
CANADA / JUDGMENT

Creyke v. Creyke

2014 BCSC 1632

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1632 Creyke v. Creyke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Creyke v. Creyke,

2014 BCSC 1632

Date: 20140826

Docket: 15413

Registry: Smithers

Between:

Troy Leslie Creyke

Plaintiff

And

Jerry Andrew Creyke

Defendant

Before: The Honourable Mr. Justice R. Punnett

Reasons for Judgment

Counsel for the Plaintiff:

T.R. Buri, Q.C.

Counsel for the Defendant:

G.E. Greene

Place and Date of Hearing:

Smithers, B.C.

March 11-14, 2014

Prince Rupert, B.C.

May 2, 2014

Place and Date of Judgment:

Smithers, B.C.

August 26, 2014

- [1] This matter concerns a dispute over the ownership of a guide outfitter certificate issued under the Wildlife Act, R.S.B.C. 1996, c. 488 [Act], along with a number of related assets. The certificate grants the holder exclusive control over guiding privileges for big game hunting in a territory in north western British Columbia, near Dease and Kinaskan Lakes. The certificate (and the related guide outfitting business) has been in the Creyke family for a number of generations; it is currently held in the name of the defendant, Jerry Creyke. The plaintiff in this matter, Troy Creyke, is the defendant's nephew, and the son of Bruce Creyke, who held the certificate and operated the related guide outfitting business prior to 2003. The dispute before the court concerns the nature of the defendant's interest in the guide outfitter certificate and the business assets and the manner in which he came to be in possession of them in 2003.
- [2] The plaintiff seeks a declaration that the certificate and other assets associated with the guide outfitting business are held by the defendant in trust for the plaintiff, along with an order transferring those assets to the plaintiff and an order for an accounting by the defendant for his use of the assets held in trust. He has applied for judgment by way of a summary trial, pursuant to Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 169/2009.
- [3] The defendant takes the position that this matter is unsuitable for summary determination. He applies pursuant to Rule 9-7(11) to have the application dismissed on the basis that the issues raised are not suitable for disposition under the Rule, and (in the alternative) seeks an adjournment in order to file additional material in advance of any summary trial hearing.
- [4] For the reasons that follow, I dismissed the defendant's application and proceeded to hear submissions on the merits. However, having heard those arguments, I have concluded that it is not possible to find the facts necessary to decide the issues of fact or law, and that it would be unjust to decide the issues on the application. I therefore decline to grant judgment as sought. The plaintiff's application for summary judgment is dismissed.

Application to Adjourn in Order to File Additional Material

- [5] The plaintiff filed his application for summary trial on October 21, 2013. The defendant retained new counsel in October 2013 and counsel received the Rule 9-7 application at that time.
- [6] On February 7, 2014 the defendant filed an application seeking the dismissal of the summary trial application on the grounds that the issues raised were not suitable for summary disposition. In the alternative, in the event that the summary trial application proceeded, the defendant sought an adjournment in order "to allow the [defendant] to file further response affidavits." In his application, the defendant indicated that he opposed the summary trial application in part because he wished "to avoid preparing affidavits for the seven witnesses" who have provided statements thus far. The defendant also indicated that he had "too much evidence to present by affidavit". Further, he indicated that he needed time to deal with certain documents held by the Ministry of the Environment. Finally, his counsel supplemented the above grounds by advising the court that he had not had adequate time to assimilate all of the material and that he had not yet received all material from the defendant's prior counsel.
- [7] A party is not entitled to frustrate a summary trial application by failing to prepare or take pre-trial steps in a timely manner: *Quantum Murray LP v. Soprema Inc.*, 2014 BCSC 437 at para. 15. As noted above, the defendant received adequate notice of these proceedings and adequate time to prepare. In addition, the defendant candidly stated in his materials that he had changed counsel in the fall of 2013 as a result of losing an interim application in this proceeding and losing a leave to appeal application respecting that interim application. He cannot rely on any delay attributable to that decision to frustrate this process.
- [8] The defendant chose not to prepare further affidavit material, despite the fact that he says that such material is relevant to the fact-finding process. That is a risky approach, as the court may find the matter can be resolved summarily and proceed with the materials as filed. There is no "respondent's veto" in the Rule 9-7 process; the respondent cannot allege that the factual record is insufficient for summary disposition by failing to provide the necessary facts: *Inspiration Mgmt Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 214. Given the circumstances, I was not satisfied that the defendant had established grounds for an adjournment or a basis for dismissal under Rule 9-7(11). The application to adjourn was therefore dismissed and the matter proceeded on the basis of the material as filed.

