

CANADA / JUDGMENT

Chartier v. Chartier

2022 BCSC 2155

COURT

Supreme Court of British Columbia

DECIDED

18 August 2022

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2022 BCSC 2155 Chartier v. Chartier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chartier v. Chartier,

2022 BCSC 2155

Date: 20220818

Docket: VIC-S-S-195449

Registry: Victoria

Between:

Elaine Janet Whiffin Chartier, as Executrix of the

Estate of Ruby Elizabeth Johnston Whiffin and Diane Ruby Wilkinson

Plaintiffs

And

Elaine Janet Whiffin Chartier and

the Estate of Ruby Elizabeth Johnston Whiffin

Defendants

Before: The Honourable G.R.J. Gaul

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing by videoconference:

J.M. Hutchison, Q.C.

Counsel for the Defendant appearing by videoconference:

D.A. Hunter

C.D. Rodocker

Place and Date of Hearing:

Victoria, B.C.

May 16, 2022

June 14, 2022

Place and Date of Judgment:

Victoria, B.C.

August 18, 2022

- [1] THE COURT: The plaintiff, Diane Wilkinson, and the defendant, Elaine Chartier, are sisters. Their father, Ronald Whiffin, died in 1994. Their mother, Ruby Whiffin, died on 14 January 2017. For ease of reference, I will refer to these individuals by their first names.
- [2] Ronald and Ruby Whiffin lived at 7864 Langley Street in Burnaby, B.C. (the "Family Residence"). They owned the property in joint tenancy, and during their marital relationship Ronald handled most, if not all, of the family finances.
- [3] A few months prior to Ronald's death, Elaine moved into the Family Residence and began living with her parents.
- [4] When Ronald died, his interest in the Family Residence transferred to Ruby as the surviving joint tenant and consequently she became the property's sole owner.
- [5] After Ronald's death and until he himself died in December 2009, James Allen Whiffin, one of Ronald and Ruby's sons, handled most of his mother's financial affairs. After James' death, Elaine took on the role of managing Ruby's financial affairs.
- [6] Ruby's last will and testament, dated 12 February 2010, named Elaine as the executor of her estate and sole residual beneficiary (the "Will"). Diane received the legacy of Ruby's jewelry.
- [7] In or about October 2013, Ruby executed a document transferring title to the Family Residence to Elaine. This document was filed at the Land Title Office in May 2015 (the "Property Transfer Document").
- [8] Diane says the Family Residence was illegitimately and improperly transferred to Elaine. This complaint is what prompted Diane to institute these proceedings.

The Litigation

- [9] By notice of civil claim filed 6 December 2019, Diane commenced the present action in two separate capacities. In her personal capacity, she challenges the validity of the Will. In doing so, she alleges that Ruby lacked the testamentary capacity to execute the document. In the alternative and in the event the Will is found to be valid, Diane seeks to have the Will varied pursuant to section 60 of the Wills, Estates and Succession Act ("WESA").
- [10] With leave of the Court granted pursuant to section 151 of WESA, Diane also pursues claims against Elaine on behalf of her mother Ruby's estate. Specifically, Diane disputes the validity of Ruby's transfer of the title to the Family Residence to Elaine. Diane maintains that the transfer was obtained because of Elaine's undue influence over her mother and that Ruby did not have the mental capacity at the time to properly execute the Property Transfer Document.
- [11] The factual allegations of undue influence and lack of mental capacity contained in the notice of civil claim include the following:
10. During her lifetime and until the death of her husband, Ruby was entirely dependent upon him for the conduct of all financial matters relating to their marriage and their property.
 11. After her husband's death, Ruby's affairs were managed for her by her son James Allen Whiffin pursuant to a grant of power of attorney that she had made in his favour, and she was wholly dependent therefore upon her son, which ceased when he died on 4 December 2009.
 12. Shortly before the death of Ruby's husband, Elaine came to stay with Ruby and Ruby's husband on a temporary basis following a breakdown in her marriage, leaving her children with her husband, for the express purpose of sorting out her affairs.
 13. Without interruption Elaine has continued to live at the family residence since her intended temporary accommodation began.
 14. Ruby's husband, and later her son James Allen Whiffin, each expressed concerns about Elaine's residence and her anticipated dominance of Ruby.
 22. After the death of Ruby's son James Allen Whiffin, Elaine persuaded Diane, even though Diane was the elder of Ruby's surviving children, that since she was residing with their mother Ruby, she should be the replacement power of attorney for Ruby. Accordingly, a new power of attorney was prepared, making Elaine the replacement for James Allen Whiffin.
 24. Prior to the death of James Allen Whiffin, Ruby displayed signs of behavioural change in that she became more slovenly in her appearance, dressed inappropriately, and displayed memory difficulties including failing to recognize family members with whom she had frequent conduct.

