

CANADA / JUDGMENT

Charbonneau v. Charbonneau Estate

2023 BCSC 2463

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 2463 Charbonneau v. Charbonneau Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Charbonneau v. Charbonneau Estate,

2023 BCSC 2463

Date: 20230421

Docket: S30208

Registry: Cranbrook

Between:

Alain Charbonneau and

Benoit Joseph Gino Charbonneau Gravel

Plaintiffs

And:

The Estate of Joseph Armand Benoit Charbonneau, Deceased,

Serge Charbonneau, Diane Charbonneau, and Esperanza De Pu Aguilera

Defendants

Before: The Honourable Justice Lyster

in Chambers

Oral Reasons for Judgment

Counsel for Diane Charbonneau and Serge Charbonneau in their capacities as Co-Executors and Co-Trustees of the Estate of Charbonneau (by video):

E. Hatch

Appearing in-person (by video):

B.J.G. Charbonneau Gravel

Place and Date of Hearing:

Cranbrook, B.C.

April 12, 2023

Place and Date of Judgment:

Cranbrook, B.C.

April 21, 2023

[1] THE COURT: These are my oral reasons for decision with respect to the application of Serge and Diane Charbonneau in their capacities as co-executors and co-trustees under the will and last testament of Joseph Armand Benoit Charbonneau for the cancellation of two certificates of pending litigation ("CPLs").

Background

- [2] By way of background, this case concerns the estate of Joseph Armand Benoit Charbonneau ("Mr. Charbonneau"). Mr. Charbonneau died on November 27, 2019. The defendants, Serge Charbonneau and Diane Charbonneau, were named as the co-executors of Mr. Charbonneau's estate in his will made May 23, 2019. They are Mr. Charbonneau's son and daughter. They are the applicants in this matter, and they appeared through counsel.
- [3] The plaintiff, Alain Charbonneau, is the son of Mr. Charbonneau. No provision was made for Alain in Mr. Charbonneau's will. Alain did not respond to or otherwise take part in this application.
- [4] The defendant, Esperanza De Pu Aguilera, was Mr. Charbonneau's partner. She did not respond to or otherwise take part in this application.
- [5] The plaintiff, Benoit Joseph Gino Charbonneau Gravel ("Gino"), is Mr. Charbonneau's nephew. In his will, Mr. Charbonneau gave Gino the right to purchase the property in issue in this case within six months of the date of his death. That property is a mobile home park in Canal Flats called Charbonneau Park. Gino did not exercise the right to purchase the park within the time provided. Gino responded to this application and appeared on his own behalf at the hearing.

- [6] Under the will, the residue of Mr. Charbonneau's estate is to be divided equally between Ms. Aguilera, Serge, and Diane.
- [7] Gino and Alain each filed CPLs against the park on October 23, 2020, and it is those CPLs which Serge and Diane, in their capacity as co-executors and co-trustees of the estate, seek to have cancelled.
- [8] The primary basis upon which Serge and Diane seek to have the CPLs cancelled is s. 252 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA]. In brief, s. 252 provides that if a CPL has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an interest in land against which the CPL has been registered may apply for an order that the CPL be cancelled.
- [9] In the alternative, they seek to have the CPL cancelled due to failure to comply with the statutory conditions set out in s. 215 of the LTA on the basis that the amended notice of civil claim filed by Gino and Alain on October 21, 2020 ("ANCC"), does not plead that they have an interest in land.
- [10] Serge and Diane also seek to have certain parts of the ANCC struck on the basis that they are *res judicata* in light of the decision of Justice Blake indexed at *Re Charbonneau Estate*, 2021 BCSC 2571, in which she pronounced the force and validity of the will in solemn form of law.

