

CANADA / JUDGMENT

Pallot v. Douglas

2017 BCCA 254

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 254 Pallot v. Douglas

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pallot v. Douglas,

2017 BCCA 254

Date: 20170706

Docket: CA43031

Between:

Owen Laurence Frank Pallot

Appellant

(Petitioner)

And

Mary Jean Douglas

Respondent

(Respondent)

Corrected Judgment: The text of the judgment was corrected at paragraphs 32 and 33 on September 14, 2022.

Before:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Fitch

On appeal from: Orders of the Supreme Court of British Columbia, dated July 27, 2015 (Pallot v. Douglas, 2015 BCSC 1296, Vancouver Registry S145398), and dated March 17, 2016 (Pallot v. Douglas, 2016 BCSC 471, Vancouver Registry S145398).

Counsel for the Appellant:

K.E. Ducey

Counsel for the Respondent:

H.L. Jones

Place and Date of Hearing:

Vancouver, British Columbia

May 31, 2017

Place and Date of Judgment:

Vancouver, British Columbia

July 6, 2017

Written Reasons by:

The Honourable Mr. Justice Savage

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Fitch

Summary:

The appellant appeals a decision that he does not have standing to apply for partition of a leasehold interest in a property on Keats Island, and from the alternative holding there is a good reason to deny partition in any event. The appellant also appeals the order granting solicitor-and-client costs to the respondent as trustee. Held: appeal dismissed, except costs order varied to divide the costs equally between the two trust beneficiaries. The appellant does not have standing. His beneficial interest under the trust does not grant him an immediate right to possession, which is required for standing under the Partition of Property Act, R.S.B.C. 1996, c. 347. While the judge correctly found the trust's trustee indemnity provision applied, he erred by allocating the burden of the indemnity solely to the appellant. The indemnity should be borne equally by the two beneficiaries, namely the appellant and his sister, who is also the trustee.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

- [1] This appeal arises from a failed application by the appellant, Owen Pallot, for partition and sale under the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA], of a leasehold interest in a property located on Keats Island (the "Keats Property"). The main issue concerns the proper interpretation of ss. 2 and 4(1) of the PPA.
- [2] The respondent, Mary Douglas, is the sole leaseholder of the Keats Property, which is subject to an agreement titled "Declaration of Trust" (the "Trust"). The parties are brother and sister.
- [3] Mr. Pallot says his beneficial interest under the Trust equates to a one-half beneficial leasehold interest, which gives him standing to apply for partition and sale, contrary to the decision below. If he has standing, he says the judge below also erred in finding, in the alternative, that there was "good reason" to deny partition. Mr. Pallot also appeals the order indemnifying Ms. Douglas for her costs.
- [4] For the reasons that follow, I would dismiss the appeal on the standing issue and allow the appeal, in part, on the issue of costs.

II. Background

- [5] The Keats Property is owned by the Convention of Baptist Churches of British Columbia (the "Landlord"). The parties' grandfather leased other property from the Landlord on Keats Island commencing in 1926. In 1964, the grandfather gave up his interest in the original property and the parties' father acquired a leasehold interest in the Keats Property.
- [6] Since acquisition, the Keats Property has been used as recreational property for the parties' families. It is approximately .95 acres on the waterfront, accessible only by boat. There are two buildings on the Keats Property, one main cottage and one sleeping cabin. Much of the rest of the property is densely forested and rugged.
- [7] The parties' father passed away in 1993. The father's interest in the Property was then transferred to the parties' mother, who was the sole beneficiary of the father's estate. The Landlord had made it clear that it would have only one person on the Lease. On 20 December 1999, the Landlord entered into a new 45-year lease with Ms. Douglas, at the wishes of the parties' mother (the "Lease").
- [8] The Lease requires that the lessee and other occupants of the Keats Property comply with a "Doctrinal Statement of Keats Camp" and an "Expanded Philosophy and Objectives of Keats Camp", which outline certain conditions and conduct required by the Landlord, associated with its doctrinal views.

