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CANADA / JUDGMENT

## Berthin v. Berthin

2016 BCSC 2235

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COURT

Supreme Court of British Columbia

DECIDED

30 November 2016

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2016 BCSC 2235 Berthin v. Berthin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Berthin v. Berthin,

2016 BCSC 2235

Date: 20161130

Docket: S162376

Registry: Victoria

Between:

Wayne Douglas Berthin

Plaintiff

And

Helen Claire Berthin

Roy Lyn Sherrod and Patsy Spikes Sherrod

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:

K. Hauer

Counsel for the Defendants, Roy Lyn

Sherrod and Patsy Spikes Sherrod:

J. A. Hall

Counsel for the Defendant,

Helen Claire Berthin:

N. W. Lott

Place and Dates of Trial:

Victoria, B.C.

August 30, September 2, and November 7, 2016

Place and Date of Judgment:

Victoria, B.C.

November 30, 2016

## Introduction

- [1] In this action, the plaintiff Mr. Berthin has sued his former wife, Ms. Berthin, as well as Mr. and Mrs. Sherrod, who purchased the former family home ("the property") from the Berthins in a sale ordered by this court in family law proceedings between Mr. and Ms. Berthin. In his amended notice of civil claim, Mr. Berthin seeks to: (1) set aside the registration of the vesting order through which the Sherrods obtained title to the property; and (2) restore title in the property to Mr. and Ms. Berthin, subject to Mr. Berthin's claims in the ongoing family law proceedings between the Berthins.
- [2] The defendants, Mr. and Mrs. Sherrod, apply to dismiss Mr. Berthin's claims as frivolous or vexatious and an abuse of process under Rules 9-5(1)(b) and (d). In the alternative, they seek to dismiss the plaintiff's claims on a summary judgment application under Rule 9-6, or on a summary trial, Rule 9-7. If the action is not dismissed, the Sherrods ask the court to order Mr. Berthin to post security for costs.
- [3] The Sherrods also ask the court to cancel a certificate of pending litigation registered against title to their property, or in the alternative that the plaintiff post security for maintaining that registration.
- [4] Ms. Berthin brings her own application to strike the plaintiff's claim as disclosing no reasonable claim under Rule 9-5(1)(a), as being unnecessary, scandalous, frivolous or vexatious, under Rule 9-5(1)(b), or as being an abuse of the process of the court under Rule 9-5(1)(d).

- [5] Mr. Berthin brought his own application in which he seeks an order for summary judgment under Rule 9-6. He also seeks an order that Mr. and Mrs. Sherrod convey title to the property they now own to him and to Ms. Berthin, its former owners, on repayment of the consideration Mr. and Mrs. Sherrod paid for the property.
- [6] These applications were argued August 30 and September 2. I reserved decision, and while considering the matter, Mr. Berthin indicated he wished to make further submissions. Those submissions consisted largely of reporting on the results of applications in the Court of Appeal. The submissions also included the result of Mr. Berthin's appeal heard and decided by the Court of Appeal on October 25, 2016, with reasons released November 9, indexed as *Berthin v. Berthin*, 2016 BCCA 425.
- [7] The background is procedurally complex. Fortunately, the Court of Appeal recently provided a convenient summary in the above-noted decision:
- [1] As the appellant, Mr. Berthin states in his factum "the background facts of this case are complicated" but are well summarized by Mr. Justice Goepel in a related appeal, *Berthin v. British Columbia (Registrar of Land Titles)*, 2016 BCCA 255, at paras. 4 - 17, as follows:
- [4] Mr. Berthin is the appellant in multiple proceedings before this Court. Each of these proceedings relates back to a family law action that began following the separation of Mr. Berthin and his former wife, Ms. Berthin, in 2010.
- [5] Shortly after separation, Mr. Berthin and Ms. Berthin drafted and entered into a separation agreement. They did so without legal advice. Pursuant to the terms of the separation agreement, Mr. Berthin was to retain the Kiowa Property.
- [6] The trial judge, Mr. Justice Steeves, pronounced judgment in the family law proceeding on January 21, 2015 and March 6, 2015. His reasons for judgment are indexed at 2015 BCSC 78 (CanLII) (the "Trial Decision"). The Trial Decision provided, among other things, for the immediate sale of the Kiowa Property. Mr. Berthin was granted conduct of sale.
- [7] On February 4, 2015, Mr. Berthin filed a notice of appeal (the "Trial Appeal"). The Trial Appeal concerned the trial judge's analysis of the separation agreement, including the enforceability of that agreement.
- [8] On May 5, 2015, the parties reappeared before the trial judge to settle the trial order. The order was entered on May 5, 2015. As of that date, Mr. Berthin had not sought or attempted to register a CPL against the Kiowa Property.
- [9] On May 22, 2015, a consent order was entered wherein the conduct of sale of the Kiowa Property was transferred to Ms. Berthin.
- [10] On June 21, 2015, the Kiowa Property was listed for sale. On July 21, 2015, the Sherrods entered into an agreement to purchase the Kiowa Property for \$860,000. The closing date was scheduled for September 15, 2015.

