

CANADA / JUDGMENT

Beach Estate v. Beach

2018 BCSC 1108

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1108 Beach Estate v. Beach

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Beach Estate v. Beach,

2018 BCSC 1108

Date: 20180704

Docket: S168106

Registry: Vancouver

Between:

Dorothy Esther Beach by the Executrix Nancy Marion Beach, and

Dorothy Esther Beach, as Executrix of the Estate of Russell Esterly Beach,

by her Executrix, Nancy Marion Beach

Plaintiffs

And

Rosalie Anne Beach and Mark Adrian Whitear

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiffs:

In Person

Counsel for the Defendant

Rosalie Anne Beach:

N.W. Lott

Counsel for the Defendant

Mark Adrian Whitear:

K. Hamilton

Place and Date of Hearing:

Victoria, B.C.

May 17, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 4, 2018

Introduction

- [1] These reasons address applications to strike pleadings and for summary judgment of the originating notice of civil claim (the "NOCC") that underlies the plaintiffs' action.

Factual Background

The Property and its Origins

- [2] Russell Beach ("Russell") was married to Dorothy Esther Beach ("Dorothy") until his death on May 15, 2003. The couple have four adult children: Nancy Marion Beach ("Nancy"), Marilyn Terry Walia ("Marilyn"), David Russell Beach ("David"), and the defendant Rosalie Ann Beach ("Rosalie").
- [3] Dorothy was the executor of the Russell's estate. Dorothy died on January 23, 2013. Nancy, David, and Marilyn are the executors of Dorothy's estate, which now includes both Dorothy's and Russell's estates.
- [4] The defendants, Rosalie and Mark Adrian Whitear, were married in 1990 but are currently separated.
- [5] The underlying action concerns a series of disputes involving approximately 514 acres of land on Salt Spring Island, BC (the "Property"), which were once owned by Dorothy and Russell.
- [6] On or about October 1990, the defendants moved onto the Property per Russell and Dorothy's wishes to maintain the Property and begin farming and logging on it.

- [7] On or about September 1994, the defendants formally leased approximately 400 acres of the Property from Russell and Dorothy (the "Leased Property").
- [8] On or about November 1997, the defendants purchased approximately 114 acres of the Property from Russell and Dorothy (the "1997 Sale Agreement"). The defendants continued to lease the Leased Property.
- [9] On or about October 1999, disputes between various members of the family resulted in Dorothy and Russell giving the defendants notice that they would terminate the lease over the Leased Property.

The Constructive Trust Claim and Counterclaim

- [10] On October 29, 2003, the defendants filed a notice of writ and statement of claim against Dorothy in the Supreme Court of BC, action no. 03 4417, Victoria Registry. This claim sought a declaration that the Leased Property was held in trust for the defendants on the basis that Dorothy had been unjustly enriched (the "Constructive Trust Claim"). In the alternative, the defendants sought damages on a quantum meruit basis.
- [11] On November 24, 2003, Dorothy filed a statement of defence and a counterclaim, in which she alleged that the defendants had logged illegally. She also claimed a set off for a residence that, she alleged, the defendants had promised to build on the Property for her and Russell (the "Counterclaim").
- [12] The issues in the Constructive Trust Claim and Counterclaim went to mediation and then arbitration.
- [13] On June 23, 2005, an arbitration award was made in favour of the defendants, declaring the existence of a constructive trust over the Leased Property, subject to the defendants meeting certain conditions (the "Arbitration Award"). The Arbitration Award was open to appeal until August 24, 2005, but no appeal was filed.
- [14] On June 28, 2006, the defendants filed a petition to enforce the Arbitration Award in the Supreme Court of BC, action no. 06 2922, Victoria Registry (the "Petition"). Dorothy did not file a response to the Petition.

The Fraud Action

- [15] On November 1, 2007, Dorothy, in her own capacity and as executrix of Russell's estate, filed a writ of summons against the defendants in the Supreme Court of BC, action no. S077349, Vancouver Registry. Dorothy sought a rescission of the 1997 Sale Agreement for the 114 acres on the basis of fraudulent misrepresentation, including but not limited to the defendants' representation to her and Russell that they had and would continue to maintain the natural character of the Property and engage in sustainable forestry, logging, and farming practices (the "Fraud Action").