- [9] In February 2004 the parties executed the Trust. The Landlord expressly does not acknowledge the Trust (Provision 3). Although the Trust describes Ms. Douglas as a "bare trustee" for herself and Mr. Pallot (Provision 1), the Trust outlines Ms. Douglas's duties, which include a requirement to "manage the [Keats] Property in a just manner, and oversee the use and occupation of the [Keats] Property in accordance with the terms of the Lease" (Provision 4). Ms. Douglas is entitled to be indemnified for costs incurred as Trustee (Provision 6). Ms. Douglas alone is on the title to the Lease and stands "seized" of the Keats Property (Provisions 1, 2, and 8).
- [10] The Trust sets out restrictions on the transfer of the Keats Property, namely, Landlord consent (Provision 3) and agreement between the parties, Mr. Pallot and Ms. Douglas (Provision 8). The parties agree to share the costs of maintaining the Keats Property (Provision 4), and indemnify each other from other liabilities and expenses arising out of their respective uses of the Keats Property (Provision 7). Any compensation received at the termination of the Lease is to be equitably dispersed between the parties and their inheritors (Provision 9).
- [11] The parties appear to have had a falling out in 2012 or 2013 over the maintenance and expenses. Mr. Pallot wanted to sell his interest in the Keats Property. In 2013 he removed his personal belongings from the Keats Property without notice and in 2014 ceased paying his share of the maintenance. In 2015 these proceedings were commenced.
- [12] Mr. Pallot is married and had one stepson who passed away in 2009. He resides in Honeymoon Bay and has a recreation property on Ruxton Island. Ms. Douglas is married and has two children and eight grandchildren. She resides in Gibsons Landing. Both parties are on fixed incomes.
- [13] Mr. Pallot is Ms. Douglas's younger brother. Ms. Douglas is in her late seventies. Her husband has been in an extended care facility since 2008. Mr. Pallot wants the Keats Property sold. Ms. Douglas wants the property to remain in the family, which both parties agree was their parents' original intention. Until 2013, both parties regularly used the Keats Property.

III. Decision Below

- [14] Mr. Justice Leask, in the court below, found that Mr. Pallot's beneficial interest in the lease is an interest in land for the purposes of the PPA, but not a possessory interest which would give him standing in a partition proceeding: *Pallot v. Douglas*, 2015 BCSC 1296. He therefore dismissed the application for partition. In the alternative, he found that the historical use and Trust were good reason not to order partition and sale.
- [15] The judge found that the language of the Trust applied to the question of costs. Ms. Douglas was entitled to be indemnified for her costs, as defending the lawsuit was a necessary part of carrying out her duties as Trustee: *Pallot v. Douglas*, 2016 BCSC 471 at para. 8.

IV. Standing

A. Standing under the Partition of Property Act

[16] Section 4(1) of the PPA sets out the persons who have standing to bring a partition application, as follows:

4 (1) Any person who, if this Act had not been passed, might have maintained a proceeding for partition may maintain such a proceeding against any one or more of the interested parties without serving the other or others, and a defendant in the proceeding may not object for want of parties.

[17] This provision codifies the test for standing set out in *Morrow v. Eakin*, [1953] 2 D.L.R. 593 at 594-595, 8 W.W.R. (N.S.) 548 (B.C.S.C.), which applied this Court's decision in *Evans v. Evans*, [1951] 2 D.L.R. 221, 1 W.W.R. (N.S.) 280 (B.C.C.A.). The test requires looking at the civil law of England as the same existed on November 19, 1858, which was made applicable in this province by the English Law Act, R.S.B.C. 1948, c. 111, subject to modification by provincial legislation.

[18] A more recent and detailed statement by this Court is that in *Jillings v. Blewett Estate*, [1993] 101 D.L.R. (4th) 604, 79 B.C.L.R. (2d) 217 (C.A.), which summarizes the principles thus:

10 To continue with the origins of our present Act I quote from Halsbury's, *The Laws of England* (1st edition 1912) Volume 21 at 834-5 (footnote);

Prior to the passing of the Partition Act, 1868 (31 & 32 Vict. c. 40), partition was a matter of right, and the court had no discretion to refuse partition or to order sale in lieu thereof (*Warner v. Baynes* (1750), Amb. 589; *Parker v. Gerard* (1754), Amb. 236). This state of the law produced numerous inconveniences and absurdities. In *Turner v. Morgan* (1803), 8 Ves. 143, Lord Eldon, L.C., decreed partition of a single house, and Mr. Romilly in argument cited a case of a house at Cockermouth which was partitioned by actually building a wall up the middle. This state of the law led to the passing of the Partition Acts, 1868 (31 & 32 Vict. c. 40) and 1876 (39 & 40 Vict. c. 17), under which the court has wide powers to order a sale in lieu of partition where the nature of the property or the interest of the parties makes that more convenient.

