

CANADA / JUDGMENT

Carleton v. Cepuran

2023 BCSC 578

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 578 Carleton v. Cepuran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carleton v. Cepuran,

2023 BCSC 578

Date: 20230313

Docket: S199918

Registry: Vancouver

Between:

Harold Brian Carleton, in his capacity as

Trustee of the Anna Cepuran Alter Ego Trust

Plaintiff

And

Anna Cepuran also known as Ana Cepuran

Defendant/Plaintiff by Counterclaim

And

Harold Brian Carleton, in his capacity as

Trustee of the Anna Cepuran Alter Ego Trust,

Sheri Cepuran and Urban Properties Limited

Defendants by way of Counterclaim

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff and the Defendants by way of Counterclaim:

E. Clough

P. Storey

Counsel for the Defendant/Plaintiff by Counterclaim:

D.K. Magnus

Place and Date of Hearing:

Vancouver, B.C.

March 8, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 13, 2023

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Introduction

- [1] THE COURT: The defendant by counterclaim, Sheri Cepuran, applies for production of several categories of documents pursuant to Rule 7-1(13) of the Supreme Court Civil Rules. Production is sought from the defendant and plaintiff by counterclaim, Ana Cepuran. Given that Sheri and Ana share the same surname, I will refer to them by their first names. I mean no disrespect in doing so.
- [2] The factual background of this litigation is found in reasons for judgment I gave in this proceeding which are indexed at 2021 BCSC 542, and in the reasons for judgment of the Court of Appeal indexed at 2022 BCCA 76. I will not repeat the general background of the case as outlined in those two judgments.
- [3] In that earlier judgment, I ordered that certain issues raised in competing petitions be referred to the trial list, and that the parties file a notice of civil claim and counterclaim to reflect the claims and cross-claims. Those orders were upheld on appeal. The trial of those issues is now scheduled to begin on May 29, 2023.
- [4] The primary focus of the submissions I heard on the present application was a list of categories of documents contained in Schedule A to the notice of application filed on June 10, 2022. That schedule contained 19 categories of documents. In the course of submissions, it became clear that for certain of the categories, identified as categories 11-15 and 19 in Schedule A, Ana accepted that the category of documents was relevant but advised through her counsel that she had no documents falling within that description, or that any such documents had already been produced. In my view, given the position taken, I do not see the need for any further order with respect to those categories as Ana's counsel has acknowledged an obligation to produce any documents falling within those categories, and I am confident any further documents in those categories that are identified will be produced.

Legal Context

- [5] Before turning to the specific categories that are in issue, I will briefly reference the legal context for this application. The application is brought pursuant to both Rule 7-1(10) and (11). Those two subrules read:

Rule 7-1 -- Discovery and Inspection of Documents

Party may demand documents required under this rule

- (10) If a party who has received a list of documents believes that the list omits documents or a class of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to
- (a) amend the list of documents,
- (b) serve on the demanding party the amended list of documents, and

- (c) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

Party may demand additional documents

- (11) If a party who has received a list of documents believes that the list should include documents or classes of documents that
 - (a) are within the listing party's possession, power or control,
 - (b) relate to any or all matters in question in the action, and
 - (c) are additional to the documents or classes of documents required under subrule (1) (a) or (9), the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to
 - (d) amend the list of documents,
 - (e) serve on the demanding party the amended list of documents, and
 - (f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[6] Rule 7-1(13) provides that:

Application for production of documents

- (13) If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.
- [7] Both parties referenced the judgment of Justice C. Ross in *Araya v. Nevsun Resources Ltd.*, 2020 BCSC 511, where the two-stage or two-tier process and the applicable test are discussed at paras. 72-78 as follows:
- [72] Pursuant to R. 7-1(1)(a)(i) parties to litigation are required to list and produce:
- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact,
- [73] The initial production obligation under R. 7-1(1)(a)(i) is limited to what could be used by any party to prove or disprove a material fact. Material fact refers to an issue that is in dispute, the resolution of which will have legal consequences between the parties to the dispute. It is a fact put in issue by the pleadings. In *Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2017 BCSC 19 at para. 90, Justice Adair stated:

What qualifies as a "material fact" was discussed by K. Smith J.A. in *Jones v. Donaghey*, 2011 BCCA 6, at paras. 9-10 and 18. An "issue" is a disputed fact the resolution of which will, without more, have legal consequences as between the parties to the dispute. Such facts are referred to as "material" facts. Thus, a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. On the other hand, facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.

