

CANADA / JUDGMENT

DeCotiis v. DeCotiis Estate

2023 BCSC 287

COURT

Supreme Court of British Columbia

DECIDED

28 February 2023

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2023 BCSC 287 DeCotiis v. DeCotiis Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

DeCotiis v. DeCotiis Estate,

2023 BCSC 287

Date: 20230228

Docket: S216393

Registry: Vancouver

Between:

Ivano DeCotiis

Plaintiff

And

The Estate of Innocenzo DeCotiis Deceased by its executors, Rossano DeCotiis, Giulio DeCotiis, IDC Alter Ego Trust (2019), Rossano DeCotiis and Giulio DeCotiis in their capacity as Trustees of the IDC Alter Ego Trust (2019) and in their personal capacity, Morris DeCotiis, Paolo DeCotiis, and RPMG Capital Corp.

Defendants

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff:

J. Watson

Counsel for the Defendant Rossano De Cotiis:

A. Cocks

C. Bildfell

No other appearances.

Place and Date of Hearing:

Vancouver, B.C.

February 2, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2023

Introduction

- [1] The defendant Rossano De Cotiis ("Rossano") applies to strike paras. 22-29 in part 1 of the amended notice of civil claim, on the basis they are unnecessary, scandalous, frivolous and vexatious; or that they may prejudice, embarrass or delay a fair hearing or that they are an abuse of process of the court.
- [2] The plaintiff Ivano De Cotiis (the "plaintiff" or "Ivano") opposes the application and says the impugned paragraphs are proper and necessary.
- [3] It is my understanding there is a typographical error in the parties' surname as it appears in the style of cause and that the proper spelling is "De Cotiis". I will use the corrected form in these reasons. Given that all of the parties have the same surname, so for the sake of clarity I refer to them by their given names in these reasons. No disrespect is intended to anyone involved.

Background

- [4] This litigation involves the estate of Innocenzo De Cotiis ("Innocenzo" or the "Deceased"), who died on September 26, 2020 (the "Date of Death"). He was a successful real estate developer who founded the Onni group of companies ("Onni Group"). He is survived by seven children including, from oldest to youngest: Donato, Vittorio, Ivano, Giulio, Rossano, Morris and Paolo.
- [5] There is an unfortunate divide between the siblings. I will refer to the three eldest (Donato, Vittorio, Ivano) as the "Older Brothers" and the four youngest (Giulio, Rossano, Morris and Paolo) as the "Younger Brothers".

- [6] The plaintiff says that since the Date of Death, neither he nor the other two Older Brothers have received any inheritance from the Deceased's estate, or anything from family trusts the Deceased established while alive. He believes that the entirety of the estate and certain trust assets have either passed to or are under the effective control of the Younger Brothers, or some of them. The plaintiff seeks a variety of relief as against the defendants.

Notice of Civil Claim

- [7] On July 12, 2021, the plaintiff filed the notice of civil claim ("Original NCC"). Among his allegations, he says the Deceased settled four trusts during his lifetime, including a 1987 Trust, 1988 Trust, 1993 Trust and 2019 Trust.
- [8] The 1987 and 1988 Trusts involved warehouse properties in Coquitlam. These are described as "foundational properties" for what eventually became the Onni Group. The plaintiff was initially a beneficiary of both trusts.
- [9] The 1993 Trust held a variety of shares in a company which eventually became Onni Development Corp., which is the central corporate vehicle within the Onni Group. Shares in one or more other companies were added later. The plaintiff says the purpose of this trust was to pass the "family business" on to the Deceased's seven children and their respective children (the Deceased's grandchildren).
- [10] The plaintiff alleges that in or about December 2014, the Deceased purported to add himself as a beneficiary of the 1993 Trust, unlawfully misappropriated the trust's property and converted it to his own use, thereby depriving the plaintiff of his share. Due to the Deceased's breach of trust and fiduciary duty, the plaintiff became a "creditor" of the Deceased as of those dates. This plea is significant for purposes of relief the plaintiff claims under the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 ("FCA").
- [11] The plaintiff says the 2019 Trust was created to hold various life insurance policies which were taken out on the Deceased's life. It is a discretionary trust. The trustees are Rossano and Giulio. The beneficiaries initially included the Deceased's seven children. The plaintiff asserts that the 1993 Trust property was used to pay some or all of the premiums on these life insurance policies. Following the Deceased's death, roughly \$34.8 million in insurance proceeds were paid to the 2019 Trust.
- [12] The plaintiff alleges Rossano and Giulio, as trustees of the 2019 Trust, loaned \$34,190,000 in 2019 Trust property to RPMG Capital Corp. ("RPMG"), a company owned or controlled by the Younger Brothers. By investing effectively the entirety of the trust's property into RPMG, Rossano and Giulio put the trust's property at risk and failed to exercise the level of care, skill, diligence and judgment that a prudent investor would in making investments, as required by the Trustee Act, R.S.B.C. 1996, c. 464 ("TA"), they acted in conflict of interest and breached fiduciary duties owed to beneficiaries of the 2019 Trust, including the plaintiff.

