

CANADA / JUDGMENT

HSBC Bank Canada v. Ladhar

2022 BCSC 84

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 84 HSBC Bank Canada v. Ladhar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

HSBC Bank Canada v. Ladhar,

2022 BCSC 84

Date: 20220118

Docket: H210465

Registry: Vancouver

Between:

HSBC Bank Canada

Petitioner

And

Jaskirat Singh Ladhar, Baljeet Kaur Ladhar,

Harveer Ladhar, Administrator with Will Annexed of the Estate of Agyapal Singh Ladhar,
deceased, Sukhbinder Kaur Ladhar,

All Tenants and Occupiers of the Subject Lands and Premises

Respondents

Before: Master Bilawich

Reasons for Judgment

Counsel for the Respondent, Harveer Ladhar, Administrator with Will Annexed of the Estate of
Agyapal Singh Ladhar, deceased:

R.A. Millar

Counsel for the Respondents, Jaskirat Singh Ladhar and Baljeet Kaur Ladhar:

J.M. Richter

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

December 9, 2021

Place and Date of Judgment:

Vancouver, B.C.

January 18, 2022

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Introduction

- [1] This is a foreclosure proceeding relating to a duplex with municipal address 10023 / 10025 128A Street, Surrey, B.C. (the "Property"). This application is part of a broader dispute between the Property's owners.
- [2] The respondent owners are all related. I will refer to them in these reasons by their given names for the sake of clarity. I intend no disrespect by doing so. I will refer to the respondent Agyapal Ladhar as the "Deceased".

- [3] By application filed November 18, 2021, Harveer in her capacity as Administrator with Will annexed of the Deceased's estate, applies for:
- a) Exclusive conduct of sale of the Property; and
 - b) Appointment of VMH Development & Management Inc. as receiver-manager and receiver of rents for the Property.

Background

- [4] Jaskirat and the Deceased were brothers. Jaskirat and Baljeet are married. The Deceased and Sukhbinder were married and later separated. They had five children together; three adult daughters and two sons who are minors (both age 16). The Deceased died on March 21, 2020. Harveer is one of his daughters and has been appointed administrator of his estate.
- [5] The Property was originally purchased in May 2006 and title was registered as follows:
- a) Jaskirat and Baljeet, as to an undivided one-half interest, as joint tenants; and
 - b) The Deceased and Sukhbinder, as to an undivided one-half interest, as joint tenants.
- [6] The Property has six rental units. Each side of the duplex has an upstairs rental unit as well as two one-bedroom suites in the basement. Two of the basement suites are unauthorized. Based on the current pattern, it appears a substantial portion of the rent collected over the years may have been in cash.
- [7] There is a dispute among the respondents as to who collected rent and managed the Property at various times over the years. Harveer alleges that Jaskirat and/or his son did so, both while the Deceased was alive and since his death. Jaskirat and Baljeet allege the Deceased did so about 95 percent of the time for the 14-year period leading up to his death.
- [8] The Deceased left a Will dated February 25, 2016. All five children are named as beneficiaries and as such they are the ultimate beneficiaries of the estate's interest in the Property.
- [9] On February 17, 2021, Haveer was appointed administrator with Will annexed of the Deceased's estate by Order of Mr. Justice Kent. A grant of probate was issued on March 9, 2021.
- [10] After the Deceased's death [March 21, 2020], Sukhbinder arranged for transmission of his undivided interest in one-half of the Property to her. The Deceased and Sukhbinder had entered into a separation agreement which provided that Sukhbinder's interest in the Property was to be transferred to the Deceased, but that had not been completed before he died. Harveer took steps to compel her mother to transfer that interest to the Deceased's estate. Harveer as administrator is now on title as registered owner of an undivided one-half interest in the Property.

