
CANADA / JUDGMENT

Hunfeld v. Molendijk

2012 BCSC 797

COURT

Supreme Court of British Columbia

DECIDED

30 May 2012

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2012 BCSC 797 Hunfeld v. Melondijk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hunfeld v. Molendijk,

2012 BCSC 797

Date: 20120530

Docket: S22719

Registry: Chilliwack

Between:

Bernard Willem Johan Rudolph Hunfeld and

Euphemia Hunfeld

Petitioners

And

Edwin Pieter Molendijk and Heidi Ellenor Molendijk

Respondents

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the Petitioners:

S.D. Robertson

Counsel for the Respondent, Heidi Molendijk:

D.K. Maser

The Respondent, Edwin Molendijk:

Appearing in Person

Place and Date of Hearing:

Chilliwack, B.C.

March 12, 2012

Place and Date of Judgment:

Chilliwack, B.C.

May 30, 2012

Introduction

[1] The petitioners are, collectively, the registered owners of a 60% interest in a parcel of lands situated in the District of Maple Ridge, British Columbia, legally described as:

PID: 010-693-521

Lot 2, Section 6, Township 15,

New Westminster District Plan 2721 (the "Property").

[2] The respondent, Edwin Molendijk, is the registered owner of a 40% interest in the Property. Mr. Molendijk and the petitioners are not related, but they are friends.

[3] The respondent, Heidi Molendijk, who is the wife of Edwin Molendijk, has brought separate proceedings against her husband under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] (Molendijk v. Molendijk, No. E6931, Chilliwack Registry) and claims a one-half interest in that part of the Property that is owned by her husband, pursuant to the provisions of Part 5 of the FRA.

[4] In this proceeding, the petitioners seek an order under s. 8 of the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA] permitting them to purchase the interest of the respondents in the Property for a price equal to 40% of the fair market value of the Lands. Alternatively, the petitioners seek an order under s. 6 of the PPA that the Property be sold and that they be entitled to bid on the sale.

[5] The principal issue in this application concerns the value of the parties' interests in the Property.

Facts

[6] The petitioners purchased the Property in 1977 and have resided there ever since. When the petitioners bought the Property it consisted of a parcel of land approximately five acres in size on which was situated a dwelling-house built in or around 1918.

[7] In 1982, Mrs. Hunfeld agreed to sell Mr. Molendijk a 40% interest in the Property for \$55,000.00. The Hunfelds and Mr. Molendijk are currently registered on title as tenants-in-common with the following registered interests:

(a)

Bernard Hunfeld:

50%;

(b)

Euphemia Hunfeld:

10%; and

(c)

Edwin Molendijk:

40%.

[8] At the time Mr. Molendijk purchased his interest in the Property, he and the Hunfelds intended to subdivide the Property to create two separate parcels of land: a parcel of approximately three acres in size from the western part of the Property, on which the Hunfelds' residence was located; and a parcel approximately two acres in size from the eastern part of the Property, on which Mr. Molendijk intended to build a residence.

[9] When Mr. Molendijk purchased his interest in the Property, he and the Hunfelds entered into an agreement, dated February 26, 1982, regarding their respective interests in the Property (the "Property Agreement"). The material parts of the Property Agreement included the following:

WHEREAS:

A. In this Agreement reference to the "Land" means the lands and premises situated in the Municipality of Maple Ridge, British Columbia, legally described as:

Lot 2 of

The southwest quarter of Section 6,

Township 15,

Plan 2721,

New Westminster District;

...

D. The parties intend to subdivide the Land into two parcels, namely, the easterly two acres of the Land (herein after called the "East Parcel") and the remainder consisting approximately of three acres (hereinafter called the "West Parcel"), as shown on Schedule "A";

E. Upon subdivision of the Land, it is the intention of the parties that Hunfelds will own the West Parcel (upon which is constructed their dwelling house in which they reside) and Edwin will own the East Parcel;

F. The parties are desirous of settling their respective interests in and rights to the Land pending subdivision and have therefore entered into this Agreement.