- [13] The plaintiff also pled a will variation claim. He says the Deceased had previously made several wills which named the plaintiff as a beneficiary. On January 12, 2016, the Deceased made a new will (the "2016 Will") which named Rossano and Giulio as executors and trustees. It bequeaths the residue of the estate to the Younger Brothers and disinherits the plaintiff and two other Older Brothers.
- [14] In the "Relief Sought" section, the plaintiff claims damages for breach of trust and fiduciary duty, tracing remedies in relation to 1987, 1988 and 1993 Trust property, tracing of other property the Deceased transferred after the date on which the plaintiff became entitled to make a claim under the FCA, an order removing Rossano and Giulio as trustees of the 2019 Trust and appointing an arm's length qualified trust administrator, a declaration the 2016 Will fails to make adequate provision for the plaintiff pursuant to s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA") and an order that adequate, just and equitable provision be made for the plaintiff out of the Deceased' estate.
- [15] In the "Legal Basis" section, the plaintiff includes sections dealing with breaches of the 1987, 1988 and 1993 Trusts by the Deceased, constructive or resulting trust due to misappropriation of the plaintiff's share of the 1993 Trust, restitution, tracing, breach of the 2019 Trust by Rossano and Giulio, their removal as trustees due to conflict of interest and self-dealing, variation of the 2016 Will and fraudulent conveyance remedies.

Response to Civil Claim

- [16] On September 24, 2021, Rossano and Giulio filed a response to civil claim ("RCC"). They admit the plaintiff was a beneficiary of the 1987, 1988 and 1993 Trusts but say these trusts were fully discretionary. There are numerous additional beneficiaries of the 2019 Trust and it was not created solely to hold life insurance proceeds.
- [17] With respect to the 2016 Will, they admit Rossano and Giulio are named as executors and trustees and that it bequeathed the residue of the Deceased's estate to the Younger Brothers. They say the 2016 Will does make just, adequate and equitable provision for the plaintiff because he and the Deceased had been estranged since the mid-to-late 1990s. A key allegation for purposes of this application is part 1, division 3, para. 20, where it is alleged the plaintiff assaulted the deceased:
20. In or about September 2004, the plaintiff physically assaulted the Deceased, resulting in significant injuries which required medical attention, and caused the Deceased to fear for his safety.
- [18] Rossano and Giulio say that a part of the 1987 Trust assets were distributed to the plaintiff.

