

CANADA / JUDGMENT

Pollyco (Latimer) Venture Ltd. v. Allwest Development Corporation

2022 BCSC 2041

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2041 Pollyco (Latimer) Venture Ltd. v. Allwest Development Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pollyco (Latimer) Venture Ltd. v. Allwest Development Corporation,

2022 BCSC 2041

Date: 20221104

Docket: S212491

Registry: Vancouver

Between:

Pollyco (Latimer) Venture Ltd.

Plaintiff / Defendant by Counterclaim

And:

Allwest Development Corporation and Allwest Properties Ltd.

Defendants / Plaintiffs by Counterclaim

And

Jae Wan Chow a.k.a. Connie Chow, Andrew Knott, Isle of Mann Capital Corporation, Isle of Mann Construction Ltd., Isle of Mann Development Corporation, Isle of Mann Management Services Inc. and

ABC Company (Isle of Mann)

Defendants by Counterclaim

Before: The Honourable Justice Matthews

Oral Reasons for Ruling Re Interlocutory

Application Pursuant to Section 249 of the Land Title Act

In Chambers

Counsel for Plaintiff Pollyco (Latimer) Venture Ltd., and Defendants by Counterclaim Andrew Knott and Jae Chow:

R.W. Cooper, KC

S.F. Stephenson

Counsel for Defendants Allwest Development Corporation and

Allwest Properties Ltd.:

R.J. Robb

A.B. Richards

Place and Date of Hearing:

Vancouver, B.C.

October 26, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2022

[1] The plaintiff, Pollyco (Latimer) Venture Ltd., and the defendants Allwest Development Corporation and Allwest Properties Ltd., to whom I shall refer to collectively as "Allwest", entered into a joint venture to subdivide, develop and sell properties in the Township of Langley. Some of the properties were owned by Allwest. Allwest's capital contribution to the joint venture was the Allwest properties. Pollyco's capital contribution to the joint venture was payment of development costs. The joint venture contract provided that Pollyco's payment of development costs was to be secured by an option to purchase the Allwest properties. Subsequent to giving notice that it was terminating the joint venture agreement, Allwest brought a petition seeking cancellation of the option to purchase. Pollyco brought this claim seeking declarations that the joint venture contract with the option to purchase remain in full force and effect. Allwest brings this interlocutory application pursuant to s. 249 of the Land Title Act, R.S.B.C. 1996, c. 50, seeking cancellation of the option to purchase registered against title to the Allwest properties.

- [2] The issues are whether Allwest has met the statutory merits threshold of raising a question that is sufficiently material in order to engage the discretion of the Court to cancel a charge pursuant to s. 249, the nature and scope of the discretion that s. 249 affords to cancel the charge for which the merits threshold has been met, and whether the Court should exercise the discretion to cancel the charge.
- [3] I delivered these reasons orally. I have edited them without changing the substance.

Section 249 of the Land Title Act

- [4] Section 249 of the Land Title Act provides for an application to be brought in a British Columbia Supreme Court proceeding to cancel a charge registered against title as follows:

Power of court to order cancellation of charge

249 (1) If, in a proceeding pending in the Supreme Court,

- (a) a question is raised
 - (i) as to the validity of a registered charge, or
 - (ii) as to money owing on or rights respecting a registered charge, and
- (b) in the opinion of the court, the question raised is sufficiently material for the application of this section,

on affidavit or other proof of the good faith of the question raised, the court may, on terms as to security and otherwise it considers proper, order that the registration of the charge be cancelled on payment into court of a specified amount of money by the person claiming relief.

- (2) Except under special circumstances to be established to the satisfaction of the court, an order must not be made under this section for the cancellation of the registration of a mortgage, except on payment into court of the full amount which the mortgagee, or the mortgagee's successor in title, has stated on affidavit to be due.
- [5] There has been very little judicial consideration of this provision.
- [6] The provision clearly includes a threshold merits test which must be met before the court's discretion to cancel the charge is engaged.
- [7] On this application, the parties do not agree what the threshold merits test is. However, Pollyco concedes that regardless of what the threshold merits test is, given that in the underlying litigation Allwest asserts that the option to purchase has expired by effluxion of time and Pollyco asserts it is in full force and effect, the merits threshold has been met.