THEREFORE THIS AGREEMENT WITNESSES that in consideration of the promises, covenants and agreements hereinafter set forth, the parties hereto agree as follows:

1. The parties will endeavour as soon as possible to effect subdivision of the Land into two parcels, being the East Parcel and the West Parcel, and the cost of and incidental to the subdivision will be borne equally between them.
2. Immediately upon the subdivision taking place:
 - (a) The West Parcel will be conveyed to Hunfelds free and clear of all financial encumbrances;
 - (b) The East Parcel will be conveyed to Edwin free and clear of all financial encumbrances.
- 3.(1) In the event that the parties cannot effect a subdivision of the Land on or before March 1, 1987, Hunfelds will have the option of purchasing Edwin's interest in the Land for cash at a price (hereinafter called the "First Option Price") decided pursuant to Subparagraph (2);
- 3.(2) The First Option Price will be the amount which the parties may determine by agreement, and failing agreement the First Option Price will be determined by arbitration;
- 3.(3) Hunfelds will exercise their option by giving notice in writing to Edwin on or after March 1, 1987, but prior to April 1, 1987 and the sale will be completed within thirty days of the First Option Price being determined.
- 4.(1) In the event that the parties cannot effect subdivision of the Land on or before March 1, 1987 and Hunfelds fail to exercise their option as provided for in Paragraph 3, Edwin will have the option of purchasing Hunfeld's interest in the Land for cash at a price (hereinafter called the "Second Option Price") decided pursuant to Subparagraph (2);
- 4.(2) The Second Option Price will be the amount which the parties may determine by agreement, and failing agreement the Option Price will be determined by arbitration;

- 4.(3) Edwin will exercise his option by giving notice in writing to Hunfelds on or after April 1, 1987, but prior to receiving any notice of sale as provided for in Paragraph 5, and the sale will be completed within 30 days of the Second Option Price being determined.
5. In the event that the parties do not effect a subdivision of the Land on or before March 1, 1987 and both parties fail to exercise their options to purchase as set out in Paragraphs 3 and 4, then on or after May 1, 1987 either party may by notice in writing to the other party demand that the Land be sold, and upon that notice being given, the Land will be sold at fair market value; and after payment of usual adjustments and real estate agents commission, if any, Edwin will be paid an amount equal to the First Option Price as defined and determined in Paragraph 3 and the balance will be paid to the Hunfelds as their interest may appear.
6. Until the Land is subdivided or sold:
- (a) Hunfelds will pay all municipal taxes, water and sewer rates, and other municipal or provincial assessments, rates or charges related to or connected with the Land as and when they become due, and will keep any improvements on the Land insured and pay all insurance premiums;
 - (b) Edwin will reimburse Hunfelds for that portion of the taxes, rates, assessments, insurance premiums and charges which relate to the East Parcel only and any improvements on the East Parcel, and in the event that the parties cannot agree on the amount of the reimbursement, the amount of reimbursement shall be determined by arbitration;
 - (c) Hunfelds will have the sole and exclusive use and occupation of the West Parcel and all benefits derived from the use, possession and occupation of the West Parcel and will have the full power and right to enter upon the East Parcel for the purpose of access;
 - (d) Edwin will have the sole and exclusive use and occupation of the East Parcel and all benefits derived from the use, possession and occupation of the East Parcel and will have the full power and right to enter upon the West Parcel for the purpose of access;
 - (e) Hunfelds will be responsible for the repairs and upkeep connected with the West Parcel, and Edwin, for the East Parcel.
7. In any determination of the value of the interest of the parties in the Land (whether by agreement, arbitration, or otherwise) the basis of the valuation will be as follows:
- (a) The interest of Hunfelds in the Land is equal to the market value of the improvements on the West Parcel plus 60% of the market value of the Land;
 - (b) The interest of Edwin in the Land is equal to the market value of the improvements, if any, on the East Parcel plus 40% of the market value of the Land.
13. Neither party will take any proceeding against the other pursuant to the Partition of Property Act of British Columbia with respect to the Land prior to May 1, 1987.