- [19] The 1988, 1993 and 2019 Trusts each included provisions stating that the trustee's exercise in good faith of the powers and discretion given to them would not subject them to any liability of any kind. The 1988 and 1993 Trusts expressly gave the trustee power to remove and exclude any person as a beneficiary, in the trustee's sole discretion. They say on or about June 19, 2008, the plaintiff was removed and excluded as beneficiary of the 1988 and 1993 Trusts.
- [20] They allege the 2019 Trust gave the Deceased a power of appointment, which he used on December 23, 2019 to execute a Deed of Appointment. That deed directed the trustees to exclude a person as a Fund Beneficiary in the event he commences any litigation against or in respect of the Trust, the Fund, the Deceased's estate or any company in which the Trust, the Deceased or his estate has an interest. The plaintiff was excluded as a beneficiary of the 2019 Trust on or about July 21, 2021, which I understand to refer to the date the plaintiff filed his Original NCC in this matter.
- [21] Regarding the loan of 2019 Trust funds to RPMG, Rossano and Giulio say the trustees are expressly permitted to enter into commercially reasonable agreements with companies in which the trustees have an interest. They say the investment with RPMG was prudent, involves a reasonable rate of return and is secured by personal guarantees.

Amended Notice of Civil Claim

- [22] On October 26, 2022, the plaintiff filed an amended notice of civil claim ("Amended NCC"). It purports to add Morris, Paolo and RPMG as defendants. It does not appear this was done via a formal application to add defendants; rather, it appears they were simply added through amendment. If the latter approach was taken, the only avenue for adding a party to an action after it has been started is pursuant to an application under Rule 6-2(7) of the Supreme Court Civil Rules ("SCCR"). See in this regard *Alexis v. Duncan*, 2015 BCCA 135 at para. 20 et seq.
- [23] The plaintiff added allegations that he had been an integral member of the Onni Group and corporate entities which preceded it. He performed a number of jobs for the Deceased and various family companies, starting at age eight. He worked continuously for the Deceased and the family businesses and gradually took on larger roles with more responsibility. He left high school and began working full-time. He served in several management roles, including Vice President - Development and Project Manager. He says he was paid little or nothing for his work but was assured at all times that he had an ownership interest in them.
- [24] The amendments which are the focus of this application to strike are part 1, paras. 22-29 (collectively, the "Impugned Amendments"):

Childhood Trauma, Assault and Battery

22. For the purposes of this Amended Notice of Civil Claim the three oldest sons of the Deceased: Donato Vittorio and Ivana will be referred to as the "Older Brothers" and the four youngest sons, Rossano, Guilio, Morris and Paolo, will be referred to as the "Younger Brothers".
23. The Plaintiff and his brothers, and in particular the Older Brothers, were the victims of abuse at the hands of their father.
24. The Plaintiff was regularly assaulted and battered by his father throughout his childhood and into his adulthood.
25. The Deceased also regularly assaulted and battered the Plaintiff's mother Rosa, which was witnessed by [the Plaintiff] and his brothers.
26. Violence between family members including the Deceased was a regular occurrence and was directed at various family members, including the mother of the Plaintiff and was perpetrated by the Deceased and his brothers.
27. To the best of the Plaintiff's knowledge, the Younger Brothers, or some of the[m] with the knowing approval of Rossano and Guilio, retained people to physically assault the Plaintiff from various times from approximately 2000 until 2006.
28. To the best of the Plaintiff's knowledge, the Younger Brothers, or some of them with the knowing approval of Rossano and Guilio, retained private investigators to surveill the Plaintiff from approximately 2000 until 2020.

The Deceased's Desire for a United Family

29. Despite the family's violence, and despite occasional disagreements and even physical altercations between the Plaintiff and the Deceased, the Deceased remained at all time[s] committed to providing for [the Plaintiff].
- [25] The plaintiff goes on to say that any temporary estrangement between him and the Deceased was caused by the Younger Brothers. He alleges they threatened to exclude the Deceased from their lives if he involved the plaintiff in social, business or family affairs to a greater degree. He says the Deceased expressed a constant and consistent desire for a united family and for each of his seven children and their families (his grandchildren) to benefit equally from the success of the family business.

