

CANADA / JUDGMENT

## Cutts v. Goddard

2020 BCSC 1939

### COURT

Supreme Court of British Columbia

### DECIDED

29 September 2020

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2020 BCSC 1939 Cutts v. Goddard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cutts v. Goddard,

2020 BCSC 1939

Date: 20200929

Docket: S27313

Registry: Cranbrook

Between:

Brian Cutts

Plaintiff

And

Leanne Goddard, Executrix of the

Estate of Judith Davis, Deceased and

the Estate of Judith Davis, Deceased

Defendants

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff

appearing by teleconference:

A. James

Counsel for Counsel for Leanne Goddard

appearing by teleconference:

A. Etheridge

Place and Date of Trial:

Cranbrook, B.C.

September 29, 2020

Place and Date of Judgment:

Cranbrook, B.C.

September 29, 2020

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## Introduction

- [1] This is an application by the plaintiff under Rule 6-2(7)(c) to add Leanne Goddard as a defendant in her personal capacity, to amend the claim, and to correct the names of the defendants to bring it into accordance with the proposed addition and amendments. Mrs. Goddard is already a party in her capacity as the executor of the estate of Judith Davis. During the course of submissions, the plaintiff agreed that any joinder would be without prejudice to Mrs. Goddard's limitation defences.

## Background

- [2] The plaintiff is the son of John "Jack" Cutts. Leanne Goddard (nee Cutts) is the biological granddaughter of Jack Cutts.
- [3] Jack Cutts and Ms. Judith Davis were common law spouses from about 1972 until Jack passed away on January 29, 2012.
- [4] For most of the period before his death, Jack Cutts and Ms. Davis operated and lived at a ranch near Elko, BC (the "Ranch").

- [5] The plaintiff alleges that beginning in or about 1982, he assisted his father in operating the Ranch, initially without pay, and later with pay well below that which would be justified in an arm's length business relationship.
- [6] In 1984, Jack Cutts sold the Ranch to the Nature Trust of British Columbia for \$600,000. A term of the sale of the Ranch to the Nature Trust was that Jack Cutts and Ms. Davis would have a lease to be able to continue ranching on the land.
- [7] Ms. Davis became the sole owner of another property referred to as the "Baynes Lake Property" in 1992. She had been a joint owner of this property with her father from at least July 27, 1989. Jack Cutts was added as a joint tenant to the Baynes Lake Property in 1998.
- [8] In or about December 2011, Jack Cutts and Ms. Davis moved to the Baynes Lake Property in order to ensure the availability of emergency services given Jack Cutts' deteriorating health. The Ranch ceased operations shortly thereafter.
- [9] In his proposed amendments, the plaintiff alleges that Ms. Davis promised the Baynes Lake Property to the plaintiff as compensation for the work he had done for her benefit on the Ranch.
- [10] Ms. Davis's last will was executed on February 4, 2014. Mrs. Goddard was named as executor, but not as a beneficiary. Nor was the plaintiff named as a beneficiary.
- [11] On February 7, 2014, Ms. Davis gratuitously transferred an undivided one-half interest in the Baynes Lake Property to Mrs. Goddard as a joint tenant. In his proposed amendments, the plaintiff alleges that this was done as a result of undue influence by Mrs. Goddard.
- [12] Ms. Davis died on April 27, 2015.
- [13] Mr. Cutts gave evidence at the examination for discovery that he knew Ms. Davis was not going to give him the Baynes Lake Property when she died.
- [14] On Ms. Davis' death, the Baynes Lake Property went entirely to Mrs. Goddard as a result of the joint tenancy. On November 30, 2015, Mrs. Goddard refinanced the Baynes Lake Property and purchased various other properties using the Baynes Lake Property as security. In his proposed amendments, the plaintiff seeks to trace the claim against Mrs. Goddard into those properties.
- [15] A related action, Blumhagen v. Cutts, Supreme Court Action Number 27286, was filed on February 3, 2017. This action pertains to an claim of unjust enrichment made by two of Jack Cutts' other grandchildren. Mrs. Goddard was named in her personal capacity in this action. These plaintiffs allege that they made contributions to the Baynes Lake Property. The relief sought is somewhat ambiguous as to whether any claim is being advanced by these plaintiffs for a proprietary interest in the Baynes Lake Property, but the parties agreed on this application that it was at least possible that such a claim is being advanced.

