

CANADA / JUDGMENT

Beach Estate v. Beach

2019 BCCA 277

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 277 Beach Estate v. Beach

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Beach Estate v. Beach,

2019 BCCA 277

Date: 20190726

Docket: CA45434

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

Appellants

(Plaintiffs)

And

Rosalie Anne Beach and Mark Adrian Whitear

Respondents

(Defendants)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia,
dated July 4, 2018 (Beach Estate v. Beach, 2018 BCSC 1108,
Vancouver Registry Docket No. S168106).

Counsel for the Appellants:

I.M. Knapp

A. Choi

Counsel for the Respondents:

N. Lott

Place and Date of Hearing:

Vancouver, British Columbia

April 16, 2019

Place and Date of Judgment:

Vancouver, British Columbia

July 26, 2019

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Fitch

Summary:

Nancy Beach, acting as executrix for her parents, appeals from an order of the Supreme Court of British Columbia that struck out her pleadings and dismissed her action pursuant to Rules 9-5(1) (b) and (d) and Rule 9-6. Her parents had entered into a variety of agreements with her sister and her sister's husband. These agreements led to litigation that culminated in a settlement agreement. Through her pleadings, Nancy sought an order setting aside that settlement. Held: appeal allowed in part. The judge erred by weighing the evidence on a Rule 9-6 application for summary judgment as if it were an application for summary trial.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

- [1] Nancy Marion Beach is the executrix of her mother Dorothy's estate (and through Dorothy, her father's estate as well). I will use first names because this litigation involves parents and siblings and I do so respectfully.
- [2] Nancy in these capacities has commenced this action against her sister, Rosalie, and Rosalie's estranged husband, Mark.
- [3] Nancy seeks varied relief in respect of matters I will shortly detail but I will describe at this time as the 1997 Sale Agreement between Dorothy and the defendants, the 2005 Arbitration Award in favour of the defendants to the disadvantage of Dorothy, and the 2009 Settlement Agreement settling all matters between the defendants and Dorothy.
- [4] Both defendants brought applications before Justice Forth to strike out or dismiss the action pursuant to Rules 9-5(1)(b) and (d) and Rule 9-6.
- [5] Justice Forth acceded to those applications; Nancy appeals.
- [6] Nancy raises two issues on appeal. She submits the judge erred by failing to treat her fairly as a self-represented litigant. She also submits the judge erred by applying the incorrect burden of proof on an application for summary judgment. Nancy is represented by counsel on this appeal.
- [7] In my view, there is no merit to the "fairness" ground but I would give effect to the second submission.

II. Background

- [8] Dorothy and Russell Beach owned a property consisting of 514 acres on Salt Spring Island.
- [9] In 1994, Dorothy and Russell entered into a lease of 400 acres of the property (the "Leased Property") to Rosalie and Mark. In 1997, Dorothy and Russell sold 114 acres of the property to Rosalie and Mark (the "1997 Sale Agreement"); Rosalie and Mark continued to lease the Leased Property.
- [10] In the fall of 1999, disputes between various members of the family arose. Dorothy and Russell gave notice to Rosalie and Mark that they would terminate the lease of the Leased Property.
- [11] In May 2003, Russell died and Dorothy became executrix of his estate.
- [12] In October 2003, Rosalie and Mark responded to the termination of the lease by commencing an action in the Supreme Court seeking a declaration of constructive trust over the Leased Property in their favour as beneficiaries. Alternatively, they sought damages for the premature termination of the lease on a quantum meruit basis alleging that Dorothy had been unjustly enriched by their labours on the Leased Property (the "Constructive Trust Claim").