- [11] On August 7, 2015, Steeves J. dismissed Mr. Berthin's application [for a stay and ordered the] sale of the Kiowa Property proceed on the basis that the balance of inconvenience favoured the sale. In that regard, he noted that Mr. Berthin had not taken any active steps to oppose the sale in advance of the acceptance of the Sherrods' offer.
- [12] Mr. Berthin filed a notice of appeal from the August 7, 2015 order (the "Sale Appeal"). On September 8, 2015, Madam Justice Garson (in Chambers) dismissed Mr. Berthin's application for an order that the Kiowa Property not be sold pending hearing of the Sale Appeal. She declined to grant a stay of execution of the August 7, 2015 order, citing s. 14 of the Family Relations Act, R.S.B.C. 1996, c. 128 (which provides that an order made under the FRA "remains in full force and effect" until the determination of an appeal from that order, unless the court that made it otherwise orders). She also found that this was not "one of those egregious cases in which this Court should exercise any residual jurisdiction to grant a stay".
- [13] On September 10, 2015, Master Bouck made an order approving the sale of the Kiowa Property and vesting that property in the Sherrods (the "Vesting Order"). This application for a vesting order was prompted by Mr. Berthin's refusal to sign the property transfer documents.
- [14] On September 11, 2015, Mr. Justice Gaul dismissed Mr. Berthin's appeal from the Vesting Order. On September 18, 2015, Mr. Berthin filed a notice of appeal from Gaul J.'s order (the "Vesting Appeal"). Mr. Berthin did not seek a stay of Gaul J.'s order dismissing his appeal from the Vesting Order.
- [15] On September 15, 2015, the Sherrods registered the Vesting Order in the Land Title Office and title to the Kiowa Property was issued in their name. To complete their purchase, the Sherrods obtained a mortgage from the Bank of Nova Scotia (the "Bank") which mortgage was then registered against the Sherrods' title.
- [16] On December 2, 2015, Madam Justice Smith (in Chambers) refused an application that the Sale Appeal and the Vesting Appeal be heard together with the Trial Appeal. She ordered that the Sale Appeal and the Vesting Appeal be stayed pending the disposition of the Trial Appeal. The Sale Appeal and the Vesting Appeal are currently scheduled to be heard together on October 25, 2016.
- [17] On March 7, 2016, in reasons indexed at 2016 BCCA 104 (CanLII), this Court allowed the Trial Appeal. Madam Justice Newbury summarized her conclusion at para. 62:
- [62] In my view, and with great respect to the trial judge, the Court misapprehended Mr. Berthin's argument on two crucial points - his position that the wife's filing of the Notice of Claim constituted a repudiation, and that he was unable financially to make a down payment on a new home for his wife and to have her removed from the mortgage on Kiowa while he remained in possession of Kiowa. More importantly, the difficulties posed by trying to "implement" or "give effect to" the Agreement as written should have led the judge to the

decision that it was not an enforceable agreement in the first place. Even if it had been, Ms. Berthin had, by filing the Notice of Family Claim, repudiated it in April 2011. The Court's attempts to "implement" the Agreement by implying terms that in the end were directly contrary to what had been written amounted in my view to the 'construction' of an agreement by the Court, "to the surprise of the parties, or at least one of them".

