

CANADA / JUDGMENT

Zaepernick v. Sayani et al

2023 BCSC 1642

COURT

Supreme Court of British Columbia

DECIDED

29 August 2023

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2023 BCSC 1642 Zaepernick v. Sayani et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zaepernick v. Sayani et al ,

2023 BCSC 1642

Date: 20230829

Docket: E211990

Registry: Vancouver

Between:

Rudy Zaepernick

Claimant

And

Sofia Somani aka Sofia Sayani, Ice Queen Brands Inc.,

Ocean Drive Holdings Ltd., Portofino Management Inc.,

0913234 B.C. Ltd., Marine Drive Investments Inc., 1226 Capital Corp.

Respondents

Before: The Honourable Madam Justice McDonald

Oral Reasons for Judgment

Counsel for the Claimant:

S. Stanislaus

Counsel for the Respondents:

P. Sheppard

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 18 and 25, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2023

- [1] THE COURT: I am delivering my reasons in respect of the cross-applications orally. Should the parties request a transcript of my reasons, I may edit them to add headings and case citations, but the result will not change.
- [2] The claimant, Mr. Zaepernick, and the respondent, Ms. Sayani, were formally in a relationship. The date they separated is disputed, but it occurred sometime in 2019 or 2020.
- [3] There are currently two cross-applications before the court concerning what to do with an unoccupied residence located at 5517 Ocean Place, West Vancouver("Ocean Place").
- [4] The claimant alleges Ocean Place is family property. However, Ms. Sayani has always held legal title to Ocean Place.
- [5] Since an order made April 27, 2023, Ocean Place and three other properties owned by Ms. Sayani and the other corporate respondents have been subject to a preservation order. That order also specifically restrains the respondents from selling or transferring Ocean Place.
- [6] The claimant seeks, among other things, permission to rent out Ocean Place, or, alternatively, to rent out Ocean Place while jointly listing it for sale with Ms. Sayani. Ms. Sayani seeks, among other things, permission to complete a sale of Ocean Place. Therefore, the main issue for determination is what to do with Ocean Place: rent it, sell it, or decline to do either of those things.

Background

- [7] The parties were previously involved in a marriage-like relationship. Each party entered the relationship with business and property interests. For example, the respondent, Ms. Sayani, was and is the registered owner of Ocean Place. Ms. Sayani purchased Ocean Place in 2007 with her former husband. There is a dispute about whether the parties ever lived together at Ocean Place.

- [8] The claimant works as a contractor and he owns a construction business. Ms. Sayani is a business woman who owns and operates the respondent corporations. Ms. Sayani's extended family is involved in a business that owns and operates hotels. And Ms. Sayani is employed by the family business.
- [9] On July 16, 2021, after their separation, the claimant commenced a family claim (the "Claim") naming Ms. Sayani and her companies as respondents. The Claim challenges the enforceability of the parties' cohabitation agreement. The Claim also seeks spousal support for the claimant, division of family property and family debt. When the Claim was filed, the claimant also registered certificates of pending litigation ("CPL") against Ocean Place and three other properties held by the respondents.
- [10] On December 8, 2021, Ms. Sayani filed a financial statement.
- [11] On December 16, 2021, the parties attended a judicial case conference, at which time a trial date was set and the parties consented to, among other things, deadlines for serving financial statements and list of documents.
- [12] Following separation, the claimant learned that Ms. Sayani had listed Ocean Place for sale. The claimant's evidence is that he was not particularly concerned about the listing because he had a CPL in place and he believed his potential interest was protected.
- [13] On April 3, 2023, Ms. Sayani entered into a contract of purchase and sale for Ocean Place with buyers at a price of 5.85 million.
- [14] On April 24, 2023, on a without-notice basis, the claimant applied for and was granted an order temporarily restraining the respondents from disposing of Ocean Place until the claimant's April 24, 2023 application could be heard. The April 24, 2023 order also granted the claimant short leave to serve his April 24, 2023 application and supporting materials on the respondents.
- [15] On April 27, 2023, the court heard the claimant's April 24, 2023 application. No respondent attended the hearing.
- [16] Justice Duncan granted the claimant, among other things, an order restraining the respondents from disposing, transferring property and enjoining them from selling or transferring Ocean Place.
- [17] On May 15, 2023, the court adjourned the trial date and required the respondents to resubmit their list of documents in compliance with the Rules within 21 days.
- [18] The respondents served a list of documents in March 2022 and an amended list of documents on August 17, 2023.
- [19] On June 8, 2023, the prospective buyers of Ocean Place applied to court in a petition proceeding seeking to remove the claimant's CPL on Ocean Place pursuant to the Land Title Act. Ms. Sayani did not participate in that hearing and the petition was dismissed.