- [13] Dorothy defended this claim and filed a counter-claim seeking a set-off.
- [14] The Constructive Trust Claim went to mediation and arbitration. In June 2005, an award was made by the arbitrator in favour of the defendants declaring a constructive trust over the Leased Property (the "Arbitration Award"). No appeal was taken from that award.
- [15] On 26 June 2006, the defendants filed a petition in Supreme Court to enforce the Arbitration Award. Dorothy did not file a response.
- [16] In November 2007, Dorothy brought an action against the defendants seeking rescission of the 1997 Sale Agreement on the basis of fraudulent misrepresentations by the defendants (the "Fraud Action").
- [17] In April 2009, the defendants and Dorothy entered into a settlement agreement (the "Settlement Agreement"). Dorothy was represented by senior counsel in the negotiation and execution of that agreement.
- [18] By the Settlement Agreement:
- (a) the parties mutually agreed to dismiss the Constructive Trust Claim and the counter-claim by consent;
 - (b) the defendants agreed to dismiss the petition to enforce the Arbitration Award by consent and to release any interest they enjoyed in the Leased Property arising under that award;
 - (c) Dorothy agreed to dismiss the Fraud Action by consent and release the defendants with respect to all matters at issue in that action.
- [19] Thereafter the releases and consent dismissals contemplated by the Settlement Agreement were executed and filed by the parties.
- [20] Dorothy died on 23 January 2013. Nancy as her executrix commenced this action. She did so as a self-represented litigant. Her Notice of Civil Claim ("NOCC") was duly filed. It recited the background facts and the various matters I have defined herein.
- [21] In respect of the 1997 Sale Agreement, Nancy alleges that Rosalie and Mark induced Dorothy and Russell to sell the 114 acres to them through various fraudulent misrepresentations.
- [22] In respect of the Constructive Trust Claim and the Arbitration Award, Nancy alleges:
- Rosalie and Mark negligently or with reckless disregard for the truth withheld pertinent information and the Arbitration Order was made on an error in fact, such fact if having been known would have been material to the Arbitration.
- [23] In respect of the Settlement Agreement, Nancy alleges that Dorothy's lawyers negligently advised Dorothy and more to the point pleads at paras. 43, 47 and 48:

43. Dorothy agreed to the terms of the Settlement Agreement but did so as the result of misinformation, duress and undue influence. Dorothy was advised by her lawyer that she had little or no chance in succeeding in a claim for fraud or fraudulent misrepresentation against Rosalie and Mark.
47. Dorothy entered into the Settlement Agreement as a result of undue influence and duress.
48. The Settlement Agreement is unconscionable because of its unilateral benefit to Rosalie and Mark, and because the claim which the Settlement Agreement resolved was one based on a lease which had by then expired.

[24] As for relief the NOCC seeks:

Part 2: RELIEF SOUGHT

1. General damages;
2. Special damages;
3. An order nullifying the 114.6 Acre Sale Agreement;
4. An order vesting title in the 114.6 acre to Dorothy (or the estate of Dorothy);
5. An order setting aside the decision of the Arbitration Order;
6. A declaration that the Defendants hold no legal or equitable interest in the Property;
7. An order setting aside the Settlement Agreement;
8. Any further relief the court may deem appropriate; and
9. Costs.

[25] It is in this context that the applications came before the judge in chambers. Justice Forth identified three issues raised by the NOCC and the defendants' applications. In her words they were these:

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.

[26] As to the 1997 Sale Agreement and the alleged fraudulent misrepresentations, the judge dealt with two submissions from the defendants: that the claim was an abuse of process and res judicata and should be struck under Rule 9-5(d); and that the claim was bound to fail as statute barred by the Limitation Act, R.S.B.C. 1996, c. 266 and should be dismissed under Rule 9-6(4).

- [27] The judge gave effect to both of these submissions. In respect of the *res judicata* argument, the judge concluded that the consent dismissal and the release by Dorothy in the Fraud Action rendered these issues *res judicata*. In respect of the limitations defence, the judge noted Nancy's admission that Dorothy and Russell learned of the alleged misrepresentations in 2002 and concluded that an action based thereon would be barred by the effluxion of time.
- [28] Turning to the issue of breach of contract of the 1997 Sale Agreement, the judge found that the allegations here mirrored those advanced by Dorothy in the counter-claim. The counter-claim had been resolved by a consent dismissal and release under the Settlement Agreement. The judge found *res judicata* again applied and "the current action is barred" (para. 51).
- [29] Finally, under the heading "Formation and Unconscionability of the Settlement Agreement", the judge noted that the allegation of unconscionability was based on the theory that the Agreement benefited only the defendants. The judge referred to the "misinformation, duress and undue influence" allegations and said (at para. 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).