- [2] In the result, this Court set aside the trial judge's order and sent the family claim back to the trial court to be decided in accordance with the relevant legislation. After the trial orders were set aside by this Court on March 7, 2016, and the family claims sent back to the Supreme Court for a new trial, Mr. Berthin applied (on March 24, 2016) to have the Supreme Court set aside the vesting order made by Master Bouck and upheld by Mr. Justice Gaul.
- [3] On August 3, 2016, Madam Justice Dorgan refused to vary the vesting order on the basis that it was being appealed to this Court, and in any event, the Supreme Court did not have jurisdiction to set it aside.
- [4] Appeal CA43108 is from the original vesting order made by Master Bouck and confirmed by Mr. Justice Gaul. Appeal CA43909 is the appeal from Madam Justice Dorgan's refusal to reconsider the vesting order.
- [8] There have been other proceedings, in which Mr. Berthin has appealed the refusal by the Registrar of Land Titles to register a certificate of pending litigation against title to the property. They include decisions in January 2016 (Berthin v. British Columbia (Registrar of Land Titles), 2016 BCSC 247) and June 2016 (Berthin v. British Columbia (Registrar of Land Titles), 2016 BCSC 1350). Mr. Berthin was unsuccessful in both of those appeals. With this action, Mr. Berthin has succeeded in obtaining registration of the certificate of pending litigation that the Sherrods seek to have canceled against title to their property.
- [9] Counsel for Mr. Berthin objected at the outset of this hearing to the affidavit evidence tendered by the Sherrods on their summary trial application. His reason was that he had not been able to obtain discovery of documents, or to arrange examinations for discovery of the Sherrods.
- [10] Counsel for the Sherrods indicated that his primary application was to strike the pleadings under Rule 9-5(1) as frivolous, vexatious or an abuse of the process of the court. His alternative application was for summary judgment, and summary trial was his final alternative. From this I took it that the Sherrods were not averse to adjourning their application for judgment on summary trial. The Sherrods' argument proceeded as an application to strike Mr. Berthin's pleadings, and in the alternative for summary judgment, with Mr. Berthin's summary judgment application in opposition. I adjourned the Sherrods' summary trial application generally, to be rescheduled, if necessary, in the usual way.
- [11] As Ms. Berthin's application to strike Mr. Berthin's pleadings was solely based on Rule 9-5(1), her argument proceeded on that basis.

## Legal Framework

[12] The relevant portions of Rule 9-5 provide:

- (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.

- (2) No evidence is admissible on an application under subrule (1) (a).

[13] The test under Rule 9-5(1) for striking a pleading is well settled: "[a] claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. While applications under Rule 9-5(1)(a) do not permit resort to evidence, evidence is admissible for applications brought under Rules 9-5(1)(b) to (d): *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 20. Further, if an amendment might salvage an otherwise questionable case on the pleadings, the court should permit the plaintiff an opportunity to amend as a condition of dismissing an application to strike the pleadings: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 41.

[14] In considering an application to strike pleadings on the ground that they disclose no reasonable claim under Rule 9-5(1)(a), I must confine myself to the pleadings, assume the facts alleged in the amended notice of civil claim are true, and take the case as pleaded by Mr. Berthin in its most advantageous light from his perspective: *Gichuru v. Smith*, 2010 BCCA 352 at para. 22; *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at para. 37.

[15] Pleadings also deserve a generous reading under the other sub-rules. The court in *Willow v. Chong*, 2013 BCSC 1083 discussed the test under Rule 9-5(1)(b):

[20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources

[16] The court in *Mohebbi v. North Vancouver RCMP*, 2015 BCSC 2083 also summarized some authorities on the meaning of frivolous, vexatious or unnecessary pleadings under Rule 9-5(1)(b), at para. 18:

"[a] pleading is frivolous if it is without substance, is groundless, fanciful, 'trifles with the court' or wastes time." A pleading is vexatious or unnecessary where it does not go to establishing the plaintiff's cause of action or fails to advance any known legal claim

[Citations omitted.]

[17] The court in *Babovic v. Babowech*, 1993 CarswellBC 2950 discussed abuse of process in the context of the predecessor to Rule 9-5(1)(d), at para. 18:

The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression.

### The Plaintiff's Pleadings

[18] The pleadings consist of an amended notice of civil claim, and particulars delivered by Mr. Berthin in answer to a demand made by counsel for the Sherrods. The pleadings set out four causes of action: (1) fraud; (2) failure of consideration; (3) unjust enrichment; and (4) restitution. The fraud claim is against both Ms. Berthin and the Sherrods, while the remaining three claims are against the Sherrods only.

[19] The amended notice of civil claim identifies the parties, asserts that the plaintiff Mr. Berthin and the defendant Ms. Berthin had been married, were separated, and went to trial on their family law issues in 2014. The document goes on to allege that at the time of separation, Mr. and Ms. Berthin owned property, identified in the pleading, as joint tenants. This is the property eventually acquired by the Sherrods, and is the subject matter of this action.

[20] The amended notice of civil claim starts with these allegations of fact in Part 1:

8. The trial judge released his reasons for judgment on January 21, 2015. He upheld the parties' separation agreement as enforceable. Under that agreement, Mr. Berthin was to keep the Property.
9. On February 4, 2015, Mr. Berthin appealed from the decision upholding the separation agreement[.]
10. On March 6, 2015, before an order after trial had been entered, Mr. Berthin brought an application to the trial judge for directions, clarification and reconsideration.
11. As an outcome of that application, that trial judge ordered the sale of the Property.
12. The order for sale of the Property was incorporated into the final order after trial.
13. Mr. Berthin amended his factum and his notice of appeal accordingly to oppose the sale of the Property.