- [10] In or around 1982, Mr. Molendijk built a barn on the eastern portion of the Property. In October 1984, the Hunfelds and Mr. Molendijk entered into a restrictive covenant with the Corporation of the District of Maple Ridge to enable Mr. Molendijk to convert the barn into a second dwelling on the Property in which he could reside. The second residence is classified as an "Accessory Employee Dwelling". The material parts of the restrictive covenant provide as follows:
1. Upon the occupancy of the second dwelling (hereinafter called the "Accessory Employee Dwelling") to be constructed or placed on the said lands for single family residential use, the Accessory Employee Dwelling shall be converted to and shall thereafter be used solely for Accessory Employee Residential use as defined in the Maple Ridge Zoning By-law No. 535-1961 as amended.
 2. Upon the Accessory Employee Dwelling ceasing to be required for accessory employee residential use or upon the said lands ceasing to be used to agricultural or resource use, the Accessory Employee Dwelling shall forthwith be demolished or removed from the said lands by the Covenantor.
- [11] After the restrictive covenant was granted, Mr. Molendijk converted the barn into a residence. He also built a garage and some decks that are connected to the barn/residence.
- [12] Neither the Hunfelds nor Mr. Molendijk exercised their options to purchase the interest of the other in accordance with paragraphs 3 and 4 of the Property Agreement, nor did they give notice requiring sale in accordance with paragraph 5 of that agreement. They simply continued to use the eastern and western portions of the Property for their own purposes.
- [13] The Hunfelds and Mr. Molendijk have also continuously used the Property, in part, as a tree farm operation in order to maintain its status as farm property for tax purposes.
- [14] Mr. Molendijk and Heidi Molendijk were married in September 1989. and Mrs. Molendijk moved into the barn/residence on the Property. She continued to live there until they separated in April 2007, when she moved from the Property, with their five children.
- [15] Mrs. Molendijk commenced an action under the FRA on July 27, 2007, in which she claimed, inter alia, an equal interest in Mr. Molendijk's interest in the Property. On August 30, 2010, a declaration was made in that action that there was no prospect of reconciliation. Consequently, as of that date, Mrs. Molendijk became entitled to an undivided one-half interest in Mr. Molendijk's interest in the Property, subject to any reapportionment under s. 65 of the FRA.
- [16] Mrs. Molendijk seeks a sale of Mr. Molendijk's registered interest in the Property so that she can recover the value of her beneficial interest. She is not concerned whether the Property is sold to the Hunfelds or to third parties.
- [17] On September 27, 2010, an order was made that this petition proceeding be heard at the same time as Mrs. Molendijk's action under the FRA.

Positions of the Parties

[18] The petitioners submit that the Property Agreement has been frustrated and no longer applies. They submit that the property interests as between themselves and the Molendijk's is to be determined in accordance with the registered interests, namely 60/40.

[19] In the alternative, the Hunfelds submit that if paragraph 7 of the Property Agreement governs the determination of the parties' interest in the Property, then there is no evidence before the court that would enable it to determine whether the improvements on the eastern portion are of any different value than those on the western portion and that they should be considered to be of equal value.

[20] The petitioners further submit that the provisions of the PPA should be applied. They submit that, because Mrs. Molendijk has applied for sale of the Property, s. 8 of the PPA applies. That section reads:

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.

[21] The Hunfelds have provided their undertaking, in writing to purchase the Molendijks' interest in the Property.