- [30] The judge concluded (at paras. 54-56):
- [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.

[31] The judge then dealt with Nancy's application to amend her pleadings in response to the defendants' applications, in particular in respect of the Settlement Agreement and the plea of duress and undue influence. The judge noted Rule 3-7(18) requiring full particulars of the alleged undue influence and concluded that the proposed amendments "fall short of this standard" (para. 64). The judge said (at para. 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.

[32] During the applications, Nancy also sought an adjournment in part to obtain legal advice to properly amend the NOCC. The judge denied that request because in her view, the case had recently been adjourned and she was not persuaded that the plaintiffs were in the process of retaining a lawyer for the matter (para. 66).

[33] In the result the judge concluded, "The plaintiffs' NOCC fails in its entirety pursuant to rules 9-5 and 9-6. The NOCC is struck in its entirety."

III. Discussion

[34] The first ground of appeal advanced by Nancy is the submission that "the chambers judge made an error in law by failing to treat the appellants fairly and allow them to present their case to the best of their ability".

[35] The "fairness" submission has at least three aspects.

[36] First, there is the suggestion that Nancy "suffered unfair disadvantage in waiving solicitor-client privilege three times in a desperate attempt to present (the appellants') case while self-represented". Second, there is the suggestion that Nancy was unfairly denied the opportunity to retain counsel (during the requested adjournment). Third, there is the suggestion that as a self-represented litigant she was vulnerable in "navigating the adversarial system and the Rules of Court".

[37] The "fairness" submission rests in part on the Supreme Court of Canada's decision in *Pintea v. Johns*, 2017 SCC 23, wherein the Court adopted the Canadian Judicial Council's "Statement of Principles on Self-Represented Litigants and Accused Persons" (2006) (online) ("Principles"). Counsel quotes this statement in the Principles:

1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.
2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.

To the extent that Nancy uses the word "unfair" in the pejorative sense, in the sense that the result was "unfair" because the judge did not decide the matter impartially, the submission has no merit.

- [38] I have reviewed the entire transcript of the proceedings before Justice Forth. She demonstrated patience and empathy throughout.
- [39] There was also no unfairness in Nancy's decision to waive solicitor-client privilege. The judge cautioned Nancy when Nancy began to refer to her dealings with previous counsel. In my view, the judge fulfilled her duty under Pinteà to Nancy as a self-represented litigant by providing this caution.
- [40] As for the request for an adjournment, that matter is quintessentially one in the judge's discretion and here there were reasons to deny it and press on with the hearing. In this regard the judge said (at para. 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.

- [41] There was, as well, a submission by the defendants that the timely resolution of these matters was very important in the context of their pending matrimonial proceedings.
- [42] For this Court to overturn a judge's exercise of discretion, the appellant must show that the judge misdirected herself or came to a decision so clearly wrong that it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19 at para. 27. In my view, Nancy has not met this burden in respect of the decision to deny her request for an adjournment.
- [43] The third aspect to Nancy's complaint is a submission that the appropriate remedy in cases of this sort is not to dismiss with prejudice the plaintiff's claim if it is susceptible to proper amendment, but to strike it and permit the plaintiff an opportunity to make appropriate amendments. This complaint has more substance and I will deal with it below, but I do not suggest that the judge was unfair in her treatment of Nancy on these applications.
- [44] This brings me to the second ground of Nancy's appeal. She submits that "the chambers judge erred in law by applying the incorrect burden of proof for summary judgment".
- [45] This submission centers on the disposition of the applications in respect of the appellants' pleadings relevant to the Settlement Agreement.