- [8] Pollyco argues that the real issue on this application is whether the Court should exercise its discretion. Pollyco argues that the Court should not, because cancellation will destroy the priority Pollyco currently enjoys with the registered option, it has a good claim as to the continuing efficacy of the option, and trial is only a few months away as it is scheduled to proceed April 11, 2023.
- [9] Allwest concedes that the section is permissive and not prescriptive, and therefore empowers the Court with discretion. However, Allwest asserts that Pollyco's position on how and why the Court should exercise its discretion is wider than the discretion that the provision provides. Allwest argues that if the threshold merits is met, the Court must cancel the charge unless it exercises its discretion to not cancel the charge based on a finding that relates to the matters set out in the provision itself.
- [10] In *R.A.D. v. Campbell*, 2015 BCCA 494, the Court of Appeal considered s. 249 on an appeal from a decision in which a chambers judge had cancelled the mortgage registered against the home of a defendant in a civil claim for sexual assault. The mortgage had been registered by his defence counsel to protect her fees. The plaintiff was successful in the claim, and registered her judgment against the home also. The judgment was behind the mortgage in priority. The plaintiff applied to have the mortgage cancelled because defence counsel witnessed the mortgage, despite becoming the mortgagee through the mortgage, and was therefore a party to the instrument. In considering whether the chambers judge was correct in cancelling the mortgage pursuant to s. 249 of the Land Title Act, Justice Groberman, for the Court, explained that in determining the validity of a charge, court must keep in mind that the land title register is a creature of statute, and so the court must look to the statute for their power to make changes to the register.
- [11] In *R.A.D.*, Justice Groberman held that despite the fact that a party to a mortgage ought not witness it, the mortgage was not invalid as between the mortgagee and the mortgagor. He held that s. 249 of the Land Title Act did not give the court authority to cancel a charge that was valid as between the parties to it. His determination that the charge was valid is such that his reasons do not provide any guidance on the threshold test to engage s. 249, except that if a charge is valid, the provision is not engaged.
- [12] In *Kang v. Steveston Public Market Inc.*, 2017 BCSC 544, Steveston Public Market applied to cancel a certificate of pending litigation pursuant to s. 249 or 256 and 257 of the Land Title Act. At paras. 26 to 31, Master Harper discussed the nature of certificates of pending litigation, and held that they must be cancelled if they are not based on a genuine and substantial interest in land. Master Harper held that it was necessary to determine whether there was a "reasonable chance" that Mr. Kang could establish that he had an interest or an estate in land. Master Harper also referred to whether there was a "triable issue" on whether Mr. Kang had an estate or interest in land. Master Harper also held that an application to cancel the CPL "necessarily involves an assessment of the relative merits" of the applicant and the respondent. It is not clear whether, in this portion of her reasons where she referred to varying descriptors of a threshold merits test, Master Harper was referring to the

requirements of cancellation under s. 249 or under ss. 256 and 257 of the Land Title Act.