- [26] The plaintiff added a section alleging the Younger Brothers unduly influenced the Deceased and made decisions on his behalf. He says they harboured a grudge against him which influenced their own decision making and the undue influence they exerted upon the Deceased. The grudge arose because he made a concerted effort to be part of their mother's life after she and the Deceased were divorced in 1993. The Younger Brothers sided with the Deceased and had little or no interaction with their mother.
- [27] In the "Legal Basis" section, the plaintiff added paragraphs addressing unjust enrichment and constructive trust based on work he did for family businesses. He says he invested sweat equity which contributed to the acquisition, preservation and maintenance of the tremendous wealth and success of Onni Group, that the defendants were enriched thereby and there was no juristic reason for the enrichment. The plaintiff made amendments addressing Rossano and Giulo's alleged breaches of fiduciary duty in relation to the 2019 Trust, a section regarding knowing receipt of trust property by Morris, Paolo and RPMG and a section regarding undue influence and unconscionability invalidating unspecified asset transfers and the 2016 Will.
- [28] For some of these newly added claims, there are no corresponding amendments in the "Relief Sought" section. One example is the undue influence claim relating to the 2016 Will. The plaintiff did not amend the "relief sought" section to include a request that the 2016 Will be declared invalid. There is also no clear relief sought relating to the new unjust enrichment and constructive trust claims. These issues are not raised in this application, so I will not comment further.
- [29] On December 23, 2022, Rossano's counsel requested that the Impugned Amendments be removed. Plaintiff's counsel refused the request the same day.

Rossano's Position

- [30] Rossano says the amended notice of civil claim alleges six causes of action, including (a) breach of trust, (b) breach of fiduciary duty, (c) knowing receipt of assets transferred in breach of trust (d) fraudulent conveyance, (e) undue influence, (f) unconscionability (g) failure to make adequate provision in the 2016 Will.
- [31] The plaintiff seeks a variety of relief including (a) damages for breach of trust and breach of fiduciary duty, (b) tracing of trust assets and property transferred after Ivano became entitled to make a claim under the FCA, (c) removal of Rossano and Giulio as trustees of the 2019 Trust, (d) a possible challenge to the validity of the 2016 Will and unparticularized property transfers, and (e) will variation.
- [32] Counsel notes that despite adding a section entitled "Childhood Trauma, Assault and Battery", the plaintiff is not making any claims in tort.

- [33] Rossano says the Impugned Amendments do not help establish any of the plaintiff's causes of action. No attempt is made to link them to any particular cause of action. If they do not advance a claim known in law, it is obvious they cannot succeed or they serve no useful purpose and are a waste of the court's time and public resources. They distract from the real issues in the litigation and draw the parties and the court into matters that are wholly apart from the issues in dispute. Finally, he says they are an abuse of process, inflammatory and "knowingly false". They are included for the improper purpose of trying to pressure, harass and embarrass the defendants.

Plaintiff's Position

- [34] The plaintiff says the Impugned Amendments are relevant to several causes of action.
- [35] Will Variation: These claims are fact-intensive. Family history and relationships need to be reviewed. The family has a contentious history which necessitates investigation of unpleasant and embarrassing matters, including childhood assault by the Deceased. This is necessary for a fair trial. The defendants have raised a September 2004 assault as an issue. This relates to estrangement and disinheritance. It is necessary to put the incident into a broader context of the history of family violence.
- [36] Fraudulent Conveyance: The plaintiff argues he had potential claims in tort against the Deceased due to childhood assaults. This gives the plaintiff standing as a "creditor or other" under s. 1 of the FCA and allows him to challenge subsequent property transfers by the Deceased as void as against him.
- [37] Unjust Enrichment / Constructive Trust: Counsel argues the childhood assault issue is relevant to the constructive trust claim. If the plaintiff can prove he was assaulted by the Deceased and witnessed assaults on other family members, the court may be more inclined to grant him a constructive trust remedy.
- [38] Trustee Duties / Removal of Trustee: Counsel argues that allegations the Younger Brothers hired private investigators to carry out surveillance of him and arranged for others to assault him from time to time are relevant to whether Rossano and Giulio, as trustees, have fulfilled fiduciary obligations owed to beneficiaries and whether they should be removed. I presume this relates to the 2019 Trust.
- [39] Undue Influence: Counsel argues the foregoing surveillance and assault allegations are also relevant to undue influence. If the Younger Brothers are found to be responsible for those things, it is more likely they exerted undue influence upon the Deceased to exclude the plaintiff.