- [20] On June 9, 2023, in reasons indexed as Wood v. Zaepernick, 2023 BCSC 1046, Justice Funt dismissed an application by the prospective purchasers seeking a release of the claimant's CPL from title to Ocean Place. In dismissing their application, Funt J. concluded that if the prospective buyers suffered hardship or inconvenience due to the claimant's CPL, "it is the result of their own actions", and if the sale does not complete, their remedy may be one in damages.
- [21] Justice Funt dismissed the application and ordered that no term of the June 9, 2023 order or any term of the April 23, 2023 order shall provide Ms. Sayani with a defence to a claim by the buyers for failing to complete the sale of Ocean Place.
- [22] The trial of this Claim is set to begin on April 22, 2024.

The Claimant's July 14, 2023 Application

- [23] The claimant applies for, among other things, exclusive occupancy of Ocean Place and permission to rent it, as well as an order prohibiting Ms. Sayani from attending Ocean Place. Alternatively, the claimant seeks permission to rent Ocean Place while also entering into a joint listing of Ocean Place with the respondents.
- [24] The claimant submits that with respect to his application regarding Ocean Place, there are a number of options which include:
- a) allowing his application to rent Ocean Place as a way to generate revenue, to repair it, cover expenses, and to potentially generate income for the parties to share;
 - b) denying the application, leaving the status quo in place, which means that Ocean Place remains vacant; and
 - c) allowing both the rental of Ocean Place and the joint listing of Ocean Place as a way to possibly achieve a higher price than Ms. Sayani agreed to sell it for.
- [25] According to the claimant, back in 2017, the parties tried without success to sell Ocean Place. The claimant's evidence is that the parties previously rented Ocean Place for approximately \$88,000 to \$108,000 per year. The claimant says he was responsible for coordinating the upkeep and maintenance of Ocean Place when it was rented. The claimant says he performed the maintenance on Ocean Place during the relationship and it is currently vacant and in need of repair.
- [26] The respondents, among other things, denied that the parties ever lived together at Ocean Place. Ms. Sayani relies on the terms of the cohabitation agreement that the parties entered into which she submits to make it clear that Ocean Place is not family property.

- [27] Ms. Sayani's evidence is that the claimant was paid for his services, if any, in relation to Ocean Place and she has always been exclusively responsible for covering the expenses associated with Ocean Place. Ms. Sayani's evidence is that she is no longer able to cover the expenses associated with Ocean Place.
- [28] The respondent submits that s. 90 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] does not apply since Ocean Place was never their ordinary residence. However, the claimant points out that this is why he also sought and obtained an order pursuant to Rules 12-1 and 12-4 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR] as well as s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA] restraining the respondents from disposing of Ocean Place.
- [29] Ms. Sayani opposes the claimant's plan to rent Ocean Place. She disagrees with the claimant's rental income projections and she points out that in the recent past, Ocean Place was rented out for a much smaller amount than he currently projects.
- [30] The respondent mainly opposes retaining and renting out Ocean Place because she says she can no longer afford to solely carry the costs of Ocean Place, including the cost of a home equity line of credit in her name registered against Ocean Place.
- [31] The respondent submits that she has always paid for the costs associated with Ocean Place, including the registered credit line and the property taxes.
- [32] The respondent's evidence is that she is no longer capable of covering the cost of Ocean Place, along with her other financial obligations.
- [33] The respondent also takes the position that if the claimant is granted permission to rent Ocean Place, she remains exposed to ongoing and future costs that are unfair to her. The respondent is no longer prepared to cover the costs associated with Ocean Place. For example, if tenants could not be located, if there were requirements for major repairs, or if it took a long period of time to market and sell Ocean Place as the claimant alternatively proposes.
- [34] After considering all of the evidence, I have concluded that it is not appropriate to grant the claimant permission to rent Ocean Place and to have exclusive occupancy of that property for purposes of renting it.
- [35] In the claimant's application, he also requests that the respondents be fined in the amount of \$5,000 for their past non-compliance with masters' orders requiring them to serve financial statements and to provide lists of documents by certain dates.
- [36] The respondents did serve a list of documents in March 2022 but the form was not the proper form, so the defendants were ordered to amend their list. The respondents point out that at no time did the claimant request copies of the many documents they listed, albeit in a list that did not use the proper form. The respondents have now provided an amended list of documents and copies of the documents.