- [13] At paras. 36 to 39, Master Harper was clearly considering s. 249. She stated that she must consider whether the party who filed the certificate of pending litigation (i.e., the party opposed to the cancellation of the charge) brought a claim that "has any merit or chance of success". Master Harper held that the CPL holder's claim was weak, and even though she allowed for the possibility that he would prove his claim at trial, a material question had been raised as to the validity. It appears that Master Harper decided the issue of whether the threshold merits had been met to engage s. 249 by analyzing the opposing party's claim to the charge.
- [14] Kang does not assist in resolving the nature of the evidence that satisfies the threshold question under s. 249. However, it may be authority for the proposition that the relative strength of the parties' cases is relevant to the exercise of discretion under s. 249.
- [15] Where the threshold merit test has been met, s. 249, by use of the word "may", provides the court with discretion to cancel the charge. The parties do not dispute this, but Allwest says the discretion is limited by the object of the provision, the nature of the order being sought, and the circumstances in which the order is being made. Allwest asserts that the discretion must be informed by the words of the statute. In particular, Allwest asserts that the discretion is not broadly concerned with justice and fairness.
- [16] While I agree the discretion is informed by the object of the provision, the requirements of the provision and the circumstances in which the order is sought, I do not agree that the considerations of justice and fairness "writ large" are not engaged. While I confess to not be sure what Allwest means by the phrase "writ large" in this context, as the Court of Appeal explained in *Hansra v. Hansra*, 2017 BCCA 199 at para. 44, despite the sometime use of the phrase "unfettered discretion", judicial discretion is always fettered by the requirement that it be exercised in a principled and consistent manner in the interests of justice. Exercise of discretion in a principled manner in the interests of justice requires fairness: *Wong v. Lee*, 2002 CanLII 44916 (ON CA) (dissenting reasons of Justice Borins), adopted in *Locking v. Armtec*, 2012 ONSC 5228 at para. 41. I also note that while discretion is always fettered, it must not be fettered by rigid rules from which judges are never at liberty to depart: *BCIT (Student Association) v. BCIT*, 2000 BCCA 496 at para. 22, citing *Ward v. James*, [1965] 1 All E.R. 563 per Lord Denning at p. 571.
- [17] Section 249 requires that the question raised be "sufficiently material". That renders the relevant strength of the parties' positions on the validity of the charge relevant to the exercise of discretion. I also consider that, as explained by Groberman J.A. in *R.A.D.*, the legislative context for the provision includes that its cancellation will eliminate its priority and that, with the exception of powers given to the court in certain circumstances, only the registrar of the land titles cancels charges. Accordingly, the court's discretion must derive from the wording of s. 249. Section 249 applies where the validity of the charge is the subject of the litigation. The discretion given to the court to cancel the charge therefore engages the

question of the relative strength of the parties' positions as to the validity of the charge.

- [18] In addition, the court is required to consider the issue of security. The language of the provision, in particular, "on terms as to security and otherwise it considers proper", directs the court to consider whether money is adequate compensation if the charge is invalidly cancelled, and, if not, whether there is another way of securing the opposing party's interest.
- [19] I also agree with Allwest's submission that the circumstances of the application must be considered in the exercise of the discretion. This submission aligns with Pollyco's submission that the stage of the litigation must be considered.
- [20] I conclude that the following factors are relevant to the exercise of the discretion:
- a) the strength of the parties' positions on the validity of the charge;
 - b) the circumstances of the application, including when the question of validity will be tried in relation to the interests of the parties;
 - c) whether money will be adequate compensation if a valid charge is cancelled on an interlocutory application, or if not, whether some other appropriate security can be ordered; and
 - d) the balance of fairness taking into account the foregoing factors.

Threshold Merits Under s. 249 of the Land Title Act

- [21] Allwest argues that it has raised a question as to the validity of the option to purchase that meets the sufficiently material threshold in s. 249(1). Indeed, it asserts that it has raised a very strong case because the option to purchase had expired on its face and the timelines for performance of certain tasks under the joint venture contract had passed, giving Allwest the right to terminate the joint venture.
- [22] Pollyco does not dispute that the validity of the option to purchase is a material question; it points out that the option's validity is central in the underlying case. However, it asserts that Allwest's case is not very strong, and that Pollyco has a strong argument that the option had not expired because when the option agreement is interpreted as part of the joint venture, as it must be, the option agreement could not have expired.
- [23] Despite the lack of a real contest on the threshold merits issue, I consider it necessary for me to make a determination that there is sufficient materiality to the question raised by Allwest. I will review the factual background for this purpose and for the purpose of the next, highly contested issue, which is whether the Court's discretion ought to be exercised to cancel the option.