25. After the death of James Allen Whiffin, Elaine intervened and hindered the communications and visits between family members and Ruby, and insisted on being present when they were visiting with Ruby.
26. After the death of James ... Ruby's mental deterioration became increasingly noticeable and showed a steady deterioration, and she was at times quite delusional.
- [12] The portion of the notice of civil claim that describes the legal basis for Diane's claims of undue influence and lack of mental capacity consist of the following:
1. The facts and circumstances give rise to a presumption that Elaine exerted undue and improper influence over Ruby, after the death of Ruby's husband.
 4. The facts and circumstances are sufficient to determine that Ruby was ... not competent to transfer title to the family residence on 29 October 2013, and each should be set aside and determined to be of no force and effect; and such consequential orders ... are required to reverse the transaction should be made.
- [13] For ease of reference, I will reproduce the portions of the relief sought in the notice of civil claim that the defendant seeks to have dismissed on the present application:
1. An order declaring that the family residence is held in trust for Ruby's estate.
 2. Alternatively, an order declaring that the transfer of the title to the family residence is invalid by reason of the undue influence of Elaine upon Ruby and vesting title to the family residence in the estate.
- ...
4. An order that Elaine account to the estate for all proceeds of the borrowing secured by the mortgage she granted against title to the family residence.
 5. An order that Elaine pay occupational rent to the estate from June 2015 for her occupation of the family residence.
 6. An order that Elaine pay to the estate all liability for deferred property taxes in respect of the family residence as a result of the Land Tax Deferment Agreement she entered into and secured against title to the family residence.

Nature of the present application

- [14] By notice of application filed 4 October 2021, Elaine seeks to have the above-noted claims for relief in the notice of civil claim summarily dismissed pursuant to Rule 9-6 of the Supreme Court Civil Rules.
- [15] The evidence of Diane on this application comes from her examination for discovery in May 2021 and from the two affidavits that she has sworn.

- [16] In *Beach Estate v. Beach*, 2019 BCCA 277, Chief Justice Bauman explained the nature of a Rule 9-6 application as follows:
- [48] Rule 9-5 is a challenge on the pleadings. Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46, quoting *Progressive Construction Ltd. v. Newton* (1981), 25 B.C.L.R. 330 at 335; *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para 14. Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10-11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.
- [17] More recently in *Robinson v. Kuypers*, 2020 BCSC 770, Mr. Justice Harvey of this court observed:
- [46] An application pursuant to Rule 9-6 is an assertion that the claim is factually without merit. If there is no genuine issue for trial, the claim will be dismissed: *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong Ltd.*, 2011 BCCA 149, at para. 9.
- [18] Elaine maintains that the impugned claims she has identified in Diane's notice of civil claim have no chance of success and are bound to lose because they are statute-barred by the Limitations Act, which provides as follows:

6(1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

...

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[19] The Limitation Act also includes specific provisions that apply to the discovery of fraud or trust claims. Such claims are defined in section 12 of the Limitation Act as including "claims to recover from a trustee trust property or the proceeds from the trust property if that property is or those proceeds are in the possession of the trustee". Section 12(2) of the Limitation Act explicitly provides:

A fraud or trust claim is discovered when the beneficiary becomes fully aware

- (a) that injury, loss or damage had occurred,
- (b) that the injury, loss or damage was caused by or contributed to by the
 - (i) fraud,
 - (ii) fraudulent breach of trust,
 - (iii) conversion, or
 - (iv) other act or omission on which the claim is based,
- (c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

Discussion

[20] Diane submits that the first aspect of the relief she seeks, that is, an order declaring that the Family Residence is held in trust for Ruby's estate, is not impacted or statute-barred by the Limitation Act. In advancing this argument, counsel for Diane points to subsection 2(1) of the Limitation Act, which provides:

This Act does not apply to the following court proceedings and has no impact on when or if such court proceedings may be brought.

...

- (d) a court proceeding in which the only relief sought is to obtain a declaration;

[21] In essence, counsel for Diane contends that for the purposes of the Limitation Act a "court proceeding" is the same as a claim. I am not persuaded that is so. In *Lower v. Investment Industry Regulatory Organization of Canada*, 2019 BCSC 2188, Madam Justice Norell rejected a similar argument. At paragraph 77 to 80 of her reasons for judgment, Justice Norell explained:

[77] The Current Limitation Act makes a distinction between a "claim" and a "court proceeding in which the only relief sought is to obtain a declaration". It defines a "claim" as a "claim to remedy an injury, loss or damage". "Declaration" is not defined, but in my view cannot be a "claim" because, by its nature, a declaration does not remedy an injury, loss or damage. It

pronounces on a legal state of affairs. A declaration does not order a person to do anything. This distinction is consistent with the transitional provisions in s. 30, which refer only to "pre-existing claims", and the inapplicability of the entire Current Limitation Act to the exempt court proceedings set out in s. 2.