The Amended Notice of Civil Claim

- [11] In order to decide this application, it is necessary to review some parts of the ANCC in some detail, and I now turn to that. The plaintiffs had counsel at the time the ANCC was filed, and that counsel acted for them both. In the statement of facts, the plaintiffs plead that Charbonneau Park was created approximately 33 years ago through a joint venture of Mr. Charbonneau and Alain. They further plead that Alain and Gino assisted in building the infrastructure and that, between 2012 and 2019, Gino assisted Mr. Charbonneau in managing Charbonneau Park and in its general maintenance and upkeep.
- [12] The plaintiffs plead that Alain worked closely with Mr. Charbonneau at the park when he was growing up and that he was not compensated for much of the work he did with his father at the park. They plead that Mr. Charbonneau made oral representations to Alain and Gino that he wished Gino to purchase and continue operating the park, and to Gino in particular that he would be able to purchase it for approximately \$300,000. The plaintiffs plead that the estate has been enriched by the work completed by Gino and that Gino has experienced a corresponding deprivation. They further plead that:

The property constitutes the bulk of the value of Mr. Charbonneau's estate. As such, Gino and Alain Charbonneau claim an interest in the land and are entitled to a certificate of pending litigation.

- [13] I have not recounted the parts of the statement of facts in which the plaintiffs plead that there were suspicious circumstances surrounding the will and that the will does not make adequate provision for the proper maintenance and support of Alain, as those pleadings are not relevant to the issues before me.
- [14] In terms of relief sought, the plaintiff seeks several orders for Alain's benefit, including an order under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 for provision for Alain and an order declaring the will to be invalid. The plaintiffs also seek several orders for Gino's benefit, including the declaration that Mr. Charbonneau and estate have been unjustly enriched by Gino's work at the park; a declaration that, as a result of that unjust enrichment, the estate and its executors hold certain unnamed property in trust for Gino; and, in the alternative, an order for damages in Gino's favour for quantum meruit for work completed at the park. They also seek a CPL in Gino's favour.
- [15] In the alternative, they seek general and special damages for Gino, and, as joint relief, they seek the removal of Serge and Diane as executors and trustees.
- [16] In the legal basis section of the ANCC, the plaintiffs plead that Alain is entitled to a beneficial interest in the estate. They state that:
- Alain Charbonneau relies on the law of express trusts, constructive trusts, and resulting trusts.
- [17] They plead that he is entitled to a CPL as the park forms a portion of the estate assets and that his claim directly involves a claim in the park. There is a generic reference to the LTA.
- [18] In respect of Gino, they plead that the estate has been unjustly enriched by Gino's work and that he has been correspondingly deprived and that there is no juristic reason for the enrichment. They plead quantum meruit. In the alternative, they again ask that a CPL be registered and provide a generic reference to the LTA.
- [19] Finally, the plaintiffs plead that Mr. Charbonneau lacked testamentary capacity, that there were suspicious circumstances surrounding the will, that Serge and Diane exercised influence over Mr. Charbonneau in the will's preparation, and that they have failed to act in the best interests of the estate.
- [20] I turn to Justice Blake's decision. She issued her decision on November 19, 2021. Alain had filed a notice of dispute in another action (Action No. 29781), on January 24, 2020, which he amended on August 26, 2020. As recounted at para. 7 of Blake J.'s decision, the notice of dispute provided:

The disputant is filing this notice of dispute because there is a conflict of interest with the current executors acting in their roles. Additionally, this disputant believes there were issues concerning the validity of the deceased's last Will, including issues with the deceased's mental capacity and undue influence/coercion.

