

CANADA / JUDGMENT

Canfield v. Bronze Wines Ltd.

2021 BCSC 1714

COURT

Supreme Court of British Columbia

DECIDED

26 July 2021

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2021 BCSC 1714 Canfield v. Bronze Wines Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Canfield v. Bronze Wines Ltd., 2021 BCSC 1714 Date: 20210726 Docket: S18180 Registry:

Nelson Between: Frances Jean Walbey Canfield Plaintiff And Bronze Wines Ltd., Continental

Appraisals Ltd., Air Touch Communications Ltd., Scot Stewart and Howard H. Engman

Defendants Before: The Honourable Madam Justice Horsman Oral Reasons for Judgment (Re

Plaintiff's Mid-Trial Application to Amend Notice of Civil Claim) In Chambers Counsel for the

Plaintiff: T. Pearkes Appearing by videoconference on his own behalf and on behalf of the

Respondent Bronze Wines Ltd.: S. Stewart (a company representative) Counsel for the

Respondent Continental Appraisals Ltd.: R. Sookorukoff For the Respondent Air Touch

Communications Ltd.: No appearance Counsel for the Respondent Howard Engman: Q. Duong

Place and Date of Hearing: Nelson, B.C. July 26, 2021 Place and Date of Judgment: Nelson, B.C.

July 26, 2021

- [1] THE COURT: The plaintiff applies to amend her notice of civil claim. The application is brought after the close of the plaintiff's case and after no-evidence motions from the defendants have been heard and dismissed.
- [2] The proposed amendments fall into two categories.
- [3] First, the plaintiff seeks to make amendments to plead that certain handwritten revisions made to the Form A Transfer Form which transferred the subject property to Bronze Wines after its execution render the Form A either voidable, as between the plaintiff and the defendant, Bronze Wines, or void. The proposed amendments include an allegation that the Form A is void pursuant to s. 25.1 of the Land Title Act. If the plaintiff was successful in establishing this, then the defendant, Continental, could not enforce its registered security against the Grand Forks property.
- [4] Second, the plaintiff seeks to add a paragraph to Part 1 of her statements of facts that relates to her claim against the defendant, Mr. Engman.
- [5] The two categories of amendments raise different considerations and I will address them separately. Legal principles

- [6] The parties agree on the legal principles to be applied on this application. Amendments should be permitted as necessary to determine the real issues between the parties. The considerations to be taken into account by the court in exercising discretion to allow a pleadings amendment during trial are set out in *Macdonald Estate v. Macdonald Estate* (1996), 21 B.C.L.R. (3d) 379, at para. 40. The test poses the following questions:
- (a) Is the amendment inconsistent with the pleadings already filed on behalf of the party seeking the amendment?
 - (b) Is the amendment inconsistent with evidence already tendered by that party and his witnesses at trial and on discovery?
 - (c) If the amendment had been asked for at the outset of the trial, would it have changed the whole course of the trial?
 - (d) Would the amendment be unfair to the opposite party?
 - (e) Is the amendment necessary for the purpose of determining the real issues raised or depending upon the pleadings?
- [7] The objective is to allow all amendments that are otherwise in accordance with pleadings rules provided there is no prejudice or injustice done to the non-amending party that cannot satisfactorily be cured by either costs or the reopening of evidence, at least for that party: *Macdonald Estate* at para. 50. The Form A amendments
- [8] I will first address what I will refer to as the Form A amendments.
- [9] The procedural history of this action has some relevance. The notice of civil claim was filed in April 2014. The length of time it has taken to get to trial is at least partly a function of the fact that two trial dates were lost due to the unavailability of a judge to hear the action. There have been a number of case planning and trial management conferences.
- [10] The plaintiff's claim against Continental originally consisted only of a plea that Continental would have known or have been wilfully blind to the existence of the plaintiff equitable mortgage. At a trial management conference before Master Keim in October 2020, the plaintiff sought an order that Continental's outstanding foreclosure petition be set for hearing at the same time as this trial. An alternative accommodation was reached by consent, in that the plaintiff was permitted to amend her pleading to allege that Continental's limitation period for enforcing its security had expired, and that its mortgage was unenforceable. The notice of civil claim was subsequently amended to include this plea.
- [11] Counsel for the plaintiff says he only became aware of the alterations to the Form A at the examination for discovery of Mr. Engman in November 2019. Assuming that to be true, the plaintiff has had a year and a half to amend her pleadings to include the claim based on the altered Form A. This was not done.

