CITATION: Green et al. v. Gardeazabal, 2023 ONSC 2683 **COURT FILE NO.:** CV-23-00000014-0000
DATE: 20230501

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)
	)
TATJANA GREEN and PAUL DUTRA	) T. Walker, for the applicants
	)
))	
Applicants	)
	)
- and -	)
	)
	)
MARIA CRISTINA GARDEAZABAL	) M. Basiri, for the respondent
	)
))	
Respondent	)
))	
	) **HEARD:** April 20, 2023

AMENDED REASONS FOR JUDGMENT

THE HONOURABLE JUSTICE R.J. HARPER

Issues

[1] The Applicants, Tatjiana Green ("Green") and Paul Dutra ("Dutra") have brought an application under the *Partition Act*, R.S.O. 1990, c. P.4 for the sale of a property known as 7609 Somerset Park, in the Township of Severn, Ontario (the "Property")

[2] The Respondent, Maria Cristina Gardeazabal ("Gardeaszabal") brought a cross application seeking, among other things, a dismissal of the application and an interim injunction preventing the sale of the Property until the end of April 2024.

Background

[3] In mid-2021, the parties discussed purchasing an investment/leisure property. As a result of their discussions, they purchased the Property n April 22, 2022. Gardeazabal contributed $235,684.65 as her part of the down payment. Green and Dutra contributed the balance of the down payment. Gardeazabal took title as tenants in common with Green and Dutra, who held their 50% share as joint tenants.

[4] The terms of the purchase were as follows:

a) Purchase price - $1,720,000.00

b) Mortgage - $1,344,000.00

c) Interest rate - 4.9%

d) Monthly payment - $6,768.84.00

e) Term of mortgage - Due May 1, 2023

Circumstances existing prior to the purchase

[5] Prior to the purchase of the Property, the parties were friends, and Green and Dutra were engaged to be married.

[6] On September 14, 2021, Green inquired with a mortgage broker who she had been dealing with about the prospective purchase price of a property given a certain down payment amount, and whether there would be a return on their investment to achieve a positive cash flow at the one to two-year mark.

[7] On January 22, 2022, the parties had a dinner meeting to discuss the potential investment. Gardeazabal took notes of the meeting. These notes were later shared with Green and Dutra and filed as an exhibit on this motion.

[8] Among other things, the notes reflected that part of the discussion related to achieving a return on their investment by year two and a break even at year one.

[9] The handwritten notes were divided into a right side and left side of the page. The left side was titled “must haves,” and on the right side, there was a note at the top that was circled and read “maybes. farm” [*sic*].

[10] The left side also read as follows:

> Location- 25 hours distance max
>
> Ideal location
>
> Ideal location of the F…n Lake!!!
>
> Rental property
>
> Opportunity for our own leisure
>
> Attractive outside or property that will drive rentals for year round
>
> Privacy
>
> ROI by 2 years
>
> Break even by year 1
>
> + 3 to +5 acres or more

[11] The right side also read as follows:

> Need to have a garage
>
> Winterized
>
> Things to do
>
> Ask Tanya to evaluate
>
> Us 4 decide next steps
>
> Nice to have/must have boat house with permits road access unless boat access only
>
> Boat tay (unreadable) must be possible for boat access only

[unreadable] Give us sea door

Must have man cave opportunity

Must have 4 bedrooms to accommodate both families [Unreadable]

[12] On April 5, 2022, Green sent an email to Lachlan West, who was employed with RBC at the time, stating that she would like to open a business bank account with RBC for a property management-focused business that will need to support larger amounts of money for the next 3 to 5 years.

Position of Gardeazabal

[13] It was conceded that there was no contract or agreement to hold any investment between the parties for at least two years.

[14] Gardeazabal submits that the court retains the discretion to refuse to allow a sale of the Property pursuant to the *Partition Act* in circumstances that amount to oppression, malice or vexatious intent: see *Garfella Apartments Inc. v. Chouduri*, 2010 ONSC 3413 (Div. Ct.). In addition, Gardeazabal submits that oppression includes hardship of such a nature as to amount to oppression.

