

CANADA / JUDGMENT

Easingwood v. Cockcroft

2014 BCSC 1595

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1595 Easingwood v. Cockcroft

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Easingwood v. Cockcroft,

2014 BCSC 1595

Date: 20140821

Docket: S097087

Registry: Vancouver

Between:

Kathleen Lillian Easingwood

Plaintiff

And

Lauren Elizabeth Cockcroft, Executor and Trustee of the

Last Will and Testament of Reginald Henry Easingwood, Deceased,

and the said Lauren Elizabeth Cockcroft, Elizabeth Janice Paterson,

Executor and Trustee of the Last Will and Testament of Reginald

Henry Easingwood, also known as R. Henry Easingwood, Deceased,

Vicki Teresa Marie Easingwood, David Easingwood, Gizah Shrine,

Kayla Theresa Easingwood, Edward James Easingwood, Marion Brand,

Kathleen Menzies, Erin Easingwood, Karla Easingwood, Grant Easingwood,

Salt Lane Investments Ltd., and Lauren Elizabeth Cockroft and

Elizabeth Janice Paterson, as Trustees of the Reg Easingwood Alter Ego Trust

Defendants

Before: The Honourable Mr. Justice Fitch

Reasons for Judgment

Counsel for the Plaintiff:

Candace Cho

Janis K.L. Ko

Counsel for Lauren Elizabeth Cockroft, Erin Easingwood, Kayla Theresa Easingwood, Edward James Easingwood, Karla Easingwood, Grant Easingwood:

Jack D.G. Buchan

Counsel for Lauren Elizabeth Cockroft and Elizabeth Janice Patterson, as Trustees of the Reg Easingwood Alter Ego Trust:

No one appearing

Defendant, Vicki Teresa Marie Easingwood:

Appearing on her own behalf

Counsel for Salt Lane Investments Ltd.:

No one appearing

Counsel for the Estate of Reginald Henry Easingwood (deceased):

No one appearing

Place and Dates of Hearing:

Vancouver, B.C.

March 19-20, 2014

Further Written Submissions of Counsel for the Defendants:

April 22, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 21, 2014

A. Introduction

- [1] The plaintiff, Kathleen Easingwood ("Kay") has outstanding a claim under the Wills Variation Act ("WVA"), R.S.B.C. 1996, c. 490. She applies pursuant to Rule 6-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 to file a Fourth Amended Notice of Civil Claim. The proposed amendments would add this additional ground for relief - that a marriage agreement Kay entered into with the deceased, Reginald Henry Easingwood ("Reg"), on December 20, 1983 is unfair having regard to the considerations enumerated in s. 65 of the Family Relations Act ("FRA") R.S.B.C. 1996, c. 128.
- [2] The application to amend is opposed by the defendants who are the residual beneficiaries of Reg's estate: Lauren Cockcroft; Erin Easingwood; Kayla Easingwood; Edward Easingwood; Karla Easingwood; Grant Easingwood; and, Vicki Easingwood. Lauren Cockcroft, in her capacity as the sole executrix of Reg's estate, takes no position on the granting of the order the plaintiff seeks.
- [3] The defendants oppose the plaintiff's proposed amendments on a number of overlapping grounds, each of which (with the exception of #5) is advanced in the alternative. The arguments the defendants advance in opposition to the plaintiff's proposed amendments may be distilled as follows:
1. Issue estoppel applies as the fairness of the marriage agreement was necessarily bound up with the issues decided in a prior proceeding;
 2. Issue estoppel applies as the fairness of the marriage agreement was fundamental to the determination of the issues at play in a prior proceeding and should have been raised at that time; and
 3. Cause of action estoppel applies as the fairness of the marriage agreement was fundamental to the determination of the issues at play in a prior proceeding and should have been raised at that time;
 4. The preconditions to the operation of issue and/or cause of action estoppel having been established, no reason has been advanced that would justify this court, in the exercise of its discretion, to refuse to give effect to the doctrine of res judicata;
 5. The doctrine of abuse of process by re-litigation should be applied to bar the amendments sought by the plaintiff; and
 6. The length of the delay by the plaintiff in bringing forth the proposed amendments to the pleadings, the absence of any excusable reason for the delay, and the prejudice that would be occasioned by an order granting leave to amend are such that the application should be dismissed.
- [4] The plaintiff counters with the following arguments:

