IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Morrison v. Greenwood,*
2020 BCSC 1356

Date: 20200828
Docket: E126331
Registry: Kelowna

Between:

Rita Bryson Morrison

Claimant

And

Lillian Bethel Greenwood also known as Bethel Greenwood by her Litigation Guardian, Peter Burnham

Respondent

Before: The Honourable Madam Justice H. MacNaughton

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by teleconference:	A. Thiele K. Okimaw
Counsel for the Respondent:	H. Taylor
Place and Date of Trial/Hearing:	Kelowna, B.C. August 27, 2020
Place and Date of Judgment:	Kelowna, B.C. August 28, 2020

[1] **THE COURT:** I have before me cross-applications in this family file. In brief, the cross-applications require me to decide whether to:

(a) make an order listing the property at 1815 Maple Street, Kelowna, B.C., (the "Home"), for sale and order terms to facilitate that sale;

(b) strike paragraphs of the respondent's affidavits on the basis that they are irrelevant to the issues before me;

(c) make an order pursuant to s. 91 of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*] restraining disposition of assets;

(d) grant an order for exclusive occupancy of the Home;

(e) remove a litigation guardian; and

(f) order a power of attorney to direct a care home to allow one party to visit the other.

[2] These applications arise in the context of a dispute about whether the parties are or were common law spouses entitling the claimant to share in the respondent's property.

[3] The parties have a 10-day trial scheduled to commence on April 26, 2021. Examinations for discovery have yet to be conducted.

[4] The respondent, Lillian Bethel Greenwood, is 88 years old and suffers from dementia. She is no longer competent to manage any of her affairs or make healthcare decisions. She resides in the Mission Creek Landing long-term care home ("Mission Creek") in Kelowna.

[5] The claimant, Rita Bryson Morrison, is 79 years old. She began living in the Home in 2000 and continues to reside there. Ms. Morrison alleges that the parties were in a committed spousal relationship. The spousal relationship is denied by Ms. Greenwood's litigation guardian who says that Ms. Morrison was a housemate

and/or tenant in the Home. The issues before me for decision do not require me to determine whether a spousal relationship existed. In any event, doing so would not be possible on affidavit evidence alone. Nevertheless, in their application materials, both parties relied on evidence about the nature of the relationship. I need not consider any of it except to provide a framework for the analysis of the orders sought.

Decisions on Some of the Applications

[6] Based on the materials and arguments, I am able to dispose of the some of the applications with relative ease. In particular, I conclude that there is no need to strike out paragraphs of affidavits filed on behalf of Ms. Greenwood. In my view, it would be unfair to do so without also removing from the record a number of affidavits filed on behalf of Ms. Morrison that speak solely to the nature of her relationship with Ms. Greenwood. At most, the affidavits provide context for the background of this dispute and establish that there is a live and contentious issue between these parties as to the nature of their relationship. Of course, Ms. Greenwood is not able to provide any *viva voce* evidence in that regard.

[7] Further, as conceded by counsel for Ms. Morrison during her submissions, I have no legal authority to direct Mission Creek to allow Ms. Morrison access to the facility to visit Ms. Greenwood. Current Covid-19 restrictions are in place and they allow for only one visitor for each resident. That visitor is to remain the same person. James Flannigan, who is a lawyer and Ms. Greenwood's power of attorney, is currently that visitor.

[8] With respect to the applications for exclusive occupancy of the Home and non-dissipation of assets, the evidentiary record does not support either order. The test for exclusive occupancy under s. 90 of the *FLA* is whether it is a practical impossibility for the parties to live together. The evidence is that Ms. Greenwood's condition is such that she will never be able to return to live in the Home. As her dementia advanced, there is some evidence that Ms. Greenwood behaved badly towards Ms. Morrison, but that issue has been resolved as Ms. Greenwood now

lives at Mission Creek. There is no evidence that Ms. Morrison's continued occupancy of the Home or her privacy have been threatened by any acts of Mr. Flannigan or anyone on his behalf. Mr. Flannigan provides notice when access to the Home is required. The parties cooperated in the completion of a building inspection report. Mr. Flannigan removed some of Ms. Greenwood's personal items without issue. Arrangements have successfully been made for the maintenance of the Home. In all of the circumstances, no exclusive occupancy order is required.