[22] In the alternative, the Hunfelds rely on s. 6 of the PPA and seek an order that the Property be listed for sale and that they have the right to bid on the Property. Section 6 of the PPA reads:

6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

[23] Mr. Molendijk submits that paragraph 7 of the Property Agreement governs the determination of the value of the parties' interests in the Property, although as will be seen, Mr. Molendijk interprets paragraph 7 in a way that leads to an absurd result.

[24] Mrs. Molendijk is not concerned whether the Hunfelds purchase Mr. Molendijk's registered interest, or if the Property is sold to a third person, so long as she obtains the fair market value of her beneficial interest in the Property. She made no submissions with respect to the value of the parties' respective interests.

Issues

[25] The issues to be determined can be summarized as follows:

1. Are the parties' interests in the Property to be determined and valued in accordance with their registered interests in the Property or does paragraph 7 of the Property Agreement apply and govern the determination of value?
2. If the interests are to be determined in accordance with the registered interests, what is the fair market value of those interests?
3. If paragraph 7 of the Property Agreement applies, what are the fair market values of:
 - (a) the Land;
 - (b) the improvements on the western parcel; and
 - (c) the improvements on the eastern parcel?
4. Are the Hunfelds entitled to purchase the interests of the Molendijks?

Discussion and Analysis

Does paragraph 7 of the Property Agreement Apply?

[26] The Hunfelds submit that the purpose of the Property Agreement was to settle the parties' respective interest in the Property pending subdivision, but subdivision is currently not possible and likely will not be possible in the future because the Property is within the Agricultural Land Reserve. The Hunfelds submit, therefore, that the original intent of the Property Agreement cannot be achieved and the agreement has been frustrated in law.

[27] Essential to the application of the doctrine of frustration of contract is that performance of the essential obligations has become impossible through no fault of either party. As stated by G.H.L. Fridman in *The Law of Contract in Canada* (Toronto: Thomson/Carswell, 2006) at p. 677, the principle is stated in this way:

The key to both the understanding and the application of the doctrine of frustration in modern times is the idea of a radical change in the contractual obligation, arising from unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about without default by either party. What would appear essential is that the party claiming that a contract has been frustrated should establish that performance of the contract, as originally agreed, would be impossible. For example, if the subject-matter of the contract has been lost or destroyed, a court will be willing to determine that the contract is ended. ...So, too, if a contract relating to land was intended to result in certain development of the land, to the knowledge of both parties and as they both intended, a change in planning legislation preventing such development will be held to frustrate the contract.

[28] It is essential for the doctrine to operate that the circumstances that have arisen should be unforeseen. If the possible occurrence of those circumstances was foreseen by the parties and the contract contains terms that deal with such potential situation, then frustration is not available. In *The Law of Contract in Canada* at p. 680, the learned author states:

Under the older implied term theory it was not possible to imply a term permitting a contract to be declared frustrated if the contract expressly covered the situation that was alleged to be dealt with by the implied term, or if any such implied term would be inconsistent with the express terms of the contract. The construction theory of frustration has the same consequences. If the contract is worded in such a way as to make an interpretation of the contract to allow frustration contradictory of what the parties have expressed in the contract, or nonsensical having regard to their language, it is not open to the court to give the contract such a construction and apply the doctrine of frustration.

[29] For example, in *Smale v. Van der Weer* (1977), 80 D.L.R. (3d) 704 (Ont. H.C.), a condition precedent in a contract for the sale of land provided that municipal approval was to be obtained for the subdivision of the land. The purchaser waived the condition precedent. Later, the purchaser tried to argue that the contract was frustrated when approval was not obtained. The court held that frustration did not apply because the parties had expressly provided for the possibility that such approval would not be granted. They had contemplated what in fact occurred and provided for it in the contract.