1. In order for the court to determine what is "adequate, just and equitable in the circumstances" in the context of the claim under s. 2 of the WVA, all of the circumstances, including the fairness of the marriage agreement, should be considered in determining the legal and/or moral obligations Reg may have owed to Kay. In this respect, the plaintiff says she does not seek to plead a new cause of action. Further, the amendment is necessary to completely and finally determine the real question in issue between the parties;
 2. The fairness of the marriage agreement was not directly determined in the prior proceeding, nor was that question necessarily bound up with any determination made in the prior proceeding. Any conclusion in the prior proceeding with respect to the fairness of the marriage agreement is properly characterized as obiter dicta;
 3. The plaintiff does not seek to amend the Notice of Civil Claim to assert that the marriage agreement is invalid in a contractual sense (an amendment she concedes to be foreclosed by the findings made in the prior proceeding) but to assert that the marriage agreement is unfair within the meaning of s. 65 of the FRA (an amendment not foreclosed through application of the doctrines of issue and/or cause of action estoppel);
 4. The delay in bringing forward the amendment application is explained by the bifurcation of the proceedings. Further, any prejudice to the defendants may be remedied by a costs award;
 5. Alternatively, even if issue and/or cause of action estoppel apply, it would be unjust in this case to give effect to the doctrine(s) since the fairness of the marriage agreement provides essential context to the WVA claim. While dismissal of the amendment application might promote the orderly administration of justice, it would do so at the cost of real injustice in that the full extent of the plaintiff's WVA claim (and, in particular, Reg's legal obligations to Kay) would not be before the court; and
 6. The proposed amendment does not meet the test for abuse of process by re-litigation.
- [5] For the reasons that follow, I dismiss the plaintiff's application to further amend her Notice of Civil Claim.
- [6] I have reached this conclusion via a number of different routes. First, it is my view that the fairness of the marriage agreement was necessarily bound up with and formed part of the latent structure for the issues that were directly determined in the prior proceeding. Second, it is my view that issue estoppel bars litigation of the fairness of the marriage agreement as this issue was one of obvious import in the prior proceeding and should have been raised and resolved in that context. But if I am wrong in concluding that issue estoppel applies to bar the litigation of points that should have been raised in the prior proceeding, I am satisfied, in the alternative, that cause of action estoppel applies to bar the amendments sought by the plaintiff. The fairness of the marriage agreement and its importance to the resolution of the issues in the prior proceeding were clearly identified at the time of that proceeding and should have been raised by the plaintiff. Having regard to all the

circumstances, I would not exercise my discretion in this case to decline to give effect to the doctrine of *res judicata*. Finally, if I am wrong in my conclusions respecting the application of issue and cause of action estoppel to this case, I conclude that the amendments sought by the plaintiff constitute an abuse of process. In the result, and were it necessary to do so, I would have dismissed the application on this alternative basis.

B. Background Facts and History of the Proceeding

- [7] I shall set out only so much of the facts and procedural history of this matter as is necessary to contextualize my reasons for judgment. The facts and procedural history of the case are fully set out in the prior proceeding and may be found in the reasons of Dillon J. in *Easingwood v. Cockcroft*, 2011 BCSC 1154 at paras. 5-34, *aff'd* 2013 BCCA 182.
- [8] The parties have been identified by their first names throughout the course of this litigation and I will continue to do so in these reasons.
- [9] Reg had four children with his first wife: Lauren; Vicki; Reginald Henry ("Hank"); and, Edward. His first wife died in 1976 while married to Reg.
- [10] Reg was a successful businessman who controlled companies (*Easingwood Holdings Ltd.* and *Salt Lane Investments Ltd.*) that owned commercial rental properties in Langley, British Columbia. All of these properties had been acquired by 1979.
- [11] Hank and Vicki became lawyers. Hank handled his father's personal and business affairs.
- [12] In 1983, Reg and Kay, both of whom were widowed, decided to get married. Kay was 13 years younger and had two daughters, Marion and Kathy.
- [13] On December 20, 1983 Reg and Kay executed a marriage agreement in which they relinquished and released any claim to the other's estate, except as set out in the agreement or as provided in the other's will, including any claim under the WVA. They agreed to keep their finances separate. The marriage agreement acknowledged that each of them had acquired an individual estate through their efforts and the efforts of their former spouses, both had financially independent adult children, and each desired to retain and maintain their individual estates as separate property. Property held prior to the marriage, and any increase or decrease in value after the marriage, was to continue to be the separate property of that party. Any shares acquired or held before or after the marriage would be the business assets of that person and not family assets. The parties further agreed that neither would have a claim to the other's pension, RRSP or other savings, all of which was to be treated as separate property regardless of the date of its acquisition or entitlement. Reg was to provide the use of a residence for their mutual cohabitation and pay for household and living expenses. The residence was to be the sole property of Reg unless he transferred an interest in it to Kay.
- [14] Both parties obtained independent legal advice before entering into the marriage agreement.