[Emphasis added.]

11 Turning to the law in the Province of British Columbia, I take this summary from the reasons for judgment of Mr. Justice Bird in *Evans v. Evans* (1951), 1 W.W.R. (N.S.) 280 at 286-7:

The civil law of England as the same existed on November 19, 1858, subject to modification by provincial legislation, was made applicable in this province by the English Law Act, RSBC, 1948, ch. 111.

Therefore the law relating to partition in British Columbia remained as it was in England prior to the enactment of 31 & 32 Vict., ch. 40, until 1880, when the provincial legislature introduced in this province legislation substantially in the terms of 31 & 32 Vict., ch. 40, the substantial change effected in the law by that legislation being to give the court jurisdiction to order sale in lieu of partition "in an action for partition where, if this Act had not been passed, a decree for partition might have been made: Partition Act, 1880, ch. 21, sec. 4. (emphasis added)

12 Section 4 of the statute of 1880 is now Section 7 of the Partition of Property Act, R.S.B.C. 1979, c. 311 and with amendments to the 1880 statute of no consequence for present purposes gives the court jurisdiction to order sale in place of partition.

7. In a proceeding for partition where, if this Act had not been passed, a judgment for partition might have been given, then if it appears to the court that by reason of the nature of the property to which the proceeding relates, 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 parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions. (emphasis added)

13 The words I have emphasized - if this Act had not been passed - are significant because as Mr. Justice Bird pointed out "the law relating to partition in British Columbia remained as it was in England prior to the enactment of 31 & 32 Vict. ch. 40" in 1868. I repeat then what was said in *Dogg v. Cattell* (cited above):

But in Courts of Equity as well as in those of Common Law the existence of a joint tenancy or a tenancy in common is essential to the jurisdiction.

[Emphasis added in original.]

- [19] As noted in *Jillings*, the provisions of the PPA dealing with those against whose interests partition may be compelled do not inform the provisions dealing with entitlement to seek partition, i.e., standing:

14 The appellants placed reliance on particular words used in Section 2 to give them standing to obtain an order for partition and in lieu thereof an order for sale. I have underlined the particular words in the section:

2. All joint tenants, tenants in common, coparceners, mortgagees or other creditors having liens on, and all parties interested in, to, or out of, any land may be compelled to make or suffer partition or sale of the land, or any part of it as provided in this Act, and the partition may be had whether the estate is legal or equitable or equitable only; except that in respect of special timber licences no partition shall be made of a single licence, and any odd licences not possible to assign by partition to any of the parties interested shall be ordered

to be sold.

15 The appellants submit that they come within the intent of "all parties interested in any land". However section 2 does not describe the parties entitled to partition. As the heading indicates - Parties may be compelled to make partition or sale - the section describes those against whom an order may be made including creditors.

[Emphasis added.]

[20] A recent summary as to who was entitled to bring a petition for partition under English law in 1858 is found in the British Columbia Law Institute consultation paper Consultation Paper on the Partition of Property Act (June 2011) at 5-6:

In order to determine who is eligible to seek partition, therefore, the English law pre-dating the English Partition Act, 1868 [31 & 32 Vict., c. 40] needs to be examined. Specifically, it is the law of England as it existed on 19 November, 1858 that needs to be examined, as the Law and Equity Act [R.S.B.C. 1996, c. 253, s. 2] makes English law as it existed on that date applicable in British Columbia except to the extent it has been altered by laws of the province or is inapplicable to local circumstances. As of that date, the classes of persons eligible to seek partition were coparcenary tenants and those co-owners to whom the statutes of 1539 and 1540 had extended the remedy. As coparcenary tenancy no longer exists, the persons eligible to seek partition or sale in lieu of partition in British Columbia are those described in the 1539 and 1540 statutes, namely:

- (a) joint tenants of the fee simple or a profit à prendre;
- (b) tenants in common of the fee simple or a profit à prendre;
- (c) joint tenants or tenants in common of a life estate;
- (d) co-owners of a leasehold estate (co-lessees).