14. Mr. Berthin sought unsuccessfully to stay the sale of the Property pending the hearing of his appeal. The trial judge declined to grant a stay. The Court of Appeal, on a motion for a stay, found that it was within the jurisdiction of the Supreme Court to issue or not issue a stay.
15. On July 19, 2015 Ms. Berthin signed a document which purported to be a contract for sale with the Sherrods for the price of \$860,000. Mr. Berthin refused to sign the purported contract and refused to sign any conveyancing documents.
16. On September 10, 2015 Ms. Berthin obtained a vesting order in favour of the Sherrods in master's chambers. The vesting order:

approved the sale of the Property for \$860,000 to the Sherrods in the terms of the purported contract;

stipulated that the purchase price of \$860,000 less the deposit held by the real estate agent and other usual adjustments was to be paid into trust; and

ordered that the Berthins' title would vest in the Sherrods upon the filing of a certified copy of the vesting order along with a letter from Ms. Berthin's solicitor authorizing the registration.

17. On or about the date of closing, namely September 15, 2015, Ms. Berthin and the Sherrods negotiated a collateral arrangement whereby the actual consideration paid would be \$850,000 instead of \$860,000.
18. As a result of the collateral arrangement, the Sherrods did not pay the full purchase price as specified in the vesting order.

18.1 Notwithstanding that the Sherrods did not pay, or would not be paying, the full purchase price as specified in the vesting order, Ms. Berthin instructed her solicitor to prepare a letter to the Registrar of Land Titles requesting registration of the vesting order and a transfer of title pursuant to the vesting order. Ms. Berthin then instructed her solicitor to provide that letter to the Sherrods.

18.2 Upon receipt of that letter, the Sherrods instructed their solicitor to file an application to the Registrar of Land Titles to register them as owners of the Property. In support of the application to register them as owners of the Property, the Sherrods attached to their application a copy of the letter written by Ms. Berthin's counsel and a copy of the vesting order.

19. In doing the above, and causing the property to vest when they knew the full purchase price set out in the vesting order had not or would not be paid, Ms. Berthin and the Sherrods committed a fraud. In particular, Ms. Berthin and the Sherrods colluded to circumvent the payment provisions in the vesting order.

19 Shortly after the sale, Mr. Berthin enquired about the incomplete consideration. Ms. Berthin did not respond. However Mr. Berthin was told by the Sherrods that the \$10,000 shortfall was a "usual adjustment" which was necessary because of the cost of disposing of a considerable volume of personal goods left at the Property at the time of closing.

20 Mr. Berthin says that the \$10,000 was neither usual nor an adjustment, and it was not necessary to cover the costs of removal of chattels. Indeed Mr. Berthin had offered to remove these chattels without charge, but had been denied access to the property for that purpose by the Sherrods. Mr. Berthin denies that the Sherrods necessarily incurred any costs in connection with the removal of chattels.

21 The Sherrods registered their interest in the property knowing it was by a judicial sale process subject to the possibility of appeal, and indeed knowing that an appeal had already been taken.

22 Mr. Berthin's family law appeal was heard on January 26, 2016. Reasons for judgment were released on March 7, 2016 and are indexed as: 2016 BCCA 104. Newbury JA [sic] for a unanimous panel, overturned the trial judge's order, including his order for the sale of the Property. The Court of Appeal ordered a new trial. The Court found that order for the sale of the Property was not only erroneous, but the trial judge, in ordering the sale, "overstepped the role of a court of law." (para. 53).

23 At the new trial which the Court of Appeal has ordered. Mr. Berthin is claiming the Property including Ms. Berthin's half interest in same. That matter is proceeding as court file No. 111523 (Victoria Registry).

24 Mr. Berthin therefore says the registration of the vesting, order should be set aside for fraud and failure of consideration and title should revert to Mr. Berthin and Mrs. Berthin subject to Mr. Berthin's family law claims.

25 In the alternative, Mr. Berthin seeks a restitutionary order in personam requiring that the Sherrods re-convey the Property to Mr. Berthin and to Ms. Berthin subject to Mr. Berthin's family law claims, in exchange for repayment of the amount that Roy and Patsy Sherrod paid for the Property, as the court may find.

## Part 2: RELIEF SOUGHT

1. An order setting aside the registration of the vesting order for fraud and/or failure of consideration and restoring title to Mr. Berthin and to Ms. Berthin subject to Mr. Berthin's family law claims[.]
  - 1a. In the alternative, an order in personam requiring Roy and Patsy Sherrod to convey their title in the Property to the previous owners, Mr. Berthin and Ms. Berthin subject to Mr. Berthin's family law claims, provided that either or both of the previous owners offer up to Roy and Patsy Sherrod the consideration paid by Roy and Patsy Sherrod for the Property in the amount that the court may find[.]
2. A certificate of pending litigation against the Property[.]
3. Damages for trespass and conversion[.]
4. Costs[.]