[74] The Rules create what has been characterized as a two tier system for document production. Pursuant to R. 7-1(10) a party who believes that documents have been omitted from the disclosure can demand further production. In addition, pursuant to R. 7-1(11) a party can seek broader disclosure of documents that "relate to any or all matters in question in the action".

[75] A party who is not satisfied with the response to a demand made pursuant to subrules (10) or (11) can apply to the court pursuant to R. 7-1(13). The discretion of the court in relation to such an application is addressed in R. 7-1(14), which states, in part:

(14) On an application under subrule (13) or otherwise, the court may

- (a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or
- (b) order a party to
- (i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,

[76] The jurisprudence with respect to the interplay between the subrules of R. 7-1 was summarized in *Edwards v. Ganzer*, 2012 BCSC 138 at para. 41, in which Master Bouck stated :

I understand the principles outlined in these various decisions, together with the applicable Rules, to be as follows:

- a. The initial production obligation under Rule 7-1(1)(a)(i) is limited to what is required to prove or disprove a material fact: *Biehl v. Strang* at para. 14;
- b. Rule 7-1(10) allows the opposing party to issue a written demand requiring the listing party to amend the original list and produce documents that should have been disclosed under Rule 7-1(1)(a)(i);
- c. In addition, Rule 7-1(11) allows the opposing party to issue a written demand requiring the listing party to amend the list and produce documents which ought to be disclosed under a test "close to" that set out in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 at 63, (the "Guano test"): *Global Pacific* at para. 9;

- d. The distinction between the two types of disclosure provided for under Rule 7-1 is stated in Global Pacific as follows:

The question is whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, or if it may have either of those two consequences. Therefore, it is acknowledged that the initial disclosure under Rule 7-1(1) relates to a materiality requirement, but that a party can apply to the court, as the defendant did here, for broader disclosure pursuant to Rule 7-1(14).

[Emphasis in original.]

- [77] The materiality requirement under R. 7-1(1) was discussed in *Biehl v. Strang*, 2010 BCSC 1391. In that case, the court considered the meaning of "used by a party of record at trial to prove or disprove a material fact" in subrule (1)(a)(i), and at para. 16, Justice Punnett noted:

In Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at para. 2.50, relevance is distinguished from materiality:

§2.50 A distinction has also been drawn between relevance and materiality. ... The concept of materiality, however, requires the court to focus on the material issues in dispute in order to determine if the proffered evidence advances the party's case.

In other words, the requirement that the disclosure relate to a material fact limits the breadth of what is relevant.

[Emphasis in original.]

- [78] The scope of disclosure pursuant to R. 7-1(14) was described by Justice Dillon in *Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141*, 2011 BCSC 1752 at paras. 8-9. Justice Dillon cited *Biehl* and stated that R. 7-1(14) "provides a wider disclosure" than subrule (1), permitting a court, on application, to order the production of documents related "to any or all matters in question in the action". The court proceeded to align this wider disclosure with the Peruvian Guano test of relevancy (at para. 9; set out in *Edwards* at para. 41; see above, para. 77).

- [8] In *Kaladjian v. Jose*, 2012 BCSC 357, at paras. 44-45, Justice Davies adopted the following comments of Master Bouck with respect to Rule 7-1(11) and (12) in *Przybysz v. Crowe*, 2011 BCSC 731, at paras. 27-29 as follows:

- [27] Those Rules contemplate a broader scope of document disclosure than what is required under Rule 7-1(1)(a). Indeed, the two tier process of disclosure (if that label is apt), reflects the SSCR's objective of proportionality. In order to meet that objective, the party at the first instance must put some thought into what documents falls within the definition of Rule 7-1(1)(a)(i) but is not obliged to make an exhaustive list of documents which in turn assists in the "train of inquiry" promoted in *Compagnie Financiere du Pacifique v. Peruvian Guano Co.*

(1882), 11 Q.B.D. 55 at pp. 62-63(Q.A.).

