

CANADA / JUDGMENT

Epic Restoration Services Inc. v. Fuller

2024 BCSC 1139

COURT

Supreme Court of British Columbia

DECIDED

28 June 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 1139 Epic Restoration Services Inc. v. Fuller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Epic Restoration Services Inc. v. Fuller,

2024 BCSC 1139

Date: 20240628

Docket: S186318

Registry: Vancouver

Between:

Epic Restoration Services Inc.

Plaintiff

And

The Estate of Desmond Maurice Fuller, Deceased, by his executor and personal representative
Rudyard Kipling Fuller

Defendant

And

Epic Restoration Services Inc.

Defendant by way of Counterclaim

And

The Dominion of Canada General Insurance Company and,

In French, Compagnie D' Assurance Generale Dominion Du Canada also known as Travelers Canada

Third Party

Corrected Judgment: The text of the judgment was corrected throughout on July 23, 2024

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for the Plaintiff and Defendant by way of Counterclaim:

S.M.M. Hirji-Lalani

Counsel for the Defendant, Estate of Desmond Maurice Fuller Deceased, by his executor and personal representative Rudyard Kipling Fuller:

M. Menkes

Counsel for the Third Party:

A. Taggar

Place and Dates of Hearing:

Vancouver, B.C.

May 31, 2023

September 22, 2023

April 5, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 28, 2024

Table of Contents

I. Overview.. 4

II. Factual Background.. 6

III. Procedural Concerns. 9

A. Relief Related to the Trial Order 10

B. Relief Related to the Costs Order 17

IV. Orders Made. 22

V. Costs. 23

I. Overview

- [1] There are two applications before me seeking virtually identical relief. The first application is brought by the Plaintiff, Epic Restoration Services Inc.; the second is brought by the Third Party, The Dominion of Canada General Insurance Company also known as "Travelers Canada".
- [2] Through their applications, Epic and Travelers seek orders that would make Rudyard Kipling Fuller[1] personally liable for all outstanding amounts that were ordered to be paid to them by the Estate of Desmond Fuller, following a trial of this action. Rudyard is the executor and personal representative of the Fuller Estate, and a beneficiary. Rudyard is also Desmond's son.
- [3] The relevant Orders were pronounced by Justice Loo in 2023 and relate to a trial judgment and costs award (collectively the "Judgments"). There is no dispute that this action had been commenced prior to Desmond's death and when Desmond died there were enough assets in his estate to satisfy the Judgments.
- [4] The Applicants allege that while acting in his capacity as a personal representative of the Fuller Estate, Rudyard came into possession of a property located on Spruce Avenue (the "Property"). The Property was a substantial asset of the Fuller Estate and alone was enough to satisfy the Judgments. Instead of preserving part of the Property to satisfy any judgments in the existing litigation, Rudyard transferred the Property into his own name for his personal use, thereby preventing the Applicants from collecting on their awards.
- [5] The Applicants argue that by distributing the assets in the Estate without regard to claims made in the underlying litigation, Rudyard breached his fiduciary duty to act in the best interests of the estate and its beneficiaries. In support of this argument, they rely on s. 149(1) of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, [WESA].
- [6] Rudyard argues that the application is flawed on procedural and substantive grounds. The procedural grounds are summarized as follows:
 - a) The Applicants do not have standing to seek any judgment against Rudyard as he is not a defendant in his personal capacity in these proceedings.
 - b) The Applicants were obliged to bring this matter before Justice Loo when seeking costs, rather than bringing a separate application before a different judge.
 - c) The application is a collateral attack on the Orders and is also barred by reason of res judicata.
- [7] The substantive defences raised by Rudyard are that:
 - a) The Applicants lack standing because they do not fall within the narrow category of persons who have an interest in the estate under s. 149(1).

- b) Section 149(1) does not cover any liability for the type of contract which is at the centre of this case.
 - c) The relief sought is essentially a tracing remedy, and s. 149(1) does not grant a tracing remedy after the estate has been administered.
 - d) By operation of s. 137 of WESA Rudyard had been discharged from his personal liability once the estate administration was complete. The Judgments are a "simple contract debt" which did not exist when Rudyard administered the Estate.
 - e) WESA does not create a positive duty on the part of the personal representative to preserve assets of the estate for an unproven creditor. Rather, the only way to preserve the estate pending judgment is through a Mareva Injunction, which the Applicants did not seek.
- [8] Finally, Rudyard submits that even if he is found to be in breach of trust, this court ought to exercise its discretion under s. 96 of WESA to relieve him from personal liability as he was acting honestly and reasonably in the discharge of his duties.