5. Such further and other relief as this Honourable Court may find just.

### Part 3: LEGAL BASIS

1. The purchase price could not be reduced without court approval.
2. The submission to the Registrar of Land Titles of a letter authorizing the registration of the vesting order when the purchase price was not fully paid constituted a fraud in which the Sherrods partook; the registration of the vesting order should therefore be set aside.
3. The Property never legally vested. Full payment was a precondition for the vesting of the Property and that condition was never met. The Sherrods have therefore been occupying the Property as trespassers.
4. Section 23(2)(i) of the Land Title Act, provides that indefeasible title is subject to "the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree". The Sherrods' title, as shown in the land registry, is therefore defeasible.
5. Since the order for sale has now been set aside on appeal, it is no longer possible to "cure" the defect in the registration of the vesting order by making a late payment of the \$10,000. There is no longer any authority to sell the Property or to complete the sale of the Property.
6. The Sherrods would be unjustly enriched if they were permitted to keep the Property.
7. Mr. Berthin has a restitutionary claim against the Sherrods in personam.
8. A party to legal proceedings has a right to recover benefits transferred in obedience to a court order that is later set aside.
9. The corollary of the obligation to obey an unstayed judgment or order is the right to be restored if it is reversed.
10. The principle of indefeasibility inherent in the Torrens system in no way denies the right of a plaintiff to bring against a registered owner a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant: *Frazer v. Walker* [1967] 1 AC 569 at 585
11. Here the Sherrods could not become registered owners without the assistance of the court; they needed an order from the court empowering the Registrar to vest title before they could be registered. By obtaining and relying on the assistance of the court, the Sherrods submitted to the jurisdiction of the court, and that meant their rights and obligations were subject to any order made by the court, including an order on an appeal: *White v. Tomasel & Anor* [2004] QCA 89 at para. 59
12. It follows that since the order for sale was set aside, the court can order the Sherrods to restore Mr. Berthin's rights to the Property by an order in personam, and that would not infringe on the doctrine of indefeasibility: *White*, supra, para. 59

13. The Sherrods' title was dependent upon a court making an order that favoured them. As a consequence of that they are burdened with the validity of that order. Once the order fell on appeal, the very foundation of their claim to registration was lost. Indefeasibility of title does not prevent a court from ordering the registered owner to deal with the land in a particular way if, as a result of litigation, it is established the register should be altered or varied in some way. *White*, supra para. 59
14. The right to restitution has its basis in the court's concern to restore to an appellant property of which he was involuntarily divested by the erroneous exercise of judicial power. It is unnecessary for the appellant to establish enrichment in the sense that property transferred is worth more than the consideration paid for it: *White*, supra, para. 68
15. Whether a stay was sought or granted does not affect the obligation to restore what was the appellant's property prior to the impugned order: *White*, supra, para. 67.

[21] Mr. Berthin delivered particulars as follows, in a letter dated June 29, 2016:

Dear Sirs:

Re: *Berthin v. Berthin et al*

### **BCSC Action No. 162376 (Victoria Registry)**

This letter is in response to the request of Mr. Hall, counsel for the Sherrods, for further particulars of the alleged fraud in the above captioned action.

On or about September 17, 2015 the plaintiff was informed by the defendant, Roy Sherrod, that on closing there had been a holdback of \$10,000 and it had to do with a 7-day period for the removal of chattels and debris. No holdback had been approved by the court or contemplated in the vesting order. Roy Sherrod declined to elaborate on the details of this holdback or collateral arrangement when asked, and said to Mr. Berthin "talk to your lawyer".

In negotiating the collateral arrangement, the Sherrods may have led the Defendant Helen Berthin to believe that the \$10,000 was a necessary and bona fide holdback against which they would draw down the reasonable and necessary costs to remove chattels and debris if the plaintiff failed to remove these from the property on his own after closing. However, after closing the Sherrods obstructed the plaintiff from removing chattels and debris so as to create a pretext for keeping the full \$10,000. Furthermore, the sum of \$10,000 greatly exceeded the actual costs, if any, incurred by the Sherrods in the removal of chattels and debris and the Sherrods never accounted for the sum.

Prior to closing, the Sherrods instructed their solicitors, Mullen Demeo, to prepare a statement of adjustments showing the \$10,000 shortfall in the purchase price as a "holdback" knowing that same was fraudulent, and the statement of adjustments did not accurately reflect the purchase price ordered by the court.