[15] In *Garfella*, the court adopted the test for oppression from the Supreme Court of Canada's decision in *B.C.E. Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560. Oppression includes conduct that (i) undermines the "reasonable expectation of the parties" and (ii) is coercive, abusive or unfairly disregards the interests of the other party: *Garfella*, at para. 44. Further, "Fair treatment – the central theme running through the oppression jurisprudence – is most fundamentally what stakeholders are entitled to 'reasonably expect'": at para. 45.

[16] Gardeazabal argues that, based on the parties' conduct and the representations of Green and Dutra, there was a reasonable expectation that they would hold the Property for at least two years in order for the parties to get a return on their investment, earn a profit, and use the property for their own leisure. At all material times leading up to the purchase of the Property, Green and Dutra represented to her that this would be a long-term investment for profit and personal leisure, for a minimum of two years. She further submits that there was a reasonable expectation to use the Property for generating rental income to assist with the carrying costs of the Property, and to benefit from the increased equity of the Property from an increase in market value and upgrade to the Property.

[17] She points to the following evidence in support of her position:

a) Green's email sent to her real estate agent dated September 12, 2021, regarding the potential sale of the Property by an agent, in which he stated, "if we want to sell this cottage in 2 years' time would Michael be willing to help us with it"

b) Green's email dated September 14, 2021, also sent to her agent in which he wrote: "If we need to achieve a positive cashflow in the 1–2-year mark projections, what limit of purchase price would you advise we look for?"

c) The January dinner meeting referred to earlier in these reasons, which included the handwritten note of Gardeazabal.

d) Green's email dated April 5, 2022, sent after the purchase of the Property, in which he writes to an RBC representative stating that, in the future, they will be needing a

flow for larger amounts for the next 3-5 years. In her cross-examination, Green stated, "when dealing with a bank, it needs to be over two years."

[18] Gardeazabal's evidence was that a company was formed by her, Green and Dutra, in order to handle the Property management and rentals. She rented the property for vacationers for the summer of 2022 and has already secured rentals for the summer of 2023.

[19] Gardeazabal stated that she relied on these reasonable expectations to secure her portion of the down payment that amounted to her life savings. She argues that, shortly after the purchase of the Property, Green communicated with her to express that she and Dutra no longer wanted to own the Property and took the position that it should be sold. Gardeazabal submits that the actions of Green and Dutra amount to coercive and abusive conduct that unfairly disregards her interests.

[20] Gardeazabal submits that, soon after the purchase of the Property, Green and Dutra wanted to purchase other properties and finish renovations on another property that they owned. She claims that Green and Dutra could not finance the purchase of other properties nor get financing for their renovations while they owned the subject Property. She submits that, by taking this position, they acted in bad faith and completely disregarded her interests.

Position of Green and Dutra

[21] Green and Dutra submit that the evidence does not establish reasonable expectations. The planning communications that took place prior to the purchase of the Property amounted to

expressions of the parties' wish list. The three of them and could not be considered to have created reasonable expectations based partly on the subjective wishes of Gardeazabal. Further, Green's emails to the broker, real estate agents and banks amounted to mere due diligence inquiries for the purpose of considering possible investment scenarios prior to any purchase being made.

[22] Green and Dutra submit that neither of them acted in a manner that could be considered coercive, abusive or unfairly disregarding the interests of Gardeazabal. They submit that they no longer trusted Gardeazabal as they became concerned that she did not account for all of the funds that she received from vacation renters of the property.

[23] Green and Dutra also submit that there was never any documentation that demonstrated that the Property was to be held for at least two years. The references to one to two years were projections on their part, subject to the ordinary exigencies of investing in real estate, including a downturn in the real estate market such that the property value was far less than what they purchased it for. Green and Dutra projected the losses in the range of $150,000.00 if sold in the current market. However, they were willing to absorb that loss.

The Law and Analysis

[24] I adopt the summary of the legal considerations that are set out by D. M. Brown J. in *Di Felice v. 1095195 Ontario Limited*, 2013 ONSC 1, at paras. 108-11:

> Sections 2 and 3(1) of the *Partition Act*, R.S.O. 1990, c. P.4, provide:
>
> 2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.
>
> 3. (1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.
>
> [109] Recently, in *Garfella Apartments Inc. v. Chouduri*, the Divisional Court nicely summarized the principles governing the partition and sale of land:

> All tenants in common (along with many other categories of co-owners) are subject to having their property partitioned or sold at the behest of another person with an interest in the land.
>
> The presumption is in favour of partition, rather than sale. However, a sale will be ordered if the court considers it to be "more advantageous to the parties." A sale has also been found to be appropriate when the land is not suitable for partition.
>
> There is a *prima facie* statutory right for tenants in common to compel either a partition or sale.