- [16] The plaintiff filed the present action on February 16, 2017. He claimed against Ms. Davis' estate in unjust enrichment, quantum meruit, and resulting trust. There was mention of the Baynes Lake Property in the original incarnation of the pleadings, but no legal claim was made as against this property. As noted, Ms. Goddard was only named in her capacity as executor of Ms. Davis' estate.
- [17] At the examination for discovery of Mrs. Goddard on May 24, 2019, the plaintiff sought to ask questions about the Baynes Lake Property, but objections were raised on the basis that the issue was not pleaded. This appears to have alerted the plaintiff to the potential gap in his pleadings. The plaintiff offers no particular excuse for not arriving at this realization earlier, other than to say this is a complex action with multiple related proceedings.
- [18] Ms. Davis' estate filed a notice of trial on May 21, 2019. In the plaintiff's trial brief filed June 10, 2019, the plaintiff signalled that an amendment may be required to address the fact that he wished to claim against the Baynes Lake Property. The scheduled trial was struck from the list at a trial management conference on July 9, 2019, at which conference the potential for Mrs. Goddard to be added personally was discussed.
- [19] On January 7, 2020, the plaintiff filed the present application. The plaintiff's amended claim alleges undue influence on the part of Mrs. Goddard in relation to the transfer of the Baynes Lake Property and seeks a resulting or constructive trust over the Baynes Lake Property. The plaintiff seeks a declaration that the estate was unjustly enriched by the plaintiff's work, yet does not allege that Mrs. Goddard herself was unjustly enriched. The plaintiff alleges that the undivided one-half legal interest in the Baynes Lake Property was gratuitously transferred from Ms. Davis to Mrs. Goddard as joint tenant and, hence, is invalid such that the property should be treated as held in trust for the estate of Ms. Davis. Lastly, the plaintiff alleges that the transfer of the undivided one-half interest in the Baynes Lake Property was made under the undue influence of Mrs. Goddard. The pleadings allege that Ms. Davis was having medical and mental problems during the relevant period.
- [20] In terms of the delay of having this application heard after its delivery, scheduling proved to be a challenge, and that challenge was further magnified by the COVID-19 pandemic.

## Legal Test

- [21] Pursuant to Supreme Court Rule 6-2(7)(c), the court can order a person to be added as a party if there may exist, between the person said to be added and any party to the proceeding, a question or issue relating to or connected with the relief claimed in the proceeding or the subject matter of the proceeding and if, in the opinion of the court, it would be just and convenient to do so: *Alexis v. Duncan*, 2015 BCCA 135 at para. 17. The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters: *Chahal v. Chahal*, 2016 BCSC 1848 at para. 25, citing *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16.

- [22] On such an application, the first issue is whether there is a possible cause of action pled against the proposed defendant. The threshold in this respect is low and evidence is not to be analyzed: *Smithe Residences Ltd. v. 4 Corners Properties Ltd.*, 2020 BCCA 227 at para. 50 [4 Corners]. That said, the court does still have an obligation to carefully review the pleadings: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329.
- [23] I conclude that the plaintiff has not done enough to lay the groundwork for a claim to the Baynes Lake Property (in which case Mrs. Goddard as owner would be a necessary party), or against Mrs. Goddard personally.
- [24] There is no pleading that the plaintiff did any work at the Baynes Lake Property which could support a resulting or constructive trust claim: *Kerr v. Baranow*, 2011 SCC 10 at paras. 50-51.
- [25] There is a proposed pleading that Ms. Davis promised the plaintiff an interest in the Baynes Lake Property in recognition of the benefits bestowed upon her, however:
1. there is no pleading of a contract, nor is there a plea for specific performance of such a contract;
  2. such a claim would bump up against the legal principles applicable to past consideration, given that any assistance provided to Ms. Davis would have occurred prior to the promise. There is no plea that the plaintiff performed further work or provided fresh consideration and reliance on the promise: *Wilburn Properties v. Silver Peak*, 2001 BCSC 1084, at paras. 80-84;
  3. there is no plea that any work was performed for Mrs. Goddard, the person sought to be added; and
  4. the plaintiff is not a beneficiary of Ms. Davis' will nor a potential Wills Variation Act claimant against Ms. Davis' estate, either of which could have entitled him to advance a claim for a proprietary interest in the Baynes Lake Property.
- [26] The plaintiff relies on the decision in *Friskie v. Piovesan*, 81 A.C.W.S. (3d) 741, [1998] B.C.J. No. 1837 (S.C.), to argue that the promise he received is sufficient to create a potential constructive trust over the Baynes Lake Property in favour of the plaintiff. In *Friskie*, the father and his three children initially owned a property as joint tenants. When the father and the children's stepmother sought to sever the lots owned by the father and children, the father asked the children to transfer their interest to him. After a meeting in which the children were assured that their interest in the property would revert to them upon the father's death, they agreed to convey their interests in the property.
- [27] The property was later registered to the father and the stepmother as joint tenants.
- [28] Upon the father's death, the children discovered that the property was owned in joint tenancy and, hence, they had no interest in it.