The Joint Venture and the Option to Purchase

- [24] Pollyco and Allwest signed a joint venture agreement dated for reference April 21, 2016. It was amended March 17, 2017; November 8, 2017; December 18, 2018; February 12, 2019; and November 7, 2019.
- [25] The April 21, 2016 joint venture agreement defined the participating interests of the parties as the "fractional interest which each Joint Venturer holds in the Joint Venture Assets from time to time as set out in Schedule B".
- [26] Schedule B of the April 21, 2016 joint venture agreement provided for Allwest to make capital contributions of the Allwest properties to the joint venture, described as an anticipated contribution of \$24,000,000, and for Pollyco to make capital contributions by paying all costs relating to the development and subdivision of the Allwest properties, estimated to be \$750,000 per acre and to total \$15,000,000. Accordingly, the initial participating interests were 61.54% and 38.46% respectively.
- [27] Pollyco and Allwest also entered into a management agreement on April 21, 2016, pursuant to which Pollyco agreed to pay Allwest management fees with regard to Allwest's properties.
- [28] The April 21, 2016 joint venture agreement refers to the management fee agreement. It provides that time is of the essence for the management fee agreement and unless Pollyco pays the management fees when due, Allwest can terminate the joint venture agreement on written notice to Pollyco.
- [29] Allwest was not required to transfer title to the Allwest properties until the time of the sale of the subdivided lots. Pursuant to provision B.1 of Schedule B of the April 21, 2016 joint venture agreement, Pollyco's security for its capital contributions, which it was making on a pay as you go basis as the development was undertaken, was an option to purchase an interest equivalent to Pollyco's participating interest registered against the Allwest properties. The option to purchase agreement was an instrument appended to a Land Title Act Form C (Section 233) Charge executed on March 3, 2017. The option to purchase agreement provides, in the recitals, that Pollyco has acquired the option to purchase by the April 21, 2016 joint venture contract. The option to purchase agreement provided for the option to purchase until the Completion Date, which is defined as the date provided for in the April 21, 2016 joint venture agreement for the sale of the Allwest properties on or before December 31, 2019.
- [30] While Pollyco takes the position that the option to purchase contract is a part of the joint venture agreement as a whole, including other amendments pertaining to timing which were extended by agreement, there is no evidence that the December 31, 2019 date stated in the option instrument terms was the subject of an express agreement to amend or extend.
- [31] Schedule B of the April 21, 2016 joint venture agreement also provides for project timing. It provides that the joint venturers will use their best efforts to accomplish a marketing schedule by which sales of the subdivided properties would begin no later than November

30, 2018. The marketing schedule provided for Pollyco to secure approval from the Township of Langley by July 31, 2017, and if not obtained, the agreement would become null and void, except that Pollyco was entitled to an extension of that deadline for up to one year if its commercially reasonable efforts to secure approval were hampered by certain events such as strikes or municipal delay. If such an extension occurred, then all other dates were extended by the same period of time. No additional extensions were permitted except pursuant to an agreement in writing of the parties.

- [32] The parties did agree to extensions to the marketing schedule. A November 8, 2017 amendment, for example, provided extensions to several dates, including that sales were to begin no later than January 9, 2020. Allwest's position is that the completion date reference in the option to purchase must be interpreted in light of, at least, the agreed-upon extension to the time at which the sale of lots would begin. If that is correct, the option to purchase had not expired when Allwest terminated the joint venture and brought its petition.
- [33] In addition, in the November 7, 2019 amendment, the parties changed the nature of the development. Instead of developing the properties by subdividing and servicing the subdivided lots, they agreed that the project would include building out end product on each of the lots. The amendment provided that the agreement would terminate on the date the final parcel or lot was developed, billed out and sold, and final distributions made. That amendment provided for Pollyco to pledge Allwest's properties as security for development financing. The amendment also provided for a new schedule of payment dates of management fees and for additional management fees paid by Pollyco to Allwest.
- [34] Allwest alleges that Pollyco failed to pay the management fees in accordance with the schedule. On December 15, 2020, Allwest gave Pollyco notice that it was terminating the joint venture agreement pursuant to article 13.03(a) of the April 21, 2016 joint venture agreement for failing to pay the management fees.

A Question That Is Sufficiently Material

- [35] In the underlying proceedings, Allwest takes the position that the option to purchase agreement was never amended or extended and so the option expired on December 31, 2019.
- [36] Pollyco seeks a declaration that the option remains in full force and effect because the option to purchase agreement describes the option to purchase as applying up to the completion date under the April 21, 2016 joint venture agreement. While that date was December 31, 2019 under the terms extant at the time the option to purchase was registered against title, Pollyco asserts that the completion date changed with the dates amended in the underlying agreement and as the underlying agreement had been amended, had not expired.