- [16] After serving the defendants with the writ of summons, Dorothy took no steps in pursuing the Fraud Action.

The Professional Negligence Action

- [17] On May 15, 2008, Dorothy filed a writ of summons and statement of claim against John Michalski and Ronald MacIsacc in the Supreme Court of BC, action no. S083499, Vancouver Registry, for professional negligence or breach of contract in relation to their representation of Dorothy in relation to the Constructive Trust Claim and the related Arbitration Award (the "Professional Negligence Action").
- [18] Dorothy claimed, inter alia, that Messrs. Michalski and MacIsacc erred in not advising her that the arbitrator lacked jurisdiction to make an order on equitable grounds.
- [19] On May 27, 2013, a notice of discontinuance of the Professional Negligence Action was filed.

The Settlement Agreement

- [20] On April 30, 2009, the defendants and Dorothy entered into a settlement agreement (the "Settlement Agreement"). Dorothy was represented by Howard Mickelson, Q.C. in negotiating and finalizing the Settlement Agreement. The Agreement had terms to the effect that:
- a) The parties mutually agreed to dismiss the Constructive Trust Claim and Counterclaim from which the Arbitration Award was derived. Dorothy agreed to release the defendants with respect to all matters at issue in that action.
 - b) The defendants agreed to dismiss the Petition to enforce the Arbitration Award, and release any interest the defendants held in the Arbitration Award and the 400 acres subject to the underlying lawsuit.
 - c) Dorothy agreed to dismiss the Fraud Action in relation to the 1997 Sale Agreement for the 114 purchased acres and release the defendants with respect to all matters at issue in that action.
- [21] On August 28, 2009, per the Settlement Agreement, Dorothy signed a release in relation to the Constructive Trust Claim and Counterclaim (the "Counterclaim Release"). The Counterclaim Release stated that, inter alia, Dorothy would release and forever discharge the defendants from any and all claims, demands, proceedings, actions, or causes of action that Dorothy and her heirs, executors, or administrators shall or may have with respect to the activities of the defendants up until April 30, 2009 on the Leased Property, without limitation, and with respect to the matters subject to Supreme Court of BC, action no. 03 4417, Victoria Registry.

- [22] On August 28, 2009, per the Settlement Agreement, Dorothy signed a release in relation to the Fraud Action (the "Fraud Action Release"). The Fraud Action Release stated that, inter alia, Dorothy in her personal capacity and as executor of Russell's estate would release and forever discharge the defendants from any and all claims, demands, proceedings, actions, or causes of action that Dorothy or her heirs, executors, or administrators shall or may have with respect to the matters subject to the Supreme Court of BC, action no. S077349, Vancouver Registry.
- [23] On November 18, 2009, per the Settlement Agreement, consent dismissals dismissing the Constructive Trust Claim, Counterclaim and Petition to enforce the Arbitration Award were filed. On December 3, 2009, the consent dismissal dismissing the Fraud Action was filed.
- [24] Nancy did not agree to release the defendants from future claims related to the Leased Property, and as a result, the Settlement Agreement provides that Dorothy and Dorothy's estate would indemnify the defendants for any costs arising from potential future claims made by Nancy in relation to the Leased Property, up to \$25,000.

The Current Action

- [25] On September 2, 2016, the plaintiffs filed the NOCC in the Supreme Court of BC, action no. S168106, Vancouver Registry. The plaintiffs seek the following relief:
- a) an order nullifying the 1997 Sale Agreement and vesting title of 114.6 acres currently owned by the defendants to Dorothy's estate;
 - b) an order setting aside the Arbitration Award;
 - c) a declaration that the defendants hold no legal or equitable interest in the Property;
 - d) an order setting aside the Settlement Agreement; and
 - e) general damages, special damages, and costs.
- [26] The legal bases for this relief as pled in the NOCC are:
- 1. Fraudulent misrepresentation with respect to the 1997 Sale Agreement--the defendants owed a duty of care and made intentionally false representations to Dorothy and Russell, which Dorothy and Russell relied upon in agreeing to sell 114.6 acres.
 - 2. Breach of contract of the 1997 Sale Agreement--the defendants breached the Sale Agreement by failing to construct a house for Dorothy and Russell, failing to preserve ecological character of the 114.6 acres, and logging in a manner contrary to ecological and sustainable practices.