[9] Similarly, with respect to a property restraining order, there is no evidence that Ms. Greenwood's assets are being dissipated. She resides in Mission Creek and her financial affairs are managed by Mr. Flannigan. She has no opportunity to dissipate her assets. She requires access to her funds to pay her living costs and her legal fees.

[10] That leaves to be decided Ms. Greenwood's application for immediate sale of the Home and the ancillary orders and Ms. Morrison's application to remove and replace Mr. Burnham as Ms. Greenwood's litigation guardian.

The Respondent's Application for Sale of the Home

[11] Ms. Greenwood seeks an order permitting Mr. Flannigan to immediately list the Home for sale. In furtherance of that order, she also seeks an order that Mr. Flannigan have exclusive conduct of the sale and may do all things reasonably incidental to the sale, including paying real estate commission at the usual commission rates of not more than seven percent on the first $100,000 of the gross selling price and 2.5 percent on the balance, plus GST. Also in furtherance of the proposed listing and sale, Ms. Greenwood seeks an order that any person or persons in possession of the Home, including Ms. Morrison, permit duly authorized agents of Ms. Greenwood to inspect the interior of the Home, appraise it, post "For Sale" signs, and show the Home to perspective purchasers between the hours of 9:00 a.m. to 7:00 p.m. on any day of the week including Sundays and statutory holidays. Finally, Ms. Greenwood seeks liberty to apply to have her agent or a bailiff remove Ms. Morrison from the Home if she continues taking down the posted listing

signs or otherwise acts to thwart Ms. Greenwood's effort to list and market the Home for sale.

[12] Ms. Greenwood proposes that, in the event that the Home is sold, the proceeds of sale, less the usual adjustments, would be disbursed through the trust account of FH&P Lawyers LLP, or any other lawyer or notary that FH&P Lawyers LLP may authorize on their behalf. The disbursement of funds would be used to pay, first, any arrears of taxes, water, and sewer rates, interest and penalties thereon owing with respect to the Home, and secondly, real estate commission and GST thereon with respect to the sale.

[13] Out of the remaining proceeds, Ms. Greenwood proposes that $200,000, the approximate value of the Home in 2000, plus one-half of the remaining balance be paid out to her and the balance be held in trust by FH&P Lawyers LLP pending written agreement of the parties or court order determining entitlement. In the event that the Home is sold for the purposes of issuing title, the following charges and liens, encumbrances, caveats, mortgages, and certificates of pending litigation will have to be cancelled, a *Land (Spouse Protection) Act,* R.S.B.C. 1996, c. 246 [*LSPA*] charge registration number CA7617964 registered by Ms. Morrison and Certificate of Pending Litigation CA8031974 also filed by Ms. Morrison, together with any charges and other encumbrances that may have been registered against the Home subsequent to Ms. Morrison's certificate of pending litigation. Finally, Ms. Greenwood seeks an order that, when the Home is sold, vacant possession is to be delivered to the purchasers on the completion date on the contract of purchase and sale.

[14] Ms. Morrison seeks an order that Ms. Greenwood's application for sale of the Home be adjourned to trial of this matter and, as I have said, she also seeks an order that Mr. Burnham be removed and replaced as Ms. Greenwood's litigation guardian.

The Parties' Backgrounds

[15] Ms. Greenwood has a Master's degree in English and is a published writer. She never married and has no children. She was close to her nieces, her now deceased brother, and her sister-in-law who resides in Kelowna.

[16] According to Ms. Greenwood's July 15, 2020, F8 Financial Statement, which was completed by Mr. Flannigan on her behalf, her 2019 income was $24,705. She has investment accounts totalling more than $200,000. She reports expenses of $51,921 in her financial statement, but some of them are not currently being incurred. For example, as a result of Covid-19, she cannot have a companion visit her in Mission Creek. So she is not paying for a companion. She has historically paid her taxes annually instead of monthly and taxes are not due until next year. Finally, some of the expenses for the Home are now being paid by Ms. Morrison.

[17] Mr. Flannigan is Ms. Greenwood's attorney pursuant to a representation agreement she signed on December 4, 2007. On January 4, 2011, Ms. Greenwood signed a will and on June 30, 2015, a codicil to that will.

[18] Ms. Greenwood is the sole registered owner of the Home which was built by her father in 1939. She inherited it from her mother in the fall of 1997.

[19] Ms. Morrison moved into the Home in the fall of 2000. She was previously married and is now divorced from the father of her two children, neither of whom live locally.