- [37] The respondent, Ms. Sayani, filed one financial statement early in the proceeding containing financial information related to personal and corporate income tax and she filed a second financial statement on August 11, 2023.
- [38] In my view, Ms. Sayani has made efforts, including through her current counsel, to comply with the financial and other information that the respondents are required to provide to the claimant.
- [39] In my view, while Ms. Sayani and the respondents have not always supplied the information in the time set by the orders, she has taken steps to correct her lack of timely responses.
- [40] I also note that Ms. Sayani has apologized for the vile and disturbing e-mail messages she sent to the claimant's counsel and his assistant as responses to their communications.
- [41] The reality is that the information due to the claimant is now flowing. Ms. Sayani's lack of participation and timely response resulted, in part, in the court granting the April 27, 2023 order. Given that Ms. Sayani has supplied her amended list of documents, copies of the documents, and a subsequent financial statement, and given that she has now retained counsel who is representing her in this matter, I am not satisfied that a fine for non-compliance with the masters' orders is required at this stage.
- [42] However, there are other concerning allegations that the respondents have not complied with the April 27, 2023 order, including by withdrawing money from accounts or businesses covered by the preservation order. The claimant may decide to pursue remedies for alleged non-compliance, but that is not the matter before me on these applications.

The Respondent's August 8, 2023 Application.

- [43] The respondent applies to set aside paragraphs 2-5 of the April 27, 2023 order, or, alternatively, to amend the order to allow the respondent's access to bank accounts for ordinary living expenses and ordinary business expenses and to allow the sale of Ocean Place with the net sale proceeds to be held in trust.
- [44] The respondent's ground for seeking to set aside the April 27, 2023 order is that it was made without notice or it was effectively without notice. The respondents acknowledge having been served according to the short leave order. However, Ms. Sayani submits that the respondents had insufficient time to respond.
- [45] In my view, the fact that an order was granted following service on a short leave basis does not mean a party who was served, can establish the order was made without notice or that the order is the equivalent to a without-notice order. If the respondents had insufficient time to respond to the claimant's application, they could have attended court to inform the court of the circumstances. However, Ms. Sayani did not appear and no one else appeared on behalf of the respondents at the hearing.

- [46] The April 27, 2023 order was made on notice to the respondents, albeit short notice. In granting the order, Duncan J. specifically finds that service according to the short leave order had been fulfilled.
- [47] Counsel for the respondent also referred me to the transcript from the hearing on April 27, 2023, where the court mentions applying to "set aside" the order. However, I'm not persuaded that by using the term "set aside" during submissions, the court was indicating that the order was effectively being made on a without-notice basis. In my view, because the order was made with notice, I am not entitled to consider the respondent's application on a de novo basis.
- [48] Further, numerous submissions were made to me on behalf of the respondents that the April 27, 2023 order was made in error, for example, by not requiring the applicant to provide an undertaking as to damages or by applying s. 91 of the FLA when it was inapplicable. Those are not matters for this court to resolve.
- [49] Having concluded that I am not entitled to conduct a hearing de novo, the question is what the respondents must establish to vary the terms of the April 27, 2023 order.
- [50] In general, under s. 216(3), a court may vary interim orders made under the FLA provided there has either been (1) a change in circumstances or (2) the emergence of new evidence of a substantial nature not available when the original order was made. However, s. 216(3) does not apply to orders made under Part 5 [Property Division] of the FLA, which includes s. 91 orders: s. 215(2).
- [51] Under s. 91(4) of the FLA, the court may change, suspend, or terminate a temporary order protecting property; in other words, an order made under s. 91(1).
- [52] Notably, in s. 91(4), it does not set out any pre-conditions for varying an order made under s. 91(1). In this regard, s. 91(4) stands in contrast to s. 216(3). A plain reading of the provisions suggests that a party applying to vary a s. 91 order need not show that there has been a change in circumstances or the emergence of new evidence.
- [53] In *Hunt v. Hunt*, 2022 BCSC 1535, this Court considered a variation application under s. 91(4). In discussing the provision, Justice Lyster stated that "it is not necessary for the applicant to show a change in circumstances for the court to vary a s. 91(4) order".
- [54] Ultimately, Lyster J. declined the variation application on the grounds that variation was not necessary to "preserve the family property at issue".
- [55] Justice Lyster also stated that on a variation application, the parties should not simply rehash their arguments and concerns. In this regard, it is not appropriate for a court to use s. 91(4) variation application as an opportunity to simply revisit the conclusions underlying the impugned s. 91 order: at para. 29.