There is another requirement: anyone seeking partition or sale must have an immediate right to possession of the land. Thus owners of a future interest, such as joint tenants of a remainder following a life estate, cannot claim these remedies.

[Emphasis added, footnotes omitted.]

[21] The persons entitled to seek partition (s. 4(1) PPA) are a distinct class from those against whom partition may be compelled (s. 2 PPA). Up to this point, the persons with standing under the PPA have been restricted to joint tenants, tenants in common, or co-owners of a legal estate.

B. Possession

[22] It is not disputed that to have standing under the PPA a petitioner must have a possessory interest in land. A possessory interest is:

The present right to control property, including the right to exclude others, by a person who is not necessarily the owner A present or future right to the exclusive use and possession of property.

Black's Law Dictionary, 8th ed, sub verbo "possessory interest".

The possessory interest requirement has been characterized as requiring the petition to have an immediate right to possession of the land: *Morrow* at 595, Consultation Paper at 6.

[23] Although the statutory language in the Ontario Partition Act, R.S.O. 1990, c. P.4, differs, it has been held in Ontario that only persons entitled to immediate possession of an estate in property may make application for partition and sale: *Di Michele v. Di Michele*, 2014 ONCA 261 at paras. 75-80; *Morrison v. Morrison* (1917), 39 O.L.R. 163 at 168, 171-72, 34 D.L.R. 677 (Ont. C.A.); and *Ferrier v. Civiero* (2001), 147 O.A.C. 196 at paras. 6 and 8, 42 R.P.R. (3d) 12 (C.A.).

[24] The judge below determined that Mr. Pallot's beneficial interest is an interest in land for the purposes of the PPA. Thus the crux of the issue as to whether Mr. Pallot has standing to seek partition is the question of whether that interest includes an immediate right to possession.

C. Application in this Case

[25] Mr. Pallot says he has a possessory interest in the Keats Property as the owner of one-half of the equitable interest in the lease, which grants him an equal and immediate right to use and enjoy the benefit of the Keats Property.

[26] As I understand his arguments, Mr. Pallot says that the judge erred because: (1) the essence of a leasehold interest is the right to use and enjoy the property, and thus co-ownership of the leasehold interest is a sufficient possessory interest, if not the same as an immediate right to possession; (2) the intervening Trust (whether bare or otherwise) is not determinative of the issue, as the parties have an equal right of possession in the Keats Property; and (3) the interest in land as a beneficiary of the Trust is enforceable against third parties, and is therefore a possessory interest.

(i) The Appellant's Interest

[27] Mr. Pallot says he has beneficial co-ownership of the leasehold interest and that is a sufficient possessory interest, if not the same as an immediate right to possession. Ms. Douglas denies that he has co-ownership of the leasehold interest.

[28] In his factum, Mr. Pallot describes his interest in several different terms: as a beneficial interest in the leasehold, as an equitable tenant in common of the undivided leasehold, as a co-owner of the lease, as holding an equitable leasehold interest, and as holding an unsubdivided one-half leasehold interest.

[29] In my view, the use of these various descriptors obfuscates rather than elucidates the interest involved. In this case, the leasehold interest is held by Ms. Douglas. She holds the leasehold interest subject to a trust in favour of herself and Mr. Pallot. Mr. Pallot is a beneficiary under a trust of an interest in a leasehold estate. The real issue, as to whether Mr. Pallot has standing to seek partition, is whether he has the requisite right to immediate possession.

(ii) The Personal Nature of the Trust Interest

[30] Regardless of the terminology used, Mr. Pallot says his interest as a beneficiary under a trust of an interest in a leasehold estate gives him a right to immediate possession of the property. However, in my view, that position ignores one of the fundamental features of a trust.

[31] One of the essential features of a trust is that one or more parties hold title to property and manage it for the benefit of one or more parties who have a right to enjoy the property. The beneficiaries under the trust enjoy the property subject to the terms of the trust. Professor Waters describes the principle as follows:

The trust is, perhaps, better described by isolating its essential features. The hallmarks, the essential characteristics of the common law trust, are heavily reflective of a particular legal history. The foremost of these is the fiduciary relationship which exists between trustee and beneficiary. One party holds the title to property, and manages it, for the benefit of another who has exclusive enjoyment of the property. As we have seen, it is possible to have a variation on this basic framework, for the trustee may himself be a beneficiary. In that case he will have a share in the enjoyment .