Statutory Scheme

- [9] In order to understand the events in issue, some understanding of the statutory scheme under which the certificate was issued is required. The governing statute is the Wildlife Act. Under s. 47 of the Act it is an offence to hunt big game unless you are a resident of British Columbia or, if not a resident, are accompanied by a guide licensed under the Act or by a

person who holds a permit under s. 70(1)(a) of the Act (a section which we are not concerned with here). Guide outfitter licences are governed by s. 51; the licence permits the holder to guide persons to hunt for the species of game and in the area described in the licence. A guide outfitter must be able to satisfy a regional manager of the recreational fisheries and wildlife programs (the "Regional Manager") that he or she possesses a working knowledge of the Act and the regulations.

- [10] In addition to the guide outfitter licences, the Act also permits the issue of assistant guide licences under s. 54(1); those licensed to act as assistant guides must operate under the employ of a guide outfitter. Under s. 48, a guide outfitter must be present in his or her guiding area during a majority of the time when his or her assistant guides are guiding for game.
- [11] A guiding territory certificate is available under s. 59. The certificate "grants to the holder the exclusive control over guiding privileges in the area described in the certificate for the period stated in the certificate, which may not exceed 25 years." Ownership of the certificates may only be transferred with the authorization of the Regional Manager: s. 62.

Background

- [12] The members of the Creyke family are indigenous people of Tahltan ancestry. As the parties and other family members share the same last name I shall refer to them by both their given and family names.
- [13] John Creyke, the defendant's father and the plaintiff's grandfather, was a well-known guide outfitter in the area around Dease and Kinaskan Lakes in northwestern BC. When he died in July 1969, his wife, Dinah Creyke, was the sole beneficiary of his estate. His son, Bruce Creyke, took over the guiding operation.
- [14] Louise Carlick, Bruce Creyke's common-law spouse, deposed that after John Creyke's death Bruce Creyke initially ran the guiding outfit on Dinah Creyke's behalf for a salary. After he reached an agreement with Dinah Creyke, Bruce Creyke applied for and received the guide outfitter certificate (the "Certificate") for the guiding territory that had belonged to John Creyke. That certificate was issued in 1973.
- [15] The agreement between Dinah Creyke and Bruce Creyke is evidenced by an agreement for sale prepared by a lawyer in Whitehorse, Yukon (the only copy produced however is unsigned). The recitals state that Dinah Creyke is the owner in equity of the big game hunting area and the owner of goods, equipment and horses. Under the terms of the agreement for sale Bruce Creyke purchased all of those assets for \$75,000, paid in installments. The installments required Bruce Creyke to pay approximately \$10,500 a year until the end of 1980. The agreement also provided that a default in payment gave the vendor the option to terminate the agreement, receive back all of the assets and retain the payments made to the date of default.