- [15] The marriage took place on December 26, 1983.
- [16] Edward died in 1996.
- [17] On April 18, 2001 Reg signed an enduring Power of Attorney naming Hank and Lauren as his attorneys.
- [18] In May 2003, Kay transferred her real property into the joint names of herself and her two daughters. As noted by Dillon J. it was clear that Kay did not intend to leave her property to Reg but was following the terms of the marriage agreement.
- [19] Reg executed a will on March 4, 2004. Hank and Lauren were appointed as executors. The will provided for Reg's interest in Easingwood Holdings and Salt Lane to be distributed to his children and grandchildren. Reg made the following provisions for Kay in his will:
- An Income Fund would be created being the greater of \$525,000 or 15% of the gross value of Reg's estate. The fund was to be increased from the base year of 2001 at a rate of \$17,500 per year after 2001 until Reg's death. The income earned by the fund was to be paid to Kay at a monthly rate during her lifetime. Upon termination of the fund on Kay's death, the capital and any accumulated income from the fund was to be divided into 24 shares and distributed as follows: four shares each to Lauren, Hank and Vicki; two shares to Reg's grandchildren, Kayla and Edward (Edward's children); and four shares each to Marion and Kathy (Kay's children);
 - Kay would have a life tenancy in the residence they occupied at the time of Reg's death;
 - One hundred thousand dollars (\$100,000) was to be set aside and invested in a House Operation Fund to be used to pay for taxes, insurance, utilities and maintenance in relation to the residence. The trustees of Reg's estate were authorized to use both the income and capital of the House Operation Fund for this purpose. If the House Operation Fund was insufficient, the trustees were authorized to encroach on the Income Fund. Upon Kay's death, both the residence and the House Operation Fund would form part of the residue of Reg's estate and be distributed as such;
 - The residue of the estate was to be divided into eight equal shares and paid as follows: two shares each to Lauren, Hank and Vicki; and one share each to Kayla and Edward.
- [20] Hank was diagnosed with cancer in June 2005 and received treatment until December 2008.
- [21] Reg was formally diagnosed with Alzheimer's disease in April 2007. He was 83 at the time.
- [22] From June 2007 onwards, and based on medical advice, Hank and Lauren concluded that Reg was no longer capable of managing his business affairs. They began to use the Power of Attorney granted to them in 2001. They did so with Kay's knowledge, concurrence and assistance.

- [23] On November 19, 2008 Hank and Lauren, acting under the Power of Attorney, settled the Reg Easingwood Alter Ego Trust (the "trust"). Hank and Lauren were appointed trustees. The trust provisions mirrored the provisions of the will. In particular, the Income Fund and the House Operation Fund provisions of Reg's will were replicated in the trust.
- [24] In December 2008, all of Reg's assets were transferred into the trust, with the exception of the residence occupied by Reg and Kay and joint accounts they held. A life interest in the residence in favour of Kay was registered against the property and the beneficiary of Reg's RRIF was changed from his estate to the trust.
- [25] At the time of the proceeding before Dillon J., Reg's estate had a declared value of \$530,000. I note, however, that Kay acknowledged in her application to amend that the residue of the estate had been reduced by the transfer of assets to the trust to the sum of approximately \$1,470,000. But for the creation of the trust, the value of Reg's estate at the time of the proceeding before Dillon J. would have been \$5,595,000.
- [26] Hank succumbed to cancer on August 17, 2009. Upon Hank's death, his wife, Elizabeth Paterson, became the replacement trustee of the trust.
- [27] Reg died on September 12, 2009, less than a month later.
- [28] The marriage between Reg and Kay lasted 26 years.
- [29] Kay commenced her action pursuant to the WVA on September 28, 2009, 16 days after Reg's death. An Amended Statement of Claim was filed on Kay's behalf on January 29, 2010. It alleged that the transfer of assets to the trust constituted a fraudulent conveyance pursuant to the Fraudulent Conveyance Act ("FCA"), R.S.B.C. 1996, c. 163.
- [30] The Statement of Defence filed February 26, 2010 pleaded the marriage agreement as a complete defence and estoppel to the WVA claim.
- [31] A Second Amended Statement of Claim was filed June 14, 2010. A Third Amended Statement of Claim was filed January 18, 2011. It alleged that Reg's estate and the trust, along with the individual defendants Lauren Cockcroft, Elizabeth Paterson and Vicki Easingwood, were unlawfully enriched, that the plaintiff suffered a corresponding deprivation, and that she should be compensated either monetarily or by means of a constructive trust imposed on the deceased's assets.
- [32] Kay did not reply to the Statement of Defence or raise the unfairness of the marriage agreement in either the Second or Third Amended Statement of Claim.
- [33] The trustees applied pursuant to Rule 9-7 for dismissal of the fraudulent conveyance and unjust enrichment claims made against them. The application was supported by the residual beneficiaries.
- [34] The summary trial application was heard by Dillon J. in January and February 2011. Two broad questions arose for determination:

1. Was the trust valid? This question subsumed the questions of whether Hank and Lauren had the authority under the 2001 Power of Attorney to create the inter vivos trust, and whether they were in breach of their fiduciary duty in doing so; and

2. Was the transfer of Reg's assets to the trust a fraudulent conveyance under the FCA?

[35] The plaintiff's fraudulent conveyance and unjust enrichment claims were dismissed (2011 BCSC 1154). The plaintiff's appeal from that decision was dismissed (2013 BCCA 1820). The WVA action remains outstanding.

[36] In her judgment on the summary trial application, Dillon J. made the following observations respecting the marriage agreement:

The marriage agreement was never varied or set aside. No party claims that it is not valid. No mention was made of the marriage agreement in the Statement of Claim. No reply was made to the assertion in the Statement of Defence that the marriage agreement was entered into and that Reg had honoured the terms of the marriage agreement in his will (para. 12).

[37] To set aside the transfer of assets to the trust as a fraudulent conveyance, the onus was on Kay to establish her standing as a "creditor or other" within the meaning of the FCA (in the sense that she had a legal or equitable claim that arose during Reg's lifetime), that the dispositions were made with fraudulent intent, and that she had been deprived of her just and lawful remedies: *Mawdsley v. Meshen*, 2010 BCSC 1099 at para. 203.

[38] In disposing of Kay's contention that the transfer of Reg's assets to the trust amounted to a fraudulent conveyance, Dillon J. held that the dispositions were not made with fraudulent intent. That the distribution of trust assets was in accordance with the provisions of the will was strong evidence that the trust was not set up to defeat Kay.

[39] In addition, the existence of the marriage agreement, the validity of which had not been contested by Kay during the currency of the marriage or thereafter, including on the application before Dillon J., was held (at paras. 64-65) to be relevant to the assessment of Hank's state of mind when the assets were transferred to the trust:

There is then the factor of the marriage agreement. Hank was aware of the terms of the agreement in which Reg and Kay had separate estates and Kay had given up any right to claim against Reg's separate property. This is significant to his state of mind. It was always the plan, and it was carried out, that Reg's assets would be kept separate to the extent described in the marriage agreement and carried out in the will. There had been every indication that Kay honoured this arrangement, as recently as August 2008 when, known to Kay, Hank refused to have Kay designated beneficiary under Reg's RIFF in accordance with the terms of the marriage agreement. Hank and Lauren had no reasons to think that the marriage agreement was not binding. They also had no indication that Kay ever intended to contest the will or challenge the marriage agreement, nor did they consider that this was a possibility.

In all of the circumstances here, I do not find that the disposition of Reg's assets to the Trust was intended to put them out of reach of Kay.

[40] Although the finding that the transfer of assets to the trust was not done with fraudulent intent would have been sufficient to dispose of the fraudulent conveyance claim, Dillon J. concluded that if she was in error on this point, "it would be helpful to have considered" whether Kay was a "creditor or other" entitling her to relief under the FCA.

[41] Relying on *Hossay v. Newman*, [1998] B.C.J. No. 3289 (S.C.) at paras. 9-10 and *Stone v. Stone* (2001), 55 O.R. (3d) 491 (C.A.), Dillon J. held that in order for a spouse to qualify as a person who is intended to be protected from conveyances of property made with the intent to defeat her interest, she must have an existing claim at the time of the impugned transactions, or other right she could have asserted in an action. She summarized Kay's position on this point in the following terms:

The plaintiff argued that the clearest potential claim that she has is under the FRA whereby all of Reg's assets would be considered family assets and the marriage agreement would not act as a bar to her claim. She also said that she had an equitable claim in unjust enrichment for the services that she provided to Reg and to his companies. There was also a statement that she had a claim for breach of the marriage agreement, although that was not pleaded.

