

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jin v. Yang*,
2018 BCCA 223

Date: 20180529
Docket: CA45013

Between:

Weiguo Jin

Respondent
(Petitioner)

And

Xuanwen Yang

Appellant
(Respondent)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated
December 6, 2017 (*Jin v. Yang*, Vancouver Docket No. S167106).

Oral Reasons for Judgment

Counsel for the Appellant:	D.C.F. Cowper
Counsel for the Respondent:	E.C. Watson R.S. Wallia
Place and Date of Hearing:	Vancouver, British Columbia May 18, 2018
Place and Date of Judgment:	Vancouver, British Columbia May 29, 2018

Summary:

In the underlying petition, Mr. Jin successfully sought a court ordered sale of the parties' jointly owned property. Mr. Yang appeals the order for sale on the basis that the sale was contrary to the parties' joint venture agreement (JVA). He also contends the property should not be sold before the issue of beneficial ownership is resolved in another action brought by a Mr. Wang. Held: appeal allowed. The judge erred in principle in determining the enforceability of the JVA on the record before him. The enforceability of that agreement is a triable issue that cannot be resolved by way of petition. The petition proceeding should be reheard with the Wang action.

[1] **FENLON J.A.:** This is an appeal from an order for sale of property under the *Partition of Property Act*, R.S.B.C. 1996, c. 347 [PPA].

[2] The property in issue is a 21,000 square foot, 12 bedroom manor house situated on about 61 acres on the Sunshine Coast of British Columbia. Originally the appellant Xuanwen Yang, the respondent Weiguo Jin, and two others, Shiyong Wang and Dejian Li, planned to buy the property and develop it. To this end, Mr. Yang drew up a document in Mandarin referred to by the parties as the joint venture agreement (the “JVA”). On March 10, 2015, Mr. Yang, Mr. Jin, and Mr. Wang signed the document. The fourth investor, Mr. Li, did not sign and decided not to participate. Mr. Yang contends that the three signatories to the JVA agreed that he would assume Mr. Li’s quarter interest.

[3] On March 13, 2015, the investors made a \$300,000 deposit, with Mr. Yang providing 50%, Mr. Jin 25% and Mr. Wang the remaining 25%. The three men contributed to the cash portion of the purchase price in the same percentages. The remainder of the purchase price was financed by a mortgage in the names of Mr. Yang and Mr. Jin, who are also named on title. Mr. Jin asserted in the underlying proceeding that he owns 50% of the property; Mr. Wang and Mr. Yang assert that Mr. Jin holds half of his interest in trust for Mr. Wang.

[4] The parties soon had a falling out over the use of the property and over payment of costs to maintain and develop it. Mr. Yang continued to pay the mortgage payments, property taxes, and maintenance costs while making unilateral decisions such as advertising the property as a hotel in Chinese language newspapers before permits had been obtained. Various attempts by the investors over the ensuing months to resolve their differences failed.

[5] On August 4, 2016, Mr. Jin commenced the underlying petition proceeding, seeking a declaration that he owned 50% of the property, and an order for sale. Mr. Jin did not name Mr. Wang as a party to the petition. When Mr. Wang learned of the petition, he commenced an action seeking specific performance of the JVA and formal acknowledgement of his beneficial ownership of half of Mr. Jin’s stake in the property (the “Wang action”). Mr. Yang counterclaimed in that action, also seeking specific performance of the JVA. He subsequently amended his counterclaim to seek a constructive trust over that portion of the value of the property attributable to his excess contributions to its acquisition, maintenance, and improvement.

[6] The judge hearing the petition began by considering the relevant provisions of the *PPA*:

2 (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.

(2) Subsection (1) applies whether the estate is legal or equitable or equitable only.

...

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.

...

6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution

of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

7 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if it appears to the court that because of the nature of the property involved, 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 interested parties than a division of the property, the court may

- (a) on the request of any of the interested parties and despite the dissent or disability of any other interested party, order a sale of the property, and
- (b) give directions.

[7] The judge then addressed the distinction between ss. 6 and 7 of the *PPA* saying:

[21] Numerous cases have considered the law regarding the partition and sale of property under the *PPA*. The law is not controversial. Section 6 applies where an applicant has a 50% or greater interest in the land. Section 7 applies where the applicant holds less than a 50% interest. As Madam Justice Newbury noted in *Elsen v. Elsen*, 2011 BCCA 314, the usual order made under s. 6 or 7 is for sale and distribution of the proceeds rather than division or partition: para. 25. I am satisfied that the orders sought as set out in paragraphs 1 to 4 and 6 to 10 of the petition effectively seek that remedy. Accordingly, the issue here is whether an order should be made under one or the other of those sections.

...

[25] In summary, the discretion granted to the court under ss. 6 and 7 of the *PPA* is the same: all of the circumstances must be examined to determine if a good reason exists, of whatever sort, to refuse to grant an order for sale and division of the proceeds where a party is in a position to bring an application for partition and sale. The only real difference between ss. 6 and 7 is the question of which party has the practical obligation to put forward evidence regarding the order that should or should not be made. Under s. 6, the person opposing the partition or sale will attempt to satisfy the court that the order should not be made. Under s. 7, the party seeking the order must put evidence before the court that a sale of the property is more beneficial than a division.