- [16] Louise Carlick deposes that she did the paperwork for the guiding outfit and in fact wrote out the cheques that were paid to Dinah Creyke in payment of the purchase price agreed to in the agreement for sale. The plaintiff has produced cancelled cheques from Bruce Creyke to Dinah Creyke, evidencing payment totalling \$69,500 by October 20, 1980. There is a shortfall of \$5,500 from the agreed-upon purchase price and it is not clear if that shortfall was in fact paid or forgiven. Louise Carlick deposes that she recalls Bruce Creyke paying off the entire purchase price. She also says that no one ever suggested that Bruce Creyke did not own the business from the time he took over in 1971 until he relinquished his guide outfitter certificate in 2003. I note that the vendor never moved to terminate the agreement.
- [17] From 1971 to 2003 the plaintiff alleges that Bruce Creyke was the sole legal and beneficial owner of the assets used by him in his guide outfitting business, including the Certificate. As discussed above, the Certificate gives the holder what is essentially an exclusive right to guide non-residents to hunt big game within the territory described in the Certificate.
- [18] Bruce Creyke operated the guide business as a sole proprietorship under the name "Kinaskan Lake Outfitters". He employed many of his brothers and sisters, including Jerry Creyke, the defendant, as well as his son, the plaintiff, as wranglers, cooks and assistant guides in the business. They were paid for their services.
- [19] In the mid-1990s Bruce Creyke apparently developed Alzheimer's disease. While there was no expert evidence establishing his condition, it is not in dispute that as time went on he was no longer able to run the guiding business. One of his brothers, Leonard Creyke, operated the business on Bruce Creyke's behalf from 1995 to 2003 and paid Bruce \$20,000 to \$30,000 per annum from the business.
- [20] However, the Act requires that the certificate holder manage the activities and guiding done pursuant to the Certificate. When the Regional Manager of the Wildlife Branch in Smithers, British Columbia became aware that Bruce Creyke was not personally managing the guiding business, he informed the Creykes that Bruce Creyke had to transfer the Certificate to a qualified family member. Failure to do so would see the Certificate made available to third parties.
- [21] As a result, on May 6, 2003, a meeting was held at the Smithers Wildlife office. Present from the Creyke family were Bruce Creyke, Louise Carlick, and Troy Creyke; Bruce Creyke's brothers Scott Creyke, Syd Creyke, Chris Creyke, Leonard Creyke, and Jerry Creyke; and Bruce's nephew, Leslie Creyke. The Wildlife Branch was represented by Dana Atagi, fish and wildlife section head; Frank Guillon, wildlife technician; and Hugh Markides, the Regional Manager of environmental stewardship, who attended by speakerphone. Mr. Guillon kept minutes of the meeting. The minutes state as follows:

The meeting was held as a result of Bruce's deteriorating health and what did the family want to do with the Guiding Territory.

The business has always been run as a family, first held by Bruce's dad. When the dad died, it was [p]ut into Bruce's name as he was the oldest son, with the dad[']s wishes it stay in the family.

Bruce expressed an interest in putting the area into his Brother Jerry's name along with his son Troy. The act allows for only one name on the licence, and Troy only has 15 months of actively guiding at this time.

There was another problem, in the fact that the outfit has a Grizzly Bear hunter arriving on May 15 to go hunting. As Bruce is not well enough to operate the territory, a temporary permit (2q) could be issued to one of the eligible brothers to act as the Guide outfitter for the spring hunt. Jerry was the one who accepted the take the permit [sic].

The permit will be for the spring hunt only, and a family decision will be made by early summer, as to who Bruce will transfer the territory to. The transfer papers will be sent in before the beginning of the fall season.

Paper work and licence applications for the Guide licence and assistant licences were made and funds paid.

The licenses will be issued along with a 2q permit to Jerry to cover the spring bear season.

Information will need to be provided to this office by early summer with regards to a transfer of the territory.

[22] The meeting ended on the understanding that the Wildlife Branch would hear back from Bruce Creyke regarding the permanent transfer of the guiding territory. It was not until July 4, 2003 that Bruce Creyke provided the Relinquishment of Guide Area form and the Relinquishment of Guide Outfitter Territory to the Wildlife Branch. In those documents he selected his brother Jerry Creyke, the defendant, to receive the Certificate. In accordance with those instructions the Ministry issued the licences to the defendant.

[23] The defendant then assumed responsibility for the guiding outfit. While the residual assets used in the operation were not formally transferred to him, he paid the annual taxes and lease costs for their use. He continued to operate the guiding outfit throughout the remainder of Bruce Creyke's life (Bruce Creyke passed away in 2006) and has done so until the present day. The plaintiff, Troy Creyke, operated what the defendant describes as an "unauthorized business" as an outfitter on a portion of the territory that is now in the defendant's name. In 2006 they had a falling out. Until the plaintiff did so in 2007, no one in the family had challenged the defendant's control over the guiding outfit.