[29] The children were successful in obtaining judgment for \$100,000 on the basis of a resulting trust or alternatively that, based on wrongful conduct, good conscience demanded the imposition of a constructive trust.

[30] I find that this case is distinguishable in that, in *Friskie*:

1. there was contemporaneous consideration given for the promise that the property would someday be the children's, being the children's conveyance of their interest in the property (para. 66). Here, any consideration had already been provided by the plaintiff by the time the promise was made;
2. the court made a finding that the transfer from the children would not have occurred absent the promise (para. 44). Here, the plaintiff did the work absent the security of any promise; and
3. the children's stepmother was found to have known of the father's commitment to his children (para. 74). Here, there is no pleading that Mrs. Goddard was aware of Ms. Davis' alleged promise to the plaintiff.

[31] Similarly *Khan Estate v. Khan Estate*, 2002 BCSC 1223, is of little assistance to the plaintiff, as in that case the court only found a resulting trust where:

1. the plaintiff had provided labour for the particular property in issue; and
2. the labour was provided after the date of the promise and not before.

[32] The court in *Friskie* relied on the test to create a constructive trust set out in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 45. The test from *Soulos* provides as follows:

- (a) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in their hands;
- (b) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (c) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (d) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[33] Here, there is no link between the plaintiff's earlier work and the Baynes Lake Property now in Mrs. Goddard's hands. Further, there is no evidence on the present record that the pursuit of a proprietary remedy is necessary. The plaintiff does not plead any particular reason why the Baynes Lake Property must end up in his hands rather than him simply being able to seek monetary compensation.

- [34] I find that, based on the pleadings, there is no scenario in which good conscience could require imposition of a constructive trust that favours the plaintiff who never provided any assistance on the property and provided no consideration facilitating its purchase.
- [35] It is true that undoing the Baynes Lake Property transaction between Ms. Davis and Mrs. Goddard would increase the size of the Davis estate in a way that could eventually benefit the plaintiff's ability to recover any judgment against the estate, but I do not see how this prospect of improving his odds of successful enforcement creates a cause of action as between the plaintiff and Mrs. Goddard in her personal capacity.
- [36] The plaintiff argues that the inherent conflict of interest in Mrs. Goddard's role as executor and her role as owner of the Baynes Lake Property means that she is not advancing an available claim against herself that should be brought, thereby compelling the plaintiff to raise the issue within the present proceeding. The first problem with this position is that the issue of conflict is not expressly pled. Secondly, it would appear that the better legal fit for addressing the plaintiff's concern would be an application under s. 158 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], which allows persons with an interest in an estate to bring an application to pass over the executor based on various types of wrongdoing including being in a conflict of interest: *Weisstock v. Weisstock*, 2019 BCSC 517 at para. 43; *Re Tomlinson*, 2016 BCSC 1223 at paras. 34-48. However, the plaintiff has not brought such an application.
- [37] Alternatively, should Mrs. Goddard take her chances and not bring any litigation against herself, it may be that the plaintiff will eventually be in a position to obtain an assignment of, or to compel pursuit of, the estate's cause of action against Mrs. Goddard personally through the insolvency provisions of WESA or otherwise: see WESA, ss. 169 to 174.
- [38] All of which is to say that there may be remedies available in the short or long term to address the problem identified by the plaintiff, but none are included in the present incarnation of the pleadings.
- [39] If I am wrong in my conclusion as to the first aspect of the test, the second issue is whether it is just and convenient that the joinder should be allowed to occur at this time. The proper approach to this aspect of the test was summarized in *Bader v. British Columbia (Minister of Public Safety)*, 2015 BCSC 715 at para. 25:

the court will consider a number of factors to determine whether it would be just and convenient to add the proposed defendants. These factors may include:

- (a) the stage of the proceedings at which the application is made;
- (b) the length of a delay in bringing the application;
- (c) the reason for the delay;
- (d) whether a limitation period has expired;

- (e) whether there is prejudice caused by the delay;
- (f) the extent of any connection between the existing claims and the proposed new causes of action and whether it is suitable that the issues be tried together; and
- (g) whether the proposed new claims will not only increase the number of parties but also the issues and overall scope of the litigation, with resulting costs and delay

[Citations omitted]