Donovan W.M. Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters, 2012) at 9.

[Emphasis added.]

[32] There are both personal and proprietary aspects to a beneficiary's rights under a trust. The proprietary aspect concerns a beneficiary's rights to pursue trust property as against, for example, a buyer with actual or constructive notice of the trust. With respect to the personal aspect of a beneficiary's right, Professor Oosterhoff says this:

If we consider first the personal aspect of the beneficiary's right, it will be apparent that, since the management and control of the trust property is vested in the trustee, the beneficiary only has a personal right against the trustee that the latter perform the trusts that he is bound to perform. The beneficiary can never "go around" the trustee and assert a claim to the trust property directly. On the contrary, the beneficiary's claim must always be against the trustee .

only the trustee, and not the beneficiary, has the right and the duty to make claims against third parties who may have interfered with or damaged the trust property .

A.H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014) at 38.

[Emphasis added; footnotes omitted.]

[33] Professor Oosterhoff further explains the respective rights of trustees and beneficiaries:

Similarly, the beneficiaries are not generally entitled to direct the trustee. For example, the beneficiaries cannot require the trustee to resign and appoint another person as a replacement. In general, then, we see that the structure of the trust is that the trust property is held by the trustee, and this gives the trustee rights in rem, rights against the whole world; the beneficiary, on the other hand, can require the trustee to use those rights according to the terms of the trust. It is not so much that the beneficiary has an interest in the trust property that lies alongside the interest of the trustee. Rather the rights of the beneficiary encumber the rights of the trustee, with the result that the trustee can be forced to use his rights in a particular way. As one legal historian has put it, "The interest of cestui que trust depends on the interest of the trustee: the creation of a trust is a process of cumulation, and not division".

Oosterhoff on Trusts at 39.

[Emphasis added; footnotes omitted.]

[34] In short, the interest of the beneficiary under a trust is the right to claim that the trust be performed in accordance with its terms. It is not an immediate right to possession of the trust property. This position was clearly shown in relation to a beneficiary's equitable interest in *Taylor v. Grange* (1879), 13 Ch. D. 223, *aff'd* (1880), 15 Ch. D. 165 (C.A.). In *Taylor, Fry J.* held there was no jurisdiction to order partition at the request of a beneficiary with an equitable estate in the trust property, which was held under a trust for management of real property created by a will. Mr. Justice Fry reasoned at 227:

For if I were to decree partition I should be putting an end to the active trusts which the testator has directed to be carried on during the lives of his daughters. The effect would be to stop the business of working the quarries and to divide the property in a manner inconsistent with the exercise of the powers given to the trustees.

No doubt an equitable owner may obtain a decree for partition if he be entitled to call for a legal estate, which would have entitled him to partition at common Law. But that is not this case, and I should be doing wrong here to make a decree for partition, the result of which, as no conveyances could be at present executed, would be to cause the trusts of the will to be administered separately as to the different persons entitled.

[35] In this case the trustee, Ms. Douglas, is required to manage the trust property. That includes fairly allocating times for Mr. Pallot and herself and their families (or assigns) to use the trust property. Mr. Pallot's entitlement to use the trust property is not immediate, but rather is subject to the limitations imposed by the Trust, namely, an allocation of time by Ms. Douglas as trustee. Provided Ms. Douglas conforms to the terms of the Trust in making such

allocations -- which requires that she manage the property "in a just manner" and "in accordance with the terms of the Lease" (Provision 4) -- Mr. Pallot has no right to claim possession at any particular time. Ordering partition would do violence to the terms of the Trust.

(iii) The Rule in *Saunders v. Vautier*

[36] Ms. Douglas says the rule in *Saunders v. Vautier* (1841), 49 E.R. 282 (Rolls Ct.), aff'd (1841) 41 E.R. 482, [1841] E.W.H.C. Ch. J82, illustrates the nature of the interest of a trust beneficiary, and in particular, that a trust beneficiary does not have a right to immediate possession of trust property. I agree. The rule buttresses the conclusion that Mr. Pallot lacks the immediate possessory interest in land required for standing to seek partition.