3. Formation and Unconscionability of the Settlement Agreement--Dorothy entered into the Settlement Agreement as a result of misinformation, duress, and undue influence, in part, from her lawyers; and the benefits allocated under the Agreement are unconscionably distributed in favor of the defendants.

[27] Both defendants filed responses opposing the relief sought.

[28] On March 14, 2018, the defendant Mark Whitear filed a notice of application to strike the NOCC pursuant to Rule 9-5 of the Supreme Court Civil Rules [Rules], or in the alternative, to dismiss the issues by way of summary judgment in Rule 9-6.

[29] On March 28, 2018, the defendant Rosalie Beach filed a notice of application to strike the NOCC, dismiss all issues, and remove a certificate of pending litigation #FB509662 (the "CPL") from the Property pursuant to the same Rules.

[30] On May 17, 2018, I presided over the hearing of the applications in chambers and reserved my judgment.

Discussion

[31] Rule 9-5 provides in part that:

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[32] Rule 9-6 provides in part that:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,

- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
- (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
- (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
- (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[33] The issues raised by the NOCC, notices of applications, and submissions are:

1. Fraudulent misrepresentation with respect to the 1997 Sale Agreement;
2. Breach of contract of the 1997 Sale Agreement; and
3. Formation and Unconscionability of the Settlement Agreement.

[34] In deciding whether to strike the claims, I will address each issue individually. After addressing each issue, I will also discuss the plaintiffs' proposed amended NOCC that was submitted into evidence as Exhibit 3 (but which has not been filed), the CPL, and costs.

1. Fraudulent misrepresentation with respect to the 1997 Sale Agreement

[35] The defendants submit that it is plain and obvious that the claim for an order nullifying the 1997 Sale Agreement is an abuse of process and the matter is *res judicata*, pursuant to subrule 9-5(d). Alternatively, they submit that the claim should be dismissed pursuant to subrule 9-6(4) because it is clear the claim is bound to fail and is barred by the Limitation Act, R.S.B.C. 1996 c. 266 [1996 Act].

[36] Pursuant to subrule 9-5(1)(d) it must be plain and obvious that the whole or any part of a pleading is an abuse of process: *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1996), 17 B.C.L.R. (3d) 187 (C.A.) at para. 37. Moreover, if the doctrine of *res judicata* applies, the action should be struck on the basis that it is unnecessary, scandalous, frivolous or vexatious.

[37] The burden is on the applicant to establish the applicability of *res judicata*, and the doctrine may apply where an action is concluded pursuant to a consent judgment: *Re Ontario Sugar Co.; McKinnon's Case* (1911), 24 O.L.R. 332 (C.A.).

[38] Cause of action estoppel, a branch of *res judicata*, applies to bar proceedings that allege the same cause of action between the same parties, if that cause has already been determined by the courts. Cause of action estoppel also applies to bar subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even though the second litigation may be based on a different legal description or conception of

the cause: *Royal Bank of Canada v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 38, citing *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59 at pp. 64-65 (C.A.) and *Chapman v. Canada*, 2003 BCCA 665 at para. 17.