- [56] In regards to the burden of proof on variation application, Justice Hardwick in *Lamoureux v. Hedquist*, 2022 BCSC 1178, considered the reverse onus created by s. 91 and noted that it continues to apply on a s. 94 application. Specifically, on a s. 94 application, the burden is on a party whose property is subject to the protection of property order to establish that the other party's claim will not be defeated if the subject property is disposed of.
- [57] The claimant submits that the order enjoining the respondents from selling Ocean Place was also made pursuant to Rules 12-1, 12-4 or the SCFR, as well as s. 39 of the LEA.
- [58] In *Hans v. Volvo Trucks North America Inc.*, 2014 BCSC 1123 at para. 23, Justice Fitzpatrick concluded that a change of circumstances is required for the court to exercise its wide discretion to vary an interlocutory Mareva injunction:
- [23] I consider that an alternate approach is best suited to this application. The Mareva injunction is an interlocutory order. As such, the court has a wide discretion to vary that order where there has been a change in circumstances, particularly when a party has specifically been given "liberty to apply" in the court order: *Canadian Cash Express Corp. v. Connect Cash Service Inc.*, 2011 BCSC 219 at para. 36.
- [59] Therefore, to vary the terms of the April 27, 2023 order, as it was granted under s. 91 of the FLA, the respondents must show that the claimant's claim will not be defeated by the variation to sell Ocean Place and to vary the terms of the order that are, in effect, a Mareva injunction, the plaintiff must show that there has been a change in circumstances.
- [60] It is not disputed that the respondents did not appear at the hearing on April 27, 2023. The respondents have now provided evidence intended to show that: (1) the claimant's Claim will not be defeated if Ocean Place is disposed of; and (2) there has been a change in circumstances such that the court should exercise its discretion to vary the order.
- [61] The claimant submits that it would be unfair if the order was varied to allow the respondent to sell Ocean Place since he obtained the protection order precisely to prevent its sale and because it means he could not retain that property if he succeeds on the Claim. The claimant further disagrees that the price Ms. Sayani negotiated for the sale of Ocean Place is reasonable because it is only \$200,000 more than the price Ms. Sayani and her ex-husband paid for it back in 2007.
- [62] The respondent submits that the claim for an interest in Ocean Place is weak and the claimant has never been responsible for covering the costs of Ocean Place during the relationship. The respondents submit that if Ocean Place is sold, as she proposes, the net proceeds could be held in trust until the matter is resolved or until further court order.