The Defendant, Helen Berthin, instructed her solicitors, McKimm & Lott, to prepare a letter requesting the registration of the vesting order knowing that the payment terms in the vesting order had not been fulfilled and would not be complied with on closing. The Defendant Helen Berthin did so in order to facilitate the fraudulent registration of the vesting order.

The Sherrods instructed their solicitors, Mullen Demeo, to complete a Land Title Act Form 17 with the vesting order and letter of McKimm & Lott attached and [sic] to it, and to submit these documents for registration to the Land Title Office, knowing that the payment terms in the vesting order had not been complied with and would not be complied with. The Sherrods did so in order to facilitate the fraudulent registration of the vesting order.

The attached documents set out additional particulars that are within the knowledge of the plaintiff at this time. When further particulars become known to the plaintiff they will be furnished to the defendants.

- [22] The documents attached mainly consist of correspondence. When considering whether to strike the pleadings under Rule 9-5(1)(a) the correspondence is not admissible to the extent that it constitutes evidence rather than a statement of fact or law. However, the correspondence is admissible when considering the applications under Rule 9-5(1)(b) and (d). The correspondence mainly entails discussions between counsel for Mr. Berthin and the Sherrods regarding Mr. Berthin's efforts to clear chattels from the property before and after the Sherrods took possession. I find they are of little relevance to Mr. Berthin's claims.
- [23] One of the attached documents, however, is a Certificate of Result of Sale signed by Ms. Berthin and filed September 30, 2015. In this document she certified that she has sold the property by vesting order and she attached an amended statement of adjustments of the seller and an amended direction to pay. Those documents show that \$10,000 was held back from the purchase price "until clearance of debris and items have been removed from the subject property" (in the amended statement of adjustments), and that the solicitors acting for the Sherrods on the purchase held back \$10,000 (in the amended direction to pay).
- [24] I remind myself that evidence is not admissible on an application under Rule 9-5(1)(a), and that I am to assume the truth of the facts alleged in the amended notice of civil claim. This presents some small difficulty, in that the amended notice of civil claim appears to plead evidence, at least in the second sentence of para. 21 where Mr. Berthin asserts an offer to remove chattels from the property, and perhaps in para. 23, where Mr. Berthin quotes from reasons for judgment on appeal. The so-called particulars compound the problem by adding more evidence in the documents incorporated into the particulars.

## Fraud

- [25] I first consider the fraud claim against Ms. Berthin and the Sherrods. Ms. Berthin applied to strike the pleadings on the basis that they disclosed no reasonable claim under Rule 9-5(1)(a). The Sherrods applied to strike the pleadings under Rule 9-5(1)(b) and (d). While the defendants did not apply on the same basis to strike the fraud claim, these subsections have

some overlap: *Sahyoun v. Ho*, 2015 BCSC 392 at para. 61. For example, my conclusion below that the plaintiff has failed to plead all the necessary elements of fraud can also mean the pleading is unnecessary or vexatious. Further, I think it is open to me to consider the fraud claim against both parties on the basis of Rule 9-5(1)(a). This Rule is a codification of the court's power under its inherent jurisdiction to stay actions that disclose no reasonable cause of action: *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at 968.

- [26] As Lowry J.A. said in *Grewal v. Sandhu*, 2012 BCCA 26 at para. 19, "[a]n allegation of fraud must be scrupulously pleaded and fully particularized". Fraud is a somewhat elastic word but Karakatsanis J., speaking for a unanimous Court in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, set out its essential elements at para. 21:

I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

- [27] The essence of the fraud claim is found in paras. 15 through 19 of Part 1 of the amended notice of civil claim, as amplified by the particulars delivered. The plaintiff pleads that a collateral arrangement existed, by which the purchase price was reduced from \$860,000 to \$850,000. The particulars amplify this as a holdback from the purchase price that had not been approved by the court or contemplated in the vesting order. Mr. Berthin alleges that the Sherrods instructed their lawyer to show the \$10,000 difference as a holdback in the statement of adjustments, knowing that was fraudulent, and that "the statement of adjustments did not accurately reflect the purchase price ordered by the court."
- [28] In Part 3: Legal Basis, at para. 2, the fraud allegation stems from the defendants submitting a letter to the Registrar of Land Titles "authorizing the registration of the vesting order when the purchase price was not fully paid".
- [29] Here, the pleading, together with the particulars, can support an assertion that the Sherrods and Ms. Berthin represented or stated that the purchase price was \$860,000 on the application for a vesting order on September 10, 2015.
- [30] But the plaintiff does not assert in the pleadings or particulars that any of the defendants knew the \$860,000 purchase price as represented was untrue, or that it was in fact untrue on September 10, 2015, at the time of the vesting order application. On the contrary, Mr. Berthin's amended notice of civil claim alleges in Part 1 at para. 17 that a collateral agreement to accept \$850,000 was made later, "[o]n or about the date of closing, namely September 15, 2015".
- [31] Mr. Berthin might amend to plead that all or some of the defendants had a positive duty to reapply to the court to revise the sale price, instead of completing the sale at a lower price: *Federal Business Development Bank v. 332100 B.C. Ltd.*, 1995 CanLII 2782 (BC SC) at para. 26; *Bank of Montreal v. McCully*, 1999 CanLII 6330 at paras. 15-16, 19. I can accept that Ms.