Legal Basis

- [40] Rule 9-5(1) of the SCCR allows the court to order the whole or any part of a pleading, petition or other document to be struck out or amended on various grounds:

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[41] Rossano relies upon sub-rules (b), (c) and (d).

Rule 9-5(1)(b) - Unnecessary, Scandalous, Frivolous or Vexatious

[42] In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras 65-66:

[65] Under rule 9-5(1)(b), a pleading may be struck if "it is unnecessary, scandalous, frivolous or vexatious". Fisher J. articulated the relevant considerations in *Willow v. Chong*, 2014 BCSC 1083, stating:

Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC (in chambers)); *Skender v. Farley*, 2007 BCCA 629. [at para. 20 (CanLII)]

[66] This Court admonished in *Imperial Tobacco* that the motion to strike

is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed... . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]

[43] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160, 36 C.P.C. (4th) 266 (S.C.) at para. 47:

47 Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* (1987), 17 B.C.L.R. (2d) 38 (B.C.S.C.). An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the

action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (B.C.C.A.). An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons of B.C. v. Cleland* (1968), 66 W.W.R. 499 (B.C.C.A.). A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [1992] B.C.J. No. 86 (Q.L.) (B.C.S.C.). A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber and Timber Co.* (1920), 28 B.C.R. 39 (C.A.). A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd. et al.*, [1992] B.C.J. 1567, (6 July 1992), Prince George Registry 20714 (B.C.S.C.).

Rule 9-5(1)(c) - May Prejudice, Embarrass or Delay the Fair Trial or Hearing of the Proceeding

[44] In *Keddie v. Dumas Hotels Ltd.*, [1985] B.C.J. No. 2328, 62 B.C.L.R. 145 (C.A.) the court of appeal approved the following definition of "embarrassing" pleadings:

7 In *Mahoney v. Coca Cola Ltd.*, unreported, February 21, 1967, No. 1612/64, B.C.S.C., and *Maddison v. Donald H. Bain Ltd.* (1928), 39 B.C.L.R. 460 (C.A.), the Courts adopted this definition of "embarrassing" pleadings from *Mayor of City of London v. Herner* (1914) 111 L.T. 512 at 514:

... ["embarrassing" means] that the allegations are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence upon that ground ... their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence.

[45] In *Sahyoun v. Ho*, 2015 BCSC 392 ["Sahyoun"] at para. 62:

[62] A pleading can be embarrassing if it does not state the real issue in an intelligible form. It can also be embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It can be prejudicial if it is designed to or has the effect of confusing the defendant, making it difficult, if not impossible, to answer; *Virk* at para. 75.

[46] In *Gross v. Peak Products Manufacturing Inc.*, 2021 BCSC 2016 at para. 15, Justice Tammen commented as follows regarding prejudice or delay of a fair trial:

[15] In my view, the offending portions also breach Rule 9-5(1)(c) in that they might prejudice or delay a fair trial. At a minimum, those parts of the notice of civil claim would exponentially expand the scope of document disclosure and likely oral discovery. Such is not in keeping with the primary object of the Supreme Court Rules described in Rule 1-3 as securing:

... the just, speedy and inexpensive determination of every pleading on its merits.