[24] There is some evidence that the defendant paid funds to Bruce Creyke and Louise Carlick with regards to some assets of the guiding business, although the nature of those payments is in dispute. Certainly no formal sale is alleged. The defendant states that he continued to give money to Bruce Creyke and Louise Carlick after 2003 "to help with their lives," rather than as payment for the business itself.

Position of the Plaintiff

- [25] As noted earlier, the plaintiff seeks a declaration that the Certificate and the other assets associated with the guide outfitting business formerly carried on by Bruce Creyke are held by the defendant in trust for the plaintiff absolutely; an order transferring and conveying the assets to the plaintiff, along with an order for an accounting by the defendant for his use of the assets (including rents, profits, dividends etc. received by the defendant in respect of the assets that are subject to the trust); or, in the alternative, a declaration that the plaintiff has an equitable interest in the assets.

Position of the Defendant

- [26] The defendant's position appears to be that there is evidence of an intention that the licence stay in the family, with Jerry Creyke as the main asset-holder, and that the events at the meeting with the Ministry and subsequent events confirmed the exercise of that intention. That is, he says that Bruce Creyke always intended that he would gift or transfer the Certificate (and other assets) to Jerry Creyke.
- [27] The defendant also submits that the discretionary licence cannot be divided into legal and beneficial interests, submitting that the plaintiff is making that argument in order to advance its claim as an equitable claim.
- [28] The defendant further submits that the pleadings restrict the trust claim to a resulting trust and that is not established and that no plea of constructive trust has been advanced. The defendant also submits that the licence was surrendered by Bruce Creyke and re-issued by the Ministry, so that there was no transfer of the licence in any event.
- [29] The defendant further alleges the plaintiff is guilty of bad faith, that the defendant in fact did provide consideration for the assets, that the affidavits filed by the plaintiff are deficient and that the true circumstances of the licence ownership and relinquishment to Jerry Creyke cannot be determined without viva voce evidence.

Suitability for Summary Trial

- [30] Rule 9-7 of the Supreme Court Civil Rules permits any party to an action to apply to the court for judgment, either on an issue or generally, by way of a summary trial. The Rule is meant to promote the early resolution of cases by allowing parties to put forward their evidence through affidavits, rather than by oral testimony.
- [31] However, not all matters are suitable for summary determination. The court may not grant judgment in a summary trial where "the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law," or "the court is of the opinion that it would be unjust to decide the issues on the application" (Rule 9-7(15)(a)).

- [32] Any analysis of the suitability of a matter for summary trial resolution starts with *Inspiration Mgmt. Ltd.*, where McEachern C.J.B.C. set out the factors that are relevant to the exercise of judicial discretion in determining whether it is possible to resolve a matter summarily:
- [49] the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.
- [33] Subsequent cases have identified a number of additional factors, including the time needed for summary trial, whether credibility is a critical factor in the determination of the dispute, and whether the application would result in "litigating in slices": see *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, *aff'd on appeal* 2006 BCCA 369; and *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31.
- [34] In *Mayer v. Mayer*, 2012 BCCA 77, the court made a number of further observations on the issue of summary trial suitability in cases where credibility is at stake. At paras. 80-81, the court commented that:
- [80] in cases of conflicting evidence, cross-examination of the parties offering the conflicting evidence is essential -- the credibility of one or the other cannot be considered in a vacuum.
- [81] In addition to exposing credibility to scrutiny, cross-examination may also cast a different light on the evidence given by witnesses and may bring out relevant information that might not otherwise be disclosed, thus enabling the court to be informed of all the evidence bearing on the issues.