- [39] When faced with a plea of *res judicata* on grounds of a consent dismissal order from an earlier proceeding, the court must first compare the cause of action in the later proceeding with the first proceeding. If the causes of action are identical, the court must examine the consent order and any agreement, correspondence, or releases leading to its entry in order to ascertain objectively whether the consent order was intended to finally dispose of all issues in the cause of action.
- [40] If no cause of action estoppel is established, the court must nevertheless examine the pleadings, the consent order, and any agreement, correspondence, or releases leading to its entry in order to ascertain what issues, if any, were intended by the parties to be determined by the consent order. The parties will be precluded by "issue estoppel" from controverting any issue that the parties intended to dispose of through the consent order: *Spender (Guardian ad litem of) v. Spender*, [1999] B.C.J. no. 910 at paras. 23-25 (S.C.).
- [41] In the NOCC, the plaintiffs allege that Dorothy and Russell entered into the 1997 Sale Agreement as a result of fraudulent misrepresentations, which include that:
- a) the defendants had been managing the Property in a manner consistent with the original intentions of Dorothy and Russell by preserving its natural environment and ecological character in a legal and sustainable manner;
 - b) the defendants had engaged in organic farming on the Property;
 - c) the defendants had been allowing the other children access to the Property; and
 - d) the defendants had engaged only in limited logging on the Property and had done so in a manner consistent with ecological and sustainable forestry practices.
- [42] Dorothy's writ of summons in the Fraud Action claimed that the defendants induced Dorothy and Russell to enter into the 1997 Sale Agreement through fraudulent misrepresentations, which included:
- a) That the agreement was induced through fraudulent misrepresentations by the defendants, particularly that the defendants misrepresented that they had and would continue to maintain the natural character of the property through ecologically responsible and sustainable stewardship and by engaging in sustainable forestry, logging, and farming practices.
- [43] As mentioned, the Fraud Action was resolved by a consent dismissal order dated December 9, 2009, and a release dated August 28, 2009, which purports to "release and forever discharge [the defendants] with respect to the matters that are the subject of the [Fraud Action]."

- [44] Upon comparing the two causes of action, I am satisfied that they are identical--both plainly assert fraudulent misrepresentation. Furthermore, upon examining the consent order, and secondary documents and correspondence such as the releases, I am objectively satisfied that the consent order was intended to finally dispose of all issues in the cause of action. Therefore this current cause of action is barred.
- [45] Another point, which now may be moot given my above determination, is the limitation period for this current cause of action. The defendants submit that the former 1996 Act applies as the pre-existing claim was discovered before the effective date of the current Limitation Act, S.B.C. 2012, c. 13, see s. 30(4). Pursuant to ss. 6(3)-(4) of the 1996 Act, the running time for an action based on fraud or deceit is postponed until the identity of the defendant is known to the claimant, and the facts within the claimant's knowledge would reasonably enable the bringing of a claim: see s. 6(4).
- [46] At paras. 23 and 25 of the NOCC, the plaintiffs plead that:
23. Prior to the 114.6 Acre Sale Agreement, Rosalie and Mark had been logging the Property extensively and illegally. They had not preserved the Property's natural environmental and ecological character. (collectively, the "Misrepresentations").
 25. Dorothy and Russell did not learn about the Misrepresentations until 2002.
- [47] As a result, I find that there is no basis for asserting a postponement of the running of the limitation period. This misrepresentation claim is also barred by the expiry of the limitation period.
2. Breach of contract of the 1997 Sale Agreement
- [48] In the NOCC, the plaintiffs allege that the defendants breached the terms of the 1997 Sale Agreement. In support, the plaintiffs state that the defendants did the following:
- a) refused or neglected to construct or cause to be constructed a house on the 114.6 acres for the use of Dorothy and Russell;
 - b) failed to preserve the environmental and ecological character of the 114.6 acres; and
 - c) engaged in extensive logging in a manner inconsistent with ecological and sustainable forestry practices.
- [49] Similarly, Dorothy's claim in the Counterclaim alleged that the plaintiffs had breached the 1997 Sale Agreement. The Counterclaim asserted that the defendants did the following:
- a) cut timber on her property, without accounting; and
 - b) failed or refused to build a place of residence on the lands for her and her late husband.
- [50] The Counterclaim was resolved by a consent dismissal order dated November 18, 2009 and a release dated August 28, 2009.

[51] Upon comparing the two causes of action, I am satisfied that they both plainly assert breach of contract. Furthermore, upon examining the consent order, and the secondary documents and correspondence such as the releases, I am objectively satisfied that the consent order was intended to finally dispose of all issues in the cause of action. Therefore this current cause of action is barred.

3. Formation and Unconscionability of the Settlement Agreement

[52] In the NOCC, the plaintiffs allege that the Settlement Agreement is unconscionable as it gives unilateral benefit to the defendants. Furthermore, the pleadings state that Dorothy entered into the Settlement Agreement as a result of misinformation, duress, and undue influence on the part of the lawyer who represented her in negotiating and finalizing the Agreement.