Rule 9-5(1)(d) - Otherwise an Abuse of the Process of the Court

- [47] Abuse of process is summarized in *First Majestic Silver Corp. v. Santos*, 2012 BCCA 5 at para. 22:
- [22] The doctrine of abuse of process is a very broad and flexible mechanism to enable judges to prevent abuses of the court's process. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35, the Supreme Court of Canada adopted descriptions of the concept of abuse of process as proceedings "unfair to the point that they are contrary to the interest of justice" and "oppressive treatment".
- [48] In *Sahyoun* at para. 60
- [60] The abuse of process standard under R. 9-5(1)(d) derives from a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37.
- [49] In *Canadian Federation of Students v. Simon Fraser Student Society*, 2010 BCSC 1816 at paras. 40-41, Justice Grauer, as he then was, summarized as follows:
- [40] Rule 9-5(1)(c) and (d) involve a number of considerations. These include whether the pleadings are unintelligible, confusing and difficult to understand, whether they are so irrelevant ("embarrassing" and "scandalous") that they will involve the parties in useless expense and prejudice the trial by involving them in a dispute that strays far from the issues, and whether they do not advance any defence known to law ("unnecessary" or "vexatious"). See, for instance, *Moulton Contracting Ltd. v. British Columbia*, 2010 BCSC 506, and the cases cited therein by Hinkson J., as he then was. These considerations also encompass a pleading that is made for an improper purpose, such as to harass and oppress the other parties, as opposed to raising a bona fide defence.
- [41] Rule 9-5(1)(d) also raises a number of considerations. A pleading is an "abuse of the process of the court" not only if it attempts to re-litigate something already decided, but also if it violates such principles as judicial economy, consistency, finality and the integrity of the administration of justice: see, for instance, *Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at para. 47, citing *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77 at para. 37.

Analysis

Will Variation

- [50] The plaintiff argues the Impugned Amendments are relevant to issues raised by his will variation claim. Section 60 of WESA provides that if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, it may order that the provision it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate.
- [51] Where, as here, the plaintiff has been disinherited, the reasons for disinheritance are relevant. The defendants appear to point to a longstanding estrangement and a September 2004 assault as reasons for disinheritance under the 2016 Will. The plaintiff, through the Impugned Amendments, seeks to put forward the broader context of his relationship with the Deceased.
- [52] Authorities addressing will variation claims brought by a child who was mistreated and disinherited by the will-maker are reviewed in *Persall v. Stromberg*, 2015 BCSC 1826 at paras. 77-85. These conclude that will variation is not intended to be an alternative means of awarding compensation for abuse. However, historical mistreatment may still be relevant. In *Doucette v. McInnes*, 2009 BCCA 393 at para. 71, the court of appeal indicated that a will-maker parent who treated their child unfairly may have a moral obligation to make amends for that through their will:
- [71] It is common ground that the Wills Variation Act is not intended as a means of awarding compensation for family abuse, but as recognized in *Sawchuk v. MacKenzie Estate*, 2000 BCCA 10, 72 B.C.L.R. (3d) 333 at para. 16, where a parent has treated a child unfairly, a judicious parent, after objective reflection, would recognize a moral obligation to make amends for it through the provisions of his or her will. In my view that is all that the trial judge was doing in this case.
- [53] By alleging the plaintiff assaulted the Deceased in 2004, Rossano and Giulio having made family violence relevant to the matters in issue. The plaintiff is entitled to respond to this, which he has chosen to do through the Amended NCC rather than through a Reply. A broader history of family violence between the plaintiff and the Deceased may be relevant to an assessment of whether the Deceased's disinheritance of the plaintiff was reasonable in the circumstances. At this stage, I am not in a position to conclude that the broader history of family violence between the plaintiff and the Deceased in particular should be struck out.
- [54] However, I do not agree that the Impugned Amendments relating to historical abuse the Deceased is alleged to have directed towards the plaintiff's siblings or his mother are relevant to will variation issues as between the plaintiff and the Deceased.

Fraudulent Conveyance

- [55] The plaintiff argues that the childhood abuse he alleges means he had potential claims in tort against the Deceased at times when the Deceased made unparticularized property transfers. He argues this gave him standing as a "creditor" of the Deceased under s. 1 of the FCA. That section actually refers to "creditors and others". This should allow him to invoke the FCA to set aside any property transfers which occurred after he gained this status.
- [56] Plaintiff's counsel did not refer me to any authorities where the court has employed the FCA in a similar manner. I also note it is arguably unnecessary for the plaintiff to invoke childhood assault to maintain this argument, He is already advancing it by virtue of the Deceased's alleged breaches of the 1993 Trust. These allegations appear to have a more logical connection to the property transfers the plaintiff seeks to challenge.
- [57] In my view, the historical abuse allegations are unnecessary, prejudicial and embarrassing for purposes of the plaintiff's fraudulent conveyance claim.