- [28] Only after a demand is made under Rule 7-1(11) for documents that relate to any or all matters in question in the action and the demand for productions is resisted can a court order production under Rule 7-1(14). It should be noted that in this case, the demand (and indeed order sought) is for production of additional documents, not simply a listing of such documents: See Rules 7-1(1) (d), (e) and (f).
- [29] The court retains the discretion under Rule 7-1(14) to order that the party not produce the requested list or documents. Again, the court must look to the objectives of the SCCR in exercising this discretion.
- [9] Justice Davies went on at paras. 61-64 to consider the nature of the supporting material needed for the second-stage production of documents:
- [61] After considering the authorities and submissions of counsel, I have concluded that the pleadings continue to govern the determination of issues of relevance in relation to the scope of examination for discovery under the present Rules and will usually also govern issues concerning the initial disclosure obligations of a party under Rule 7-1(1), if challenged by a party under Rule 7-1(10).
- [62] I have also concluded that the narrowing of the discovery obligations of parties and most particularly the removal of the Peruvian Guano "train of inquiry" test of relevance will generally require a defendant to provide some evidence to support an application for additional documents, whether demand is made under Rule 7-1(11) or Rule 7-1(18).
- [63] A requirement for evidentiary support recognizes the difference between the scope of examination for discovery and the scope of document discovery under the present Rules and will allow considerations of proportionality to be addressed in specific cases.
- [64] A requirement for evidentiary support in requests for additional documents and third party records also prevents against unwarranted "fishing expeditions" based solely upon pro forma pleadings.
- [10] In Kaladjian, the issue was whether a defendant in a personal injury matter who had pleaded the existence of pre-existing conditions was entitled to production of MSP records. Justice Davies noted at paras. 67-69 that:
- [67] defendants have at their disposal other means by which to obtain information about the state of a plaintiff's health prior to discovery.
- [68] Foremost amongst those tools is the obligation of plaintiffs to produce documents that could be used by either party to prove or disprove a material fact. If indeed there is a relevant pre-existing condition as pleaded, a plaintiff's relevant medical records will likely have been produced on the plaintiff's initial list of documents under Rule 7-1(1).

- [69] The extent to which there has been compliance with that obligation can be pursued at examination for discovery, and if evidence is obtained that can support an application for production of MSP records, such an application can then be made.
- [11] Justice Davies concluded at para. 74 that the argument that a mere pleading of a pre-existing condition was sufficient to overcome the plaintiff's privacy interest, failed the proportionality analysis, noting that:
- [74] Even when the information sought is as limited as that contained in MSP records, privacy rights should not be abridged without cogent reasons to do so.

Making of the Document Requests

- [12] Counsel for Sheri wrote to counsel for Ana on April 27, 2022, making demand pursuant to both Rule 7-1(10) and (11) for production of the various categories of documents that are at issue on this application. Counsel for Ana responded on June 6, 2022, setting out Ana's position with respect to each of the requests. The positions of the parties as set out in that correspondence are essentially the same as those they advanced at this hearing.
- [13] I note that Davies J. suggested in Kaladjian that applications pursuant to Rule 7-1(11) will in most cases require evidence in support. The application before me was argued almost entirely on the basis of the pleadings. That said, there has been extensive evidence already placed before me on the applications I have heard in this matter, and the record before me contained a number of affidavits, even though counsel did not directly reference the materials that I have been taken to at the previous hearings.
- [14] I note that the parties have scheduled examinations for discovery in April 2023. That will provide an opportunity for each party to cross-examine the other, so it is possible additional facts may come out at that time. I am deciding the application before me based on the present record.

The Pleadings

- [15] This proceeding was commenced by Mr. Carleton, in his capacity as trustee of the Anna Cepuran Alter Ego Trust ("the Trust"). The proceeding was initially commenced by way of petition on September 5, 2019. It was converted to an action pursuant to the order I made in 2021. The notice of civil claim was filed on March 24, 2021.
- [16] Mr. Carleton has since passed away, and I am advised that Sheri has recently appointed herself as replacement trustee pursuant to a power of appointment reserved to her as settlor of the Trust.
- [17] By way of brief background, the Trust was settled by Sheri on August 20, 2019, acting pursuant to a power of attorney granted to her on January 25, 2018. The power of attorney was prepared as part of comprehensive estate planning involving both Ana and her husband, John Cepuran, who was diagnosed with cancer in 2017 and passed away in April

2019. The estate plan included wills and representation agreements in addition to powers of attorney. The power of attorney made by Ana included a specific provision authorizing the attorney to create and settle trusts and corporations for the benefit of Ana, her estate, or her family, and to transfer assets to such corporations or trusts.

