

CANADA / JUDGMENT

Ali v. Ali

2022 BCSC 1022

COURT

Supreme Court of British Columbia

DECIDED

17 June 2022

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2022 BCSC 1022 Ali v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ali v. Ali,

2022 BCSC 1022

Date: 20220617

Docket: S213338

Registry: Vancouver

Between:

Adnan Barkat Ali

Plaintiff

And

Imran Barkat Ali and Aliia Development Ltd.

Defendants

And

1271848 BC Ltd.

Defendant by Way of Counterclaim

Before: The Honourable Justice Iyer

Reasons for Judgment

Counsel for Plaintiff:

R-M. Basham, Q.C.

C. Basham

Counsel for Defendants:

H. Mickelson, Q.C.

G. Boothroyd-Roberts

Place and Date of Hearing:

Vancouver, B.C.

May 30 and 31, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 17, 2022

OVERVIEW

- [1] This application arises out of an action commenced by the plaintiff, Adnan Ali, seeking a 50% beneficial interest in four properties owned by the defendants. The defendants deny that the plaintiff has any beneficial interest in these properties on various grounds, including a limitation defence. By counterclaim the defendants assert a 50% beneficial interest in two other properties.
- [2] The defendants now apply under Rule 9-7 for summary trial of the limitation issue.
- [3] Before a court considers the merits of such an application, it must determine that the matter is suitable for summary determination. For the reasons that follow, I find that the limitation issue in this case is not suitable for summary trial and I dismiss the defendants' application.

BACKGROUND

- [4] The following narrative is uncontroversial. As this matter should go to trial, although I refer to disputed facts I make no factual findings.
- [5] The plaintiff, Adnan Ali, and the defendant, Imran Ali, are brothers. They have another brother, Irfan Ali, who is not a party to this litigation, but has sworn an affidavit. For clarity, and intending no disrespect, I will refer to the three brothers by their first names.
- [6] Imran is the eldest brother, Irfan is his younger twin, and Adnan is three years younger. All are involved in property development projects. Imran is a real estate agent and the corporate defendant, Aliia Developments Ltd ("Aliia") is his company. Irfan is a lawyer. Adnan is a developer.

- [7] Over the years, the brothers have bought, developed and sold properties, sometimes with each other and sometimes individually. In the present action, Adnan claims a 50% beneficial interest in four properties: 3011 202nd St., Langley, BC ("Langley Property"); 1598 West 28th Ave., Vancouver, BC ("W28 Property"); 3886 West 14th Ave., Vancouver, BC ("W14 Property"); and 5909 Athlone St., Vancouver, BC ("5909 Athlone Property"). The primary basis for his claim is an alleged partnership agreement with Imran.
- [8] In his response, Imran denies that Adnan has any interest in these properties and denies they had a partnership. He says that he and Adnan occasionally bought properties together in a joint venture specific to that property, but none of the properties named in the Notice of Civil Claim are among them.
- [9] In his counterclaim, Imran claims that he and his company, 1271848 BC. Ltd. have a 50% beneficial interest in two other properties that Imran says were part of a joint venture with Adnan.
- [10] Imran and his family reside in the W28 Property.
- [11] Sometime in 2015, the relationship between Adnan and Imran began to break down, eventually resulting in this litigation, which commenced in June 2021. The relationship between Imran and Irfan also soured, leading to separate legal proceedings between them in 2016.
- [12] From late 2015 through the end of June 2017, Adnan and Imran communicated by email and text.
- [13] In November 2017, at the request of their mother, Adnan and Imran participated in a mediation relating to the W28 Property. At the hearing before me, Imran applied to me for an order for disclosure of documents including the mediation agreement and the mediator's report ("Mediation Materials"). Adnan opposed its admission on the ground of settlement privilege.
- [14] Imran's position is that by the end of June 2017 or, at the very latest, after the November 2017 mediation, Adnan was fully aware that Imran was denying he had any beneficial interest in the W28 Property. He says that the Mediation Materials demonstrate this.
- [15] Between June 2017 and June 2019 (and perhaps before then), family and friends of Adnan and Imran were trying to help heal the rift between them. These included Irfat, Feroz Rahiman, and Marvin Ali, all of whom provided affidavits in this proceeding.
- [16] Adnan and Imran met in person in June 2019 on one or two occasions. Imran recalls that there was one meeting and Adnan recalls that there were two. Adnan's evidence is that it was at the second meeting that he first became fully aware of Imran's position that he was not entitled to any beneficial interest in the W28 Property.