- [11] Harveer alleges that after she was appointed administrator, she asked Jaskirat for an accounting of rents he had collected and expenses paid for the Property. Initially, he failed to respond. She says he also failed to keep the petitioner's mortgage in good standing and pay property taxes and utility rates owing to City of Surrey. She alleges Jaskirat and his son collected rents but failed to remit half of the net rental income to the Deceased / his estate, despite demand.
- [12] The Property's 2021 BC Assessment valuation for the Property was \$1,217,300. Harveer believes it is worth considerably more than that. As of October 19, 2021, property tax arrears were \$21,594.35 and utility rate arrears were \$5,814.60.
- [13] The earliest known demand for an accounting was made by the Deceased through counsel on November 15, 2019, but Jaskirat failed to comply.
- [14] On April 27, 2021, Jaskirat responded to Harveer's demand through counsel with a form of accounting. Harveer's position is that it is not in an understandable form and is either inaccurate or untruthful. For example, Jaskirat indicated that only two of six units were rented, but she says she attended the Property in person and spoke to unidentified tenants who informed her that all six units had been regularly rented.
- [15] I note that the affidavit of service for service of this application on tenants of the property identified 5 named tenants and 1 John Doe tenant. Further, a letter from counsel for Jaskirat and Baljeet to counsel for Harveer dated December 3, 2021 identified 6 rented units generating rent of about \$4,200 for the month of December 2021.
- [16] Jaskirat says that 2020 property taxes and 2021 insurance for the property in 2020 were \$19,298. He paid these without contribution from the Deceased or the estate. He says that monthly expenses for the Property are \$3,890, including:
- a) Mortgage \$1,800
 - b) Insurance \$275
 - c) Utilities \$700
 - d) Property Taxes \$700
 - e) Repairs \$415
- [17] He says that prior to August 2021, the Property was running at a deficit due to a vacancy. He also alleges he and the Deceased made a verbal agreement that if Jaskirat passed away before the Deceased, the Deceased would give Jaskirat's son the option to buy his share and Jaskirat would give the Deceased's children the same option. He also requests the opportunity to match the purchase price before it is sold on the open market.

- [18] Harveer says Jaskirat refused to cooperate with a proposed renewal of the mortgage after it matured. She alleges as well that he continued to collect rents since at least March 2020 (and likely earlier) and did not apply them to necessary property related expenses.
- [19] On July 13, 2021, Harveer as administrator started Vancouver registry action no. S216433 (the "Estate Action") against Jaskirat, Baljeet, their son Navijeet, Ladhar Development Ltd. and Ladhar Development Group Ltd. Extensive claims are made including:
- a) Express, resulting or constructive trust relating to various assets and properties;
 - b) Damages for breach of trust;
 - c) Equitable damages;
 - d) Tracing;
 - e) Disgorgement of profits;
 - f) Orders for sale of six properties (including the Property);
 - g) Order for occupational rent from Jaskirat's son;
 - h) An accounting in relation to a former company, Best Way and Ladhar Development;
 - i) An accounting in relation to existing properties;
 - j) Appointment of an interim or permanent receiver of rents for six properties (including the Property);
 - k) Orders for the Deceased's shares in Ladhar Development be transferred to and Harveer be appointed as a director and officer;
 - l) Leave for Harveer to commence an action in the name of Ladhar Development against Jaskirat and his son and others for monies taken by them from Ladhar Development;
 - m) Appointment of an Inspector to report on the financial affairs of Ladhar Development;
 - n) Judgment against Jaskirat and his son for amounts wrongly taken by them from Ladhar Development or amounts for personal expenses charged to the company;
 - o) A certificate of pending litigation against seven properties;
 - p) An order that a law firm pay Harveer monies due to the Deceased or the estate and held in trust by it further to the sale of lands owned by Ladhar Development;
 - q) Interest; and
 - r) Special costs.
- [20] On October 15, 2021, the defendants filed a response to civil claim. On November 8, 2021 Jaskirat and Ladhar Development filed a counterclaim, which includes claims for:

- a) A declaration as to the existence and scope of an express/resulting or remedial constructive trust in favor of Jaskirat and/or Ladhar Development in relation to two properties;
- b) An accounting and tracing of all funds to which Jaskirat and/or Ladhar Development is entitled to pursuant to a resulting or constructive trust [this appears to include an accounting in relation to the Property];
- c) A declaration that Jaskirat is entitled to trace the said amounts and recover same;
- d) Damages for breach of contract;
- e) Equitable damages;
- f) An accounting of occupational rent owing by the Deceased to Jaskirat and/or Ladhar Development for his use of 6609 and judgment against the Deceased for the amount found due and owing;
- g) A certificate of pending litigation against two properties;
- h) Special costs; and
- i) Interest pursuant to the Court Order Interest Act.