[46] I begin by repeating that the applications were expressly brought pursuant to Rules 9-5(1)(b) and (d) and Rule 9-6.

[47] These Rules provide in part:

Rule 9-5 -- Striking Pleadings

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
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (d) it is otherwise an abuse of the process of the court,

Rule 9-6 -- Summary Judgment

Definitions

- (1) In this rule:

"answering party", in relation to a claiming party's originating pleading, means a person who serves, on the claiming party, a responding pleading that relates to a claim made in the originating pleading;

"claiming party" means a party who filed an originating pleading.

Application

- (2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

Response to application

- (3) An answering party may respond to an application for judgment under subrule (2) as follows:
 - (a) the answering party may allege that the claiming party's originating pleading does not raise a cause of action against the answering party;
 - (b) if the answering party wishes to make any other response to the application, the answering party may not rest on the mere allegations or denials in his or her pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

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.

[48] Rule 9-5 is a challenge on the pleadings. Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46, quoting *Progressive Construction Ltd. v. Newton* (1981), 25 B.C.L.R. 330 at 335; *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para 14. Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10-11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.

[49] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial: *Tran v. Le*, 2017 BCCA 222; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8-12.

- [50] The summary trial procedure is of course covered in Rule 9-7. It is just that - a trial in summary form based on affidavit evidence, answers to interrogatories, evidence taken at examinations for discovery, and admissions in addition to other forms of evidence (Rule 9-7(5)).
- [51] Because it is a trial, the chambers judge hearing a Rule 9-7 application must weigh the evidence, make findings of fact and apply the law thereto unless the conditions set out in Rule 9-7(15)(a)(i) or (ii) are found to exist. The burden of proof to apply is the traditional civil burden of proof on the balance of probabilities.
- [52] Both applicants here filed an affidavit in support of their applications. That of Mark set out the history of the matter in short form and exhibited various documents including the pleadings, the Settlement Agreement, and the releases and consent dismissals arising out of the settlement. The affidavit of Rosalie contains a similar narrative. In para. 15, Rosalie referred to Mark's recital of the elements of the Settlement Agreement and said:
- I have read Mark's affidavit #1. I agree with and confirm his evidence contained in paragraphs 32-36 that I understood the settlement was a final resolution of all the issues underlying the legal proceedings with my mother, over the property Mark and I owned.
- [53] Neither Mark nor Rosalie referred to the allegations contained in the NOCC, in particular in respect of the Settlement Agreement and the allegation that Dorothy entered into the Settlement Agreement "as the result of misinformation, duress and undue influence". Neither Mark nor Rosalie expressly denied these allegations in paras. 43 and 47 of the NOCC. Neither Mark nor Rosalie generally deposed to the lack of merit in Nancy's action.
- [54] A number of affidavits sworn by Nancy were also before the judge. Apparently Nancy handed up her "submission" and it included her affidavits 1 to 7 filed in the proceedings to that date. Affidavits 4 and 7 are in the Appeal Book. It is fair to say that they present many documents, emails and notes in a very disorganized fashion. It is virtually impossible to follow the train of Nancy's evidence purportedly contained in these affidavits. But they do repeat the "misinformation, duress and undue influence" allegations made by Nancy in the NOCC. And they do contain an email from a doctor who did a capacity assessment of Dorothy in 2013. I note these conclusions of that doctor:

In my opinion Dorothy Beach is capable to direct the disposition of her estate and to direct the affairs of her person. She is not capable to manage the mechanical details of her personal finances due to her loss of numeracy due to short-term memory lapses and lack of practice in dealing with numbers, and she has no exact conception of the extent of her estate, which may be due to her lack of interest in money matters. However, she is capable of expressing coherent intentions in order to direct her financial affairs. Her memory problems and lack of facility with her finances are risk factors for potential financial abuse. Her score on the MOCA test does not accurately reflect her global abilities. She possesses a degree of insight, awareness, and intent sufficient to direct the affairs of her estate including the naming of executors.