- [12] The plaintiff's proposed Form A amendment advances a new claim, that being that the Form A is void or voidable as a result of the alterations that were made prior to its registration. Counsel for the plaintiff suggests that the defendants were put on notice that the plaintiff would advance such a claim in the trial brief filed in advance of this trial. While the trial brief does contain a passing reference to the Form A Transfer being void, no particulars are given. More to the point, the claim was not pleaded.
- [13] The parties most directly affected by the proposed Form A amendment are Continental, Bronze Wines, and Mr. Stewart. They oppose the amendment. Continental submits that such an amendment at this stage is prejudicial. Continental has had no opportunity to undertake pretrial investigations into how the Form A came to be altered or why it was accepted for registration by the Land Title Office despite the alteration. Continental says that it would be prejudiced in any attempt to conduct such investigation now due to the passage of time given that it has been almost a decade since the Form A was registered. Continental has lost the opportunity to examine Mr. Engman for discovery as it might otherwise have done given that the plaintiff's proposed amendment creates more adversity between these parties. Mr. Stewart, on behalf of himself and Bronze Wines, adopts Continental's submissions.
- [14] I turn now to the consideration of the factors that govern this application. Is the amendment inconsistent with the pleadings already filed, or evidence that has been adduced at trial or on discovery?
- [15] The amendment is not obviously inconsistent with the existing pleadings. However, it is a new and distinct issue that has a factual component that the defendants have been deprived of the opportunity to explore prior to trial. The evidentiary record is therefore incomplete. Would the amendments have changed the course of trial?
- [16] I accept Continental's submission, which is adopted by Mr. Stewart, that the trial would have been conducted differently if the proposed plea had been advanced prior to trial. I have already alluded to some of the concerns of Continental which, in my view, have merit. Continental has fully lost the opportunity of pretrial discovery in relation to this issue including the possibility of adopting a more adversarial position vis-à-vis Mr. Engman. Would the trial be unfair to the opposing party if the amendment is granted?
- [17] The proposed amendments would be prejudicial to Continental, Bronze Wines, and Mr. Stewart at this stage. Counsel for the plaintiff suggests that any prejudice could be remedied by an award of costs or an adjournment of the trial to allow the defendants to carry out any necessary investigations. I do not agree that either option remedies the prejudice. The defendants should not be subject to a prolonged litigation process beyond the lengthy time it has already taken to get this case to trial because the plaintiff wishes to advance a new claim in the middle of trial. That, in itself, would be prejudicial. Furthermore, as counsel for Continental points out, an adjournment would not remedy the potential unfairness to the defendants arising from the passage of time if they were now required to investigate the factual circumstances of the registration of a Form A Transfer that occurred almost a decade

ago. Is the amendment necessary so that the court can determine the real issues raised?