- [17] The parties agree that, if Adnan became fully aware of Imran's position on the W28 Property before the end of 2017, the limitation defence applies to bar his claim. If as Adnan asserts, he only became fully aware of Imran's position in June 2019, his claim is not statute-barred.
- [18] Prior to the hearing of this application, the parties conducted examinations for discovery of Adnan and Imran on the limitation issue.

ANALYSIS

Applicable Legal Principles

- [19] The Limitation Act, S.B.C. 2012, c. 13 establishes a basic two-year limitation period within which civil claims must be filed, subject to specified exceptions. Section 6 provides that the limitation clock starts to run when the potential claimant "discovered" it. Section 8 establishes that a claim is discovered when the person "knew or reasonably ought to have known" that the loss had occurred, that the potential defendant had caused or contributed to it and that a court proceeding would be an appropriate way of seeking a remedy.
- [20] In the present application, the parties agree that the applicable test is not s. 6, but s. 12 of the Limitation Act. That section creates a different discoverability rule for claims based on fraud or for the recovery of trust property. Subsection 12(2) states:
- (2) A fraud or trust claim is discovered when the beneficiary becomes fully aware
 - (a) that injury, loss or damage had occurred,
 - (b) that the injury, loss or damage was caused by or contributed to by the
 - (i) fraud,
 - (ii) fraudulent breach of trust,
 - (iii) conversion, or
 - (iv) other act or omissionon which the claim is based,
 - (c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

- [21] The burden of proof of discoverability rests on the trustee, in this case, Imran: s. 12(3). This is a more stringent test than the basic discoverability rule because the trustee must show that the beneficiary actually "knew", not merely that they "ought to have known" that their claim was being denied: *Maussion v Maussion*, 2021 BCSC 530 at para. 35. The purpose of the test is to protect a dishonest trustee from obtaining the protection of a limitation period: *Hochsteiner v. Kilback*, 2013 BCSC 1316 at para. 33.
- [22] Rule 9-7 governs summary trials. It permits parties to a proceeding to apply to court for judgment on an issue or generally unless the judge determines that the matter is not suitable for summary determination. Rule 9-7(15) defines two such situations: (a) where the court is unable, on the whole of the evidence before it, to find the facts necessary to decide the issue, or (b) where the court considers it would be unjust to decide the issues on the application.
- [23] The principles governing suitability are well-established: *Gichuru v. Pallai*, 2013 BCCA 60 paras. 30-35. Where, as here, the summary trial application is sought to resolve only some of the issues in the lawsuit, relevant factors include:
- a) whether the court can find the facts necessary to decide the issues of fact or law;
 - b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
 - i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
 - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
 - (2) the potential for multiple appeals; and
 - (3) the novelty of the issues to be determined;
 - ii. the amount involved;
 - iii. the complexity of the matter;
 - iv. its urgency;
 - v. any prejudice likely to arise by reason of delay; and
 - vi. the cost of a conventional trial in relation to the amount involved.
- Ferrer v. 589557 B.C Ltd.*, 2020 BCCA 83 at para. 27, quoting *Greater Vancouver Water District v Bilfinger Berger AG*, 2015 BCSC 485 at para. 110.
- [24] In *Ferrer*, the defendant applied for summary trial of a contractual limitation clause. Justice Groberman emphasized that one of the most important considerations is whether the issue sought to be determined summarily is intertwined with the other issues in the action: para. 36. "Litigating in slices" is both inefficient and potentially unfair. However, where the issue

for determination is discrete from the other issues, can be decided on the evidence before the court and facilitates access to justice, a summary trial is appropriate: *Langley (Township) v. Witschel*, 2015 BCSC 123 at paras. 16-19.