[55] While this presents a positive view of Dorothy's capacity in 2013 at age 100, it does point to a risk "for potential financial abuse".

[56] In oral submissions before the judge, although Nancy was not under oath, the judge repeatedly invited Nancy to state her reasons "why the settlement agreement should be nullified " Nancy repeated her allegations that the agreement was unconscionable and Nancy spoke to her belief that "my mom was under extreme pressure and duress and undue influence in signing the settlement agreement" (Transcript, p. 33, lines 23-25). This exchange also occurred:

THE COURT: Okay. Well, you're trying - you're telling me in April of 2009 your mother was under extreme pressure, undue influence and stress, and then you made reference to a meeting that took place.

MS. BEACH: Yes.

THE COURT: I think on April 22nd?

MS. BEACH: Correct. Undue influence. She went to that meeting, I think, with Howard Mickelson and David Beach. I wouldn't be surprised if Arpal Dosanjh, the other lawyer who was Howard Mickelson's co-worker, was there as well, and at - right after she came out of that meeting, and David has admitted - my brother who took her there, that he believes the stress of that meeting was - resulted in her going to hospital that day. She had a heavy weight in her chest. She said it felt like a great big lead ball, and so she was in hospital for a week. I believe Rosalie and Mark knew that she was in the hospital, and so she had high and irregular heart rate, and when she was completed that week, her doctor told her, Well, we haven't got the heart rate full under control but you might as well go home and live your life because - like, they didn't have the total solution for it.

So, she went home, and after that - well, I was writing emails back and forth to her lawyer because I understood there was a meeting expected, I guess, of coming more with this whole settlement thing and trying to dissuade him from involving her at that point, but he was not dissuaded.

[Transcript, p. 34, line 32 to p. 35, line 17]

The colloquy between the judge and Nancy continued in this vein for some pages.

[57] I do not criticize the judge for receiving Nancy's "evidence" in this fashion. However, between her oral submissions and the voluminous affidavit materials put before the judge, there is support for Nancy's submission before us that there was a triable issue in respect of the duress and undue influence claim.

[58] But that is not how it appeared to the judge. She reasoned so:

[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.

[59] It will be seen that while the judge appears to apply the "bound to fail" test, she is in fact considering the matter as if she were a summary trial judge weighing the evidence in support of the claim and, importantly, drawing inferences from the fact that Dorothy "was represented by experienced and senior counsel in the negotiation of the Settlement Agreement".

[60] The judge stated that:

The pleading and evidence adduced by the parties support that the plaintiff is bound to lose.

[61] However, the defendants did not address the duress/undue influence allegation directly in their affidavits. They did not depose that the allegations were false. All we have are the documents and Nancy's allegations in the pleadings buttressed by her affidavits and oral submissions of "misinformation, duress and undue influence".

[62] In our quest for efficiency and expedition in the disposition of claims, one must not lose sight of a party's right to a trial on the merits of their dispute if they otherwise meet the thresholds set by Rules 9-5 and 9-6.

[63] In *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, this Court again considered Rule 9-6. Justice Low said this in the context of a defendant's motion for summary judgment under Rule 9-6(4) (at paras. 14 and 15):

[14] It is also inconceivable to me that a defendant could obtain summary judgment without presenting sworn evidence establishing that the claim is without merit. In either case, if the court is faced with oath against oath it is most unlikely that it could grant judgment to the plaintiff or dismiss the claim, as the case may be. In that regard, see the judgment of Thackray J.A. in *Skybridge Investments Ltd. v. Metro Motors Ltd. (c.o.b. Metro Ford)*, 2006 BCCA 500, 61 B.C.L.R. (4th) 241, at para. 12.