[37] The rule in *Saunders v. Vautier* provides that if all beneficiaries under a trust are sui juris and in agreement, they can terminate the trust and have the trust property transferred to them. The beneficiaries do not have a claim to the trust property directly, however; it must be transferred to them from the trustee upon the dissolution of the trust.

[38] Professor Waters describes the rule thus:

The broader statement of the rule is this: if there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees. It not only applies when there is one beneficiary, but when there are two or more, and they must agree to terminate the trust .

Waters Law of Trusts at 1236.

[Emphasis added.]

See also *Buschau v. Rogers Communications Inc.*, 2006 SCC 28 at para. 21.

[39] Professor Waters explains that the rule:

is based on the theory that, though title and management rest in the trustees, the significance of property lies in the right of enjoyment. This enjoyment is in the beneficiaries of the trust, and therefore, the theory goes, in the last analysis it is for them to decide how they will enjoy the property. It is most important to realize that that this does not mean that, despite all the doctrine of the common law trust, the common law ultimately associates ownership with the trust beneficiary rather than with the trustee

Waters Law of Trusts at 1235.

[40] Thus:

The common law conceived of the divisibility of ownership into rights. Rights of management and of disposition were "owned" by the trustee, and the right of enjoyment was "owned" by the beneficiary. It is a simple, almost pragmatic, conclusion that, if one person has all the rights of enjoyment in the trust property, and he is of age and capacitated, he should be able to say what he wants done with the property over which he alone has and will have, rights of enjoyment. And, if that is so, then he should be able to call for the property from the trustee if he is not satisfied with the manner of enjoyment dictated by the terms of the trust. The intention of the settlor, who after all had alienated the property by way of trust, thus gives way to the wishes of the "owner" of all of the rights of enjoyment in the property.

Waters Law of Trusts at 1235.

[Emphasis added.]

- [41] The rule in *Saunders v. Vautier* was part of the common law at the time of passage of the PPA. It came into being in recognition of the nature of the interests in a trust, and is limited by strict conditions as to its application. In this case, the conditions for applying the rule in *Saunders v. Vautier* are not satisfied because Mr. Pallot and Ms. Douglas do not agree. Mr. Pallot therefore seeks to use the PPA to achieve what he cannot achieve under the rule in *Saunders v. Vautier*, namely the transfer of his share of the trust property.
- [42] In my opinion, the PPA was not intended to broaden the rule in *Saunders v. Vautier* to allow for the collapse of trusts where one or more, but not all beneficiaries, are not satisfied with the manner of enjoyment dictated by the terms of the trust. The PPA is legislation designed to deal with the "numerous inconveniences and absurdities" when "partition was a matter of right, and the court had no discretion to refuse partition or to order sale in lieu thereof": Jillings at para. 10.
- [43] The PPA was not intended to expand the scope of persons entitled to seek partition, but rather to provide greater flexibility than the former law as to the nature of the remedy (partition or sale) and the availability of the remedy (creating a discretion to deny partition). Indeed, the appellant has not provided any authority for the proposition he asserts, which, in my view, would fundamentally alter the relationship between trustee and beneficiary in situations of this kind.
- [44] In summary, the rule in *Saunders v. Vautier* demonstrates the limited circumstances in which trust beneficiaries may collapse the trust to obtain the trust property, thereby avoiding the provisions of the trust dictating the terms on which the beneficiary enjoys the trust property. That circumstance is not present in this case, as Mr. Pallot and Ms. Douglas do not agree. The PPA did not extend the rule in *Saunders v. Vautier* as contended by Mr. Pallot. As a result, Mr. Pallot's interest remains that of a beneficiary of a trust holding a leasehold estate, and is not a possessory interest in the leasehold estate itself.
- [45] In the result, in my view, Mr. Pallot has no standing to seek partition and sale of the leasehold estate.

V. Good Reason

- [46] Assuming success on the standing issue, Mr. Pallot also appeals the trial judge's conclusion that there is a good reason to deny partition in this case. Mr. Justice Leask found good reason based on the historical use of the Keats Property and the agreements contained in the Trust. Mr. Pallot says the judge erred by relying on the historic family use of the Property and the intention to preserve that use.
- [47] As I have determined that Mr. Pallot lacks standing to seek partition or sale under the PPA, it is unnecessary to deal with these arguments.