Positions of the Parties on Suitability for Summary Trial

- [35] The plaintiff submits that the evidence before the court is sufficient to determine that the assets were transferred without consideration and to find that a trust should be imposed.
- [36] The defendant, on the other hand, says Bruce Creyke's intentions in 2003 are in issue and cannot be resolved summarily. He says that on the evidence Bruce Creyke may have intended that the transfer as a gift or; alternatively, it may have been a sale, given the defendant has made a number of payments to Bruce Creyke and Louise Carlick. He says that credibility is a major issue as there is conflicting evidence on all of the points in contention and that these conflicts cannot be resolved on affidavit evidence.

Discussion

- [37] Resolution of this matter, whether on summary trial or at a full trial, is complicated by the fact that we are dealing with events from many years ago where the principal actors are now deceased and failed to document the details of their arrangements. The resulting confusion is compounded by the fact that those who remain alive have not fully directed their minds to the legal concepts involved in their dispute. This issue is perhaps best illustrated by how the pleadings have evolved.
- [38] Initially, the plaintiff pleaded that it was the custom within the Creyke family that the guide outfitting business would pass from father to son and that family members would be employed in the business. The plaintiff asserted that Bruce Creyke intended to pass the business on to the plaintiff, who would then employ family members as his father had done. The plaintiff also claimed that Bruce Creyke had expressed the intention that both the plaintiff and the defendant would hold the Certificate and licence. Finally, the plaintiff pleaded that the defendant had assured Bruce Creyke that he would hold the licence and related assets in trust for Bruce Creyke during his life and after that for his son, or alternatively for Bruce Creyke's estate.
- [39] In response, the defendant denied that there was any custom in the Creyke family in relation to the assets. He also said that John Creyke, the original holder of the certificate, had instructed that the business was to transfer to the defendant and thereafter be held by family members in "perpetuity". He said that Bruce Creyke did not acquire the assets in 1971 for his sole and personal benefit, but rather as fulfillment of John Creyke's wish that the business be operated on behalf of the family generally.
- [40] The defendant also asserted that the plaintiff was not Bruce Creyke's biological son and was, as a result, not related to the Creyke family by blood. The defendant also pleaded that Bruce Creyke told Troy Creyke that the transfer of the business to the defendant would end the plaintiff's participation in the business, but that the plaintiff instructed Bruce Creyke to sign the transfer despite this fact. He also stated that John Creyke intended Bruce Creyke (and, later, the defendant), to hold the assets for the benefit of the entire family, so that any trust was for the whole Creyke family, not for the plaintiff or the estate of Bruce Creyke.
- [41] The plaintiff then amended his pleadings to remove the submissions on family custom. He instead characterized his claim as a breach of fiduciary duty by the defendant for converting the business to his own use and benefit when he received the licence and assets without consideration in trust for Bruce Creyke.
- [42] The defendant then brought an application to have the plaintiff provide a sample of his DNA in order to determine if he is a member of the family of John Creyke. In oral reasons dated February 8, 2013, I dismissed that application. The defendant sought leave to appeal. On May 27, 2013 Garson J.A. dismissed that application.

