

CANADA / JUDGMENT

Soo v. Soo

2020 BCCA 149

COURT

British Columbia Court of Appeal

DECIDED

26 May 2020

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2020 BCCA 149 Soo v. Soo COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Soo v. Soo, 2020 BCCA 149 Date: 20200526 Docket: CA46253 Between: Kelvin Soo Respondent (Petitioner) And Rick Soo Appellant (Respondent) Before: The Honourable Madam Justice Newbury The Honourable Madam Justice Stromberg-Stein The Honourable Madam Justice Fenlon On appeal from: An order of the Supreme Court of British Columbia, dated June 28, 2019 (Soo v. Soo, 2019 BCSC 1383, Vancouver Docket S1811784). Counsel for the Appellant (via videoconference): M. Uzelac Counsel for the Respondent (via videoconference): J.D. Fisher S.D.G. Orstad Place and Date of Hearing: Vancouver, British Columbia May 8, 2020 Place and Date of Judgment: Vancouver, British Columbia May 26, 2020 Written Reasons by: The Honourable Madam Justice Newbury Concurred in by: The Honourable Madam Justice Stromberg-Stein The Honourable Madam Justice Fenlon Summary: Chambers judge below did not err in granting order for sale of real estate owned by two brothers pursuant to s. 6 of Partition of Property Act. Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] For reasons indexed as 2019 BCSC 1383, Madam Justice Duncan in the court below granted the application of the respondent, Kelvin Soo, for an order directing the sale of the property located at 1125 East 13th Avenue in Vancouver. Kelvin Soo's brother, Rick Soo, appeals that order. Together, Kelvin and Rick Soo are the registered owners of the property. I will refer to them as "Kelvin" and "Rick" respectively.
- [2] As often happens in applications brought under the Partition of Property Act, R.S.B.C. 1996, c. 347, it appears that a history of family differences underlies the application. It is clear, however, and the chambers judge below found, that Rick and his mother were the registered owners as joint tenants of the property from 1974 (at which time Rick was age 21 and Kelvin age 17) until 1988, when (shortly after the death of Mr. Soo, Sr.), Rick and his mother transferred their interests in the property to the two brothers as joint tenants. Evidently, this was done for no consideration. Kelvin lived in the house, which contains two rental suites, between 1980 and 1992; it appears Rick has also lived there since 1980 with his family.
- [3] The effective result of the 1988 transfer was that Rick and Kelvin became the registered owners of the property as joint tenants. Section 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 states that subject to various exceptions (none of which is relevant here): An indefeasible

title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title .

- [4] Between 1988 and the present, various mortgages were granted by the brothers and secured against the property. Rick conceded in his factum that the mortgages secured loans that were for his or his wife's personal benefit. Although Rick states that he has "been in sole occupation possession of the subject property, paying all taxes, maintenance, and expenses, and collecting all rents relating to the property", Kelvin deposes that Rick defaulted in 2012 and 2013 on the then-outstanding mortgage and that in March 2019, the City of Vancouver issued a notice of auction of property for taxes owing. The notice is in evidence and indicates that at the time, there were total taxes owing of some \$18,000.
- [5] Also at some time during this period, the health of the parties' mother deteriorated. She is now incapable of managing her own affairs. According to the judge below, members of her family with her then-representatives under a power of attorney arranged in 2016 to sell the home in which she was living and bought one for her in Maple Ridge that was wheelchair-accessible. However, some difficulties developed with respect to the authority of her representatives and in the words of the chambers judge, Mrs. Soo, Sr. "ended up living in the middle or top floor of the East 13th Avenue property" with Rick and her daughter Pamela, who is her caregiver. The judge noted that Kelvin and other family members now "cannot communicate or visit with" their mother and that Kelvin is concerned for her safety. (At para. 5.) Meanwhile, her house in Maple Ridge sits empty and is subject to the tax on vacant houses.
- [6] The chambers judge found that Kelvin's petition for the sale of the property had "effectively severed" the joint tenancy with his brother, and no challenge was made to this finding on appeal. Any doubt on the point is removed by the fact that Kelvin formally severed the tenancy in October 2018 by transferring his interest to himself and registering the transfer in the Land Title Office.
- [7] Rick pleaded that Kelvin had been placed on title to the property as a trustee for Rick and therefore holds his half interest in trust for Rick. The latter deposed that "At no time was it contemplated that Kelvin would be a beneficial owner of, or acquire a beneficial interest, in the Property, nor did he pay or provide any consideration in return for being placed on title." (Similarly, it appears that Rick did not pay any consideration for his half interest.) Rick submits further that Kelvin's willingness for many years to allow his brother to retain all rents and enjoy the property shows that he accepted that Rick was the sole beneficial owner.