- [78] The parties did not locate any B.C. case authority that has addressed the characterization of an action for a declaration for the purposes of the Current Limitation Act when all other consequential relief is statute barred. However, that issue has been addressed in other provinces where there are similar limitation acts.
- [79] In *Yellowbird v. Samson Cree Nation No. 444*, 2006 ABQB 434 at para. 35-38, aff'd 2008 ABCA 270, the Court stated:
- [35] The cases show that plaintiffs faced with a limitations problem will sometimes seek a declaration that the defendant has violated a right or owes a duty, in an attempt to avoid openly seeking a remedial order. To date the cases have not identified a satisfactory test on this issue. In my respectful view, an attempt to define the boundary between remedial orders and declaratory orders by searching for the "thrust of the claim" is unproductive. This test is too vague to be helpful, and will lead to results-oriented jurisprudence. The statutory test is whether the relief requires the defendant to comply with a duty or pay damages for violating a right. The coercive nature of a remedial order is captured in the words "requiring a defendant to comply". A helpful test to determine if the relief is truly declaratory, or only declaratory in form, is:

If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff "leave the court in peace" and enjoy the benefits of the declaration "without further resort to the judicial process"?

- [37] Theoretically the Court could issue a bare declaration that a sum of money is owed. But if the defendant resisted the declaration, the plaintiff could not collect without getting a remedial order as well: *Papaschase Indian Band No. 136 v. Canada*, 2004 ABQB 655 (CanLII), [2005] 8 W.W.R. 442, 43 Alta. L.R. (4th) 41, 365 A.R. 1, [2004] 4 C.N.L.R. 110, at para. 154. If the necessary remedial order is barred by the Limitations Act, the judicial system would be faced with a declaratory order that the defendant does not have to obey, and a plaintiff with a supposed right, but no remedy. This undermines respect for the orders of the Court, which is why the Court, in its discretion, will not grant declarations in these circumstances.
- [38] As I have noted, describing the remedial relief as being "ancillary" to a declaration does not change its character as a remedial order. The mischief of the "ancillary relief" argument can be seen in this case. The Plaintiffs claimed a declaration of membership in the Defendant Band, claimed a declaration that they are entitled to all financial benefits that result from membership, and then argue that the second part of the relief is merely ancillary to the first. Even though the Defendant has now conceded that the Plaintiffs are members, rendering that portion of the claim moot, the Plaintiffs continue to press for the declaration of entitlement to benefits. If a plaintiff could avoid the Limitations Act by the simple stratagem

of asking for a declaration of a state of affairs that is not disputed, and then attaching remedial relief to that declaration, there would not be much left of the Act. For example, the plaintiff could claim a declaration that the plaintiff and defendant were parties to a contract, and then seek to avoid the limitation period by "attaching" a declaration that the plaintiff is entitled to all damages that flow from a breach of that contract.

[80] In *McMurtry*, the court stated:

[134] The case law and academic authorities emphasize that "declaratory relief" is to be construed narrowly - specifically because relief in that form is not subject to a limitation period. In *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Carswell, 2007) at p. 3, the author introduces the subject as follows:

The essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness and judicial support to the legal relationship between the parties without an order of enforcement or execution

If a declaration is merely ancillary to consequential relief which is statute-barred, the entire recourse is considered as consequential relief and will fail. [Footnote omitted]

[135] It is the potential for additional resort to the judicial process, and not the potential for additional administrative or other steps to be required, that is meant by "consequential relief".

[22] I agree with Justice Norell and adopt her reasoning in the present case. Moreover and in any event, contrary to counsel for Diane's assertion that all that is being sought in paragraph 1 of the relief is a declaratory order, I find that the plaintiff, Diane, is or must be seeking more than that. In her affidavit number 2, sworn 18 October 2021, Diane explains:

[2] I have commenced this action, to recover property or to enforce rights, duties or obligations owed to the estate of my late mother, Ruby

[23] I should also note that if the Court made the declaration sought in paragraph 1, then Diane would still need to seek the Court's assistance to enforce the results of the declaration in the event Elaine refused to take steps to return title to the Family Residence to the estate. Adopting the wording used in *Yellowbird*, Diane could not leave the court in peace and enjoy the benefits of the declaration without further resort to the judicial process.

[24] In my opinion, the provisions of the Limitation Act apply squarely to all of the relief under consideration on this application. Consequently, I find the two critical questions to answer are those posed by Elaine's counsel:

- a) What incontrovertible material facts did Diane know or ought she have known and when did she know them?; and
- b) Could Diane have drawn a plausible inference of liability on Elaine's part based on the incontrovertible facts which she, Diane, had or ought to have had knowledge of?