[20] Ms. Morrison was retired, but, according to her affidavit, was bored so she came out of retirement and took the necessary course to become a traffic flagger which is her current employment. Her income in 2019 was $39,681 and, according to her F8 Financial Statement, her annual expenses are $25,638.

[21] Mr. Flannigan moved Ms. Greenwood into Mission Creek in May 2019 after it became apparent that it was no longer safe for her to remain in the Home. Thereafter and in July 2019, Mr. Flannigan advised Ms. Morrison that he intended to

sell the Home. Ms. Morrison responded by filing the *LSPA* charge. Ms. Morrison filed the *LSPA* charge on the basis that she was a spouse as defined in the *Act*.

[22] In October 2019, Ms. Greenwood's litigation guardian, Peter Burnham, filed a petition for an order that the *LSPA* charge be removed from title to the Home and that the Home be listed and marketed for sale so that the proceeds of sale could be used to care for Ms. Greenwood and her living and care Home expenses for the rest of her life. On Ms. Greenwood's behalf, Mr. Burnham took the position that she and Ms. Morrison were not in a spouse-like or marriage-like relationship. The petition proceeding was set down for hearing on January 13, 2020. The parties agreed to adjourn it generally as on January 14, 2020, Ms. Morrison filed this family claim alleging that she and Ms. Greenwood began living together in a marriage-like relationship in October 2000 and that they separated on October 30, 2019, when Ms. Greenwood filed a petition to remove Ms. Morrison from the Home.

[23] In her family claim, Ms. Morrison seeks spousal support and an equal division of family property and debt. She indicates that the Home is the primary family asset. On February 12, 2020, Ms. Morrison filed a certificate of pending litigation against title to the Home.

[24] Ms. Greenwood has responded to the claim denying the spousal relationship. As an alternative and in her counterclaim, she makes a claim for excluded property and for an unequal division of property in her favour on the basis that she was solely responsible for the upkeep and costs of the Home.

The Application for Immediate Sale

[25] Ms. Greenwood makes this application for immediate sale of the Home pursuant to Rule 15-8(1) of the *Supreme Court Family Rules* which provides:

> **Court may order sale**
>
> (1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

[26] Rule 15-8(1) confers discretion on the court to order the interim sale of property where it is necessary or expedient to do so. In the event that there is no necessity, expediency becomes the sole basis for determining whether or not such an order should be made.

[27] There is no dispute that I have the discretion to make the order sought by Ms. Greenwood. In this case, the order is being sought in advance of a determination that the Home is family property, but the Rule is broad enough to apply.

[28] The rule has been considered in a number of cases. In all of the cases relied on by the parties, there is no dispute that the property sought to be sold is family property.

[29] In *L.M.R. v. J.F.R.*, 2009 BCSC 1332, the court said that "expedient" is defined in the Shorter Oxford Dictionary to mean "advantageous; fit, proper; suitable to the circumstances of the case," and involves a balancing of the interests of both parties as the Rule requires that any proposed sale "be advantageous to both parties." In *Kapoor v. Makkar*, 2020 BCCA 223, the Court of Appeal's most recent decision on the test to be applied on an interim application to sell a Home, the court reviewed its earlier cases and said:

> [21] In *Tomic v. Tough* … this court considered an interlocutory order for sale of property under R. 15-8 in a family case and said:
>
> > [26] The criteria for an interlocutory order for sale of property are whether it is expedient and necessary. Those words were described in… [*Bodo v. Bodo* …] as encompassing, in family law proceedings, a number of factors: the needs of the children; the availability of alternative accommodation; the emotional condition of the spouses; external economic factors; wasting of the asset; and the capacity of both parties to maintain the asset. In *Reilly v. Reilly* … the court adopted the word 'advantageous' in place of 'expedient', at para. 35:
> >
> > > At the risk of over simplification my own view is that what the rule requires, where necessity is not in issue, is that the proposed sale be advantageous to both parties.