[21] On September 27, 2021, the petitioner started this foreclosure proceeding.

[22] On November 18, 2021, Harveer filed this application, which was originally returnable on December 2, 2021.

[23] On December 2, 2021, the petitioner applied for order nisi of foreclosure. The matter came before me in chambers and was not opposed. I granted the order sought, set the amount required to redeem the mortgage at \$179,485.55, with interest at the rate of 1.19% per annum above the petitioner's prime rate (\$17.70 per day). The redemption period was set at six months, expiring June 2, 2022. The petitioner was granted personal judgment against Jaskirat, Baljeet, the Deceased's Estate and Sukhbinder.

[24] Also, on December 2, 2021, Jaskirat and Baljeet applied to adjourn Harveer's application to December 9, 2021 to allow additional time to prepare responding material. I granted the adjournment but made an order (pending a decision on the application) that rent received from tenants of the property from December 1, 2021 onward be paid into the trust account of counsel for Jaskirat and Baljeet pending further order or agreement of the parties.

[25] On December 6, 2021, Jaskirat and Baljeet filed a petition pursuant to the Partition of Property Act ("PPA") in Vancouver registry action no. S2110593 (the "PPA Proceeding"), naming Harveer as Administrator of the Deceased's Estate and HSBC Bank Canada as respondents. They seek, amongst other relief:

- a) An accounting of rents received, expenses and money received by the Deceased from Jaskirat and Baljeet on account of expenses from May 2006 to March 21, 2020;

- b) An accounting of rents received expenses paid and monies expended by Jaskirat and Baljeet on the Property from March 21, 2020 to present;
- c) A determination of their respective interests in the Property;
- d) A declaration that Harveer brought a proceeding for partition by filing her November 18, 2021 application for exclusive conduct of sale in this proceeding; and
- e) Orders and directions relating to appraisal of the Property and then exercising a right to purchase the estate's interest in the Property based on the results of the accounting.

[26] On December 9, 2021, Harveer's application came before me once again.

Preliminary Objection

[27] Jaskirat and Baljeet raised a preliminary objection to Harveer tendering in evidence a letter dated November 15, 2019 from Ms. Han, then counsel for the Deceased, to Jaskirat and Baljeet regarding the Property and a second property they co-owned at 6569 Randolph Avenue, Burnaby. The letter is marked "without prejudice" on the first page. Counsel for Jaskirat and Baljeet argued that the letter is privileged and thus not admissible.

[28] I have reviewed the letter. In substance, it is simply a demand letter. It does not contain an offer to settle and as such it does not attract settlement privilege. Simply marking correspondence "without prejudice" does not make it privileged. In any event, the contents of that letter are not significant for purposes of the present application.

Conduct of Sale

Harveer's Position

[29] Harveer says she wishes to protect the interests of the petitioner to be paid the amounts due on the mortgage and to also preserve, protect and maximize the ownership equity in the Property. She says that sale of the Property is inevitable and there is now the looming threat posed by the approaching expiry of the redemption period.

[30] Jaskirat has indicated he wishes to purchase the Property. Harveer does not object to that so long as he pays based on its fair market value. She objects to any suggestion that Property's value be determined using an appraisal and says the only acceptable way to determine fair market value is to expose the Property to the open market. Jaskirat will have the opportunity to present the highest offer.

[31] To the extent that Jaskirat seeks credit for amounts he claims is owing to him and his wife from their demand for an accounting, Harveer argues it is unlikely those issues can be resolved before the redemption period expires. A sale of the Property will inevitably be necessary before an accounting dispute between the owners is resolved.