- [21] Serge and Diane filed a petition seeking to have the court pronounce the force and validity of the will. Alain responded to the petition. He sought to have the petition converted into an action. Both Serge and Diane and Alain had counsel at the hearing of the petition in November 2021. Gino was not a party.
- [22] At para. 6, Blake J. referred to the ANCC, which she noted was not before her, but stated "... that the determination of this petition will determine finally the issue of whether the Will is valid or not."
- [23] She also noted that the ANCC was likely procedurally flawed:
- ... as it is generally improper to include both a wills variation claim and an action for proof of will in solemn form in the same proceeding, as a valid will is a condition precedent to a variation proceeding: See Schell Estate (Re), 2019 BCSC 2168 at para. 8.
- [24] At paras.13-14, Blake J. summarized Alain's position before her as being that there were suspicious circumstances surrounding the making of the will sufficient to rebut the presumption of testamentary capacity arising from the executors having proven the formal validity of the will.
- [25] At para. 21, Blake J. reviewed the evidence surrounding the preparation and execution of the will, including from the notary public who prepared and witnessed the will. At para. 30, she noted that Alain's argument centred on there being no reason for his father to have disinherited him. She noted that his wills variation action, being the action in which the application before me is made, provides him with an opportunity to address that position.
- [26] At para. 31, Blake J. found that Alain had not rebutted the presumption of testamentary capacity on the basis of the alleged suspicious circumstances. At para. 34, she stated that "Alain's general allegations fall far short of raising a specific and focused suspicion which excites the suspicion of this Court."
- [27] Alain had raised no evidence which raised a reasonable doubt as to Mr. Charbonneau's capacity.
- [28] Justice Blake then turned to Alain's allegations of undue influence, starting at para. 35. At para. 37, she noted that Alain's argument that no one can explain why his father disinherited him would clearly need to be addressed in his wills variation claim, but that it did not lead to the conclusion that someone had unduly influenced Mr. Charbonneau. At para. 34, Blake J. found that Alain had put forward insufficient evidence to suggest that he had a defence that deserved to be tried, namely that Mr. Charbonneau was unduly influenced.
- [29] Justice Blake provided her conclusion at paras. 45-47 of the decision as follows:

- [45] In my view, Alain's allegations of suspicious circumstances and undue influence are largely speculative, not well-grounded in the evidence, and do not bear upon the circumstances associated with the making of the Will. His assertions do not raise a specific and focused suspicion. Rather, they centre on his position that there is no valid and rational reason for his father to have disinherited him under his Will. Those assertions properly should be the subject of his wills variation action, which he has already commenced.
- [46] I have also considered whether all of the facts and circumstances presented by Alain, when taken together, would collectively negate testamentary capacity or knowledge and approval. He argues that when taken together, they are evidence of a well-founded suspicion upon which it is reasonable to conclude that the Deceased was subject to undue influence and lacked testamentary capacity. With respect, I disagree. While taken together, his allegations may raise a suspicion that something unsavoury may have occurred, the evidence advanced by Alain does not meet the threshold of suspicious circumstances. I find the evidence does not support a specific and focused suspicion that the Deceased did not know and approve the contents of the Will, that the Deceased lacked the requisite testamentary capacity or that the Will was not the product of the Deceased's own free will.
- [47] Alain has failed to satisfy this Court that his assertions are sufficient to rebut the presumption that the Will is valid. I am satisfied that there is no dispute as to the facts or law which raise a reasonable doubt or which suggest that Alain has a defence that deserves to be tried. Put another way, I am satisfied that Alain's arguments are bound to lose, and it is appropriate to determine the issues on the basis of the within petition. In all of the circumstances, I am satisfied that the Will expresses the true will of the Deceased. I find that the Executors have proven the Will in solemn form of law and are entitled to an order to that effect.
- [30] In sum, she found that the executors had proven the will in solemn form of law and that they were entitled to an order to that effect.

ANCC Analysis

- [31] I turn to my analysis of whether parts of the ANCC should be struck. Gino made submissions which made clear that he continues to harbour suspicions about the circumstances of Mr. Charbonneau's will. This is so despite the fact that he was not a beneficiary under the will and was not a party to the petition which determined its validity. Alain was a party to that proceeding, and his allegations regarding suspicious circumstances and undue influence were finally decided within it.
- [32] It is clear that parts of the ANCC relating to the validity of the will should be struck, as the claims made have been finally decided in Blake J.'s decision. In this regard, I refer and rely upon *Stoneman v. Denman Island Local Trust Committee*, 2015 BCSC 264, at paras. 60-61, where the court wrote:

- [60] If the doctrine of res judicata applies, the action should be struck pursuant to Rule 9-5(1)(b), on the basis it is "unnecessary, scandalous, frivolous or vexatious", or Rule 9-5(1)(d), on the basis it is otherwise an abuse of process of the court. Res judicata applies if the judicial decision and order dealt with the same issues and causes and is designed to eliminate claims at a preliminary stage that are unsupportable in law: *MacDonald v. Marriott*, 1984 CanLII 829 (BC SC), [1984] B.C.J. No. 2916 (S.C.).
- [61] The court requires that parties to litigation bring all of their claims forward at the same time. The court will not, except in special circumstances, allow the same parties to open the same subject of litigation in respect of a matter which might have been brought in the first action, but was not brought forward or was omitted through negligence, inadvertence or accident. Res judicata applies not only to issues that were before the court, but also issues which properly belonged to the subject of the litigation and which the parties could have brought forward: *Henderson v. Henderson* (1843), 67 All E.R. 313; *MacDonald*, at para. 8a.
- [33] In their notice of application, Serge and Diane sought to have paragraph 35 of the factual basis of the ANCC struck on this basis. In the course of submissions, their counsel properly conceded that at least some parts of paragraph 35 may be relevant to Alain's wills variation application.
- [34] I decline to strike paragraph 35, although I note that it would open to Serge and Diane at the eventual hearing of the wills variation claim to argue that some of the subparagraphs may be subject to issue estoppel, to the extent that Blake J. made findings of fact in respect of them.
- [35] Paragraph 51 of the relief sought in the ANCC, which sought an order declaring the will to be invalid, should clearly be struck as the validity of the will was finally decided in Blake J.'s decision. Similarly, paragraphs 73, 74, and 75 of the ANCC, which plead that Mr. Charbonneau lacked testamentary capacity, that there were suspicious circumstances, and that Serge and Diane exercised influence over Mr. Charbonneau must be struck, as all of those issues were finally decided in Blake J.'s decision.

Summary of Proceedings

- [36] I turn to a summary of the proceedings in this action since the ANCC was filed. As mentioned, the plaintiffs filed the ANCC on October 21, 2020. On February 10, 2021, Gino filed a notice of intention to act in person. On May 11, 2022, this notice of application was filed. On May 13, 2022, Serge and Diane, in their capacities as co-executors and co-trustees, filed their response to civil claim. Neither they nor Ms. Aguilera have filed responses in their personal capacities, as they were never personally served.

- [37] On May 12, 2022, counsel for Serge and Diane served this application on Alain's then counsel. There is no proof of service in the materials before me of the application being served on Gino, but it is apparent that he was, in fact, served, as on May 25, 2022, Gino filed his application response and supporting affidavit.
- [38] On October 17, 2022, Alain filed a notice of intention to act in person. Alain has never responded to this application. Unfortunately, I am told that this application was adjourned six times prior to this hearing due to a lack of court availability. The plaintiffs have not renewed the ANCC. Nor have either of them taken any steps to move this proceeding forward since the ANCC was filed.

CPL Cancellation Analysis

- [39] I turn to my analysis of whether the CPL should be cancelled pursuant to s. 252 of the LTA. Section 252 of the LTA reads as follows:

Cancellation of certificate of pending litigation

252 (1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

- (2) An application under subsection (1) must be made to the court in which the proceeding was commenced and must be brought
- (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
- (b) by petition, if the applicant is not a party.
- (3) The registrar must, on application and on production of a certified copy of the order of the court directing cancellation under subsection (1), cancel the registration of the certificate of pending litigation.

- [40] In *Dhillon v. Dasta*, 2019 BCSC 729 [Dhillon], the court provided substantial guidance about the purpose of s. 252 as follows:

- [41] A certificate of pending litigation ("CPL") is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the issues in dispute can be resolved (*Berthin v. Berthin*, 2018 BCCA 57 at para. 32). However, the plaintiff must pursue an action diligently. Section 252 of the Land Title Act R.S.B.C. 1996 c. 250 (LTA) is intended to keep property from being tied up in dormant litigation.