[30] In the present case, the parties entered into the contract intending that the Property would be subdivided into two separate parcels. It appears that they hoped that subdivision would take place before March 1, 1987. However, it is clear that they contemplated that subdivision might not take place within that time period or at all and provided for that eventuality by paragraphs 3 - 5 of the Property Agreement. Paragraph 5, which takes effect if there has been no subdivision before March 1, 1987, and neither party has invoked their option under paragraphs 3 and 4, contains no time limit for requiring a sale of the property. Paragraph 13 contemplates the possibility of one or both parties taking proceedings under the PPA after May 1, 1987. Further, paragraph 7 provides a formula for determining the parties' interests in the Property. In my view, that paragraph is clearly intended to apply in the event subdivision has not taken place since, if the Property was subdivided, the parties would become the owners of individual parcels of land and a determination of the value of their respective interests in the Property would not be required.

[31] I conclude, therefore, that the value of the interests of the Hunfelds and Molendijks in the Property is to be determined in accordance with paragraph 7 of the Property Agreement.

What is the Fair Market Value of the Parties' Interests?

[32] Paragraph 7 of the Property Agreement requires the determination of the fair market value of the Land, the improvements on the West Parcel and the improvements on the East Parcel.

- [33] The first question that arises is what is meant by the term "Land" as it is used in paragraph 7? Mr. Molendijk submits that the word "Land", whenever it is used in paragraph 7, is to be given the definition set out in the preamble to the agreement, namely the lands and premises comprising the approximately five-acre parcel as it existed when the agreement was entered into. He argues, therefore, that "Land" means the five-acre parcel of land, including the improvements that were located on the western portion of the land when the agreement was made that is the Hunfelds' residence.
- [34] In my view, this construction is not in accord with what the parties intended and would lead to an absurdity.
- [35] In my view, the only way to make sense of paragraph 7 is to give one meaning to the term "Land" where it is used in the phrases "the interest of the Hunfelds" and "the interest of Edwin" in the first part of sub-paragraphs (a) and (b) and a different meaning where the word is used in the phrases "60% of the market value of the Land" and "60% of the market value of the Land" in the second part of sub-paragraphs (a) and (b). In my opinion, "Land" as used in the first part of sub-paragraphs (a) and (b) must mean the land including all improvements, whereas "Land" as used in the second part of sub-paragraphs (a) and (b) must mean the land exclusive of all improvements.
- [36] I am satisfied that the parties intended that if the Property were subdivided Mr. Molendijk would own a 2-acre parcel (40% of the land not including improvements) on which would be situated his residence and any other improvements he made to the eastern parcel and the Hunfelds would own a 3-acre parcel (60% of the land not including improvements) on which would be situated their residence and any other improvements they made to the western parcel. I am satisfied that they intended that if subdivision did not take place, they would share the fair market value of the land, exclusive of improvements, in accordance with the 60/40 registered ownership, but each would be entitled to the fair market value of the improvements situated on their respective parcels, even though the parcels were not separate titles.
- [37] To demonstrate the absurdity that would result from the definition that Mr. Molendijk suggests, assume the whole of the Property and all improvements has a fair market value of \$600,000.00, the land exclusive of all improvements has a fair market value of \$400,000.00, and the improvements on the western parcel and those on the eastern parcel each have a fair market value of \$100,000.00. Using the formula proposed by Mr. Molendijk the parties' interests would be:

Hunfelds:

=

100% of FMV of western improvements + 60% of FMV of land (including western improvements)

=

100% of \$100,000.00 + 60% of \$500,000.00

=

\$100,000.00 + \$300,000.00 = \$400,000.00

Molendijks:

=

100% of FMV of eastern improvements + 40% of FMV of land (including western improvements)

=

100% of \$100,000.00 + 40% of \$500,000.00

=

\$100,000.00 + \$200,000.00 = \$300,000.00

[38] The total value of the interests of the Hunfelds and the Molendijks would therefore be \$700,000.00, but the total fair market value of the whole of the Property is only \$600,000.00.

[39] I am satisfied, therefore, that the term "Land" as used in the second part of sub-paragraphs (a) and (b) means the land exclusive of the improvements.

