

CANADA / JUDGMENT

Carpino v. Carpino

2023 BCSC 1518

COURT

Supreme Court of British Columbia

DECIDED

30 August 2023

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2023 BCSC 1518 Carpino v. Carpino

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carpino v. Carpino,

2023 BCSC 1518

Date: 20230830

Docket: 18719

Registry: Smithers

Between:

Lisa Carpino and Anita Carpino

Plaintiffs

And:

Gino Carpino, Executor of the Will of Alessandro Carpino,

The Estate of Alessandro Carpino, and Gino Carpino

Defendants

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Plaintiffs:

L. Perry

Counsel for the Defendants:

G. Crampton

Place and Date of Hearing (via MS Teams):

Terrace, B.C.

January 30 and March 1, 2023

Written Submissions of Plaintiffs:

March 31, 2023

Written Submissions of Defendants:

April 14, 2023

Written Reply Submissions of Plaintiffs:

April 21, 2023

Written Surrebuttal Submissions of Defendants:

June 1, 2023

Supplementary Written Submissions of Plaintiffs:

July 14, 2023

Supplementary Reply Submissions of Defendants:

July 17, 2023

Place and Date of Judgment:

Smithers, B.C.

August 30, 2023

Introduction

- [1] The defendants apply for an order dismissing the action with costs to the defendants at Scale B. The plaintiffs apply for an order the defendants produce an updated list of documents and production of specific documents.
- [2] On December 21, 2022, I issued reasons, reported at 2022 BCSC 2237, dismissing the plaintiffs' application to remove the defendant Gino Carpino as executor of their late father's estate. I also dismissed their leave application, pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], to commence an action on behalf of the estate to have the properties transferred by their parents to the executor returned to the estate under a resulting trust claim. The plaintiffs had failed to establish an arguable case.
- [3] That decision was not appealed.

- [4] At issue is the effect of that decision given the result was the plaintiffs lacked standing to pursue their claims without removing and replacing the executor or obtaining leave under s. 151 of WESA. The plaintiffs however take the position that their action remains alive and was not dismissed, so the defendants have an obligation to disclose documents.
- [5] As I have concluded the action is to be dismissed, the plaintiffs' application for document production is moot and is dismissed.

Background

- [6] The plaintiffs, Lisa and Anita Carpino, and the defendant Gino Carpino (the executor of the estate), are the children of the late Alessandro Carpino, who died on April 26, 2021 at the age of 85. At issue is Gino Carpino's administration of the estate and the status of the real properties formerly owned by the deceased and now registered in Gino Carpino's name.
- [7] The detailed background is found in the reasons referred to.
- [8] After release of those reasons counsel for the defendants sought removal of the plaintiffs' certificate of pending litigation ("CPL") filed against the properties received by Gino Carpino. As the plaintiffs took the position they had the right to continue the action they refused to remove the CPL. The defendants then brought this application.

Application Chronology

- [9] The plaintiffs first set down their application to remove the executor and for leave under s. 151 of WESA on the Smithers assize on July 18, 2022. The defendants filed their material in response on July 11, 2022. The application was not heard during the July 18, 2022 assize due to insufficient court time and was adjourned generally.
- [10] Counsel for the plaintiffs delivered a requisition to reset their application on the August 22, 2022 assize in Smithers. Counsel for the defendants was away on vacation but plaintiffs' counsel sought to have the matter proceed. Counsel for the defendants travelled to Vancouver in order to attend virtually.
- [11] The plaintiffs did not seek an adjournment or seek leave under Rule 8-1(14) to file additional affidavits or rebuttal affidavits. They took the position they were ready to proceed.
- [12] During submissions, the effect of a failure to replace the executor or obtain leave under s. 151 of WESA arose. Counsel for the plaintiffs expressed surprise that if that were the result it would end the proceedings. However, the response to civil claim filed by the defendants had raised the inability of the plaintiffs to proceed without leave. In any event, no adjournment of the hearing was sought at that point. The hearing concluded and judgment was reserved.
- [13] On December 21, 2022, reasons for judgment were released dismissing the plaintiffs' application to remove the executor and the application for leave under s. 151 of WESA with costs. The plaintiffs had not met the threshold established under WESA.