- [63] The respondent says that with the net sale proceeds held in trust, coupled with the CPLs the claimant registered on other real property, there is no risk of the Claim being defeated. The respondent submits that selling Ocean Place for 5.85 million is the fair and reasonable solution, that does not put the Claim at risk, and because it ends her ongoing financial outlay for the expenses of Ocean Place.
- [64] As mentioned, Ms. Sayani has owned Ocean Place since 2007. In 2011, after the mortgage was paid off, she secured a line of credit on it in her name as the borrower. That secured line of credit remains on title and the current balance is approximately 2.1 million. Ms. Sayani makes payments associated with that credit facility and she states that she can no longer afford to do so. According to Ms. Sayani's evidence, she has always covered the expenses for Ocean Place such as the line of credit payments, the property taxes, the utilities, the landscaping, and other ordinary expenses for the property.
- [65] In 2016, Ms. Sayani wanted to sell Ocean Place because her children were going away to university. Ms. Sayani wished to move closer to downtown and to live in a condominium.
- [66] In August 2017, Ms. Sayani purchased a condominium and started to renovate it.
- [67] On November 28th, 2017, Ms. Sayani listed Ocean Place for sale at a price of 8.988 million with a realtor, Mr. Hasman. Ms. Sayani said Mr. Hasman advised her the list price was too high, but she insisted. Ms. Sayani said she told the claimant about her reasons for listing Ocean Place, including that she wanted to reduce her expenses. When Ocean Place was listed in 2017, it was vacant, which Ms. Sayani hoped would be a selling point for quick possession.
- [68] After seven months, Ms. Sayani received no offers to purchase Ocean Place. Ms. Sayani said the inability to sell Ocean Place left her in a financial predicament because her parents had loaned her the money to buy and renovate the condominium while she was paying the claimant for his renovation services while she was continuing to pay the expenses for Ocean Place. Ms. Sayani said that Mr. Hasman advised her to stage Ocean Place and to reduce the price, which she did. When no offers were received, Ms. Sayani decided she needed to rent Ocean Place.
- [69] In June 2018, she signed a rental agreement with a rental property manager. Under the rental agreement, Ms. Sayani was responsible for heat, water, gas, electricity, municipal services, and internet. Ms. Sayani also covered landscaping, sprinklers, and outdoor lighting services while Ocean Place was rented. She says she paid painters to paint the exterior, to fix the fireplace, and she replaced the laundry facilities.
- [70] Ocean Place was rented from June 2018 until September 2021 at a monthly rental of \$11,000 per month according to the rental agreement. Ms. Sayani said the tenants left with one month's notice and she had to pay for repairs totalling \$20,000 to fix various problems at Ocean Place, including floor repairs, repainting, and fixture repairs.

- [71] She considered renting it out as an Airbnb property but concluded it was impossible due to city bylaws. Ms. Sayani said she was financially stressed, that she wanted to sell Ocean Place to reduce her expenses.
- [72] According to Ms. Sayani's evidence, in addition to the CPL registered against Ocean Place, the claimant has registered CPLs registered against additional properties owned by the respondents with the following values:
- a) The condominium where Ms. Sayani resides with an assessed value of 5.637 million;
 - b) A property at 372 3rd Street East owned by one of the corporate respondents with an assessed value of 6.452 million; and
 - c) A property at 1602-1788 Columbia Street, Vancouver, owned by one of the corporate respondents with an assessed value of 1.343 million.
- [73] Ms. Sayani's evidence is that the total value of the real estate against what the claimant has filed CPLs is approximately 15 million.
- [74] In December 2021, Ms. Sayani listed Ocean Place for sale with a realtor, Mr. Soprovich. It was initially listed for six months at 7.998 million. At the time, the BC Assessment value was 6.064 million. Ms. Sayani said Mr. Soprovich advised her the list price was too high, but she insisted. During the first six-month listing agreement, Ms. Sayani received no offers.
- [75] Ms. Sayani signed another six-month listing agreement for Ocean Place on June 3, 2022, with a list price of 7.998 million at a time when the 2022 assessed value was 7.053 million. Ms. Sayani received no offers during the first two months under the second listing agreement.
- [76] On August 17, 2022, Ms. Sayani agreed to reduce the list price for Ocean Place to 6.998 million and at that time she entered into a third six-month listing agreement with Mr. Soprovich at the new list price. Ms. Sayani received no offers on Ocean Place under the third listing agreement.
- [77] Mr. Soprovich advised Ms. Sayani to reduce the list price further. On October 24, 2022, Ms. Sayani reduced the list price to 6.598 million and she signed a three-month listing agreement with Mr. Soprovich which was the fourth listing agreement. That listing agreement expired on January 17, 2023, and Ms. Sayani received no offers to purchase during that fourth listing agreement.
- [78] On January 16, 2023, Ms. Sayani and Mr. Soprovich signed another listing agreement for a four-month term at the same list price of 6.598 million. At the time of the fifth listing agreement, the assessed value for Ocean Place was 7.423 million. Ms. Sayani received no offers until March 26, 2023, when she received an offer to purchase Ocean Place for 5 million. On March 27, 2023, Ms. Sayani countered for 6.25 million but her counteroffer was not accepted and there was no response from the prospective buyer.