VI. Costs

- [48] In a separate decision on costs, the trial judge awarded costs to Ms. Douglas on a full indemnity basis pursuant to Provision 6 of the Trust. Mr. Pallot appeals that award, saying that provision does not apply to claims brought against Ms. Douglas "in her capacity as co-owner of the leasehold interest" rather than "with respect to the carrying out of her duties as bare trustee". He says the claim for partition is, by its nature, a claim against Ms. Douglas as co-owner of the equitable interest in the leasehold.
- [49] Mr. Pallot also argues that even if the provision applies the indemnity would be borne "by the beneficiaries of the trust equally", in this case himself and Ms. Douglas. For her part, Ms. Douglas emphasizes the pleadings did not state she was being sued only in her capacity as a trust beneficiary. She says the petition was an attempt to do something not permitted by the terms of the Trust, and thus by its nature implicated her as trustee.
- [50] Ms. Douglas relied primarily on Provision 6 (indemnity for trustee), but argued that Provision 7 (indemnity between parties for costs arising as a result of their respective use and occupation of the Property) also supported an indemnity. In my view, Provision 7 does not apply as the issue does not concern indemnity for costs arising out of the use and occupation of the property.
- [51] Although raised somewhat tangentially, Ms. Douglas did not address the position that she as beneficiary would be liable for half the indemnity owed to her as trustee pursuant to Provision 6. In fairness, I would also note that this argument does not appear to have been advanced before the judge below.
- [52] Provision 6 of the Trust provides:
- Both parties acknowledge that Mary Jean, the Bare Trustee/Lessee, shall be indemnified and saved harmless from all actions, suits, liabilities, costs, charges, and expenses whatsoever in carrying out the duties of her position as Bare Trustee/Lessee.
- [53] The trial judge considered the words of Provision 6 as well as the petition pleadings. He concluded:

- [8] I am satisfied that the respondent was being sued in her capacity as Bare Trustee/Lessee of the property. Defending the lawsuit was a necessary part of "carrying out the duties of her position".
- [54] I agree with the trial judge's conclusion as to the applicability of Provision 6. Ms. Douglas as trustee is the sole holder of the leasehold. Mr. Pallot sought to partition the Property, contrary to the provisions of the Trust. As trustee, Ms. Douglas was obliged to respond and participate in the proceedings. Provision 6 provides that in such a case, she will be indemnified.
- [55] However, there remains the question whether Mr. Pallot is solely responsible for the indemnity, as held by the judge in the court below. On the plain reading of Provision 6, "[b]oth parties" (i.e., Mr. Pallot and Ms. Douglas) acknowledge that Ms. Douglas as trustee will be indemnified.
- [56] Since there is no trust property other than the Keats Property, the indemnity must come from the beneficiaries. This is in accordance with the long-established rule in equity that a trustee is entitled to be indemnified by the sui juris beneficial owners of the trust property for expenses properly incurred: *Hardoon v. Belilios* (1900), [1901] A.C. 118, 17 T.L.R. 126 (P.C.); *Elliott v. Canadian Credit Men's Trust Assn. Ltd.* (1934), [1935] S.C.R. 1, [1935] 1 D.L.R. 353; *Re Reid* (1970), 17 D.L.R. (3d) 199, [1971] 2 W.W.R. 121 (B.C.C.A.).
- [57] The parties did not provide any authorities where liability for indemnification was distributed to one beneficiary of a single trust but not another, nor was I able to uncover any such authority. The language of the Trust similarly indicates that both beneficiaries are equally liable. The issues that arose here are ones determinative of an ongoing relationship and therefore of importance to both parties.
- [58] As a result, I am of the view that, pursuant to the Trust and consistent with the common law, the indemnity of the "Bare Trustee/Lessee" is to be borne equally by Mr. Pallot and Ms. Douglas as the beneficiaries of the Trust.

VII. Disposition

- [59] The appeal is dismissed, except the order as to indemnity for costs is modified to make Mr. Pallot liable for one-half of Ms. Douglas's costs here and in the court below.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Fitch"

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Prepared on 28 October 2026 · Esheria