- [25] The fact that there are conflicts in the evidence or credibility is in issue does not necessarily make a matter unsuitable for summary trial. However, as the Court of Appeal cautioned in *Brisette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at para. 27, the court should not simply prefer one conflicting affidavit over another; rather,

there must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another.

- [26] The same principles apply when the issue for summary determination is a limitation defence.

Suitability of the Limitation Issue for Summary Determination

- [27] Imran submits that Adnan's own text and email communications demonstrate that he was fully aware that Imran was definitively denying that Adnan had any beneficial interest in the W28 Property and that, as a sophisticated business person aware of the extent of their disagreements over their business arrangements, he would have known that litigation was an appropriate means of seeking redress. Imran points to specific emails between the brothers from June 20-30, 2017, in which Adnan asserted that he had money in the W28 Property and Imran said that he did not.
- [28] The difficulty with this submission is that it does not acknowledge the complex context within which these communications took place. That context includes the long history of the business relationship between Adnan and Imran, dating back some 20 years, the dispute over the terms of that relationship, many of which are not documented in writing, or the larger family context including efforts by other relatives and friends over some years to get the brothers to reconcile.
- [29] That context necessarily informs what Adnan would have understood from the particular communications Imran relies upon. It is probative of when Adnan would have become fully aware that Imran's denial that Adnan had any beneficial interest in the W28 Property was firm and not, for example, a passing expression of frustration or anger.
- [30] Imran acknowledges in his submissions that a full trial would require a lengthy (and costly) determination of "the legal character of the brothers' lengthy, and on its face uncertain, business relationship." He attacks Adnan's credibility on his examination for discovery, describing it as "sticking to a 'talking point' which became increasingly evasive and incredible." He submits that a full trial would be a waste of judicial resources because Adnan would simply repeat the "false", "evasive" and "incredible" evidence he gave at his discovery.

- [31] Imran also attacks the reliability and credibility of each of the three other persons who submitted affidavit evidence. The gist of their evidence is that at various points during that period, Imran acknowledged that Adnan had an interest in the W28 Property. Interpretation of the nature of the agreement between the parties depends on an assessment of the credibility to the two parties themselves and also of the three other witnesses. Credibility assessment is not a discrete element of this case; it lies at the heart of it.
- [32] It follows that it is unnecessary for me to address the admissibility of the Mediation Materials. The mediation was part of the background context within which others were assisting brothers to resolve their disputes. Having determined that the limitation issue is not suitable for summary trial, the admissibility of the Mediation Materials should be left to the trial judge.
- [33] I note that even if I were to decide the limitation issue, it would not end the dispute. The Langley Property would remain, as would the 5968 Athlone Property, which is the subject of the counterclaim. Deciding the ownership interests in these properties will require the court to examine the evidence about the nature and terms of parties' business relationship over the years. That is the same evidence necessary to decide the limitation issue.
- [34] In conclusion, the affidavits and discovery materials show that the parties have substantially different perspectives on their long relationship. They each attack the other's credibility, and a credibility determination necessarily goes to both the applicability of the limitation defence and to the issues on the merits of the claim. The issues are intertwined and require determination by conventional trial. While I was not told about the exact amount, it was described as a "seven-figure" dispute. There was no suggestion of urgency or prejudice.
- [35] I do not agree with Imran that evidence given in discovery or cross-examination on an affidavit is the same as evidence in a courtroom. The trial judge's ability to assess the oral testimony of a witness is not comparable to the situation of a chambers judge hearing portions of a discovery read into the record by counsel.
- [36] The application is dismissed.

"Iyer J."

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