The court retains a discretion to refuse any relief, i.e. neither partition nor sale. However, the onus is on the responding party to demonstrate circumstances warranting the refusal of such relief. This is only appropriate in circumstances of malice, oppression, or vexatious intent. The Court of Appeal in *Greenbanktree* stipulated that "oppression" in this context includes "hardship ... of such a nature as to amount to oppression."

[110] As put by the Court of Appeal in *Greenbanktree Power Corp. v. Coinmatic Canada Inc.*:

> Co-tenants should only be deprived of this statutory right in the limited circumstances described above, with this caveat. In our view, "oppression" properly includes hardship, and a judge can refuse partition and sale because hardship to the co-tenant resisting the application would be of such a nature as to amount to oppression.

[111] In exercising its discretion under section 2 of the *Partition Act* a court should take into account the effect of any agreement between the parties about the land in question.

[25] Many of the legal concepts and analysis dealing with oppressive, coercive conduct and reasonable expectations, come from cases dealing with oppression remedies pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B-16. I am guided by the Divisional Court's approach in *Garfella*, at paras. 43-49, for oppression when it arises in the context of the *Partition Act*, which draws from analogous situations in shareholder cases and condominium law:

> [43] The concept of an oppression remedy for minority shareholders of corporations is not a perfect fit with oppression in situations where a majority

property owner seeks to force the sale of a minority owner's interest, but there are some useful parallels. In each case, the court is concerned with preventing the majority from taking advantage of the minority through actions, which while not illegal, are so unfair as to constitute oppression.

[44] The definitive analysis of the oppression remedy in the corporate law context is the Supreme Court of Canada's 2008 decision in *BCE Inc. v. 1976 Debentureholders*. The Supreme Court recognized two prongs underlying the oppression remedy: (1) conduct that undermines the "reasonable expectations" of the parties; and (2) conduct that is coercive, abusive or unfairly disregards the interests of the minority. Both must be present before an oppression remedy is appropriate.

[45] The first element is what the court referred to as "a reasonable expectation that [the claimant] would be treated in a certain way". The concept of reasonable expectations is both "objective and contextual". What is reasonable will depend upon "the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations". The court held that "Fair treatment -- the central theme running through the oppression jurisprudence -- is most fundamentally what stakeholders are entitled to 'reasonably expect'."

[46] In considering the concept of reasonable expectations, the Supreme Court held, at para. 71:

> The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*.

[47] At the second stage, the court must determine whether there is conduct that is oppressive, unfairly prejudicial or that unfairly disregards the interests of the minority. The court recognized in *BCE* that these concepts of oppressive behaviour are not watertight compartments and often merge or are tied up with conduct that defeats the reasonable expectation of the parties. Oppressive conduct is described as being "coercive, abusive and suggests bad faith". Included in this type of behaviour would be conduct that is "burdensome, harsh and wrongful", and an "abuse of power" or a "visible departure from standards of fair dealing". Unfair prejudice and unfair disregard are considered to be less culpable states of mind, but nevertheless have unfair consequences that ignore the other parties' legitimate expectations. The court

provides examples of unfair disregard for minority [page638] interests including squeezing out a minority shareholder and changing corporate structure to drastically alter debt ratios.

[48] In my view, the concept of reasonable expectations as developed in corporate law oppression cases is useful in determining whether there has been the type of oppressive conduct that would warrant denying a remedy under the *Partition Act*. The existing case law under the *Partition Act* considers similar principles without actually labelling them as an "expectation interest". For example: in *Shabinsky v. Cohen* and in *997897 Ontario Inc. v. 926260 Ontario Ltd.*, a remedy was denied because to do otherwise would thwart the intention of the parties as expressed in their partnership or co-ownership agreements; in *Yale v. MacMaster*, the court considered "how, when and why" the property had been acquired to be a significant factor; in many of the family law cases, a remedy was denied so that disadvantaged parties could continue to live in homes they expected to occupy into the future. All of these involve the protection of an expectation interest. Even in *Greenbanktree*, which permitted the minority interest holder to force the sale of the property, expectations of the parties played a role. One of the factors the court considered in exercising its jurisdiction in favour of the applicant was the fact that the respondent developer knew what it could expect when it bought the interests of the other parties over the objections of *Greenbanktree*.

