought a lien. They did improvements, at least in part, for their own benefit during their residency. The evidence of value comes only from a very general statement that is not documented. I do not, in these circumstances, find it appropriate to make allowances for the improvements.

viii. Fees and Arrears

[89] The petitioners indicated that they had paid \$6,000 in combined fees and arrears just before Mr. Garriott left the residence to avoid a foreclosure. Again, they did not seek to include this sum in the lien claim. The amount referred to was disputed by Mr. Garriott. Given the petitioner's position, I do not make any adjustment against the respondents' interests.

ix. Summary

[90] In the result, the following adjustments to Mr. Garriott and Mr. Graham's interests must be made to equalize the parties' contributions to the property:

Mr. Garriott

Mr. Graham

Mortgage Payments

- \$ 15,000.00
- \$35,170.00

Insurance & Property Tax

- 8,000.00

Net Mortgage Advances *

- 5,593.64
- 21,593.64

Misappropriation of Building Line of Credit

- 68,000.00

Personal Debts

- 3,508.45

Total Deduction

- \$ 32,105.09
- \$124,766.64

(*See para. 77 above for the method of calculation)

- [91] Thus, Mr. Garriott is entitled to a 1/3 interest in the property less \$32,105.09, Mr. Graham has a 1/3 interest less \$124,766.64, and the petitioners are entitled to the remainder.

Property Law Act Lien Claim

- [92] Based on my conclusions regarding partition and sale, it is not necessary to deal with the lien claims. The amounts that could form the basis of a lien have been dealt with above with the same financial result for the petitioners. Even if I had dealt with them in the context of the lien claim, it would not have changed my conclusion that partition and sale is necessary here.
- [93] I will, however, make some comments on the lien claim. There are two issues in respect of each amount claimed for a lien under s.14 of the Property Law Act. The first is whether the sum claimed is of a nature that can form part of the lien entitlement. The second is whether the amount claimed has been proven.
- [94] As noted above, there are critics of ss. 13 and 14. In 2012, the British Columbia Law Institute recommended that ss.13 and 14 should be repealed and replaced with more effective legislation (BCLI, Report on Accounting and Contribution Between Co-Owners of Land at p. 16).
- [95] Among the criticisms is that s. 13 limits liens imposed under s. 14 to expenses that fit the explicitly enumerated (and limited) categories contained in the legislation.
- [96] The petitioners' submissions did not comment on how the items dealt with after paragraph 76 in this decision fall within the scope of ss.13 and 14 of the Property Law Act. It appears the petitioners assumed those provisions of the Property Law Act allow for a general accounting between owners. That is incorrect.
- [97] Thus, any lien granted under s. 14 could only be based on the first three categories of expenses discussed in the partition section, namely, mortgage payments, property tax and insurance. Those categories have been dealt with in the partition and sale context, and greater equity between the parties is done through partition. I therefore dismiss the petitioners' application.

Conclusion

- [98] In all of the circumstances, it is my conclusion that the property should be partitioned and sold subject to my adjustments of the parties' interests in the property and any orders that may be appropriate under s. 8 of the Partition of Property Act.
- [99] Under s. 8, the court may make an order that a party to the partition proceeding may undertake to purchase the interest of the party requesting sale based on a court-ordered valuation. Since I have not heard submissions from the parties on this issue, a date shall be scheduled to hear submissions on that matter.

[100] No order for sale is made here pending hearing those submissions. I will, at that time, deal with the issue of costs.

"D.A. Betton, J."

The Honourable Mr. Justice Betton

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