- [8] Evidence of this kind — i.e., evidence not about the intentions of the settlor of the alleged trust at the time of transfer, but about the conduct of the alleged beneficiary some years later — is obviously of dubious assistance in proving the existence of a trust to the required degree of certainty. As we pointed out during argument, the facts relied upon by Rick were also consistent — and perhaps more so — with Kelvin's simply forbearing from making assertions against Rick for family reasons over the years.
- [9] Mr. Uzelac conceded on Rick's behalf that there is no documentary evidence as to the intentions of Mrs. Soo, Sr. at the time of transfer in 1988. While it is true that unlike most provinces, British Columbia repealed its modern counterpart of the Statute of Frauds some time ago, without such evidence a person asserting a beneficial interest under a trust in respect of land is, as Professor Waters suggests, only inviting litigation. (See Waters' *Law of Trusts in Canada* (3d ed., 2015) at 245.) Here, no concrete facts of any kind were put in evidence that would support an intention on the part of Mrs. Soo, Sr. to create a trust binding on Kelvin to hold his interest in the property for Rick or any other person. To the contrary, the evidence supports the inference that the parties' mother gave a half-interest to each of Rick and Kelvin by way of gift, treating each brother equally. As Professor Waters observes, it is not enough to "intend to transfer for another's benefit; the transferor must be shown to have had in mind a transfer on trust. This means that the intention to make a gift by way of handing over is not the intention to make a gift by way of a trust." (Supra at 135.)
- [10] Rick submits that the chambers judge erred in failing to convert the present proceeding into a full-blown action for trial, at which the question of his mother's intentions could be explored in detail. He did not suggest any particular source of possible evidence that might be "explored", nor any reason why Rick would have been favoured over Kelvin in 1988. Rick's affidavit evidence is conclusory only. Nor did he seek an order converting the proceeding into an action prior to the hearing below, although the chambers judge noted that he did say at the hearing that the Court should dismiss Kelvin's position "and perhaps make such an order." (See para. 7.)
- [11] It must be borne in mind that the present application was for an order for sale of the property. Section 6 of the Partition of Property Act required the Court to grant the application in a case such as this, unless there was "good reason to the contrary". The onus was clearly on Rick to assert some basis on which his defence — the existence of a trust in his favour — could be founded. Although Mr. Uzelac on behalf of Rick suggested in passing that a resulting trust should be explored at a trial — and I note that such a trust could rebut the presumption created by s. 23 of the Land Title Act (see *Hilborn v. Wright*, 2014 BCCA 92 at para. 11) — it is Mrs. Soo, Sr. who gave up an interest in the property and it is she, rather than Rick, who would have been the beneficiary of any resulting trust. In the absence of a claim to a resulting trust made by or on behalf of the mother, the possible existence of such a trust is irrelevant to Rick's position in the case at bar.

- [12] At the end of the day, the chambers judge found that Rick had not met the onus imposed by s. 23 of the Land Title Act and that Kelvin was the legal and equitable owner of his half share. (At para. 13.) I am not persuaded that her finding was clearly wrong, that her discretion was not properly exercised, or that this was a "doubtful" case in which a trial of the matter should have been ordered, even if that course had been properly and vigorously pursued.
- [13] In addition to the order for sale, the judge ordered an accounting "with respect to both the mortgage proceeds and rents received solely by the respondent [Rick] for his sole benefit", as well as for unpaid market rent accruing by reason of Rick's sole occupation of the property. If Rick wishes to pursue the idea of a full-blown trial of issues of financial entitlement in the context of the accounting, he may apply to the court below, subject of course to the Rules. However, the issue of beneficial ownership has been decided.
- [14] It was also submitted on behalf of Rick that Kelvin's "delay" in bringing the present application had been inordinate and that embarking on the application would prejudice Rick. Although counsel referred in this court to limitation periods in general, he did not cite any particular statutory provision aside from the 15-year 'ultimate' limitation period in s. 21 of the Limitation Act, S.B.C. 2012, c. 13. It was not necessary for Kelvin to assert a claim or seek a proprietary remedy in this case: as one of the two registered owners of the property, he was presumed to be "indefeasibly entitled to an estate in fee simple" in the property, which he shares with his brother: see s. 23 of the Land Title Act, *supra*. Of course, if limitation periods or laches apply to the financial claims that arise in the course of the accounting, it will be for each party to raise them clearly and specifically.
- [15] In the circumstances, I am not persuaded the chambers judge below made any error in concluding that the order of sale should be granted. Indeed, in my opinion, that order was properly made. I express the hope that the process to follow may go a good way towards addressing the longstanding dispute that seems to have been simmering between these parties and other family members. Perhaps it will also pave the way to resolving the living situation of Mrs. Soo, Sr., whose representatives, we were advised, were aware of this proceeding and chose to take no position.
- [16] I would dismiss the appeal. "The Honourable Madam Justice Newbury" I AGREE: "The Honourable Madam Justice Stromberg-Stein" I AGREE: "The Honourable Madam Justice Fenlon"

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Prepared on 27 October 2026 · Esheria