- [43] The defendant's legal position has altered since his initial response. He now states that he is the sole beneficial owner of the assets, as he says in his amended pleadings that the assets have always been held in trust for him alone, although he claims that in dealing with the assets he intends to follow John Creyke's wishes by operating the business for the family benefit. I note that this claim is contrary to Rule 3-7(6), which states that a party "must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading."
- [44] The fact that the parties have changed positions during the litigation weighs against summary resolution. The ongoing amendment and refinement of the pleadings along with the contradictory positions taken by the parties (even in their own pleadings) demonstrate the complexity of the issues.
- [45] In addition, there are a number of concerns with regards to the evidence itself; I will review some of those here.
- [46] The evidence as to Bruce Creyke's intentions is contradictory or conflicting. The plaintiff deposes that in the early 1990's Bruce Creyke stated that he wanted the plaintiff and the defendant to take over the business if anything happened to him. Then, in July 1998, ten of Bruce Creyke's brothers and sisters witnessed Bruce Creyke's signature on a document stating that 50% of the outfitting business would be sold to the Creyke family and 50% to the plaintiff, on the condition that if the plaintiff sold his 50% interest it would be to the Creyke family. There is some suggestion that Bruce Creyke signed the document under duress. However, on the evidence before me, I cannot conclude that this transaction ever occurred.
- [47] A year later Bruce Creyke signed a document, described as a will, stating that the outfitting business was to go to Louise Carlick and the plaintiff on his death. However, that document failed to comply with the Wills Act, R.S.B.C. 1996, c. 489.
- [48] There are also conflicts on the evidence as to what Bruce Creyke understood or intended at the time when the transfer of the Certificate was arranged. The plaintiff alleges that, prior to the transfer of the Certificate, Bruce Creyke told him "several times that if he signed the papers then we, meaning Bruce and me, would no longer be part of the hunting business." Yet the plaintiff is pursuing a claim in resulting trust or constructive trust. The plaintiff deposes that he urged his father to sign the papers because he "hoped that Jerry would realize that he was just getting the Certificate so the business could continue as it was he [Bruce] was only transferring the Certificate to Jerry, not the business itself" and that he and his father knew that they would "lose the business completely if the Certificate didn't get transferred to someone else."
- [49] The evidence as to the defendant's own understanding of the legal ramifications of the transfer is equally unclear. He deposes that between 2004 and 2008 he made six payments to Bruce Creyke (or Louise Carlick) totalling \$63,000, each on cheques from Kiniskan Lake Outfitters and four with the notation "payment on hunting business." He says the final payment, in December 17, 2008, was a cheque to Troy Creyke for \$40,000 which the

defendant states was given to Troy Creyke to give to his parents, although given the date it could only have gone to Louise Carlick.

- [50] The defendant deposes he made those payments because it was a practice that Leonard Creyke had followed while he operated the business for Bruce Creyke in the late 1990's and early 2000's. However, there is no evidence as to why Leonard Creyke made those payments and the notations on the cheques that the payments were "payments on the hunting business" do not provide much clarity. The recipients apparently cashed the cheques. There was no evidence before the court respecting what they thought the payments were for. On discovery the defendant indicated that he gave Bruce Creyke and Louise Carlick "some money over the years" but then at some point they no longer wanted the money. When asked why he was paying this money to Bruce Creyke and Louise Carlick, he indicated that it was 'the right thing to do' but that, in his mind, there was no obligation to pay Bruce Creyke anything because the defendant's receipt of the assets was in fulfillment of John Creyke's wishes. As a result, the evidence currently before the court regarding the payments is not helpful in determining what legal relationship the parties intended when the Certificate was transferred to the defendant.
- [51] There also appears to be a potential issue around Bruce Creyke's capacity to surrender the Certificate in 2003. The plaintiff has submitted various medical records addressing Bruce Creyke's health at the time, but there is no expert opinion evidence on the issue. The medical records introduced simply indicate that Bruce Creyke had moderate Alzheimer's as of May 2002. The evidence dealing with its impact on him is conflicting. If competency is indeed an issue, it cannot be determined summarily.
- [52] As noted by Mr. Justice McEwan in *Colosimo and Berge v. Geraci*, 2004 BCSC 636, the court should not decide a matter summarily in cases where the facts cannot be clearly discerned from the filed materials. The following statement from that case as it is equally applicable to this matter:
- [17] Here it is not at all obvious that the evidence of the parties, given in open court, will not materially depart in substance or effect, from what now lies inert and immutable in three inches of affidavits and exhibits.
- [53] The legal and factual uncertainties described above are not resolvable on the affidavit material before me given the conflicting evidence and lack of documents. I am not satisfied that the parties in making certain assertions are accurately explaining their understanding of what occurred. I am of the view that the evidence of the parties and their witnesses when given in open court may "materially depart in substance or effect" from what is contained in their affidavits, the pleadings and discovery evidence.
- [54] Resolution of the competing claims clearly requires viva voce evidence. I am not satisfied that I can find the facts required to resolve the issues, nor am I satisfied that even if the facts were ascertainable it would be just to do so.

Costs

[55] Costs will be in the cause.

"Punnett J."

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