[53] The defendants submit that these claims raise no bona fide triable issue against the defendants, as the claim is bound to fail and/or it is manifestly clear that it raises no genuine issue for trial: *Korkut v. Kinloch*, 2014 BCSC 1576 at para. 24. The defendants seek a dismissal by way of summary judgment: see R. 9-6(4).

[54] In my view, the claim for undue influence, misinformation and duress against the defendants is bound to fail. The material facts pled in support of this claim are woefully inadequate for this to be a genuine issue for trial as against the defendants. Moreover, the allegation of unconscionability is also bound to fail. For a finding of unconscionability it must be shown for success that there was an inequality in the power of the parties due to ignorance, need or distress of the weaker, which would leave her in the power of the stronger, coupled with proof of substantial unfairness in the bargain: *Braut v. Stec*, 2005 BCCA at para. 16.

[55] Dorothy was represented by experienced and senior counsel in the negotiation of the Settlement Agreement. There was a multitude of benefits that resulted in having a resolution of all of the outstanding claims. The pleading and evidence adduced by the parties support that the plaintiff is bound to lose.

[56] As a result of this determination, the plaintiffs' submission that the Arbitration Award should be set aside also fails--the Award is a nullity: see generally *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 at 975.

4. Proposed amendments to the NOCC

[57] At the hearing, the plaintiffs proposed certain amendments to the NOCC.

[58] Rule 6-1 outlines when pleadings may be amended:

When pleadings may be amended

- (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party

- (a) once without leave of the court, at any time before service of the notice of trial, or
- (b) after the notice of trial is served, only with
- (i) leave of the court, or
- (ii) written consent of the parties.

[59] In addition, unless the court otherwise orders, the amending party must file the amended pleading (R. 6-1(2)(c)), and serve the filed amended pleading on all parties (R. 6-1(4)).

[60] No notice of trial has been filed with the court for this action; therefore the plaintiffs would not ordinarily require leave to amend the pleadings. However, in this case, the plaintiffs have not filed the amended pleading. The plaintiffs have merely submitted the proposed amendments at the hearing of the applications.

[61] Subrule 6-1(8) gives the court discretion to grant amendments to pleadings at a hearing, and to dispose of the need for filing and service. The court has applied this rule (and its predecessor) to authorize amendments after the hearing of evidence at trial: see e.g. *Batyka v. Barber*, 2014 BCSC 769 at paras. 28, 33. The court has also commented on the threshold for amendments proposed during the submission stage of a summary trial: see *Patzer v. Hastings Entertainment Inc.*, 2010 BCSC 426 at para. 21.

[62] I have not been directed to any authority on how subrule 6-1(8) should apply during a hearing to strike pleadings and for summary judgment. Nevertheless, an important point to consider is the prejudice or injustice to the non-amending party. I also note that a party should be allowed to amend its pleading to avoid technical defeat on a summary application: *Century Services Inc. v. LeRoy*, 2014 BCSC 702 at para. 76, reversed in part 2015 BCCA 120, citing *Helman v. Brown*, [1966] B.C.J. No. 48 (C.A.); and the general approach to amendments is generous and non-technical, thereby to permit amendments as are necessary to determine the real question between the parties, considering always the interests of justice: *Century Services Inc.* 2015 BCCA 120 at para. 10.

[63] In my view, the portions of the proposed amendment that require discussion are those related to issue 3--the formation of the Settlement Agreement. The plaintiffs have proposed several new wordings that attempt to link the defendants' conduct to the formation of the Settlement Agreement:

39. [The defendants] negligently or with reckless disregard for the truth withheld pertinent information and the Arbitration Order and the Settlement Agreement were made on error in fact, such fact if having been known would have been material to the Arbitration and to the Settlement Agreement.