- [18] The notice of civil claim pleads that in the spring and summer of 2019, Sheri became concerned about Ana's ability to manage her affairs, which led to her settling the Trust. It pleads that on August 30, 2019, Sheri was advised that Ana had revoked the power of attorney but that Sheri did not accept that her mother was capable to do so. Because of steps taken by Ana, the trustee was not in a position to complete the transfer of legal ownership of the properties into the name of the Trust.
- [19] The relief sought in the notice of civil claim is a request for directions from the court as to whether the trustee should complete the transfer of legal ownership and, if required, a declaration that the trustee holds the beneficial interest in the properties.
- [20] In the amended response to civil claim, Ana denies that she was incapable of revoking the power of attorney and says that the revocation was valid. She asserts that the Trust was created against her wishes and that its creation creates an unnecessary financial burden (in particular, the payment of substantial property transfer taxes). She pleads that the creation of the Trust prevents Ana from disposing of the properties and reducing Sheri's inheritance. She submits that Sheri was not acting in good faith as an attorney when she created the Trust, that the Trust was created in breach of fiduciary duty, that the Trust must be set aside, and that, in any event, the transfer of the properties to the Trust has not been and cannot be completed or perfected given the revocation of the power of attorney.
- [21] In the amended counterclaim, Ana advances a number of different claims:
- (a) As against Sheri in her personal capacity, and as against the trustee of the Trust, Ana repeats many of the allegations set out in the response to civil claim. She asserts that under the power of attorney, Sheri has a fiduciary duty to act in Ana's best interests, take into account her current wishes, inform her of decisions, and encourage her involvement in decisions. She asserts that the creation of the Trust without her knowledge or consent was in breach of those duties and that in creating the Trust, Sheri acted in a self-interested manner. She alleges that the trustee has refused her demands to dismantle the Trust and return the properties to her. The amended counterclaim seeks declarations that:
 - (i) The power of attorney is null and void;
 - (ii) The revocation of the power of attorney from August 30, 2019, is valid;
 - (iii) The various documents creating the Trust are null and void or in the alternative, an order setting them aside; and
 - (iv) Ana is the legal and beneficial owner of the properties.

- (b) As against the trustee, there are claims of slander of title through the registration of certificates of pending litigation against title to Ana's properties. It is alleged that as a result of those false statements, Ana has suffered loss, expense and special damages, including but not limited to Ana being prevented from selling her Vancouver properties.
 - (c) As against Urban Properties Limited ("Urban Properties"), which manages the Vancouver properties, Ana alleges a failure to remit the actual net revenue from the units, a failure to accept Ana's notice of termination of the management agreement, and the wrongful leasing of three residential units at a rent of \$0. She also alleges that Sheri, as president of Urban Properties, is in breach of her duties under the power of attorney by authorizing Urban Properties' conduct, and also by virtue of being one of the beneficiaries of the rent-free units. Ana in the amended counterclaim denies that there was any agreement to rent out the other units for rent at \$0 in return for the provision of services. She claims unjust enrichment in respect of services that are alleged to have been provided to Sheri personally by the occupants of those units. She seeks orders that Urban Properties be required to pay her the net revenue, that it be restrained from renting out any units at below market rentals, and that it pay damages for breach of the management agreement.
 - (d) The statement of relief sought includes a claim for "general damages" that is not otherwise particularized - the original counterclaim sought "general damages against Sheri for breach of fiduciary duty", but the final seven words were removed when the counterclaim was amended.
- [22] With respect to this latter point, the additional allegations that could arguably give rise to a claim for general damages are:
- (a) An assertion in Part 1 that as a result of the conduct of the defendants by counterclaim, Ana has suffered loss, including:
 - (i) Loss of market rent;
 - (ii) Inability to sell the properties and any potential loss of value/sale price of the properties;
 - (iii) Such other losses as may be particularized prior to trial.
 - (b) Assertions in Part 3 of breach of fiduciary duty, breach of trust, the law of injurious falsehood and slander of title.
- [23] Finally, there is a claim for aggravated and punitive damages against the trustee and Sheri. This is based on an allegation that the trustee, by continuing to assert the validity of the Trust, has interfered with:

Ana's unfettered and unrestricted right to deal with her Properties to the benefit of Sheri. Such conduct is callous, malicious and highhanded and is deserving of rebuke. Further, it caused stress and anxiety to Ana as such that the conduct of the Plaintiff is deserving of aggravated and punitive damages.