Berthin may have such a duty, as she had signed the purchase and sale agreement and had applied for the vesting order to sell the property for \$860,000. I am not convinced that the Sherrods, at that point strangers to the action who merely wanted to buy a house, had such a duty. As for Ms. Berthin, if Mr. Berthin were to amend to allege that she had a positive duty to reapply to the court and that she breached that duty, I cannot see how such a breach would constitute a fraud, whether on the court or on Mr. Berthin.

- [32] The plaintiff does not plead that either the Sherrods or Ms. Berthin intended that the representation be acted on, or that this court in fact acted on the representation of an \$860,000 final purchase price, although the latter point can be inferred from the pleadings. Instead, the pleading alleges that Ms. Berthin instructed her lawyer to prepare a letter requesting the Registrar of Titles to transfer title pursuant to the vesting order.
- [33] Pitched at its highest, the pleading can be read to assert that the defendants agreed to the price of \$860,000 for the purchase and sale of the property, obtained court approval of that transaction on Ms. Berthin's application for a vesting order, subsequently negotiated a \$10,000 holdback by collateral agreement (as pleaded) or variation of the sale agreement, and then registered the transfer using the vesting order.
- [34] Counsel argued that Mr. Berthin was the victim of a fraud, but the pleadings do not allege this, nor is it alleged that the Sherrods or Ms. Berthin made any representation to him relating to the holdback. What was represented to the court and to Mr. Berthin was that Ms. Berthin wished to accept the offer of \$860,000, and it is not alleged that at that time any of the defendants had any intention to reduce that amount by a holdback.
- [35] I conclude it is plain and obvious that the fraud allegations disclose no reasonable cause of action, and I dismiss them.

### Failure of Consideration

- [36] Mr. Berthin pleads that the holdback arrangement constituted a failure of consideration, in para. 25 of Part 1: Statement of Facts, para. 1 of Part 2: Relief Sought, and arguably in paras. 2 and 3 of Part 3: Legal Basis. While the pleadings seem to couple the fraud allegations with the failed consideration allegation, I think I must consider whether to strike a plea that there was no consideration for the agreement by which the Sherrods acquired the property.
- [37] The amended notice of civil claim, read as a whole, makes it clear that Mr. Berthin alleges that the Sherrods paid \$850,000 rather than \$860,000 for the property. As a matter of contract law, a court does not inquire into the adequacy of consideration: the inquiry begins and ends with whether some consideration supports a bargain. The pleading states that the Sherrods paid some consideration for the property so the pleading that there was a failure of consideration obviously cannot succeed. I thus strike out this portion of the pleading under Rule 9-5(1)(b).

## Unjust Enrichment

- [38] Mr. Berthin pleads that if the Sherrods are permitted to keep the property they will be unjustly enriched. Unjust enrichment requires three elements: one, proof that someone has been enriched; two, that someone else, in this case Mr. Berthin, if he is to have standing to complain, has suffered a deprivation that corresponds to the enrichment complained of; and three, that there is no juristic reason to support the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.
- [39] Unjust enrichment springs as a bald assertion in the Legal Basis portion of the amended notice of civil claim, which does not make at all clear where or how the unjust enrichment is alleged to arise. I have to assume that the factual basis to support the plea of unjust enrichment is the same \$10,000 holdback on which the fraud allegation rests. Although it very much appears to be an afterthought, I ought not to dismiss this claim if it can be perfected through proper amendment, however substantial.
- [40] I cannot conceive of how a claim in unjust enrichment against the Sherrods could be properly pleaded through amendment, nor was I shown any path by which amendments might give some life to this plea. In my view it is obviously cannot succeed and I dismiss it under Rule 9-5(1)(b).