[42] On the material before her, Dillon J. concluded that there was no air of reality to the notion that Kay had a potential claim under the FRA:

In my view, in order to qualify as a potential claimant so to be a creditor or other within the meaning of the FCA, a spouse must either have begun an action under the FRA or there must be an evidential basis to reasonably conclude that the claimant has a potential right or claim to have asserted entitlement to family assets on marriage breakup under s. 56 of the FRA. The plaintiff does not qualify under any of these criteria. Kay and Reg were happily married at all material times and there was no likelihood that the marriage was about to break up in November 2008. There were no irreconcilable differences between them, no periods of separation, or indicators of strife except for the stress of Reg's illness. Kay always knew the terms of Reg's will and the Trust does not depart from those terms. Kay had never said that the provision for her under the will was inadequate or indicated that she would contest it. She was never involved in decisions about Reg's business or investments as she had recognized Reg's desire for Hank and Lauren to manage his affairs in June 2007. She could have had access to the information in Reg's accounts at the bank and she participated in discussions at the bank where it was clear that she was neither the decision-maker nor the beneficiary. There is no reality to a claim under the FRA when there is no evidence as to the value of any of either Reg's or Kay's assets at the time of the marriage and no description of Kay's present needs, notwithstanding the presumption in s. 60 and the provisions of s. 65 of the FRA. The marriage agreement which, I find, was applied by both Reg and Kay, kept Reg's business and other assets that were transferred to the Trust as separate property of Reg. Kay kept her own property to herself. It is not sufficient for Kay to now maintain that she is a creditor or other because she might have brought a claim under the FRA if she and

Reg had separated.

[43] In addressing Kay's contention that she had standing as a "creditor or other" of Reg grounded in her unjust enrichment claim, Dillon J. applied the framework in *Kerr v. Baranow*, 2011 SCC 10 and held (at para. 56-58) that:

In any event, I conclude that the marriage agreement provides a juristic reason for any benefit and corresponding detriment that Kay may have incurred. This is a contract that separated the property of Kay and Reg and that was followed by them. As such, the plaintiff has not made out a prima facie case in the first step to establish absence of juristic reason within the analysis of *Garland v. Consumer's Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 40 (Garland as quoted in *Kerr* at para. 43; *Skillen v. Tomlin*, 2007 BCSC 424 at para. 41).

Further, the reasonable expectations of the parties and public policy considerations favour the applicants here (*Kerr* at paras. 41 and 43). Kay knew the terms of Reg's 2004 will. It followed the terms of their marriage agreement which Kay does not say is invalid. She will receive under the Trust the same as she would have received under the will, consistent with her expectations throughout. She never expected to receive a share of the companies, or other investments of Reg identified in the marriage agreement, or of the house that Reg provided for them to live in. The marriage agreement has not been shown to be unfair within s. 65(1) of the FRA, nor was it alleged to be so. In *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, marriage agreements were recognized as a mechanism to govern division of property upon marriage breakdown as long as it was fair. There is not sufficient evidence before me to evaluate fairness in the full sense of that requirement here. The plaintiff has not shown that the agreement was unfair. This is a policy reason to conclude that there is juristic reason for any deprivation here.

Kay was not a creditor or other to Reg within the meaning of the FCA.

[44] On appeal, Kay argued that Dillon J. erred in finding Hank and Lauren did not breach their fiduciary duties to Reg by setting up the inter vivos trust. The argument was dismissed (at para. 77) for the following reasons:

The key question is in which direction the best interests of the principal lie. Here, the principal was a man of business who had executed a will that complied fully with the terms of a marriage agreement. The trust, in turn, is entirely consistent with the marriage agreement, the will, and business prudence, and the trust secured the principal's assets for his use during his lifetime. It would be a fiction to say the attorneys were acting in breach of their duty to their principal in the creation of the trust, when it conforms to all the arrangements the principal had made.

C. General Principles

(a) Applications to Amend Pleadings

[45] Rule 6-1 provides that a court may grant leave to amend the whole or any part of a pleading filed by a party. Discretion to permit amendments is unfettered, subject only to the general rule that it be exercised judicially. Among the factors to be considered are: the length of the

delay; the reasons for the delay; prejudice that will accrue if the amendment is granted; the connection, if any, between the existing claim and the proposed new cause of action; the consequences to each party and to the administration of justice of granting or refusing the application; and the overriding question of what is just and convenient: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (B.C.C.A.).

[46] As a general rule, such amendments as are necessary to determine the real question in issue between the parties should be permitted. Where possible, and consistent with the generous approach generally taken in applications to amend pleadings, the existence of prejudice should be dealt with by an order for costs. A party seeking an amendment need not adduce evidence in support of the proposed amendment as it is sufficient if the pleading discloses a reasonable cause of action: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.).