[37] The issue of whether the option to purchase had expired is material. If the option had expired, the validity is clearly in question.

[38] I conclude that Allwest has raised a sufficiently material question as to the validity of the option.

Discretion to Cancel the Option to Purchase if the Option is Sufficiently Material

Strength of the Parties' Positions on the Validity of the Charge

[39] Both parties have raised substantive and compelling arguments as to the validity of the option.

[40] Allwest takes the position that the option to purchase agreement was never amended or extended and so the option expired on December 31, 2019. It cites authorities for the proposition that options shall be strictly interpreted and enforced only when the option holder can show that the option terms had been strictly observed: *Rae v. Paduano*, 2000 BCSC 990 at para. 15, citing *Pierce v. Empey*, [1939] S.C.R. 247 (S.C.C.) at para. 11. Allwest also submits that because options are unilateral obligations, they are strictly interpreted so that the grantor has certainty of his or her obligations: *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 SCR 265 at para. 91. Related to this, Allwest points out that Pollyco drafted the option, and so any uncertainty in its terms, such as whether it had an expiry date other than the one Allwest asserts that was stated in it, must be construed against Pollyco.

[41] Pollyco points out that the starting point is that the option agreement is part of and integral to the joint venture contract. Pollyco notes that Allwest relies on the dissenting judgment in *Sail Labrador*. Pollyco relies on the majority judgment, which, according to Pollyco, provides that where there is a lease with an option to purchase, there may be one contract or there may be two (para. 41 of *Sail Labrador*).

[42] Pollyco asserts that the usual rules for interpreting contracts govern, requiring the Court to interpret the contract consistent with the intent of the parties when they entered into it. Pollyco asserts that it is clear from the contract itself that the option was to secure the development costs Pollyco had advanced and was to advance. Pollyco asserts that the option's duration is tied to the completion date of the joint venture, not a particular date not connected with the completion date. Pollyco points to a term of the option instrument that provides that if there is any inconsistency with the option terms and the April 21, 2016 joint venture agreement, the latter prevails. Pollyco submits that properly interpreted, despite that the option agreement also referred to the specific completion date then applicable, the option duration was to mirror the completion date in the April 21, 2016 agreement as amended. Pollyco asserts that is the only interpretation consistent with the clear intention of the parties.

- [43] Both of these positions have merit. It is not obvious that one or the other will prevail. On the material and the submissions I have heard in a compressed timeframe on this application, it is not advisable or appropriate to further attempt to determine their relative strength.

The Circumstances of the Application

- [44] Allwest gave notice that it was terminating the joint venture in December 2020 and immediately commenced legal proceedings for relief, including cancellation of the option.
- [45] For almost two years, the option has remained on Allwest's properties, which are its only assets. Its affiant deposed that Allwest's options to obtain financing have been limited by the continued registration of the option. Pollyco points out that Allwest has not deposed as to why that is specifically causing problems or prejudice for Allwest.
- [46] I am of the view that having real property encumbered with a charge is prejudicial per se and that the thinness of Allwest's evidence on this point does not undermine the force of its claim to have what it considers to be an invalid charge cancelled from the title of its only assets. However, the lack of specifics does affect the weighing of prejudice as between Allwest and Pollyco.
- [47] Pollyco, in its claim, seeks a declaration that the joint venture and the option are in full force and effect. It wishes to proceed with the development. Cancellation of the charge will affect the viability of that relief if, for example, Allwest has encumbered the properties with financing charges. Allwest has also deposed that it has entered into discussions with another developer. While its affiant has deposed that it does not intend to convey the Allwest properties pending trial, it has not made any commitments in that regard or that the properties would be in a condition that will permit the joint venture to proceed if Pollyco achieves that outcome at trial.
- [48] As I have stated, the trial is scheduled to commence on April 11, 2023.
- [49] Pollyco submits that the pendency of the trial date is a strong factor in favour of not cancelling the charge. Given the cogency of the argument that both sides make and the fact that the charge was registered in relation to an agreement Pollyco seeks to enforce, I accept this submission.
- [50] However, at present this court's complement is short by about a dozen judges. As a result, frequently there are not enough judges to hear trials and when that occurs, a trial that is not assigned a judge is bumped and must be rebooked. Over the last many years, the rate of appointment of judges has not kept up with the rate of retirements of judges or judges electing supernumerary status. Sadly, it is too optimistic to assume that matters will have significantly improved by April 2023. If the trial is bumped and has to be rebooked, the rebooked trial may be a year or two down the road.