- [24] Sheri's response to counterclaim denies many of the allegations in the amended counterclaim. With respect to Ana's claim that she should be entitled to deal with her properties and her estate as she wishes, Sheri in her response to counterclaim asserts that this is contrary to an estate-planning agreement entered into as amongst Sheri, John and Ana in 2017, after John had received his cancer diagnosis. Among the key terms of the alleged agreement are the following:
- (a) Sheri agreed to sell her home and advance money to help John and Ana pay for expenses as well as to renovate the rental properties;
 - (b) Ana and John agreed that Sheri could live at one of the rental properties without having to pay rent;
 - (c) Ana and John agreed that:
 - (i) Sheri would inherit the estate of the survivor of Ana and John;
 - (ii) Sheri would have discretion as to any gifts to Ana and John's grandchildren; and
 - (d) This agreement as to estate planning was implemented through the preparation of wills, powers of attorney, and representation agreements in January 2018, and by Sheri selling her house and advancing funds as agreed.
- [25] In her response to counterclaim, Sheri repeats and relies on the assertions set out in the notice of civil claim, and supplements the allegations on which she says she based her decision to settle the Trust, particularly her concerns about Ana's ongoing capability to deal with her affairs.
- [26] In its response to counterclaim, Urban Properties asserts that it has acted in accordance with the management agreement and that all of the tenancy agreements were made with the knowledge and consent of the owners.

Positions of the Parties - Scope of Pleadings

- [27] It became apparent during argument that the parties have a fundamental disagreement as to what is really relevant in this case. This was most apparent in some of the broader requests seeking production of documents with respect to Ana's health and with respect to Ana's financial matters, not only in 2019 (at the time of the creation of the Trust and the revocation of the power of attorney), but also from 2020 onward to the date of trial. By way of example, I refer to two of the document requests made:
- 2. all documents regarding Ana's finances since August 2019;
 - 6. all documents evidencing Ana's health generally;

Because this issue impacts on a number of the requests, I will deal with it as a preliminary matter.

- [28] Generally speaking, Ana argued at the hearing before me that the primary issue in this action is whether Ana had the requisite capability to revoke the power of attorney in August 2019, which limits the time range during which there is an issue on the pleadings as to capability.
- [29] Sheri takes the position that Ana's capability from 2019 to the date of trial is in issue, meaning that all documents with respect to her health and the management of her affairs from 2019 onward should be disclosed.
- [30] Sheri points to the following pleadings in support of her position:
- (a) Ana's pleading in support of her claim for aggravated and punitive damages, in which she asserts that she has suffered "stress and anxiety". Sheri says this pleading requires disclosure of any medical records that might deal with claims of stress or anxiety to the date of trial.
 - (b) Various pleadings by Ana in her response to civil claim which respond to assertions in the notice of civil claim:
 - (i) Ana's assertion that she is "well aware of her assets" (paragraph 19), which responds to a pleading that Ana "does not have an accurate concept of money or the value of money" (paragraph 24);
 - (ii) Ana's assertion denying that her mental health has declined (paragraph 20), which responds to a pleading that Ana's mental health declined after John's death in April 2019 (paragraph 25);
 - (iii) Ana's assertion that she enjoys good health, and her denial that she is unable to look after the Surrey property (paragraphs 30-31), which respond to pleadings that she is physically frail, has significant health concerns, and is unable to look after the Surrey property (paragraphs 71-72); and
 - (c) Ana's pleading in the amended counterclaim claim that she is competent to manage her affairs (paragraph 23.1), which Sheri notes is expressed in the present tense.
- [31] Sheri argues that Ana's claims that Sheri has failed to do what she was asked to do, including to accept the termination of the management agreement with Urban Properties and to remove the certificate of pending litigation, all relate to ongoing conduct. Sheri says that her ongoing refusals to do those things are explained in the response to counterclaim and in portions of the notice of civil claim that are incorporated into the response to counterclaim. They include a lengthy list of Sheri's ongoing concerns about Ana's capability and well-being. Sheri argues that in considering the allegations of ongoing conduct, the court will need to review not only what was known to Sheri, but also the reality of Ana's ongoing mental state and capability.
- [32] Finally, Sheri points to the fact that Ana's counsel has given notice pursuant to Rule 11 of an expert report, which report concludes that as of November 2022, Ana continues to be capable to manage her affairs.