[30] Returning to the comments in *Kapoor*:

> [22] In *Bodo*, referred to in *Tomic*, Madam Justice Huddart described the approach that should be brought to such an application:
>
> > … I consider that, on an interim application, the onus should be on the spouse seeking to change the status quo pending trial. Any doubts about the justice of an order for sale on an interim application should be resolved in favour of the status quo. …
> >
> > Given the wide variety of factual patterns in family law actions it would be singularly foolish of me to attempt a definitive listing of factors that might be relevant to the determination as to whether a sale is "necessary and expedient". However, those factors that have been considered in determining whether a sale should be ordered at trial will always be relevant. They include [as applicable to this case] …
> >
> > 2. The availability (including affordability) of alternative accommodation for each spouse and his or her dependents;
> >
> > 3. The emotional condition of the spouses, especially the parenting spouse;
> >
> > 4. … economic factors (e.g., a declining market);
> >
> > 5. Wasting of the asset, and
> >
> > 6. The capacity of the parties to maintain the asset.
> >
> > …
> >
> > Potential prejudice to a party must always be a factor in determining an issue on an interim basis that irrevocably alters the status quo.

[31] In *G.J.U. v. J.L.U.*, 2017 BCSC 1352, beginning at para. 57, the court outlined a series of considerations that guide the court's exercise of discretion under Rule 15-8. They include:

> [57] … whether the sale will promote early settlement, whether the sale will defeat a spouse's claim for reapportionment, whether the sale is inevitable or whether a spouse might be able to retain the property on a division of assets.

[32] I intend to apply those factors to this case starting with whether or not a sale of the Home is necessary.

[33] In this case, the evidence does not disclose that the immediate sale of the Home is necessary. Deducting the expenses that Ms. Greenwood is not currently incurring from her budget, Ms. Greenwood has sufficient funds to pay her living expenses at Mission Creek. If there is an encroachment into her investment accounts, it is not significant. I understand from Mr. Flannigan's affidavit that she is

currently on a waitlist for a care home which would better suit her needs and that it will cost more. However, the waitlist is about two years' long and there is no imminent change in Ms. Greenwood's living arrangements.

[34] Turning to whether the asset is wasting, Ms. Greenwood submits that in the current Kelowna market, the fair market value of the Home has likely fallen by $100,000 in the last six months.

[35] Donald King, a realtor with Royal LePage in Kelowna, had previously been retained by Mr. Flannigan to sell the Home. He provided an affidavit sworn July 30, 2020, in which he says that, in January 2020, based on his research and knowledge of the market, he prepared a comparative market analysis for Mr. Flannigan for the purpose of determining an appropriate listing price. He lives in the neighbourhood and has sold nearby properties. He concluded that the market value of the Home was in the range of $850,000 to $875,000. He listed the property on February the 5th, 2020, for $869,000. He had not seen the interior before doing it. The listing resulted in no showings or offers.

[36] Mr. King says that his opinion of the market value of the Home has changed given the economic and financial implications of the pandemic and a significance asbestos problem that will have to be addressed either in advance of the sale or by a purchaser.

[37] In contrast, Ms. Morrison has filed materials which suggest that average monthly housing prices in Kelowna have increased, year over year, during the pandemic. In any event, and to the extent that the pandemic has affected market values of properties in Kelowna, neither party could have anticipated it. Presumably, the Home's value will rebound once the pandemic effect is removed as it is a heritage Home in a desirable neighbourhood. The asbestos situation will remain as a potential problem for buyers.

[38] In all the circumstances, I conclude that there is unlikely to be a downside to waiting for a trial decision or earlier resolution to sell the Home. The asset is not wasting.

[39] Is a sale of the Home inevitable? I accept that based on Ms. Morrison's financial circumstances, the sale of the Home is inevitable. Ms. Morrison acknowledges in her affidavit that she is not in a financial position to buy out Ms. Greenwood's interest in the Home in the event that she is successful in establishing that the parties were common law spouses.

[40] Thus, the exercise of my discretion is focused on whether the sale is expedient and "expedient" has been defined in the cases as whether the sale is advantageous to both parties. I accept that a sale would be advantageous to Ms. Greenwood. It would convert the primary family asset in dispute into cash that would be available for her use.

[41] However, I conclude that an immediate sale of the Home would not be advantageous to Ms. Morrison. Instead of being able to remain in the Home where she has lived for almost 20 years, Ms. Morrison would be forced to relocate.

[42] Ms. Morrison is not a high-income earner. Her income is less than $40,000 from a combination of employment income, old age security, Canada Pension Plan payments, and employment insurance. She works seasonally as a traffic flagger and her employment income is highest in the late spring, summer, and early fall. Her Form 8 Financial Statement indicates that her assets total approximately $7,500 and she has a credit card debt of $5,000. Ms. Morrison says that she is able to afford to pay the expenses for the Home until trial when a determination will be made about the status of her relationship with Ms. Greenwood and her interest, if any, in the Home. She says that she is maintaining the Home in good condition and paying the expenses with the exception of property taxes which are not due until 2021.