[40] The application of the Property Agreement to determine the value of the parties' interests requires a determination of three different values:

1. The market value of the land exclusive of the improvements;
2. The market value of the improvements on the West Parcel; and
3. The market value of the improvements on the East Parcel.

[41] Unfortunately, the lack of evidence makes the determination of these values very difficult. The Hunfelds provided two appraisals by Mr. Brian Kobelsky, one dated October 31, 2009 and the other dated June 11, 2011, which appraised the whole of the lands and improvements at \$575,000.00 and \$600,000.00, respectively, based on a direct comparison approach. No expert opinion was provided with regard to the market value of the land, exclusive of improvements, or of the market value of the improvements.

[42] Each of the Kobelsky appraisals contain a section entitled "Cost Approach" in which the land is given a value of \$375,000.00 (October 31, 2009 appraisal) and \$400,000.00 (June 11, 2011 appraisal), and the total improvements are given a cost of \$204,288.00, broken down as follows:

Barn/Residence

(2398 sq.ft. x \$80 per sq. ft.)

\$191,840.00

Less depreciation 30%

(\$57,552.00)

Depreciated cost

\$134,288.00

\$134,288.00

Attached double garage

\$20,000.00

Decks

\$5,000.00

Landscaping, Driveways

\$5,000.00

Original "Old-timer" House

\$40,000.00

\$204,288.00

[43] The value attributed to the barn/residence under the Cost Approach is based on a notional cost per square foot which is then reduced for depreciation. There is no indication in the appraisal how the depreciated cost for the original house occupied by the Hunfelds and the other improvements that are identified was arrived at.

[44] Each of the Kobelsky appraisals contains the following statement:

The Cost Approach in this Appraisal Report is not to be relied on as an Indicator of Present Market Value. The Cost Approach was utilized for reference purposes only for the adjustments made in the Direct Sales Approach.

[45] Mr. Kobelsky did not testify and it is not clear to me how the Cost Approach was used to make adjustments as stated. However, the appraisals contain a clear warning against using the cost approach data as indicators of market value.

[46] Mr. Molendijk tendered, and I admitted at the hearing of the petition, an appraisal that he obtained from Mr. Kundarewich dated July 12, 2009, in which the Property was valued at \$600,000.00 based on a cost approach as well as direct sales comparisons. The Cost Approach portion of Mr. Kundarewich's appraisal sets out a value for land of \$375,000.00 and the following cost figures for improvements:

Building (Barn/Residence

(2398 sq. ft. x \$90.00 per sq. ft.)

\$215,820.00

Less depreciation 40%

(\$86,328.00)

Depreciated cost

\$129,492.00

\$129,492.00

Two car garage

\$20,000.00

Deck

\$6,000.00

Driveway, Roads, Plants

\$30,000.00

Older House

\$30,000.00

\$215,492.00

[47] Mr. Molendijk seeks to rely on these cost figures as representative of the market value of the improvements. The Hunfelds submit that they are not reliable indicators of fair market value and refer to the following opinion of Mr. Kobelsky set out in a letter dated February 26, 2010:

Since the property was purchased in 1977 to present the value of the property and the estimated replacement cost of the improvements have increased. Therefore, the cost paid for any improvements by the two separated owners improved the overall value of the property to the Estimated Market Values provided in the Appraisal Reports. Since the Property is valued as a 60/40 "undivided" interest, with no agreement between the parties as to the shared costs in their individual improvements, each should share or benefit on a 60/40 basis. If individual cost could be shown for their Improvement costs this would NOT be indicative of the present Market Value as provided in the Appraisal Reports. Therefore, based on their purchase agreement there will be added value and losses for each party.

[48] I am not satisfied that the figures set out in the appraisals under the Cost Approach are a reliable basis upon which to determine fair market value under paragraph 7 of the Property Agreement. The depreciated cost of the barn/residence is simply based on published average building costs and there is no factual basis stated for the other costs that are recorded in the appraisal.