- [32] Harveer says that, based on Jaskirat's conduct towards her since she became involved and his failure to discuss matters relating to the Property with her, she does not believe he and Baljeet will cooperate with an efficient sale of the Property. Further, because Jaskirat wishes to purchase the Property, it would be a conflict of interest for him to share conduct of sale. He cannot be both buyer and seller.
- [33] Harveer points out there are two minor beneficiaries whose interests are being monitored by the Public Guardian and Trustee of B.C. This means a higher level of diligence is necessary on her part to protect their financial interests by seeking the best possible sale price for the Property.
- [34] Harveer's application relies on s. 15 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA], rule 13-5 and rule 21-7 of the Supreme Court Civil Rules [SCCR].

Jaskirat and Baljeet's Position

- [35] Jaskirat and Baljeet note that they have a counterclaim pending in the Estate Action and a partition claim in the PPA Proceeding, which includes them seeking a determination of the parties' respective interests in the Property and allowing them to purchase the estate's interest in it, pursuant to ss. 6, 8 and 10 of the PPA.
- [36] They say that none of the parties have yet provided the other with an accounting of rent, expenses and debts relating to what they describe as their 18 month and the Deceased's alleged 14-year management of the Property and there has been no determination of their respective interests based on the results of the accounting.
- [37] They argue the appropriate statute to determine rights amongst co-owners of property is the PPA not the SCCR. They say Harveer has effectively invoked the jurisdiction of the PPA by seeking an order for immediate sale.
- [38] An immediate order for sale would effectively determine the counterclaim and the PPA Proceeding, which are final orders which ought to be heard before a judge. Such an order would preclude the relief in the counterclaim, partition proceeding and their undertaking to purchase the property.
- [39] They argue that the Estate is obliged to provide an accounting of the 14 years of property management which may dictate whether and which section of the PPA applies.

Applicable Law

- [40] Section 15 of the LEA is as follows:

Order for sale

15 The court may, before or after judgment in a proceeding

- (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or

- (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,

on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

[41] Rule 13-5 [Sales by the Court] of the SCCR includes the following:

Court may order sale

- (1) If in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

Conduct of sale

- (3) If an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner the person considers appropriate or as the court directs.

[42] Rule 21-7 (5) [Foreclosure and Cancellation] of the SCCR is as follows:

Powers of the court

- (5) The court may do one or more of the following in a proceeding under subrule (1):
- (i) order a sale of the mortgaged property;
 - (j) grant further or corollary relief;

[43] The court must conclude that a sale of property is necessary or expedient before the jurisdiction under Rule 13-5 can be exercised. Where necessity is not in issue, the requirement that the sale be expedient is satisfied if the sale would be advantageous to both parties in their current position: see *Reilly v. Reilly*, [1992] B.C.J. No. 2561 (C.A.) at para. 31.

[44] In *Phoenix Homes Limited v. Takhar*, 2017 BCSC 699 [Phoenix Homes] at para. 10, Mr. Justice N. Smith noted that the expediency requirement is satisfied if sale is objectively determined to be advantageous to both parties:

10 That Rule gives the Court broad discretionary power, including power to direct the sale as it sees fit. The expediency requirement in the Rule is satisfied if the sale is objectively determined to be advantageous to both parties, irrespective of their wishes: *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 [Boffo Developments] at paras. 72 and 73.

[45] Phoenix Homes involved a property development company which had two equal shareholders who were deadlocked. One of the shareholders started a derivative action in the name of the company against several defendants including the other shareholder. One of the issues was validity of an agreement to sell a development the company owned at a price alleged to be less than fair market value. The plaintiff applied for an interim order to allow it to sell the property to a different purchaser, with the net sale proceeds to be held in trust pending trial of the derivative action. Justice Smith concluded it would not be appropriate to exercise the discretion under rule 13-5 to make what would amount to a final decision on the merits of an issue in the action. At para. 15:

15 Although the court has broad discretion under the Rule [13-5], I am not persuaded that it goes so far as to include what would amount to a final decision on the merits of an issue in the action. Even if the court's jurisdiction under the Rule does go that far, it would not be appropriate to exercise that discretion when I have already found that closely related issues cannot be decided summarily.