- [15] There was no evidence before the chambers judge. The contract documents, in my opinion, could have been before the court as exhibits to an affidavit on the application for summary judgment but not on the application to strike the entire statement of claim. In my opinion, the chambers judge was obliged to dismiss the application for summary judgment under R. 9-6 because of the absence of sworn evidence establishing that the claim was without merit.
- [64] In this case it is not even a situation of "oath against oath" as the defendants did not address the issues raised by Nancy in respect of the Settlement Agreement.
- [65] In my view, the judge on this record simply could not conclude "beyond a reasonable doubt" that there was here "no genuine issue for trial" in respect of the allegations impugning the Settlement Agreement. "Beyond a reasonable doubt" is the high bar set by Justice Esson (then of the Supreme Court) in *Progressive Construction Ltd.*, quoted with approval by this Court in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137. There the court (per Lambert J.A.) adopted this summary of the law stated by Esson J. in *Progressive Construction Ltd.*:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

- [66] While the judge used the more modern language in the cases of "bound to fail", she was in essence trying the issues touching on the enforceability of the Settlement Agreement in the manner of a summary trial when no such application was before the judge. I conclude that this disposition conflates Rules 9-7 and 9-6.
- [67] Put another way, in order for the judge to reject this particular claim of Nancy's, she needed to weigh the evidence on the "misinformation, duress and undue influence" issue and find it essentially unlikely (especially in light of Dorothy's representation by "experienced and senior counsel" as the judge stressed). On an application under Rule 9-6, if the evidence needs to be weighed and assessed, then the test of "plain and obvious" or "beyond a doubt" has not been satisfied and the application is to be dismissed: *Skybridge Investments Ltd. v. Metro Motors Ltd.* at paras. 8-12.
- [68] This error also affected the judge's decision to not permit Nancy to make amendments to her pleadings. It is not disputed that the judge was correct in finding Nancy's pleading in respect of the Settlement Agreement inadequate and defective. Nor is it disputed that the judge correctly reached the same conclusion concerning the amended pleading Nancy proffered

at the hearing. However, it seems to me that in the situation of a defective pleading on an issue that does not reach the "no triable issue" threshold, in a claim brought by a self-represented litigant (at least), the proper course would be to strike the pleading and permit the litigant to seek appropriate amendments. This is the practice in the Supreme Court in these matters: *Ahmed v. Assu*, 2014 BCSC 1768 at para. 19; *Sechelt Nation v. Bell Pole*, 2013 BCSC 892 at para. 14; *Leighton v. Canada (Attorney General)*, 2012 BCSC 961 at para. 7; *Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at para. 40; and *Ferstay v. Dywidag Systems International*, 2008 BCSC 793 at para. 22.

- [69] In my view, that should have been the result here in respect of Nancy's effort to vitiate the Settlement Agreement.
- [70] Where does that leave the parties? With the validity of the Settlement Agreement in issue, the *res judicata* submission in respect of the 1997 Sale Agreement cannot succeed at this time. That agreement is as I have noted impugned in the pleadings as induced by fraudulent misrepresentations. It is also alleged that the defendants are in breach of the terms of that agreement. The judge struck the fraudulent misrepresentation claim as out of time under the Limitations Act 1996, and I cannot say she was wrong to do so -- indeed Nancy did not so submit. That aspect of the judgment stands although as counsel notes if the Settlement Agreement falls, the Fraud Action and the other proceedings are revived. (So too is the Arbitration Award and that result may cause Nancy some real concern.)
- [71] There may well be a limitations issue with the breach of contract claim but again that is for Nancy and her counsel to consider.
- [72] I would conclude by observing that although Nancy has largely prevailed on the applications in my reasons, nothing I have said should be taken to encourage the pursuit of this litigation. Clearly the chambers judge rightly had very significant concerns with the viability of Nancy's claims. Even with properly amended pleadings, Nancy faces very significant hurdles and undoubtedly future applications to strike or dismiss or a summary trial on the merits.
- [73] In the result, I would allow the appeal to the extent indicated. The appellants are at liberty to seek amendments to the pleadings in the Supreme Court of British Columbia as they may be advised.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Fitch"

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