[25] I have reviewed all of the evidence presented on this application and I am satisfied that:

- a) Diane knew that dating back to the 1990s, Ruby was reliant on others, like her husband, Ronald, and then her son, James, for the management of her financial affairs;
- b) Since the time Elaine moved into the Family Residence in or around 1994, Diane was suspicious of Elaine's motives and her concerns about Elaine continued to grow as Elaine became more involved in the management of her parents' finances, especially Ruby's;
- c) Diane knew that following James' death in 2009, Elaine took on the responsibility of managing Ruby's financial affairs;
- d) Shortly before James' death in 2009, Diane began to notice clear signs indicating a decline in Ruby's cognitive abilities and that those abilities declined even further and quicker after James had died;
- e) Diane knew there was a dramatic reduction in Ruby's cognitive functioning, especially her memory, after the stroke she suffered in 2013;
- f) Because of her immense distrust of Elaine and her suspicion that she might transfer the Family Residence into her name, in 2014 Diane obtained a title search for the property and confirmed that it was still registered in Ruby's name;
- g) On or about 4 January 2016, with her distrust of Elaine undiminished, Diane again had a title search conducted on the Family Residence. It was at this point that she became aware that title to the property had been transferred into Elaine's name;
- h) A year later, in February 2017, Diane obtained a third title search on the Family Residence, again confirming that it was registered solely in Elaine's name;
- i) In early March 2017, Diane's counsel obtained a transfer document from the Land Title Office, which indicated that the Family Residence had been transferred to Elaine for the nominal consideration of one dollar; and
- j) In early March 2017, Diane obtained a copy of the Will and became aware of its contents, including that Elaine was named as the principal beneficiary. It was around this time that Diane sought legal advice relating to her options vis-à-vis her mother's estate and the property in question.

[26] Based upon these incontrovertible facts, facts that I am satisfied Diane had actual knowledge of, I conclude that she could have drawn a very plausible inference of liability on the part of Elaine by early 2017.

- [27] I accept the submission of Elaine's counsel that given Diane's knowledge of these facts and the strong suspicions she had of Elaine's motives, Diane discovered and became aware of the claims or potential claims against Elaine by the date of Ruby's death in January 2017 and most certainly no later than early March 2017. As counsel correctly pointed out during his submissions, by early March 2017, at the latest, it was very plausible that:
- a) The transfer of the Family Residence to Elaine for practically no consideration may have caused injury, loss, or damage to Ruby and, by extension, to her estate; and
 - b) The loss was caused because of the transfer of the property in circumstances in which Ruby was possibly vulnerable and heavily reliant on Elaine and at a time when Ruby may not have possessed the required mental capacity to gift the Family Residence to Elaine.
- [28] Counsel for Diane argues that while Diane was aware of the transfer as of January 2016, she had no claim or standing to make a claim at the time. It was only after she was given a copy of the Will that she began to take steps to challenge Elaine's personal conduct and her conduct as executor of Ruby's estate. In my opinion that argument is not persuasive. As of the date of Ruby's death, Diane had a number of options available to her, including:
- a) She could have, as she eventually did, seek leave of the Court to start an action for the recovery of the Family Residence in the name of Ruby's estate; or
 - b) She could have, as a named beneficiary in Ruby's Will, filed an action before the expiry of the limitation date seeking a declaration that Elaine held the Family Residence in trust for the estate and then sought leave under section 151 of WESA to bring the estate into conformity with the declaration.
- [29] I am satisfied that Diane knew, as of March 2017 at the latest, that she could and should take steps to address her concerns about the transfer of the Family Residence to Elaine. She did take some steps and that is further evidence that she was aware of Elaine's potential liability to Ruby and her estate. However, given the pace and timing of those steps, I am satisfied that they were too little and definitely too late.

Conclusion

- [30] In my opinion, by March 2017 at the latest, Diane actually knew that it was plausible that Elaine had improperly received the Family Residence from Ruby.
- [31] Given that Diane did not seek leave to start the present action until October 2019 and did not actually file her notice of civil claim until December 2019, I find the claims in question on this application were commenced beyond the applicable limitation period set out in the Limitation Act and are consequently statute-barred from proceeding.
- [32] The law is settled that when an action has clearly been commenced beyond the statutory limitation date established by the Limitation Act, summary dismissal of the claim is warranted.

[33] For all of the foregoing reasons, the defendant Elaine's application is granted. Paragraphs 1, 2, 4, 5, and 6 of Part 2 of the notice of civil claim are dismissed.

[34] Elaine has been successful in this application and consequently she is entitled to her costs on Scale B.

"G.R.J. Gaul J."

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