Unjust Enrichment / Constructive Trust

- [58] The plaintiff argues that the claim in constructive trust is impacted by the claims of historical abuse. Counsel argues that if the plaintiff can prove he was assaulted and witnessed assaults on other family members, the court may be more inclined to find a constructive trust in favour of the plaintiff. Counsel refers to BNSF Railway Company v. Teck Metals Ltd., 2016 BCCA 350 for the proposition that "good conscience" may require a finding of constructive trust. He also suggests this may also involve a novel extension of constructive trust law beyond the two types of situations where they are typically found to exist - (a) where there has been a breach of fiduciary duty or (b) unjust enrichment.
- [59] Counsel did not direct me to any authority which supports this proposition. I conclude that the Impugned Amendments are unnecessary and irrelevant to the plaintiff's unjust enrichment / constructive trust claims.

Trustee's Duties / Removal of Trustee

- [60] The plaintiff argues the Impugned Amendments which allege the Younger Brothers hired private investigators to conduct surveillance on him between 2000 and 2020 and retained people to physically assault him between 2000 and 2006 are relevant to whether Rossano and Giulio are meeting their obligations as trustees of the 2019 Trust. They are also relevant to whether they ought to be removed as trustees.
- [61] A summary of principles applicable to removal of a trustee were summarized by Hinkson C.J.S.C. in Parker v. Thompson (Trustee), 2014 BCSC 1916 at paras. 35-40. I will not reproduce the entire excerpt here. Among the principles set out, the standard of conduct expected of a trustee is set out at para. 36:

[36] The standard of conduct to be expected of a trustee in the administration of a trust was not in dispute between the parties. It is as set out by Mr. Justice Dickson, as he then was, for the Court at 315 in *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302:

Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs (*Learoyd v. Whiteley* [(1887), 12 App. Cas. 727.], at p. 733; *Underhill's Law of Trusts and Trustees*, 12th ed., art. 49; *Restatement of the Law on Trusts*, 2nd ed., para. 174) and traditionally the standard has applied equally to professional and non-professional trustees. The standard has been of general application and objective though, at times, rigorous. There has been discussion of the question whether a corporation which holds itself out, expressly or impliedly, as possessing greater competence and ability than the man of ordinary prudence should not be held to a higher standard of conduct than the individual trustee. It has been said by some that a higher standard of diligence and knowledge is expected from paid trustees: *Underhill's Law of Trusts and Trustees*, art. 49, relying upon obiter of Harman J. in *Re Waterman's Will Trusts; Lloyds Bank, Ltd. v. Sutton* [[1952] 2 All E.R. 1054.], at p. 1055, and upon dicta found in *National Trustees Co. of Australasia v. General Finance Co. of Australasia* [[1905] A.C. 373 (P.C.)], a case which did not turn upon the imposition of a greater or lesser duty but upon the relief to which a corporate trustee might be entitled under the counterpart of s. 98 of the *Trustee Act of British Columbia*, to which I have earlier referred.

[62] The Chief Justice approved the following principles for removal of a trustee, at para. 37:

- (1) the court will not lightly interfere with the testator's choice of estate trustee;
- (2) clear evidence of necessity is required;
- (3) the court's main consideration is the welfare of the beneficiaries; and
- (4) the estate trustee's acts or omissions must be of such a nature as to endanger the administration of the trust.

[63] At paras. 39-40, the basis for removing trustees and significance of past misconduct to the analysis is addressed:

[39] It is clear from the authorities that while actual dishonesty, lack of proper capacity to execute his or her duties, or lack of reasonable fidelity are all bases for removing a trustee (*Re Commonwealth Investors Syndicate Ltd.* (1986), 69 B.C.L.R. 346 at 356, [1986] B.C.J. No. 3112 (S.C.)), even the lesser basis of a trustee's ability to act impartially may suffice to justify the removal of a trustee (*Re Shaw Co. Ltd.* (1922), 68 D.L.R. 616, [1922] S.J. No. 89 (K.B)).