[43] Ms. Morrison says that she is elderly and a smoker and therefore at risk for Covid-19. She says that if she were required to vacate the Home, she would be

forced into shared housing which increases her risk of exposure. It is true that she previously shared the Home with Ms. Greenwood, but she has been its sole occupant since May 2019. A forced move into what is likely to be shared accommodation in advance of the trial increases the health risk to Ms. Morrison.

[44] I turn now to consider whether a sale will make settlement more likely. I conclude that in the circumstances of this case, a sale of the Home is unlikely to result in a settlement of the dispute. It will not assist in determining the main issue, whether the parties are spouses. While it is true that the Home is a major source of contention, a sale will force Ms. Morrison to use more of her limited resources than she currently does on alternative accommodation and it will therefore reduce her ability to meaningfully pursue her claims in this case. A sale will therefore have the effect of putting unfair pressure on Ms. Morrison to settle her claims before trial and will provide a strategic advantage to Ms. Greenwood.

[45] The proposal for disbursement of the proceeds of sale of the Home would have Ms. Morrison's potential share held in trust until after trial. Based on a hypothetical sale price of $800,000, taking into account Ms. Greenwood's excluded property claim and absent any further reapportionment net of commissions and other sale expenses, Ms. Morrison's share would amount to something less than $300,000. She would not have access to these funds until the court determined the question of her spousal status. With access to her funds, she may only have to move once instead of twice. Without access, she will be required to move twice.

[46] Turning to whether the status quo should be maintained, I conclude that in a case such as this, where it is not possible to determine the parties' respective interests in the Home absent a determination of their spousal status, the status quo should be maintained.

Conclusion and Further Comments

[47] After considering all of the appropriate factors, I decline to exercise my discretion under Rule 15-8(1) to order a sale of the Home in advance of trial.

[48] Despite this conclusion, it is my view that it is in both parties' interests that the Home be sold as soon as possible after the trial. Given its original condition and the apparent presence of asbestos, it may not sell quickly. Assuming that the trial proceeds in April 2021 and a decision is released shortly thereafter, I believe that the Home should be listed shortly in advance of trial and should be on the market to take advantage of the spring and early summer market which Mr. King describes as the premier real estate market in Kelowna.

[49] If Ms. Morrison is successful and found to be a spouse, she will have access to her share of the proceeds of the sale of the Home more quickly by an early listing and it will reduce the period in which she will exposed to the occupational rent claim being made by Ms. Greenwood. According to Mr. King, market rent for the Home would be between $2,500 and $2,800 a month. If she is not found to be a spouse, an expeditious sale of the Home will reduce her exposure to damages.

[50] Thus, I urge the parties to list the Home in early 2021 and no later than the beginning of March 2021 with a proposed closing date after the trial.

The Application to Remove Mr. Burnham

[51] I turn now to the question of whether or not Mr. Burnham should be removed as litigation guardian. Relying on *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, 2002 SCC 38, Ms. Morrison argues that in order for a litigation guardian to be appointed, the evidence must demonstrate that the litigation guardian is qualified, is prepared to act, and is indifferent as to the outcome of the proceedings. She submits that as Mr. Burnham is Wendy Burnham's spouse, who is one of three residual beneficiaries of Ms. Greenwood's estate, he is not indifferent as to the outcome of this family case. Ms. Morrison also questions whether it is in Ms. Greenwood's interest to oppose this litigation and suggests, without proof, that both Mr. Burnham and Mr. Flannigan are not acting in Ms. Greenwood's best interests.

[52] I do not agree with Ms. Morrison's submissions. I concur with the judge's conclusion in *Owen v. Owen*, 2010 ONSC 2852. There, the court interpreted the

third criterion from *Gronnerud* -- indifference as to result -- as requiring that the litigation guardian not be in a conflict of interest vis-à-vis the interests of the disabled person.

[53] In *Owen*, the court determined that where there was no established conflict in the action by the daughter, the litigation guardian, and the mother, the daughter was an appropriate litigation guardian despite the fact that she might inherit the mother's estate at one point.

[54] While it is possible, but not established on the evidence, that Mr. Burnham may at some point benefit indirectly from the outcome of this family claim through his marriage to Wendy Burnham, in my view, that is mere speculation at this point. Ms. Greenwood is alive and well and the terms of her will have not taken effect.