44. Dorothy's lawyers made various errors, including

- c. [The defendant's] Constructive Trust Claim, including claiming costs for the Road Building when they had been specifically instructed that they must pay for it themselves, was part of Rosalie and Mark's undue influence.
46. The lawyers failed to properly advise Dorothy of the details of the claim, including but not limited to that the claim was based on a lease which had expired, and persuaded Dorothy to accept the Settlement Agreement stating that she did not have a reasonable prospect of success. But, it is believed the lawyers were unaware that [the defendants] lacked farm status on part of [the defendants'] land, so the lawyers were not responsible for the misrepresentation of [the defendants] within the Settlement.
47. Dorothy entered into the Settlement Agreement as a result of undue influence, including by [the defendants].
48. The Settlement Agreement is unconscionable because of its unilateral benefit to [the defendants], and because the claim which the Settlement Agreement resolved was based on a lease which had by then expired, and because [the defendants] unduly influenced Dorothy through their "fraudulent misrepresentation involving its exclusionary clause while hiding their lack of farm status", and because they involved Dorothy in such a disturbing agreement when she had just returned home from hospital, still with a high and irregular heart rate at age 95, etc.

Part 3: LEGAL BASIS

2. c. Fraudulent Misrepresentation by [the defendants] also occurred within the Settlement Agreement.

[New wordings underlined.]

- [64] Subrule 3-7(18) requires that "[i]f the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence full particulars, with dates and items if applicable, must be stated in the pleading." The proposed amendments fall short of this standard: see e.g. *Harris v. Ray Kissack Memorial Housing Society*, 2003 BCSC 1476 at paras. 11-14. Furthermore, portions of the new wordings, such as "it is believed the lawyers were unaware that [the defendants] lacked farm status on part of [the defendants'] land", are simply not material facts.
- [65] I have considered the pleadings and evidence, and they indicate that Dorothy entered into the Settlement Agreement while being represented by an experienced and senior counsel. The plaintiffs have submitted over 200 pages of email correspondence, spanning at least the past ten years. I have reviewed all of this material. This voluminous material is largely unhelpful as it lacks much relevance and adds no coherent narrative or basis to the allegations raised in the proposed amendments. Moreover, the plaintiffs submitted into evidence a printout from BC Assessment that states the Property at 242 Bridgman Road, Salt Spring Island had residential, light industry, and farm 'land property classes' from 2005-2016. This is in direct contradiction to the amendments put forward, and I was not

given a cogent explanation of this at the hearing.

[66] At the hearing, the plaintiffs also sought an adjournment in order to, among other things, obtain legal advice to properly amend the NOCC. I denied that request as this case has already recently been adjourned, and I was not persuaded that the plaintiffs were in the process of retaining a lawyer for this matter.

[67] In the result, the proposed amendments do not affect my earlier determinations.

Certificate of Pending Litigation

[68] As mentioned, the defendant Rosalie Beach also seeks to remove a CPL registered against the Property.

[69] As recently summarized by the Court of Appeal in *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at paras. 5-9, a CPL may be cancelled in one of three circumstances. If an application for summary dismissal is successful for the part of a claim relating to land, a CPL may be cancelled in accordance with the procedure set out in s. 254 of the Land Title Act, R.S.B.C. 1996, c. 250.

[70] It is open to this defendant to follow that procedure in seeking to remove the CPL.

Costs

[71] Special costs may be ordered where a party pursues a meritless claim and is reckless with regard to the truth; where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty; where a party presents a case so weak that it is bound to fail; and where a party pursues claims frivolously or without foundation: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11 [Mayer]. The nature of special costs is to address the conduct of the parties: see *Watson v. Slavik* (1996), 5 C.P.C. (4th) 315 at para. 16 (B.C.S.C.).

[72] The defendant seeks special costs against Nancy as the executrix of Dorothy's and Russell's estates.

[73] Although the plaintiffs' claims have all failed, I am not inclined to award special costs. Nancy acted on her own without a lawyer. I accept that her conduct and motivations were genuine despite being legally inadequate. In my view, her conduct does not rise to the standard of "reprehensible conduct" that justifies an award of special costs, nor do I think the circumstances justify a punitive award that incorporates an element of deterrence: see generally *Mayer*, at para. 8.

Summary

[74] The plaintiffs' NOCC fails in its entirety pursuant to rules 9-5 and 9-6. The NOCC is struck in its entirety. It is open to the defendant Rosalie Beach to apply to remove the CPL pursuant to s. 254 of the Land Title Act. Costs awarded to the defendants on scale B.

"The Honourable Madam Justice Forth"

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