(b) The Doctrine of Res Judicata

[47] Where a cause of action or fundamental issue has been decided, it is said to be res judicata and, absent special circumstances, is precluded from being adjudged a second time: *Tylon Steepe Homes Ltd. v. Pont*, 2011 BCSC 385, per Ballance J. at para. 52.

[48] The public policy interests served by the doctrine include the avoidance of duplicative litigation, the promotion of finality in litigation, the protection of individuals from repeated suits, and the avoidance of inconsistent judicial determinations of the same cause of action or issue: *Henderson v. Henderson* (1843), [1843-60] All E.R. 378 per Wigram V.C.; *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.) per Laskin J., dissenting in the result, at para. 23; *Re Cliffs Over Maple Bay Investments Ltd.*, 2011 BCCA 180 at para. 25; *Reliable Mortgages Investment Corp., v. Chan*, 2014 BCCA 14.

[49] Res judicata takes two distinct forms in modern practice: issue estoppel and cause of action estoppel, indicating that there can be estoppel with respect to a cause or a discrete issue. Even when the preconditions to the operation of the doctrine are established, the court retains a residual discretion to decline to apply it if doing so would cause unfairness in the particular case: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 33, 80.

[50] The criteria for cause of action estoppel were reviewed in *Re Cliffs Over Maple Bay* at para. 28, and *Reliable Mortgages* at paras. 44-45. In the latter case, Willcock J.A. explained cause of action estoppel in these terms:

Cause of action estoppel is concerned with ensuring that parties bring forward all claims and defences with respect to the cause of action in a proceeding, such that, if they fail to do so, they will be prevented from claiming these in a subsequent proceeding. In *Henderson*, Wigram V.C. said:

The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

More recently, in *Hoque v. Montreal Trust Co.* (1997), 162 N.S.R. (2d) 321, [1997] N.S.J. No. 430 (N.S.C.A.), Cromwell J.A. (as he then was), reviewed this basic principle of cause of action estoppel:

My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. [Emphasis in original.]

[51] It has been said that cause of action estoppel is grounded in judicial intolerance of litigation by installment and the prohibition against a party splitting its case: *Tylon Steepe Homes* at para. 62.

[52] It would seem that the rule expressed in *Henderson* extends to any point that was the subject of an admission of a fact or matter fundamental to the decision: *Tylon Steepe Homes*, at para. 65; *Cliffs Over Maple Bay*, at para. 32.

[53] Issue estoppel applies to prevent re-litigation of a particular factual issue, even where the cause of action is not the same. In *Angle*, three requirements for the invocation of issue estoppel were identified:

1. That the same question as that before the court has been previously decided;
2. That the judicial decision said to create the estoppel was final; and
3. That the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.

[54] For issue estoppel to apply, "it will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. The question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceedings": *Angle* at para. 3.

[55] In *Danyluk*, Binnie J. stated (at para. 54) that issue estoppel applies, "to issues of fact, law and mixed fact and law that are necessarily bound up with the determination of that 'issue' in the prior proceeding".

[56] Whether the rule in Henderson requiring parties to bring forward every point properly belonging to the subject matter of the first litigation applies to issue estoppel as well as cause of action estoppel is less than clear: see Tylon Steepe Homes at para. 61; Cliffs Over Maple Bay at para. 33. Having said that, I note that in Reliable Mortgages the Court of Appeal (at para. 23) appears to have accepted the notion that issue estoppel under the rule in Henderson bars an issue which could have been brought in the first proceeding.

[57] Counsel for the plaintiff contends that the governing jurisprudence on this point can be distilled down to the following propositions:

1. Where a point fundamental to the decision is made in the first proceeding, a party is barred from re-litigating that point, even if it was not fully argued, if the point properly belonged to the subject matter of the first litigation and should have been raised in the first proceeding;
2. An "extended form" of issue estoppel, barring any question that could have been decided or could have been raised at the first proceeding has not received appellate approval in this province.

[58] I believe this accurately expresses the current state of the law in British Columbia on this point.

(c) Abuse of Process by Re-litigation

[59] When the technical requirements of res judicata have not been met, the doctrine of abuse of process by re-litigation may be invoked where permitting the matter to proceed would frustrate achievement of the public policy goals of judicial economy, consistency and finality in litigation. As Arbour J. explained in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63 at paras. 38 and 42:

It is true that the doctrine of abuse of process has been extended beyond the strict parameters of res judicata while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (*Lange*, supra, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange*, supra, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process [citations omitted].