- [33] Ana argues that the requests for all documents related to Ana's health and her financial management up to the date of trial are overly broad, intrusive, and not relevant to the issues actually arising on the pleadings. She acknowledges that the pleadings contain a lengthy narrative that includes assertions going beyond the material facts related to the actual matters in issue. She suggests that arises from the evolution of this proceeding, which began as a petition with a lengthy recitation of facts. She submits that the court should look closely at document requests that show little if any connection to the claims made. She argues that the court should consider carefully the material facts on which the claims are said to be based, particularly where document requests that are made have little or no connection to these material facts while seeking intimate and personal details of Ana's private life.
- [34] Ana argues that all of the issues with respect to the validity of the Trust, including the trustee's application for directions and her application to set aside the Trust, will turn on her capability as of August 2019 when the creation of the Trust and revocation of the power of attorney all occurred within days. She argues that slander of title and related claims will turn on whether it is appropriate to maintain the certificate of pending litigation after revocation of the power of attorney, and that the appropriateness of that again turns on her capability as of August 2019.
- [35] Ana says that she has disclosed the records of her family doctor from February 5, 2015 to November 16, 2020, that this encompasses more than enough medical information for any determination as to her capability as of August 2019 and that no further documentation is required.
- [36] Ana further argues that the report of Dr. Dian may or may not be used at trial, and that the fact that a party has given notice of an expert report under Rule 11 does not define or change the scope of relevance.

Analysis

Scope of Pleadings

- [37] In my view, the extent that Ana's health and capability and her ability to manage her affairs are in issue in this action is determined by the extent to which those issues are material facts to the claims pleaded. The primary claims in the action relate to the validity of the actions taken by Sheri to create the Trust and of the actions taken by Ana to revoke the power of attorney. All of those actions were taken in August 2019. Ana's capability at that time is a material fact.
- [38] However, that does not mean that disclosure of all medical records and financial documents both before and after that time is necessary. While I agree that the nature and extent of Ana's assets is relevant, in that those assets are the "affairs" that the court is to determine her ability to manage, I do not agree that ongoing disclosure of her financial affairs in the over three years since that time is relevant. Even on a Peruvian Guano standard, where the court

might consider whether documents would give rise to a "train of inquiry", I have difficulty seeing how financial documents from subsequent years would be relevant to the issue of Ana's capability in August 2019. In my view, the request for financial records from subsequent years is disproportionate and, in effect, amounts to a fishing expedition.

- [39] With respect to medical records, I accept that, to some degree, symptoms reported to and observations made by a doctor or other treatment provider both before and after the material dates may be relevant to ascertaining an individual's physical and mental state. However, there must be reasonable limits to the scope of relevance, particularly given the personal and private nature of a person's medical records. In my view, the period of time for which production has been given, which goes back in time to 2015 and also for more than a year subsequent to the material time (i.e., to November 2020) is a reasonable time range, given the nature of what is in issue in this case.
- [40] I do not agree that Sheri's reliance on ongoing concerns about Ana's capability as an explanation for refusing to accept the unwinding of the Trust or the refusal to remove certificates of pending litigation or the refusal to accept the termination of the management agreement, makes Ana's actual capability at subsequent dates a material fact. Whether the Trust should be unwound or declared void will be determined by whether its formation was an appropriate exercise of the power of attorney and whether the revocation of the power of attorney was valid in 2019. If Ana is successful on those issues, then it is difficult to see any basis to retain the certificates of pending litigation regardless of what Sheri's motivations may have been. The same would apply to the termination of the management agreement.
- [41] As a result, I do not accept that on the pleadings as they currently stand, production of Ana's medical and financial records is required up to the date of trial. The one exception to this would be in relation to the pleading that Ana has suffered from stress and anxiety, which is a foundation of her claim for aggravated and punitive damages. In my view, medical records containing reports of or treatment for stress and anxiety, even after the currently disclosed records, would be material to that particular pleading.

Specific Requests

- [42] I return to the specific requests in Schedule A to Sheri's notice of application. The first three deal with Ana's management of her finances. The three specific requests are:
1. all documents regarding Ana's management of her finances since August 2019;
 2. all documents regarding Ana's finances since August 2019;
 3. all documents showing Ana's awareness of her finances since August 2019;
- [43] In my view, these requests are dealt with by my conclusions in the preceding section.
- [44] The next request is for:

4. all documents showing Ana's capacity and knowledge to understand the nature and consequences of revoking her Power of Attorney on August 30, 2019, including:
 - (a) (i) her knowledge of her property at that time and its approximate value;
 - (b) (ii) her understanding of the authority of an attorney, and how an attorney's management of the adult's financial affairs may impact those financial affairs;
- [45] Sheri argues that this request essentially tracks the test for capability.
- [46] Ana argues that this request is too broad, and it is unclear as to what is being sought. She notes a number of documents that were disclosed on the initial list of documents that deal with the issue of Ana's capability as of August 30, 2019.
- [47] While I agree that the request is somewhat general in nature, I conclude that the documents sought by this request go to the heart of the claims in this action, and I will order production of documents within this category.
- [48] The next request seeks production of:
5. all documents evidencing Ana's assets, liabilities, income, and expenses as at August 30, 2019;
- [49] Ana argues that this request is too broad and it is unclear as to what is being sought, but agrees to disclose her 2019 income tax return and her bank and investment account statements for the month of August 2019.
- [50] I agree that, to some degree, Ana's capability to manage her affairs is connected to the nature of those affairs, and her capability to revoke the power of attorney is also connected to her knowledge of the property, which can only be considered in light of what the property is.
- [51] I am concerned, however, about the breadth of the request. I agree with the approach of producing account statements for any bank and investment accounts. Other evidence that would be material would include any loan statements as well as notices of assessment for 2019 and 2020 (given that 2020 notices of assessment will show assessed values as of July 2019). I will order production of asset and liability information on that basis. I agree that production of an income tax return should provide sufficient information on Ana's income, and I am not persuaded that there is a need to produce "all documents" related to Ana's expenses in August 2019.
- [52] Request 6 seeks:
6. all documents evidencing Ana's health generally;

- [53] This request is dealt with by my conclusions in the previous section. The production of the family doctor's records up to November 2020 is appropriate. I have concluded that subsequent medical documents dealing specifically with concerns of anxiety and stress are also relevant. If there are other medical records required from within that time period or certainly within the time period up to November 2020, then Sheri should formulate specific requests.
- [54] Request 7 seeks:
7. all documents evidencing the maintenance of [the Surrey property] by Ana or anyone engaged by Ana, to maintain [the Surrey property], including the terms of that engagement;
- [55] Sheri argues that production of this category of documents is relevant because in paragraph 31 of the response to counterclaim, Ana has pleaded that she enjoys maintaining the property.
- [56] Ana argues that it is unclear on what basis Ana is required to report to Sheri how her property is being managed and that the only assistance she has is a gardener whom she pays in cash.
- [57] In my view, this evidence is not relevant to any material fact underlying any of the claims made in either the notice of civil claim or the amended counterclaim.
- [58] Request 8 seeks production of:
8. all documents, evidencing Ana's hiring of professionals to assist her with the management of her estate and income derived therefrom ...
- [59] Sheri argues that the relevance of this arises from s. 34 of Ana's response to civil claim, which responds to a pleading in the notice of civil claim that Ana does not have experience or training in managing finances, and might be taken advantage of. Ana response, as pleaded, was that she "denies that there is a risk to her assets in the absence of the Trust" and that she is "capable of hiring the appropriate professionals to assist her with the management of her estate and the income deriving therefrom".
- [60] Ana responds that this request is unclear, that many of the arrangements made to date are made through her counsel and thus some of the relevant correspondence is subject to privilege, and that as a result of Urban Properties' refusal to accept the termination of its management agreement, Ana has not yet been in a position to hire a new property management company. Ana has produced a retainer letter by which she retained Grant Thornton in 2020 to provide accounting services.
- [61] In my view, a pleading that Ana "is capable of" hiring professionals to assist her does not make the question of who she has, in fact, hired relevant to the issues surrounding her capability in August 2019, or to any other issue in this action.
- [62] Request 9 seeks production of:

9. all documents evidencing Ana's decisions she wishes to make regarding her three properties;
- [63] Sheri argues that this request arises from Ana's pleading in her response to civil claim that she "wishes to continue to make her own decisions with respect to the properties."
- [64] To similar effect is Request 17, which seeks production of "all documents evidencing how Ana wishes to use, enjoy, or deal with her properties". This is said to arise from a pleading in the amended counterclaim that the Trust "restrains Ana's right to use, enjoy, and deal with her property as she sees fit".
- [65] Ana argues that her wishes are private and subjective, and that the basis on which production is sought is not clear. She notes that her counsel has written to Sheri's counsel advising that she wishes to sell the Vancouver properties.
- [66] In my view, the pleadings that are said to give rise to these two document requests simply assert a desire on behalf of Ana to continue to make her own decisions, and reflect the practical effect of turning the properties over to a trust. There is nothing about either pleading that gives rise to a contested material fact that requires document disclosure at this point in time.
- [67] Request 10 seeks production of:
10. all documents regarding Ana's mental health during the spring and summer of 2019;
- [68] Sheri initially made this request pursuant to a pleading in the response to civil claim that during that period of time Ana's health was "delicate". That pleading has since been removed. The document request is advanced now on the basis that in light of the evidence reviewed in my judgment in 2021, there is a serious question as to Ana's capability, of which her mental health is one part.
- [69] In response to this request, Ana argues that she has already produced the records of her family doctor for that time period, and that no further production has been identified as necessary.
- [70] In my view, Request 10 identifies an area of relevance. I do not understand Ana's submissions to be contesting that. Sheri's counsel, during the course of submissions on this point, handed up a sheet from the family doctor's files indicating that Ana had been seen by a nurse during the time period identified, and identified this as one file as to which production might be appropriately sought. However, this document was not included in the application materials, and as a result, there has been no opportunity for Ana to respond to it.