- [49] Mr. Kobelsky opines that the parties' interests should be determined on the basis of their registered interest as applied to the market value of the Property as a whole, inclusive of all improvements. Such an approach, however, would ignore the parties' contractual rights under the Property Agreement.
- [50] I do not read Mr. Kobelsky's remarks as saying that it is not possible to ascribe a market value to the improvements. He simply says that, in his opinion, the value of the parties' respective interests should simply be determined in accordance with the registered interests. It is my view that, notwithstanding the difficulty in determining the market values of the constituent parts of the Property as a whole, that is what the contract requires.
- [51] The petitioners submit that even if paragraph 7 of the Property Agreement governs, given the lack of reliable evidence, the fair market value of the improvements on the Eastern Parcel and those on the Western Parcel should simply be deemed to be equal. That would ignore the reality that the residence constructed by Mr. Molendijk on the Eastern Parcel is newer and larger (about 2,400 square feet, compared to about 1,200 square feet) than the house occupied by the Hunfelds and, on that basis, ought to be worth more.
- [52] On the other hand, the existence of the restrictive covenant is a factor that may have a significant effect on the value of the barn/residence. This factor is remarked on by Mr. Kobelsky in his letter of February 26, 2010:

The Restrictive Covenant is clear as to the results of failure to comply with the terms of this agreement as to the related use of the secondary dwelling. The Accessory Employee Dwelling shall be used solely for the Accessory Employee Residential use. If the Accessory Employee Dwelling ceases to be required to be used for agriculture or resource use, the building shall forthwith be demolished or removed as per the Agreement. The Dwelling could be reverted back to the barn as built in 1982. Therefore, the expected value of the secondary dwelling as per the Restrictive Covenant may only be the value as the improved barn.

The Registered charge agreed to by the Owners in favour of the District of Maple Ridge, whether a positive or negative nature to the owners, is in favor of the Municipality. Therefore, the secondary building value may be only the present value as a barn for the next sole owner of this property.

- [53] On the basis of the evidence that is available I would attribute \$400,000.00 of the total market value of the lands and all improvement to the land exclusive of improvements and \$200,000.00 to the total value of the improvements. Taking into account the size and ages of the two dwellings and discounting the value of the barn/residence due to the restrictive covenant, I would attribute 60% of the total market value of the improvements to the improvements on the Eastern Parcel and 40% of the total market value of the improvements to the improvements on the Western Parcel.

[54] Applying the formula set out in paragraph 7 of the Property Agreement I find the Hunfelds' interest in the Property to be \$320,000.00 and the interest of the Molendijks to be \$280,000.00.

Are the Hunfelds entitled to purchase the interests of the Molendijks?

[55] In my view, the provisions of s. 8 are engaged in this proceeding. It is common ground that Mrs. Molendijk is the beneficial owner of one-half of the legal interest of Mr. Molendijk in the Property, although Mr. Molendijk seeks an adjustment in the FRA proceeding to take into account family debt. I am satisfied Mrs. Molendijk is an owner who can seek relief under the PPA. She seeks to have the Property sold so that she can realize her interest. The Hunfelds do not want the Property sold to a third persons and move off the Property, and they have given the appropriate undertaking under s. 8(2) of the PPA.

[56] Accordingly, the petitioners will have the right to purchase the interest of the Molendijks in the Property for the sum of \$280,000.00. Such sale is not to complete until 30 days after the date of this judgment, but must be completed within 60 days after the date of this judgment. The net sale proceeds, after satisfaction of the judgment and any other financial encumbrances that are registered against Mr. Molendijk's legal interest in the Property, are to be paid into court to the credit of Proceeding No. E6931, Chilliwack Registry, unless Mr. Molendijk and Mrs. Molendijk jointly direct otherwise. The parties have liberty to apply for directions with respect to the sale and conveyance of the Property.

"B.M. Joyce J."

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