[55] Ms. Morrison has not shown that Mr. Burnham is not acting in Ms. Greenwood's best interests. Ms. Morrison's status as a spouse is a triable issue and the outcome is far from certain. Mr. Burnham's actions merely require Ms. Morrison to prove her spousal status at trial and, in the interim, he is acting to preserve the equity in the Home built by Ms. Greenwood's father, and in her family since 1939, so that it may be disbursed in accordance with her wishes as set out in her will.

[56] In conclusion and in summary, I have dismissed Mr. Greenwood's application for immediate sale of the Home, but have made a suggestion for an early listing prior to trial; I have dismissed Ms. Morrison's application to strike paragraphs of affidavits filed on Ms. Greenwood's behalf; I have dismissed Ms. Morrison's application that she have exclusive occupancy of the Home; I have dismissed Ms. Morrison's application to restrain Ms. Greenwood's dissipation of assets; I have dismissed Ms. Morrison's application to remove Mr. Burnham as litigation guardian; and I have dismissed Ms. Morrison's application to order Mission Creek to permit her to visit Ms. Greenwood.

[57] I make the following ancillary orders in respect of Ms. Morrison's continued occupation of the Home.

[58] First, she must continue to contribute to the expenses of the Home, including paying the cable, Internet charges, lawn and garden maintenance fees, snow removal fees, and such other expenses associated with her ongoing use of the Home as agreed between the parties.

[59] Second, she must maintain the Home in good condition. This order extends to not smoking inside the Home which may affect the eventual marketing of it and, as I understand it, was not her habit when Ms. Greenwood resided there.

[60] Third, she must provide access to the Home on reasonable notice to contractors and other maintenance workers as requested by Mr. Flannigan.

[61] Fourth, she will continue to pay $600 per month towards the cost of her continuing to reside there. The monthly payments are to be taken into account by the trial judge in the final determination of the family claim or by the parties on any settlement of it.

[62] So, counsel, is there any clarification required of my ruling?

[63] MS. THIELE: Not from us.

[64] MS. TAYLOR: My Lady, just --

[65] MS. THIELE: I should -- I should say we have been -- I think we have been paying that money to Mr. Flannigan --

[66] MS. OKIMAW: No.

[67] MS. THIELE: Oh, Ms. Okimaw says [indiscernible] -- okay, so, we will pay that -- pay that to Mr. Flannigan.

[68] THE COURT: All right.

[69] MS. TAYLOR: I do not believe the $600 a month has been paid to Mr. Flannigan.

[70] THE COURT: I do not -- my understanding was it was in Ms. -- I think it was in --

[71] MS. TAYLOR: Ms. Okimaw's trust account.

[72] THE COURT: Yes, Ms. Okimaw's trust account --

[73] MS. THIELE: We were collecting it and I think my suggestion at the JCC was we pay it every three months, but we can pay it once a month. It just seemed to make sense to not have a bunch of cheques going [indiscernible].

[74] MS. TAYLOR: My Lady --

[75] THE COURT: And so Ms. Taylor is on her feet.

[76] MS. TAYLOR: Yes, My Lady, with respect to the suggestion that the Home be listed in the New Year and no later than March 1st, does that form part of the order that we are to --

[77] MS. THIELE: I cannot see myself disagreeing with that. I would certainly need to take instructions, but it makes sense to me.

[78] THE COURT: Well, I urged the parties to do it. I did not order them to do it. Frankly, I would have ordered it if it had been argued, but as I worked through the materials last night, I think that regardless of the outcome, both parties would benefit from having it sold as quickly after trial as possible and, based on Mr. King's evidence about the early spring market in Kelowna, I think it cannot wait until the end of April to be on the market. So, as I say, I do not have an application, but I think it needs to be listed.

[79] MS. THIELE: I agree with you, My Lady. The only thing that I -- because I am not familiar with Kelowna, I gather that we do not have as many bumping's in Kelowna in terms of longer trials. So I am comfortable with that.

[80] MS. TAYLOR: Yes, but the decision would likely be reserved [indiscernible].

[81] THE COURT: Yes, I just cannot tell you how long, but the reality is, is it should be marketed and on the market not starting in April which will put you into the fall which I think is problematic.

[82] MS. TAYLOR: Thank you, My Lady, and then with respect to costs, both parties, it seems, were successful on certain issues.

[83] THE COURT: Costs should be in the cause.

"MacNaughton J."