- [41] I emphasize that, pursuant to s. 215 of the LTA, a CPL can only be legally registered and maintained if a person has and pleads a valid interest in land. A CPL protects such an interest in land. It cannot be used to secure a monetary debt.

- [42] Section 252(1) provides that if no step has been taken in the proceeding for one year, a person may apply to have a CPL cancelled. In Dhillon at para. 15, the court explained that:
- [15] "Step" within the meaning of s. 252(1) means a formal step either required or permitted by the Supreme Court Rules that moves the action forward towards trial or resolution (Lawn Genius Manufacturing (Canada) Inc. (Drainmaster) v. 0856810 BC Ltd., 2016 BCSC 1915 at paras. 11-12; West Harbour Electric Ltd. v. NGC Constructors Ltd., 2019 BCSC 452 at para. 29; see also Easton v. Cooper, 2010 BCSC 1079 at para. 9).
- [43] Exchanges of correspondence between counsel are not steps. At para. 16, the court explained that:
- [16] "One year" in s. 252(1) refers to the year immediately preceding service of the Notice of Application to cancel the CPL (Lawn Genuis Manufacturing (Canada) Inc. (Drainmaster) at para. 11).
- [44] As explained at para. 17, if the statutory pre-conditions of no step being taken within one year immediately preceding service of the notice of application are met, the court retains a discretion not to cancel the CPL. However, once those conditions are met:
- [17] ... prejudice to the landowner is presumed and the respondent must show that the prejudice is either not serious or outweighed by other factors that suggest that cancellation of the CPL would be unjust (Mozt at para. 12; Lawn Genuis Manufacturing (Canada) Inc. (Drainmaster) at para. 12; West Harbour Electric Ltd. at para. 30). Factors relevant to exercise of the court's discretion include: whether an acceptable explanation has been given for the delay, whether no prejudice would in fact be incurred, and whether the plaintiff's claim for an interest in land has a reasonable prospect of succeeding (Mozt at para. 12).
- [45] In this case, the statutory pre-conditions under s. 252 have been met. Alain was served with the notice of application through his then counsel on May 12, 2022. Gino was served no later than May 25, 2022. Neither Alain nor Gino had taken any steps that moved this litigation forward in the one-year period immediately preceding service of the notice of application. Indeed, neither of them have taken any steps to move this litigation forward since filing the ANCC on October 21, 2020, a period now of almost two and one-half years.

Exercise of Discretion

- [46] I turn to a consideration of whether it is appropriate to exercise my discretion not to cancel the CPL despite the statutory pre-conditions being met. First, I note that prejudice to the landowner is presumed. Serge swore in his first affidavit in this proceeding on May 4, 2022, that he and Diane intend to list and sell the park once they obtain grant of probate. Counsel advised that probate was granted on December 28, 2022. Serge also says that they are unable to proceed with listing and selling the park due to the CPLs.

- [47] Serge also provides some evidence of the expenses the estate is incurring and will continue to incur relating to the park until it is sold. This evidence of expenses is not particularly compelling evidence of prejudice, as no evidence was provided about the income the park was earning as on operating mobile home park. No evidence was provided by Alain on this application. Gino did provide some evidence, but none of it was about prejudice to the estate.
- [48] Notwithstanding the incomplete financial information provided by Serge and Diane about the park's operations, I accept that the estate is prejudiced by the ongoing registration of the CPLs. Probate has been granted, and it is reasonable that Serge and Diane wish to list and sell the park in order to conclude their duties as co-executors and co-trustees, and then to be able to distribute the residue of the estate. The continued registration of the CPLs, while it would not technically prevent them from listing the park, would effectively prevent it from being sold. It is contrary to the interests of the estate for it to be tied up by the CPLs for almost two and one-half years. Neither Gino nor Alain have shown that the estate would not be prejudiced by the continued registration of the CPLs.
- [49] Alain has provided no explanation for his delay in moving this litigation forward. Gino submitted that he attempted to settle the litigation, and he averted to the difficulties he has experienced in pursuing this litigation as a self-represented person. I appreciate that it is difficult for any self-represented person to move litigation of this type forward, but no acceptable explanation for the significant delay in this case has been offered.