- [79] On April 2, 2023, Ms. Sayani received an offer to purchase Ocean Place for 5.85 million. These are the purchasers who attempted without success to apply to have the claimant's CPL removed from Ocean Place. Ms. Sayani's evidence is that 5.85 million is the highest offer she has ever received for Ocean Place since she first listed the property in 2017. Ms. Sayani said she accepted the offer because she could no longer afford to carry the costs of Ocean Place while also paying for her condominium.
- [80] Ms. Sayani states that because of the cohabitation agreement, she did not think she needed the claimant's permission to list or sell Ocean Place. Ms. Sayani's evidence is that she cannot afford to cover the costs of Ocean Place along with her condominium.
- [81] The costs of Ocean Place, not including maintenance and repairs, are set out in her evidence as follows:
- a) Approximately \$10,000 per month, or \$120,000 per year in interest only due on the registered line of credit (which has a current balance of 2.1 million);
 - b) Approximately \$35,000 per year for property tax;
 - c) Approximately \$20,000 per year for insurance;
 - d) Approximately \$5,000 per year for utilities;
 - e) Approximately \$2,500 per year for BC Hydro and Fortis BC; and
 - f) And approximately \$6,500 per year for landscaping.
- [82] Ms. Sayani states that Ocean Place must be sold because the monthly costs are too high and she cannot afford to carry the costs through to the trial of the Claim. Based on her past experience with tenants, which she said left Ocean Place in a state of disrepair, Ms. Sayani states she does not wish to rent the property out.
- [83] The evidence indicates that even if Ocean Place could be rented at \$18,000 per month, as the claimant submits, the fixed annual expenses of the property of \$189,000, are not much less than the projected rental income. The rent the claimant hopes to achieve is significantly more than the previous tenants paid. However, it's unclear if significant repairs are required, and how those expenses would be paid in the future.
- [84] The claimant was aware that Ms. Sayani had listed Ocean Place. His evidence is that he thought Ms. Sayani was testing the market to see what price could be achieved. The claimant appeared at the application of the prospective buyers to oppose their application to remove the CPLs. He thinks the purchase price for Ocean Place is too low. He is confident a higher price can be achieved, for example, if he undertook some clean-up and maintenance of Ocean Place.
- [85] Ms. Sayani's evidence is that the prospective buyers have now demanded a significant amount of damages from her that they say they are entitled to under the contract when she failed to complete. The damages sought are in excess of \$500,000. The respondent's evidence

is that the buyers are still interested in purchasing Ocean Place and selling would limit her exposure to damages, stop her need to continue to pay all of the expenses, and allow her to take up the only offer to purchase Ocean Place she has received despite listing it for significant periods. Ms. Sayani submits that she would also agree to the claimant purchasing Ocean Place for 5.85 million cash, which is the same as the offer made by the current prospective purchasers.