D. Application to the Case at Bar

(a) Application of General Principles Respecting the Amendment of Pleadings

- [60] The delay in raising the fairness of the marriage agreement can only be characterized as extraordinary. Further, I consider the delay to be unexplained. I do not accept the plaintiff's contention that the "bifurcation" of the proceedings resulted in the issue essentially being "parked" or "put on hold" until after resolution of the fraudulent conveyance portion of the claim.
- [61] The marriage agreement was pleaded in the Statement of Defence filed February 26, 2010 as a complete defence and estoppel to the plaintiff's WVA claim. The fairness of the marriage agreement was not raised by the plaintiff in the prior proceeding even though it arose in the context of that litigation. It was not raised until more than four months after the conclusion of appellate proceedings in the previous case and it is evident to me that the prospect of litigation concerning the fairness of the marriage agreement came as a complete and unwelcome surprise to the defendants, who have now been embroiled for more than 4 ½ years in this emotionally-charged litigation.
- [62] There can be little doubt that if the fairness of the marriage agreement became a part of this litigation, the defendants would be substantially prejudiced. Further documentary disclosure would have to be made, the plaintiff would have to be examined for discovery a second time, and the time required to accommodate the trial would be significantly increased.
- [63] On the other hand, the proposed amendments are closely connected to the issues engaged by the WVA action and the prejudice suffered by the defendants could, in some measure, be offset by a substantial award of costs.
- [64] In addition to these competing considerations, resolution of the amendment application is complicated by virtue of the fact that res judicata and the doctrine of abuse of process are in play.
- [65] In light of the conclusions I have come to, a balancing of competing interests will be required as an important component of determining whether to give effect to issue and/or cause of action estoppel. In my view, it is preferable to resolve the issue of whether the amendments should be granted in that more specific context. Doing so has the advantage of engaging an analytical framework in which considerations generally applicable on an application to amend pleadings, as well as considerations underlying the doctrines of res judicata and abuse of process, can be fully considered.

(b) Application of the Doctrine of Res Judicata

- [66] Even assuming that a distinction can be drawn between the "validity" and "fairness" of a marriage agreement, it is my view that both issues were fundamental to and necessarily bound up with the issues decided in the prior proceeding.

- [67] In determining whether Kay had standing as a "creditor or other" within the meaning of the FCA, Dillon J. was obliged to determine whether she had some legal or equitable claim that arose during Reg's lifetime. As Kay did not contest the validity of the marriage agreement or show that it was unfair (see para. 57 of the Reasons for Judgment of Dillon J.), the case proceeded on the footing that Kay had no potential cause of action pursuant to s. 65 of the FRA. Further, and perhaps more clearly, Kay's contention that her standing as a "creditor or other" was rooted in her unjust enrichment claim was dismissed, in part on grounds that the marriage agreement provided a juristic reason for any benefit and corresponding detriment she may have incurred (at para. 56).
- [68] In these circumstances, the fairness of the marriage agreement was "necessarily bound up with" and "fundamental to" the determination of the fraudulent conveyance claim. To borrow the language of Donald J. Lange in *Res Judicata in Canada*, 3rd ed. (Markham: LexisNexis Canada Inc. 2010) at 47 [adopted in *Cliffs Over Maple Bay* at para. 36] the fairness of the marriage agreement, a point assumed or at least unchallenged by the plaintiff, became part of the "latent structure" supporting the express question of whether the transfer of Reg's assets to the trust constituted a fraudulent conveyance.
- [69] I am not convinced that this analysis is inapplicable because the reasons of Dillon J. on this point may be characterized as obiter. In my view, the policy interests underlying the doctrine of *res judicata* have application regardless of whether the issue is characterized as part of the ratio of the decision given in the prior proceedings or obiter dicta.
- [70] But even if I am wrong in coming to this conclusion (either because the fairness of the marriage agreement was not an issue "necessarily bound up with" resolution of the fraudulent conveyance claim, or because decisions properly characterized as obiter are not "final" and cannot, therefore, satisfy an essential precondition to the application of issue estoppel) I am satisfied that, whether as an aspect of the doctrine of issue estoppel or cause of action estoppel, the fairness of the marriage agreement was an issue front and central to the determination of the issues that arose in the prior proceeding and should have been raised at that time. There is simply no explanation before me as to why it was not.
- [71] In my view, both issue and cause of action estoppel apply because the fairness of the marriage agreement properly belonged to the subject matter of the litigation before Dillon J. and should have been raised at that time.
- [72] Having come to this conclusion, it is still necessary to consider whether, as a matter of discretion, the doctrine of *res judicata* should be applied on this application. As Binnie J. noted in *Danyluk* at para. 33, the rules governing the doctrine should not be mechanically applied. The public policy interests underlying the rule must be balanced with the particular context in which the rule is sought to be engaged to ensure, at the end of the day, that justice is done on the facts of a particular case. Issue and cause of action estoppel should be applied flexibly where an unyielding application of them would create rather than alleviate unfairness: *Minot v. O'Shanter Development Co.* (1999), 168 D.L.R. (4th) 270 (Ont.C.A.) at