Reasonable Prospect of Success

- [50] I turn to a consideration of whether either Gino or Alain's claims for an interest in land have a reasonable prospect of succeeding. Their claims need to be assessed separately, as they are quite different.
- [51] I will deal first with Alain. Alain pleads that the park was created 33 years ago through a joint venture between him and Mr. Charbonneau and that he assisted in building various infrastructure. He does not provide any details of this joint venture. He pleads that, while growing up, he worked closely with his father at the park. He pleads that he was not compensated for much of the work that was completed with his father during the years he worked at the park. Unlike Gino, Alain does not make any claim for unjust enrichment or quantum meruit.
- [52] Alain pleads that he is entitled to a beneficial interest in the estate. He does not plead that he has a beneficial interest in the park. Alain pleads that he relies on the law of express trusts, constructive trusts, and resulting trusts, but there is no pleading as to how any of those doctrines would apply in this case.

- [53] In *Cooney v. Purely Canadian Log Homes Ltd.*, 2023 BCSC 210 [Cooney], the court dealt with an application to cancel a CPL under s. 252 in circumstances where the plaintiff claimed that the defendant held the property in trust by way of an express, resulting or constructive trust. At para. 40 the court referred to *Sohi v. Sohi*, 2017 BCSC 678, at para. 21, for a description of the three types of trust relied on both there and by Alain in the ANCC:
- [21] The law recognizes three kinds of trust. Express trusts are intentionally created by settlors. Resulting trusts arise by operation of law in the absence of an intention to confer full rights of ownership on a recipient of property. Constructive trusts are created by the court to vindicate a plaintiff's right. Any of these trusts gives rise to equitable rights for the beneficiary that may overcome the usual presumption under s. 23 of the Land Title Act, R.S.B.C. 1996, c. 250, that a certificate of title is conclusive evidence of entitlement; *Suen v. Suen*, 2013 BCCA 313 at para. 34.
- [54] As in *Cooney*, there is no evidence that Alain is the beneficiary of any express or resulting trusts, and those claims have no chance of success. A constructive trust is a remedy for unjust enrichment. Alain does not plead unjust enrichment, and there are scant factual pleadings in the ANCC upon which such a pleading could be based. A claim of constructive trust for Alain's benefit has no reasonable chance of success. As Serge and Diane submitted, Alain's claim is really a wills variation claim. It is not a claim for an interest in land. He has no reasonable prospect of establishing an interest in land.
- [55] I turn to a consideration of whether Gino has a reasonable prospect of establishing an interest in land. As mentioned, Gino does plead unjust enrichment, or in the alternative quantum meruit. Serge and Diane submit that Gino fails to seek any proprietary claim, to provide any evidence in support of his unjust enrichment claim, or to plead a constructive trust. They further submit that he has not pleaded that a monetary remedy is inadequate and that this is fatal to any proprietary claim.
- [56] Gino does plead that the estate and its executors hold certain property in trust for him as a result of the estate being unjustly enriched by his work at the park. While not a clear pleading of there being a constructive trust over the park, I think that is the reasonably available implication of the pleading. Gino has provided some evidence that would be capable of supporting the inference that he performed work for Mr. Charbonneau related to the park, in the form of correspondence with officials from the Village of Canal Flats, in which they dealt with Gino about issues related to the park. Gino submitted, without evidence to support it, that he worked for years on the park.
- [57] In light of the fact Gino is self-represented and did not appreciate how to marshal evidence of the work he performed and whether he was compensated for it, I would not find that he does not have a reasonable prospect of establishing an interest in land on this basis.