- [14] Counsel for the defendants then provided a form of order to counsel for the plaintiffs in December 2022 and sought removal of the CPL. Counsel did not agree on the wording of the order and counsel for the plaintiffs refused to remove the CPL and advised that the plaintiffs would continue with the action.
- [15] On January 11, 2023, the defendants filed and served their notice of application for hearing on January 30, 2023 in Terrace seeking dismissal of the action on the basis that there were no genuine issues remaining for trial and that the judgment refusing leave barred the plaintiffs' action from proceeding.
- [16] On January 20, 2023, the defendants filed their application response stating that the action survives because it was not dismissed by the judgment. Also on January 20, 2023, the plaintiffs filed their notice of application seeking production of documents from the defendants.
- [17] On January 23, 2023, the defendants filed their application response to the plaintiffs' application for document production, seeking dismissal on the basis the judgment bars the plaintiffs' action from proceeding and that the application is an abuse of the process of the Court.
- [18] The hearing of the applications began on January 30, 2023 and continued on March 1, 2023. Counsel for the plaintiffs submitted that they proceeded with the hearing in August because he believed they had met the threshold under WESA and knew that without leave or removal of the executor the plaintiffs could not proceed. Nevertheless, he submitted the application for leave under s. 151 was for an interim order and that res judicata and issue estoppel did not apply. Written submissions were ordered.

Preliminary Issue

- [19] The plaintiffs filed their written submissions on March 31, 2023. The defendants filed their submissions on April 14, 2023 in which they addressed reopening given the Court was not functus officio as the order had yet to be entered. The plaintiffs filed reply submissions on April 21, 2023 in which they objected to the new arguments advanced by the defendants relating to the non-entry of the order. They sought further time to prepare a response to those new arguments if reopening was to be considered. Counsel in their written submissions submitted they had insufficient time to research and prepare a full response to the new arguments. They did not apply for additional time.
- [20] The defendants filed surrebuttal submissions on June 1, 2023.
- [21] Because of the reference to not having enough time to respond, the plaintiffs were asked to make further submissions regarding the reopening submissions of the defendants if they wished. They have done so, and the defendants have filed reply submissions.

Position of the Plaintiffs

- [22] The plaintiffs submit their application to replace the executor and for leave pursuant to s. 151 of WESA was an interim application because the Court retains jurisdiction and has discretion to re-hear the issues or to vary or rescind the decision.
- [23] They further argue that the doctrine of res judicata (cause of action estoppel and issue estoppel) do not apply as the decision was not final, they have new evidence, and they could not have produced it at the first hearing because they had not had enough time to prepare and provide it.

Position of the Defendants

- [24] The defendants submit that all orders are final in the sense they conclusively determine the issues that are decided. However, judgments that have been pronounced and communicated but have not been reduced to an order can be varied by the Court that made them as the Court is not functus officio.
- [25] The defendants acknowledge the plaintiffs may apply to reopen. They submit however the plaintiffs have not met the test for reopening.

Law and Analysis

Res Judicata and Issue Estoppel

- [26] On December 21, 2022, I found the plaintiffs had no arguable case; that is, their action was bound to fail. The plaintiffs could not proceed with their claims relating to the estate without leave. I refused to grant leave under s. 151 of WESA. I also dismissed their application to remove and replace the executor.
- [27] As leave was required to pursue the action and was not granted, that ended the claims made in the action. Such an order is a gatekeeper order: if leave is not granted to proceed with the claims, the claims cannot be pursued. It is an order binding on the Court. In *Tietz v. Affinor Growers Inc.*, 2022 BCCA 307, the Court of Appeal stated that dismissal of a leave application has final effect but because it does not finally dispose of the rights of the parties, it is interlocutory in nature. Therefore it appears that once the leave application was denied, issue estoppel may apply because there are no avenues open to the applicant other than an appeal or reopening if the order has not been entered. In this instance, no appeal was taken hence only reopening remains.
- [28] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court of Canada explained the rationale applied to consideration of issue estoppel:

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen*

(1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmsted and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.
[Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, supra, at p. 254:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[29] More recently the Supreme Court of Canada commented on the principles of issue estoppel, res judicata, the finality in judgments and due diligence in *Barendregt v. Grebliunas*, 2022 SCC 22:

37 The relationship between due diligence, and finality and order are deeply rooted in our common law. The law generally "requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18. This animates, for example, the cause of action estoppel doctrine, which safeguards "the interest of an individual in being protected from repeated suits and prosecutions for the same cause" and "the finality and conclusiveness of judicial decisions": K. R. Handley, Spencer Bower and Handley: *Res Judicata* (4th ed. 2009), at pp. 3-4. This doctrine achieves these ends through a due diligence component: it precludes a party from bringing an action against another party where the basis of the cause of action was argued or could have been argued in the prior action if the party in question had exercised reasonable diligence (*Grandview (Town of) v. Doering*, [1976] 2 S.C.R. 621, at pp. 634-38, citing *Henderson v. Henderson* (1843), 3 Hare 100).

38 The Palmer test's due diligence criterion plays a similar role: it ensures that litigants put their best foot forward when first called upon to do so.

39 The principle of finality and order has both individual and systemic dimensions in this setting. On an individual level, it speaks to the profound unfairness in providing "a party the opportunity to make up for deficiencies in [their] case at trial": *Stav v. Stav*, 2012 BCCA 154, 31 B.C.L.R. (5th) 302, at para. 32. A party who has not acted with due diligence should not be afforded a "second kick at the can": *S.F.D. v. M.T.*, 2019 NBCA 62, 49 C.C.P.B. (2nd) 177, at para. 24. And the opposing party is entitled to certainty and generally should not have to relitigate an issue decided at first instance, absent a reviewable error. Otherwise, the opposing party must endure additional delay and expense to answer a new case on appeal. Permitting a party in an appeal to fill the gaps in their trial evidence based on the failings identified by the trial judge is fundamentally unfair to the other litigant in an adversarial proceeding.

[30] As a result, the finding that leave was not to be granted under s. 151 of WESA ends the claims being made in the action as a matter of issue estoppel. The plaintiffs were required to "put their best foot forward to establish the truth of their allegations" but failed to do so: *Danyluk* at para. 18.

[31] The plaintiffs are left with seeking the remedy of reopening.

Reopening

[32] As noted, because the order arising from my December 2022 decision has not been entered the defendants raised the issue of reopening in their written submissions of March 13, 2023. Counsel for the plaintiffs took exception to their doing so, hence the further submissions referenced earlier received in July 2023.

[33] The plaintiffs seek a rehearing of the leave application based on the evidence contained in their affidavits filed in January 2023, some five months after the hearing which they say is "new" evidence.

[34] In their written submissions they state that such materials were not submitted on the WESA applications because:

The Plaintiffs did not receive the Defendants' materials until July 11, 2022. The First Application was originally scheduled to be heard on July 18, 2022. The First Application was adjourned until August 22-23 and the Plaintiffs were in the process of preparing their responding materials but they were unable to have them submitted before the court due to the timelines. Lisa Carpino was in transit to England. Lisa's father-in-law was in poor health and had been diagnosed with cancer. Smithers and Terrace are approximately 200 kilometers apart.

The Plaintiffs submit that they were unable to submit their responding materials prior to the hearing of the First Application.

The "new" evidence was in the process of being discovered by the First Application. Communications were ongoing. However, due to the time constraints and the volume of the materials from Defendants, the Plaintiffs were unable to prepare a full and complete response to the Defendants' claims by the time of the hearing of the First Application.