[40] But the removal of a trustee should not be lightly entertained. In *Radford v. Radford Estate* (2008), 43 E.T.R. (3d) 74, [2008] O.J. No. 3526, Mr. Justice Quinn discussed a number of other considerations to apply when considering an application for the removal of a trustee at paras. 102 -- 107:

Removal must be the only course to follow

[102] Removal of an estate trustee should only occur "on the clearest of evidence that there is no other course to follow": see *Crawford v. Jardine*, [1977] O.J. No. 5041 (Ont. Gen. Div.) at para. 18, citing *Tempest, Re* (1866), 1 Ch. App. 485 (Eng. C.A.) and *Owen Family Trust, Re* (1989), 33 E.T.R. 213 at 215 (B.C.S.C.).

Removal to be guided by welfare of beneficiaries

[103] In deciding whether to remove an estate trustee, "the court's main guide should be the welfare of the beneficiaries": see *Crawford v. Jardine*, *ibid*, citing *Letterstedt v. Broers* (1884), (1883-84) L.R. 9 App. Cas. 371 (South Africa P.C.) at 385-387 and *Anderson, Re* (1928), 35 O.W.N. 7 at 8 (Ont. H.C.).

Non-removal must likely prevent proper execution of trust

[104] "It is not every mistake or neglect of duty on the part of the trustees which will lead to their removal. It must be shown by the applicant that the non-removal of the trustee will likely prevent the trust from being properly executed": see *Crawford v. Jardine*, *ibid*.

[105] "[I]t is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to [remove trustees]. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity": see *Letterstedt v. Broers*, *ibid*, quoting s. 1289 of *Story's Equity Jurisprudence*.

Removal not intended to punish past misconduct

[106] "The authorities are, I believe, consistent in placing the emphasis on the future administration of the estate, and the risks to which it will be exposed if the trustee remains in office. The question is whether the trust estate is likely to be administered properly in accordance with the fiduciary duties of the trustee and with due regard to the interests and welfare of the beneficiaries. The sanction of removal is intended not to punish trustees for past misconduct but rather to protect the assets of the trust and the interests of the beneficiaries": see *St. Joseph's Health Centre v. Dzwiekowski*, *supra*, [2007] O.J. No. 4641 at para. 28.

[107] But, "past misconduct that is likely to continue will often be sufficient to justify removal ...": see *St. Joseph's Health Centre v. Dzwiekowski*, *supra*, at para. 29.

[64] I am not persuaded that the allegations that Rossano and Giulio were involved in or approved of other Younger Brothers arranging surveillance of and assault upon the plaintiff are relevant to whether Rossano and Giulio adequately carried out their duties as trustees of the 2019 Trust and were in conflict of interest. These allegations are unnecessary, embarrassing and prejudicial.

Undue Influence

- [65] The plaintiff argues that allegations that the Younger Brothers hired private investigators to conduct surveillance on him between 2000 and 2020 and retained people to assault him from time to time between 2000 and 2006 are relevant to his claim in undue influence. If they are found to have done these things, this makes it more likely that they exerted undue influence on the Deceased to exclude the plaintiff.
- [66] I am not persuaded that the allegations that the Younger Brothers arranged surveillance of and assaults upon the plaintiff are necessary to address alleged undue influence of the Deceased. I am concerned that they would involve an exponential expansion of the scope of discovery into irrelevant or at best marginally relevant issues. These allegations are unnecessary, embarrassing and prejudicial.

Conclusion

- [67] The application to strike paragraphs 22 and 24 of part 1 of the Amended NCC are dismissed. For para. 24, further particulars of the alleged assault and battery should be provided.
- [68] With respect to paragraph 29, the portions "Despite the family's violence," is struck out and the balance of the paragraph shall remain.
- [69] The application to strike paragraphs 23, 25, 26, 27 and 28 are granted.
- [70] Success has been divided on this application. Costs are in the cause.

"Master Bilawich"

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