[71] I will not make an order at this point with respect to this category but will make myself available should there be a need for further court orders with respect to specifically identified medical records that may relate to Ana's mental health in the spring and summer of 2019.

[72] Request 16 seeks:

16. all documents evidencing how the Trust has impacted Ana's finances and whether there is any impact;

This is said to arise from a pleading in the counterclaim that alleges that the Trust "creates unnecessary financial burdens that do not benefit Ana."

[73] Ana has responded identifying a number of documents that have already been produced that relate to this request. While some have not yet been listed (including the monthly statements from Urban Properties), Ana's counsel has advised that they will all be listed. The pleadings also identify the burden of the property transfer taxes, which will be payable if the court gives direction that the formation of the Trust is to be completed.

[74] As I understand the submission made, Ana does not dispute that this is a relevant area of inquiry. In my view, this is an appropriate area to be the subject of an order for production.

[75] Request 18 seeks production of:

18. all documents evidencing how the Trust allegedly benefits Sheri directly;

This request was made in response to an earlier version of paragraph 27 of the amended counterclaim, which pleaded that the Trust "benefits Sheri directly." In the amended counterclaim, the following words are added:

... in that Ana's property goes directly to Sheri upon Ana's death, contrary to Ana's current will.

[76] In response to the document request, Ana asserts that the Trust document speaks for itself and that the Trust "puts Ana's properties out of her control and further stipulates that all of Ana's property automatically vests to the applicant upon Ana's death, contrary to Ana's current testamentary wishes".

[77] In my view, what Sheri is seeking here is more in the nature of particulars than of document disclosure. If Sheri wishes to have this information in the form of particulars, she should issue a demand for particulars. It does not appear to me that any documents other than those creating the Trust would have any relevance to this issue.

Estate Planning File

[78] In addition to the categories listed on Schedule A, the notice of application also sought production of the estate-planning file of a lawyer who provided legal services to Ana and John. Production was sought based on an assertion of waiver of privilege in light of the evidence and the positions taken in this litigation. At the start of the hearing, Ana's counsel

advised that Ana no longer opposes the production of this file. In the absence of opposition and given the evidence that was before me at the 2021 hearing as to what Ana said about what she understood about the power of attorney, I am satisfied that production of the file should be ordered.

Conclusion

[79] I have ordered that Ana produce:

- (a) Documents in categories 4 and 16 of Schedule A;
- (b) With respect to category 5, documents showing her assets and liabilities as of August 30, 2019, including:
 - (i) Bank, investment account and loan statements; and
 - (ii) notices of assessment,

as well as her 2019 income tax return;

- (c) Medical records subsequent to what has already been produced, limited to those records showing recent complaints of and/or treatment for anxiety or stress; and
- (d) The estate-planning file.

[80] My preliminary view is that success on this application has been mixed and that costs should be in the cause. If either party wants to suggest an alternative order as to costs, I will hear submissions on that.

(SUBMISSIONS ON COSTS)

[81] THE COURT: When a party seeks a certain range of damages and gets a partial amount of what was sought damages, they still will get their costs. Here, Sheri sought a wide range of documents, and was successful with respect to some of them. I agree that Ana did not oppose production of the estate-planning file. There were some other categories that Ana acknowledged that an obligation to produce, for which I did not make any order. The orders I made for document production are for categories that Ana actually opposed.

[82] On the other hand, the main meaty issue on this application was the production of the medical records and business affairs right up to the date of trial. Ana was successful on that.

[83] In these circumstances, I think an order that costs be in the cause is appropriate.

"Veenstra J."

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