[35] In other words, the evidence is not new in the sense that it was not known or available to the plaintiffs before the hearing--it just was not put before the Court last summer due to an allegation of insufficient time to prepare it and have it sworn. Counsel for the plaintiffs did not seek an adjournment from the Court. Indeed, it was the plaintiffs who were pursuing the hearing of the matter which counsel for the defendants accommodated by suspending his vacation to do so.

[36] In *Hansra v. Hansra*, 2017 BCCA 199, the Court addressed the discretion of a trial judge to reopen a matter. The Court reviewed a number of authorities and the reference to a judge having an unfettered discretion first noted in *Clayton v. British American Securities Limited*, [1935] 1 D.L.R. 432, 1934 CanLII 229 (B.C.C.A.). Citing *Clayton*, the Court noted that in exercising the Court's discretion a judge "would discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of the judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result".

[37] Regarding the principles applicable on an application to reopen, the Court in *Hansra* referenced *Moradkhan v. Mofidi*, 2013 BCCA 132:

54 This Court remitted the matter for a new trial because the process followed by the trial judge was flawed and unfair. In summarizing the principles applicable on an application to reopen, Garson J.A. stated (at para. 31):

- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- a judge's unfettered discretion to reopen a trial should be exercised with restraint;
- a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

[Emphasis in original.]

56 Most significant is the judgment of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, a commercial case involving a bribery allegation. The trial judge released reasons in which he found corporate defendants and Stewart Landow liable and awarded the plaintiff damages. The judge dismissed the action with respect to two other corporate defendants and Joseph Kavana. Mr. Kavana had testified at the trial, but Mr. Landow had not. The plaintiff then applied to reopen its case to call Mr. Landow to testify that Mr. Kavana had participated in the bribery scheme.

57 The trial judge in *Sagaz* applied the two-part test articulated in *Scott v. Cook*, [1970] 2 O.R. 769 (H. Ct. J.): (1) would the evidence, if presented at the trial, probably have changed the result; and (2) could the evidence have been obtained before trial by the exercise of due diligence. Finding that neither of those tests had been met, the judge dismissed the application. The Court of Appeal of Ontario held that the judge had erred and ordered a new trial.

58 On further appeal, the Supreme Court of Canada held that the Court of Appeal should not have reversed the trial judge's exercise of discretion. Although Clayton is referred to in *Sagaz*, there is no mention in *Sagaz* of the discretion to reopen being "unfettered". At the conclusion of his reasons for judgment in *Sagaz*, Mr. Justice Major stated:

- [65] The court in Scott mandated that both branches of the test to reopen a trial to admit fresh evidence must be met. Having failed to meet the first branch of the test, it is unnecessary to examine whether the precluded evidence in this case could have been obtained by the exercise of reasonable diligence. It is sufficient to say that that too is a matter largely within the discretion of the trial judge and, absent error by him, that finding should not be interfered with.
- [38] Here the explanation for why the evidence was not adduced at the hearing was a conscious decision of the plaintiffs to proceed with the evidence they had, apparently because it was thought they had met the s. 151 of WESA threshold and the requirements to remove Gino Carpino as executor. If they had believed otherwise, presumably they would have sought an adjournment to provide more complete responsive material. With the adjournment from July to August the plaintiffs had over four weeks to provide response affidavits or seek leave to do so or seek an adjournment. They did not.
- [39] They now seek to re-litigate the s. 151 issue.
- [40] In addition, the new evidence is once again, like the earlier evidence relied on, speculative and argumentative. I note the plaintiffs continue to seek disclosure to support their case indicating an awareness of the need for further evidence. Further, the "new" material does not include evidence that addresses the transfers of the two properties forming the bulk of the estate.
- [41] Considering the circumstances reviewed in these reasons, the need to exercise the discretion to reopen sparingly, the conscious decision of the plaintiffs to proceed with their application with the material they had, the insufficient material newly filed not affecting the result and the integrity of the trial process, I decline to reopen the matter.
- [42] The applications for production of documents and to reopen are dismissed with costs at Scale B to the defendants. The application of the defendants to dismiss the action is granted with costs also at Scale B.

"The Honourable Mr. Justice Punnett"

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