## Restitution

- [41] Is the claim against the Sherrods based on restitution, as pleaded in para. 26 of Part 1, para. 1a of Part 2, and paras. 6 to 15 of Part 3 of the amended notice of civil claim frivolous, vexatious or an abuse of process?
- [42] The plaintiff relies on *White v. Tomasel & Anor* [2004] Q.C.A. 89, a decision of the Court of Appeal of Queensland, Australia. In that case, the respondent Tomasels were the highest bidders at an auction for the sale of the appellant White's land. However, they had bid less than White's reserve price for the land. There was a factual dispute over whether White gave oral instructions to the auctioneer during the auction to sell to the highest bidder without a reserve price. White left the auction, thinking the property had not been sold, while the auctioneer executed a contract of sale on behalf of White. White later refused to execute conveyancing documents, contending that he had not agreed to sell for less than the reserve price. The Tomasels sought and obtained an order from the court compelling White to convey, and authorizing the Registrar to sign on his behalf if he refused to do so.
- [43] White was not present when that order was made, for reasons not entirely his fault. He later applied to set aside the order, but was refused on the ground that the purchasers were entitled to assume the auctioneer had authority to sell, and were not otherwise guilty of fraud. White appealed this refusal to set aside the order that he convey title. A majority of the Court of Appeal concluded that the judge who made the original order that he convey title had no jurisdiction to consider the validity of the contract for sale of land, White had not received sufficient notice of the initial application, and, on the application to set aside

the order, White had tendered a reasonable explanation for his failure to appear.

- [44] After deciding to set aside the order compelling White to transfer his property, the Court of Appeal majority considered the next issue: whether the court could and should set aside the transfer by which the respondents acquired registered title to the land, and thus restore the property to White, on repayment of the purchase price.
- [45] A majority of the court decided that, on principles of restitution, the court could order the property re-conveyed to White after setting aside the lower court order on which his title was transferred away. However, the majority declined to order the re-conveyance because the issue of whether the auctioneer had the authority to sell the land still had to be tried between the parties. The majority recognized that the resolution of this outstanding issue would determine who was entitled to the land.
- [46] Returning to the case at bar, counsel for the defendants point out the difference between a compulsory transfer from one party to a suit to the other, where the order compelling transfer is later overturned on appeal, and this case, where one party has court approval to transfer to a third party, and after that transfer, the order underlying the court ordered approval is set aside on appeal.
- [47] It seems to me that the recent decision of our Court of Appeal in *Berthin*, in which the plaintiff advanced the same argument, is determinative. There, the court said:
- [16] In my view, despite Mr. Hauer's thorough and able submissions, the sale cannot be undone on the facts of this case. Although the Sherrods were aware that Mr. Berthin at one point opposed the sale, they also knew that he had applied to court to stop the sale from proceeding and had not succeeded. To the contrary, the Sherrods knew that the court had made orders approving the sale and vesting title in them. Absent a stay or variation of those orders, which did not occur despite Mr. Berthin's persistent efforts, the orders remained in effect. The Sherrods were not required to second guess the authority of the Court. Put more directly, they were entitled to rely on those orders and cannot be faulted for doing so.
- [17] This Court reached the same conclusion in *Mid-Pacific Services Inc. v. Ashmar Developments Ltd.*, 2000 BCCA 608. In that case the trial judge vested two properties in one of the parties. On appeal, those orders were set aside, but by then the properties had been sold to an arm's length purchaser. The plaintiffs sought to have the transfers undone. This Court refused to do so, saying at para. 12:

The vesting orders were not subject to orders staying their execution at the time of they were acted upon. They were valid and effective from the time of their pronouncement until reversed on appeal.

- [18] In Mid-Pacific the purchasers also had knowledge of the ongoing dispute between the plaintiffs and defendants but the Court held the purchasers were entitled to rely on the valid orders and acquired a full and unencumbered interest in the property. That interest was not affected by the underlying order being set aside on appeal.
- [19] As Madam Justice Garson observed, Mr. Berthin's initial ambivalence about the sale of the Kiowa property contributed significantly to the order for sale being approved and the stay applications denied. Although it is understandable that the removal of the Kiowa property from the family assets to be divided between the parties is unsatisfactory from Mr. Berthin's point of view, it is now too late for the orders vesting the property in the Sherrods to be undone.
- [48] The claim in restitution is dismissed.

## Conclusion

- [49] As nothing survives in Mr. Berthin's pleading, the action is dismissed. I order the certificate of pending litigation removed from title to the property.
- [50] As for costs, my tentative view is that the allegations of fraud are reprehensible. Mr. Berthin appears to have seized upon them to obtain the certificate of pending litigation he had previously been denied, causing an embarrassment to the Sherrods. However, I will hear counsel on the matter of costs if the parties are unable to reach agreement.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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Prepared on 29 October 2026 · Esheria