- [18] The amendment is not necessary to address the issues presently raised by the plaintiff's pleading. It is an entirely new claim and not one that arises out of the evidence that has been adduced at trial. It would require a new factual investigation.
- [19] I agree with counsel for Continental that balancing the equities there is greater prejudice to the defendants in allowing the Form A amendment than to the plaintiff in refusing it. For these reasons, I dismiss the plaintiff's application to amend her notice of civil claim to include the claim based on the Form A transfer. The disallowed amendments in the draft further amended notice of civil claim are those contained in para. 20 or Part 1, para. 2 of Part 2, and paras. 4 and 5 of Part 3. The Engman amendments
- [20] Turning now to the proposed amendment relating to Mr. Engman, the plaintiff seeks to add the following paragraph to Part 1 of her notice of civil claim, and I am quoting from para. 13: Mr. Engman did not read the transfer form, he did not establish that the plaintiff had read or understood it, he did not establish the plaintiff's voluntariness or capacity to execute the transfer, he did not take care to ensure that the document was in registerable form. He attested the document and permitted Mr. Stewart to leave the office with it.
- [21] It appears from the plaintiff's notice of application that this paragraph is also intended to support the proposed Form A plea. That certainly seems to be the import of the words, "He did not take care to ensure that the document was in registerable form," and the portion that follows. If the only relevance of this proposed plea is to establish some fault on the part of Mr. Engman for the registration of an altered Form A, then this amendment is disallowed to that extent for the reasons I have stated. The notice of civil claim does not presently advance a claim based on the registration of the altered Form A and I am not permitting the plaintiff to amend her pleadings to advance one.
- [22] In the course of submissions on the pleadings amendment application, Mr. Engman's counsel raised the further objection that the proposed amendment also raises new factual issues about the plaintiff's voluntariness and capacity to sign the agreement. Mr. Engman says it would be unfairly prejudicial to allow the plaintiff to raise such an issue mid-trial as he has been deprived of the opportunity to investigate issues of capacity and voluntariness, possibly through expert evidence.
- [23] I do not interpret this paragraph to raise an issue as to whether the plaintiff, in fact, lacked capacity or that she did not, in fact, voluntarily sign the agreement. The notice of civil claim does not allege a lack of capacity or voluntariness on the part of the plaintiff. Instead, it is alleged that the plaintiff was influenced to sign the agreement as a result of a power imbalance between herself and Mr. Stewart.
- [24] The plaintiff's case against Mr. Engman, in very summary terms, is that he did not take the steps that a prudent and diligent notary would have taken in witnessing the plaintiff's signature on the Form A Transfer. Mr. Engman's evidence at discovery, which has been read

in by the plaintiff, is that he considered his obligations in the circumstances to be limited to ensuring that the plaintiff had proper and adequate identification with her, taking her signature in his presence, and attesting the document. The plaintiff says that Mr. Engman was obliged to do more. This is the crux of the dispute between these parties and it is a dispute that will be addressed at trial.

- [25] It is not apparent to me that it is necessary for the plaintiff to include proposed para. 13 in her notice of civil claim in order to make the argument to the court at the end of trial that Mr. Engman did not take certain steps that he ought to have taken. There is presently evidence before the court as to what steps Mr. Engman did and did not take at his meeting with the plaintiff. The evidence comes not just from Mr. Engman's discovery read-ins, but also from the plaintiff's cross-examination and direct examination. This is not evidence that the court can ignore. I expect that both parties will make submissions on the sufficiency of Mr. Engman's discharge of his obligations.
- [26] Whether the amendment is necessary or not, I cannot see any particular prejudice to Mr. Engman in an amendment that simply lists as a factual allegation the steps that Mr. Engman did not take during his meeting with the plaintiff. This is particularly so given that the amendment does not put the plaintiff's capacity or voluntariness in issue.
- [27] The latter half of para. 13 stands in a different category for the reasons I have already stated. The allegation that Mr. Engman did not take care to ensure the Form A was in registerable form and that he permitted Mr. Stewart to leave the office with the document are allegations that relate to the claim that the Form A is void or voidable. As I am not allowing the Form A amendment, those portions of para. 13 that relate to the Form A amendment should also not be allowed.
- [28] For these reasons, I grant the plaintiff's application to amend her pleading to include the draft para. 13 in Part 1 up to the words, "Or capacity to execute the transfer." I disallow the remainder of the paragraph on the basis that it relates to the Form A amendment that I have disallowed.
- [29] There are other seemingly inconsequential amendments that the plaintiff proposes and which I did not understand the defendants object to. I will leave it to the parties to try to reach agreement on the content of the plaintiff's further amended notice of civil claim that reflects my reasons. The parties may seek direction if agreement cannot be reached. "Horsman J."

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