- [86] Ms. Sayani states that since the April 27, 2023 order was made she has been unable to access her bank accounts for personal or business expenses. As well, there are two accounts in her name which are actually accounts for her now adult daughters that she has held since they were children. That matter has been dealt with by way of a consent order.
- [87] On August 25, at a continuation of the hearing, for reasons that I explained, I made an order varying the April 27, 2023 order to authorize Ms. Sayani to use the Scotiabank account ending in number 827, which was opened after the preservation order for ordinary living expenses and ordinary business expenses. I did so because the claimant submitted he never intended to preclude the respondents from accessing funds for ordinary living expenses or ordinary business expenses and because I found it unfair and disproportionate for the respondents to have had no access to accounts for their ordinary expenses for nearly four months. However, in varying this order, I made no determination concerning the claimant's serious allegations that Ms. Sayani had deposited funds into this account in contravention of the April 27, 2023 order.
- [88] Again, the claimant is concerned that the purchase price for Ocean Place is too low. The claimant suggests that the property should be rented and jointly listed.
- [89] However, in my view, there is compelling evidence presented by Ms. Sayani that Ocean Place has been listed and marketed by two different realtors since 2017. Since 2017, there were two offers received, the first one in 2017 of 5 million, which Ms. Sayani countered unsuccessfully, and the current offer by the buyers for 5.85 million, which Ms. Sayani accepted.
- [90] There is evidence that Ms. Sayani listed Ocean Place at a higher list price for considerable periods while receiving no offers. She resisted the recommended list price of her realtors and she eventually reduced the list price but only two offers were ever received. In my view, the evidence indicates substantial professional efforts to sell Ocean Place in 2017 and then again in 2022 and 2023.
- [91] While the claimant thinks the higher price can be achieved under a joint listing, the evidence of the recent listing history does not support that view. It is true that spending time and money improving Ocean Place might enhance its future selling price. However, it is Ms. Sayani who covers the costs associated with carrying Ocean Place, and while the claimant is prepared to work on Ocean Place himself, there is no offer to personally cover or share Ms. Sayani's carrying costs if the property is not rented out and sold in an expeditious manner.

- [92] In essence, the claimant wishes to hold Ocean Place in the hopes of generating rental revenue or in the hopes of being able to retain it himself. However, that fails to recognize that most of the risk of holding Ocean Place into the future falls on Ms. Sayani, including because she is the borrower on the line of credit registered on the property who must make payments and cover expenses for the property.
- [93] The April 27, 2023 order prevents the respondents from selling Ocean Place but it does not obligate Ms. Sayani to expend her ongoing resources on maintaining a property that she says she can no longer afford. If the respondent ceased paying the registered line of credit or the property taxes because she was unable to continue to cover the expenses, it would have to be sold before the creditor or municipality sold it. Indeed, Ms. Sayani's evidence is that she could not afford to pay the 2023 tax bill for Ocean Place.
- [94] When I consider all of the evidence, including the number of properties that are subject to the April 27, 2023 order, I conclude that the respondent has met the onus of establishing that the Claim will not be defeated if I exercise my discretion to order the April 27, 2023 order varied to allow for the sale of Ocean Place for 5.85 million pursuant to the contract of purchase and sale that Ms. Sayani has signed. I so conclude, including because there is evidence which I accept that the properties against which the claimant has registered CPLs have assessed values of approximately 15 million. Ms. Sayani proposes the hold the net sale proceeds of Ocean Place in her lawyer's trust account pending the parties' further agreement or court order, so in my view there is no question that the proceeds will be secured.
- [95] I am satisfied that there is sufficient evidence of a change of circumstances, namely Ms. Sayani's inability and unwillingness to cover the expenses of Ocean Place indefinitely, along with her other financial obligations. There is also evidence of Ms. Sayani's potential exposure to a claim for damages by the prospective purchasers that increases her potential costs associated with Ocean Place.
- [96] In varying the April 27, 2023 order, I have considered the order of Funt J. dismissing the application of the prospective buyers of Ocean Place whereby they sought to release the claimant's CPL. The claimant states that the question of releasing the CPL on Ocean Place is res judicata. However, I do not find that the respondent's application to vary the April 27, 2023 order to facilitate its sale is res judicata or subject to issue estoppel as a result of Funt J.'s June 9, 2023 order. The application before Funt J. was brought by different parties seeking different relief with different evidence under a different statutory provision and legal framework than the application that is presently before me.
- [97] After considering all those submissions and the evidence, and for the reasons that I have explained, I grant the relief sought in para. 3 of the respondent's August 8, 2023 notice of application, including that the net proceeds of the sale of Ocean Place are to be held in trust with Ms. Sayani's counsel until further order or agreement of the parties.

Costs

[98] While the respondents have succeeded on their application to vary the April 27, 2023 order, and while the claimant has not succeeded on his application, I conclude that the parties should bear their own costs of these applications. All the other relief sought in respect of costs is dismissed.

"E. McDonald J."

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