[51] In addition, the parties have advised me that although document discovery and oral discovery is complete or nearly complete, both parties are contemplating amendments to pleadings that may affect whether the case can be tried in April 2023.

[52] All of this is to say that there is a chance that the trial is not so near at hand as the current trial date suggests.

Whether Money will be Adequate Compensation if a Valid Charge is Cancelled, or If Not,
Whether Some Other Appropriate Security can be Ordered

[53] If Allwest is successful in persuading the Court to exercise its discretion, it seeks to have the charge cancelled on its undertaking to pay damages and its statement that it does not intend to sell the Allwest properties. It asserts that it should not be required to post security because it has made an undertaking as to damages.

[54] Allwest asserts that Pollyco's claim is to the option as security for its development costs. It points out that Pollyco has not put forward any evidence of its development costs on this application. Pollyco has pleaded development costs in excess of \$7 million. Allwest has put forward a spreadsheet of development costs that Pollyco produced in the litigation. Allwest has gone through the spreadsheet and reduced the amounts by those it disputes. Allwest comes up with a figure of just under \$1 million. However, Allwest asserts that given that Pollyco could have put forward evidence as to its development costs, but did not, Allwest should not be required to post security.

[55] Pollyco argues that monetary compensation will not be adequate because its primary goal in the litigation is to enforce the joint venture agreement. If it is successful, it will require the Allwest properties to be in the same state they were in when the joint venture was entered into (or at least when the option was registered), i.e., unencumbered. It notes that Allwest specifically refers to being limited in its options to obtain financing using the Allwest properties, and although Allwest states it has no intentions to sell the properties, the only undertaking it has offered is to damages. Pollyco asserts that its litigation goals will be thwarted if Allwest has encumbered or sold the Allwest properties by the time of judgment. It asserts that in these circumstances, it had no reason to put forward evidence of its development costs on this application because it does not bear the burden to do so on this application, and damages for development costs is not the primary relief it seeks in the underlying litigation.

[56] I do not accept that an undertaking to pay damages is appropriate. While some forms of interlocutory relief are made on an undertaking to pay damages, s. 249 calls for security or moneys paid into court, or another order that the court sees is appropriate. Given the wording of the provision, I would have to be persuaded that posting security or paying funds into court is not appropriate. I am not persuaded by Allwest's submissions. I accept that Pollyco has not put forward the evidence of its development costs on this application and takes the position that if it is successful in the litigation, it wants the Allwest properties securing its development costs in the priority it now has. It does not want damages in that

amount, because it wants to proceed with the joint venture.

The Balance of Fairness

- [57] If I were to order the charge cancelled, I would not do so on the basis of an undertaking as to damages. Even if an amount were paid into court to secure Pollyco's damages, the potential mismatch between monetary security and the relief Pollyco seeks, coupled with the April 20, 2023 trial date, are factors that strongly weigh in favour of Pollyco's position. Against that, Allwest is deprived of the full use of its assets. The nearness of the trial date is such that the harm to Allwest in leaving the option in place is not as great as the harm to Pollyco if it is inappropriately removed.
- [58] However, if the trial does not proceed in April 2023, Allwest should be entitled to renew this application. I expect that the reason the trial was adjourned or did not proceed will be relevant on a renewed application.

Disposition

- [59] The application is dismissed with leave to Allwest to reapply if the April 2023 trial is adjourned or is bumped.

"Matthews, J."

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