- [58] It is true that Gino does not plead that a monetary remedy would be inadequate. In cases relied upon by Serge and Diane, such as *Nouhi v. Pourtaghi*, 2019 BCSC 794; and *Beijing Tian Zi Property Group Trading Ltd. v. Jia*, 2021 BCSC 423, this court has held that the failure of a plaintiff to plead that a monetary remedy would be inadequate is fatal to a claim for constructive trust and thus to the maintenance of a CPL.
- [59] In *Save-A-Lot Holdings Corp. v. Christensen*, 2022 BCCA 39, a case not cited by Serge and Diane, the Court of Appeal discussed this line of cases at paras. 11-17, and certainly cast some doubt on that holding, but did not decide the pleadings issue raised. For a further discussion of this issue, one can also review *Dhanani v. Kassam*, 2022 BCSC 2271, at paras. 22-32. Given what I would suggest is the currently unsettled state of the jurisprudence on this pleadings issue, I would not cancel Gino's CPL on the basis that he fails to plead that a monetary remedy is inadequate.
- [60] In *Cooney*, the court cancelled the CPL in circumstances where it could not say that the plaintiff's claim in unjust enrichment was bound to fail. The court noted at para. 43 that even if the plaintiff is successful in proving an unjust enrichment claim, the courts typically only impose a constructive trust as a remedy where a monetary remedy would not be adequate. At para. 44 of *Cooney*, the court concluded that a monetary remedy would probably suffice if the plaintiff was successful. This is a different argument than that the failure to plead the insufficiency of a monetary remedy is fatal. Given that Gino specifically seeks damages in the alternative to a trust claim, it appears that a monetary remedy would probably suffice, if he were successful.

Considering the matter as a whole, I do not think Gino's claim to an interest in land is bound to fail, but neither do I think that it has a reasonable prospect of success. I conclude in the case of both Alain and Gino, that the statutory pre-conditions for their CPLs to be cancelled pursuant to s. 252 have been established. That is, they took no steps to move this litigation forward in the one-year period preceding being served with this application. In both cases, I conclude that it is appropriate for me to exercise my discretion to cancel the CPLs. There has simply been too much unexplained delay in moving this litigation forward to justify the park continuing to be tied up by this dormant litigation. Alain's claim to an interest in land is, in my view, bound to fail. While Gino's claim to an interest in land is not bound to fail, it is not strong, and the equities favour both CPLs being cancelled. In light of this conclusion, it is not necessary for me to consider Serge and Diane's application under s. 215 of the LTA.

Summary

- [61] In summary, I have ordered that both CPLs be cancelled under s. 252 of the LTA. Specifically, CA 8514291 and CA 8514300 are cancelled against the property legally described as PID 011140615, Lot 25, District Lot 110, Kootenay District Plan 1738, except part included in Plan 16422.

- [62] I order that upon filing a certified copy of this order at the Nelson Land Title Office, the registrar of the Land Title Office shall forthwith cause the CPLs to be cancelled against the property.
- [63] The order sought that the plaintiffs require leave before registering any further CPLs against the property in this or any subsequent proceeding is adjourned generally.
- [64] I have ordered that paragraphs 51, 73, 74, and 75 of the ANCC be struck, as those claims were finally decided in Blake J.'s decision.
- [65] The order sought that one of the plaintiffs be removed from this proceeding and file a separate action for his claims is adjourned generally.
- [66] I order that Gino pay to Serge and Diane, in their capacities as co-executors and co-trustees, the costs of this application in any event of the cause.
- [67] Finally, I note that, in the hearing, counsel for Serge and Diane submitted that the estate was improperly named in the style of cause. She was correct in this submission. I, therefore, amend the style of cause as follows:

Alain Charbonneau and Benoit Joseph Gino Charbonneau Gravel against Serge Charbonneau and Diane Charbonneau in their capacities as coexecutors of the will of Joseph Armand Benoit Charbonneau, and cotrustees of the estate of Joseph Armand Benoit Charbonneau, Serge Charbonneau, Diane Charbonneau, and Esperanza De Pu Aguilera.

[68] That concludes my reasons for judgment.

"L.M. Lyster J."

LYSTER J.

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