[49] A relatively recent decision under the *Condominium Act* bolsters my view that the reasonable expectations of the parties is a relevant factor in these types of cases. In that case, the court considered whether to grant a remedy to an applicant under s. 135 of the *Condominium Act*, which applies if there is conduct that is or threatens to be "oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant". In that context, Juriansz J. adopted the principles that have been articulated in the context of the corporate oppression remedy, including the protection of legitimate expectations. He held, at para. 33:

> This new creature of statute [s. 135] should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that

> prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as "awesome". It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets. (Emphasis added)

[50] Accordingly, in my view, in considering whether to exercise its discretion not to grant a remedy under the *Partition Act*, the court should take a contextual approach, rather than looking at the allegedly oppressive conduct of the applicant in isolation. Determining whether there is hardship or oppressive conduct requires examining the relationship between the parties and how it arose, and the reasonable expectations of the parties, as well as the nature of the conduct and its impact on the person seeking to avoid a sale. [Footnotes omitted.]

1. Did the evidence establish that there were reasonable expectations that the parties would not sell the Property for at least two years?

[26] In my view, the evidence does not establish that there was a reasonable expectation to hold on the Property for at least two years, viewed objectively.

[27] I find that the parties embarked on an investment venture. However, there was never any agreement on the terms of this venture. I find that the dinner meeting held by the parties on January 22, 2021 was no more than an expression of a wish list that outlined what a prospective property would look like. There was never any finality to such an expression of their wishes. This is evidenced by the notation in the notes of the meeting that read, “next steps decided by us”.

[28] The expressions in the notes of the meeting with respect to timelines, I find to be further examples of wishes as opposed to reasonable expectations. In addition, the notes make, a clear reference to projections of profitability and an inquiry as to a potential purchase prices. I find that this amounts to planning and due diligence with respect to a potential investment. Once again it does not amount to reasonable expectations.

[29] I find that Gardeazabal did have an expectation of the length of time that the Property would be held, however, I find that expectation was a subjective one. Objectively, looking at all of the

exigencies of investing in the real estate market, the setting of a minimum time to hold the investment is not a reasonable expectation given the nature of the investment.

[30] I find that Green and Dutra did not act in a manner that was in bad faith or in a manner that was "burdensome, harsh and wrongful", or an "abuse of power" or a "visible departure from standards of fair dealing."

[31] I find that Green and Dutra gave a number of options to Gardeazabal when they were confirming that they wanted to sell the Property. They no longer saw it as profitable, and it did not suit their needs at that time. In addition, they had lost confidence in Gardeazabal's ability to manage the Property, knowing that Green and Dutra were travelling frequently.

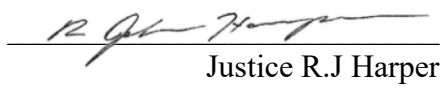
[32] None of the options were even considered by Gardeazabal. One of the options was a potential buy out by her of Green and Dutra's interest. Instead of responding or presenting a counter offer, Gardeazabal's fiancée communicated with Green and Dutra that they would simply allow the mortgage to automatically renew and that would not allow them to get out of the mortgage that was coming due at the end of April.

[33] Under the circumstances and given my findings as set out above, there shall be the following order:

1. The Property known as 7609 Somerset Park, in the Township of Severn be sold. If the parties are unable to agree on the terms of a listing within 30 days, a motion may be brought for an order setting out the terms.

2. The application is granted and the cross application is dismissed.

3. If the parties are not able to agree on the costs of this motion, written submissions may be filed within 30 days.



Justice R.J Harper

Released: May 1, 2023

Corrigendum

1. In Paragraph 33.2: “The application and motions of the Applicant are dismissed” was removed and is replaced with “The application is granted and the cross application is dismissed”.

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R. Harper, J.

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