Analysis

- [46] In this case, there are two other pending proceedings between the parties, including the Estate Action and PPA Proceeding. There is a possibility that those two matters may end up being tried at the same time.
- [47] In the Estate Action, both sides seek an accounting relating to the Property (among others) and Harveer seeks an order for sale and appointment of a receiver of rents for the Property (amongst others). Harveer started that action well before this application was made.
- [48] In the PPA Proceeding, Jaskirat seeks an accounting relating to the Property and orders which allocate to him a larger than half beneficial interest in the Property based on the outcome of the accounting and orders which would allow him to acquire the Estate's interest in the Property. Some of the relief sought in that proceeding duplicates relief Jaskirat seeks in his counterclaim in the Estate Action. I also note that Jaskirat and Baljeet started the PPA Proceeding after Harveer filed this application. It seems a possibility that these two actions may end up being tried together.
- [49] I note as well that there are no cross-claims pled between Harveer on behalf of the estate, Jaskirat and Baljeet in this foreclosure proceeding. None of the parties has indicated in their evidence that they lack the financial resources, individually or collectively, required to redeem or refinance the HSBC mortgage. Harveer has not established that the Property will inevitably be sold by the petitioner should her application not be granted.
- [50] Given the complex cross-claims and issues the parties have regarding the Property in the Estate Action and PPA Proceeding, I am concerned that granting Harveer exclusive conduct of sale of the Property in the present proceeding would effectively amount to a final decision on the merits of some key disputed issues in the two other proceedings. Selling the Property is relief that Harveer seeks in the Estate Action. Granting Harveer exclusive conduct of sale

of the Property would deprive Jaskirat of the opportunity to persuade the court that he should have the opportunity to purchase the estate's beneficial interest in the manner he proposes in the PPA Proceeding. In my view, those issues should be addressed and resolved under one or both of the Estate Action or PPA Proceeding rather than on an interim application made in a foreclosure proceeding in which none of the relevant disputed accounting and contribution issues between the parties are before the court.

- [51] I exercise my discretion to dismiss Harveer's application for exclusive conduct of sale in this proceeding. She is at liberty to re-apply for conduct of sale in either the Estate Action or the PPA Proceeding, as she considers appropriate.

Receiver of Rents

- [52] Harveer's application does not identify a specific legal basis for appointment of a receiver of rents in this proceeding. I note as well that there is no cross-claim between Harveer as administrator of the estate and Jaskirat and Baljeet in this proceeding which could justify appointment of a receiver of rents.
- [53] As noted above, Harveer has claimed for appointment of a receiver of rents for the Property (among others) in the Estate Action. That action was started well before this foreclosure and application were filed. There are clearly issues in dispute in the Estate Action which make it the appropriate forum for addressing the receiver of rents issues.
- [54] I exercise my discretion to dismiss Harveer's application for appointment of a receiver of rents in this proceeding. I also vacate my order of December 2, 2021 that that rent received from tenants of the Property from December 1, 2021 onward be paid into the trust account of counsel for Jaskirat and Baljeet pending further order or agreement of the parties. Harveer is at liberty to re-apply for appointment of a receiver of rents in the Estate Action.

Conclusion

- [55] Harveer's application for exclusive conduct of sale of the Property is dismissed. She is at liberty to re-apply in either the Estate Action or the PPA Proceeding, as she considers appropriate.
- [56] Harveer's application for appointment of a receiver of rents is dismissed. She is at liberty to re-apply in the Estate Action.
- [57] My order of December 2, 2021 that rent received from tenants of the Property from December 1, 2021 onward be paid into the trust account of counsel for Jaskirat and Baljeet pending further order or agreement of the parties is vacated.
- [58] Harveer as Administrator of the Deceased's estate will pay Jaskirat and Baljeet costs of this application.

"Master Bilawich"

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