[Emphasis added.]

[8] The judge noted that, at the beginning of the hearing, he was concerned that Mr. Wang was not a party to the petition so adjourned the hearing in order to solicit his input. Having done so, the judge was satisfied that Mr. Wang did not oppose the sale of the property as long as the proceeds were held in trust until the Wang action determined the parties' respective interests. The judge then considered whether the petition should be dismissed nonetheless on the basis that the Wang action raised the possibility that Mr. Jin did not hold 50% of the property as he asserted, and that Mr. Yang owned more than a 50% interest. He concluded (at para. 48) that the uncertainty about the parties' relative interests precluded him from relying on s. 6 of the *PPA*, but left open an order under s. 7.

[9] Ultimately, the judge decided that the order for sale sought by Mr. Jin should be made under s. 7:

[50] Given the circumstances, I am satisfied that a sale of the Property would benefit all of the parties, as it would allow the parties to receive the monetary value of their respective interests in the Property and thus lead to a resolution of the issues raised between them. In other words, it would not prejudice any party.

[10] In coming to this conclusion, the judge rejected Mr. Yang's submission that the property should not be sold because the JVA governed the relationship between the parties and provided for a long

term investment. The judge observed “that the JVA was not finalized” because one of the original four investors had not signed it and its terms had not been “put into effect” (at para. 3). He described the JVA as “at best a statement of interest or intent” ... “so vague and aspirational as to be meaningless” (at para. 38).

[11] As a result of his assessment of the enforceability of the JVA, the judge had “no hesitation in concluding that the JVA does not provide a basis for concluding that it would be unfair or inequitable to order a sale of the Property” (at para. 40). Relying on *Zimmerman v. Vega*, 2011 BCSC 757, he observed that Mr. Wang and Mr. Jin no longer wished to participate in Mr. Yang’s current plans for the property, and that the circumstances were completely different from those in place when the three men held their early discussions about the JVA.

[12] In addressing Mr. Yang’s objection that the property should not be sold until the parties’ respective interests have been determined, and in particular his claim for an increased interest due to the excess contributions he had made to maintain the property, the judge was satisfied those claims could be addressed by way of an accounting after sale.

[13] Finally, the judge dismissed Mr. Yang’s argument that it would be unfair to sell the property because he had purchased a number of the surrounding lots on the assumption that the property would be developed in accordance with the long term plans provided for in the JVA. The judge observed that Mr. Yang had bought the additional properties in September 2016, after Mr. Jin commenced the petition proceedings and after becoming aware that the property could be sold.

[14] On appeal, Mr. Jin contends the judge was correct to characterize the JVA as a vague and aspirational document which could not be enforced. He also emphasizes the discretionary nature of an order for sale under the *PPA* and contends this Court should defer to the judge’s decision.

[15] I would agree that a deferential standard of review applies on this appeal. However, a discretionary decision may be set aside where the judge errs in principle or gives no weight or insufficient weight to a relevant consideration. In my respectful view, the judge in this case erred in principle in making a determination about the enforceability of the JVA on the record before him. In my view, the enforceability of the JVA in this case was a triable issue that could not be resolved by way of a summary petition proceeding: *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at paras. 43 and 44. There was evidence in support of Mr. Yang’s contention that the parties had entered into subsequent written and oral agreements amending the JVA, and that steps had been taken by Mr. Jin to enforce its terms. Further, Mr. Jin relied on the JVA in his pleading of the petition. It is also noteworthy that the terms and enforceability of the JVA are central issues in the Wang action, which the judge recognized would determine the parties’ precise entitlements to the proceeds of sale.

[16] In addition to this error in principle, in my respectful view the judge gave no weight to a relevant consideration. The JVA includes an express term governing the withdrawal of an investor from the

venture. A translation of the clause reads as follows:

Special covenants regarding the freedom of participation and exit: Shares shall only be transferred internally, no shares shall be transferred to any external parties; contributed capital may be redeemed along with the interest calculated at the annual rate of 10%;

Mr. Yang submits that a buyout based on contributed capital plus interest at 10% in accordance with this provision of the JVA might well be more favourable to him than paying fair market value to buyout the other owners on a sale under the *PPA*. In fairness to the judge, although Mr. Yang relied on the JVA generally, this aspect of his argument was not developed in the hearing below.

[17] Finally, the judge misapprehended the date on which Mr. Yang purchased the land surrounding the property in order to carry out the joint venture plans. The judge referred to the closing date for that purchase, which occurred after the petition for sale was commenced, but Mr. Jin conceded that Mr. Yang had committed to buying the land before the petition was filed.

[18] I would, accordingly, set aside the orders below and direct that the rehearing of the petition proceed with the hearing of the Wang action. I would award costs of this appeal to the appellant, with the costs of the first petition hearing to be determined by the judge rehearing the matter.

[19] **GROBERMAN J.A.:** I agree.

[20] **FISHER J.A.:** I agree.

[21] **GROBERMAN J.A.:** The order below is set aside and this Court directs a rehearing of the petition with the Wang action. The appellant is entitled to costs of the appeal, but the costs of the first petition hearing are to be determined by the judge hearing the matter.

“The Honourable Madam Justice Fenlon”