- [40] In terms of the stage of the proceedings, although there were earlier proposed trial dates, there is no trial date pressing on Mrs. Goddard should she be added. She will have adequate time to fully prepare for trial. This factor weighs in favour of granting the order.
- [41] In terms of the delay, there is no principled explanation for the delay up to this issue having been raised in mid-2019, other than the fact that managing the various actions was said to be complicated. This factor weighs against the granting of the order.
- [42] In terms of limitations, it is certainly arguable that a two-year limitation period applies, and this new proposed claim would have been treated as having been expired had it been launched as a separate proceeding more than two years after Ms. Davis' death. However, the fact that the plaintiff is willing to allow Mrs. Goddard to maintain her limitation period argument goes a substantial way to mitigating the effects of this factor, although I find that the factor still favours Mrs. Goddard's position given that the limitation argument appears to be quite strong.
- [43] As to the question of prejudice caused by the delay above and beyond the potential expiry of any limitation period, Mrs. Goddard says she has been suffering stress and health problems as a result of this litigation. She claims that it has affected her ability to earn an income as a chartered professional accountant. She also says that she has not maintained an accounting of her own contributions to the Baynes Lake Property as she did not expect that she would need to do so. She estimates that she has incurred \$40,000 in improvements and over \$20,000 in carrying costs, but she does not have as much documentation as she would like in this respect.
- [44] The plaintiff says that any prejudice created by the admitted delay is mitigated by the following facts:
1. Mrs. Goddard has been aware of these proceedings throughout, given her role as a party wearing her hat as executor of the estate;
  2. Mrs. Goddard has been a party in her own capacity in a related proceeding brought by Jack Cutts' grandchildren;
  3. the move to the Baynes Lake Property was already pleaded as a material fact in the original claim;

4. Mrs. Goddard was made aware of the plaintiff's interest in pursuing a remedy in relation to the Baynes Lake Property through the questioning at her May 2019 discovery;
5. Mrs. Goddard was further alerted of the plaintiff's intention through the plaintiff's trial brief and the discussion which occurred at the subsequent trial management conference;
6. any delay since the filing of the application has largely been a result of scheduling issues and COVID-19-related delays; and
7. the plaintiff's primary position will be that the remedy they seek could be achieved without any finding of wrongdoing by Mrs. Goddard, resting simply on the fact that she received a gift without consideration thereby creating a presumption of a resulting trust in favour of the estate. Any need to consider potential wrongdoing by Mrs. Goddard will only arise in the context of their alternative position that if there was a gift, then that gift should be unwound on the basis of undue influence.

[45] In terms of the degree of connection, I accept that if there was a proper cause of action, the overlapping facts, parties, and family relationships would favor having the matter heard in the same proceeding: 4 Corners at para. 81.

[46] As to whether the proposed new claims will increase the number of parties and the scope of the litigation:

1. it only increases the number of parties in a legal sense, and not in a practical sense; but
2. it does nonetheless increase the scope of the trial somewhat, at least in relation to the allegations of wrongdoing on the part of Mrs. Goddard in relation to the transfer to her of the interest in the Baynes Lake Property.

[47] In conclusion, on the second part of the test:

1. the test generally favours the determination of all related issues between the parties;
2. any legal prejudice is largely mitigated by the preservation of Mrs. Goddard's rights to advance a limitation defence;
3. any practical prejudice is largely mitigated by Mrs. Goddard's earlier involvement in this case as an executor and in the related case in her personal capacity; and
4. the practical prejudice is further mitigated by the fact that she will need to be involved in this litigation irrespective of the outcome of this application.

[48] As such, I find that had a proper claim been pleaded, it would have been just and convenient that Mrs. Goddard be added to the action in her personal capacity.

## Conclusion

[49] The application is dismissed.

[50] Any submissions on costs, counsel?

[SUBMISSIONS AND DISCUSSION RE COSTS]

[51] MS. ETHERIDGE: Okay. So I think that seems like something I should get instructions on. So I will take advantage of Your Lordship's proposal that basically the default is that the costs will follow the result of the application payable within 30 days, but depending on my client's instructions, I would have liberty to provide a one-page written submission?

[52] THE COURT: How long do you think you need to sort of make that call, just so it is not drifting for all of us?

[53] THE COURT: Is a week enough time?

[54] MS. ETHERIDGE: Oh, yes, I was going to say two days.

[55] THE COURT: You have until the end of the week to sort of declare yourself one way or the other. If you declare yourself in favour of a higher costs award, then you can submit a two-page submission and your friend will have a week to submit a two-page submission.

"Branch J."

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