para. 50.

- [73] In the case at bar, there are no considerations (sometimes categorized as "special circumstances") suggesting as a matter of fundamental fairness that issue and cause of action estoppel should not be applied. For example, there has been no unanticipated legal or factual development that would make it unfair not to permit litigation of the fairness of the marriage agreement at this stage.
- [74] The plaintiff's central argument on this point is that determination of the fairness of the marriage agreement is necessary "to paint the circumstances of her WVA claim."
- [75] On balance, I do not think that the circumstances warrant exercise by the court of its residual discretion not to give effect to issue and cause of action estoppel. The public policy interests that underlie the doctrine of res judicata apply with considerable force in the case at bar. While the goal of judicial finality would certainly be undermined by an exercise of discretion that relieves against the operation of the rule, this will inevitably be the case. The more direct question is whether that overarching goal must give way in the face of what is equitable and just in the particular action.
- [76] In this case, re-opening the fairness of the marriage agreement risks undermining the repute of the administration of justice by courting inconsistent judicial appraisals of the same issue. It would countenance litigation by installment. It would expose the defendants to further, prolonged and emotionally-charged litigation that has been ongoing now for 4 ½ years. It would require the defendants to address issues that should have been raised earlier. No explanation has been provided as to why the fairness of marriage agreement was not raised when it was identified as a fundamental aspect of the summary trial application heard by Dillon J.. No explanation has been provided as to why the fairness of the marriage agreement was not raised until more than four months after the conclusion of the appellate proceedings initiated in respect of the prior proceeding.
- [77] Balancing these competing considerations as best I can, I decline to exercise my discretion to relieve against the operation of the rule. In my view, doing so in this case would cause more unfairness than it would prevent.

(c) Abuse of Process

- [78] Were it necessary to do so, I would dismiss the application to amend on abuse of process grounds. As noted above, the doctrine of abuse of process has been extended beyond the strict parameters of (and is unencumbered by) the specific requirements of res judicata: *Toronto (City) v. C.U.P.E.* at para. 42. It does, however, borrow much of its underlying rationale from the doctrine of res judicata.

- [79] The abuse of process doctrine focuses, in this context, on the integrity of the administration of justice. It prohibits the re-litigation of issues or causes where permitting it to proceed would offend vital systemic values such as a judicial economy, consistency, finality in litigation, and the integrity of the decision-making process: Tylon Steepe Homes, at para. 79. It is not, however, a doctrine to be engaged lightly.
- [80] In the case at bar, the plaintiff essentially seeks the opportunity to argue her case on an incremental basis. No explanation has been given for why the fairness of the marriage agreement was not raised at an earlier time, including when it arose in the context of the prior proceeding. Permitting this issue to go forward at this late stage would undermine the systemic values the abuse of process doctrine seeks to protect. In all the circumstances of this case, I would refuse leave to amend on this ground as well.

E. Conclusion

- [81] The plaintiff's application for leave to file its Fourth Amended Notice of Civil Claim is dismissed insofar as it proposes to expand the litigation to encompass issues going to the fairness of the marriage agreement.
- [82] I confirm the order made on March 19, 2014 permitting other unopposed amendments to the plaintiff's Notice of Civil Claim, some of which were made necessary by the dismissal of the fraudulent conveyance portion of her claim.
- [83] Should counsel require more specific direction concerning the scope and application of these reasons, the matter may be addressed at 9:00 a.m. on a date convenient to counsel and the court.
- [84] An application by the plaintiff for the further production of documents from the executors of the estate was adjourned generally at the time of the hearing of the application to amend the pleadings. As I am uncertain whether this application has been rendered moot as a consequence of this decision, the production of documents application will stand adjourned, to be brought back on by the plaintiff, on proper notice to the defendants, if she is so minded. I am not seized of that application.
- [85] The defendants shall have their costs attributable to this application on Scale B.

"FITCH J."

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