II. Factual Background

- [9] The following facts are not in dispute.
- [10] Desmond Fuller was an insured of Travelers. In 2017, Desmond's home suffered water damage. Epic was retained to repair the damage. After completing the work around March 2017, Epic issued a repair invoice to Travelers for \$39,693.80.
- [11] In April 2017, Travelers issued a joint cheque (also referred to as a "co-payable cheque") to Desmond and Epic for \$39,693.80, which was the total amount of Epic's outstanding repair invoice (the "Contract Amount"). The cheque was drawn from Travelers account at the Toronto-Dominion Bank ("TD Bank"). Desmond deposited the cheque into his personal bank account at the Royal Bank of Canada ("RBC"). When Epic sought payment from Desmond for its services, he refused to pay Epic.
- [12] Epic took the position that the co-payable cheque was intended to reimburse it for the repair invoice, and that Desmond wrongfully retained those funds for his own use. Epic also took issue with the banks processing the joint cheque without the requisite two signatures.
- [13] Epic commenced this action on June 1, 2018, against Desmond and TD Bank, as well as RBC by a later amendment. The action against Desmond was framed in breach of contract, unjust enrichment, and breach of fiduciary duty. Around June 22, 2018, Desmond filed a counterclaim against Epic and issued a Third Party Notice to Travelers.
- [14] At the time this court action was commenced, Desmond was one of two registered owners of a property located on Spruce Avenue. The other owner was Rudyard. Desmond Fuller had a 2/3 fee simple interest in the Property and Rudyard had a 1/3 interest.

- [15] Desmond Fuller passed away on January 30, 2019. His Will provided for the residue of his estate to be divided equally between his two children, Rudyard and Kenneth. Probate was granted on July 2, 2019, with Rudyard being appointed as the personal representative of the Estate of Desmond Fuller. This action was then continued in the name of Desmond Fuller's estate, by his executor and personal representative, Rudyard Kippling Fuller.
- [16] The Statement of Assets, Liabilities, and Distribution filed by Rudyard in the grant of probate shows that Desmond's interest in the Property had a net value of approximately \$767,486.75 at the time of his death.
- [17] On July 29, 2019, Rudyard transferred the Property to himself in his capacity as executor of the Fuller Estate. Then on October 31, 2019, Rudyard transferred title of the Property from himself as executor, to himself in his personal capacity.
- [18] At some point in 2019, the \$39,693.80 that had been deposited into Desmond's bank account was retrieved and paid into court.
- [19] In February 2022, Rudyard filed an Amended Response to Civil Claim, Amended Counterclaim, and Amended Third Party Notice, to continue the proceedings against and on behalf of Desmond, in Rudyard's capacity as executor and personal representative of the Fuller Estate.
- [20] The trial of this matter started in November 2022, and completed in December 2022, after 12 days.
- [21] On February 16, 2023, Justice K. Loo issued Reasons for Judgment, indexed at 2023 BCSC 232. The Trial Order required the Fuller Estate to pay to Epic the total Contract Amount (\$39,693.80), less money for damaged chattels (\$1,990.67); contractual interest at the rate of 24% for the period June 6, 2017, to February 16, 2023 (\$43,957); ongoing interest at a per diem rate of \$21.12 from February 17, 2023, until full payment of the Contract Amount; and the funds sitting in court be paid out to Epic in partial satisfaction of the amount owed by the Estate. Justice Loo also ordered Travelers Insurance to pay the Fuller Estate for rental losses (\$1,205.25).
- [22] On February 17, 2023, counsel for Epic, Mr. Hirji, wrote to Rudyard seeking payment of the Judgment amount and costs of the proceeding for a specified amount. In this letter, Mr. Hirji advised Rudyard that if he did not satisfy the judgment in full, Epic would be seeking relief against him personally on the grounds that Rudyard was personally liable under s. 149(1) of WESA.
- [23] At the time that Justice Loo made his Trial Order, the Contract Amount was being held in court and had accrued a small amount of interest. That amount was subsequently paid out to Epic in full satisfaction of the award for the principal Contract Amount, and partial satisfaction of the award for contractual interest.

- [24] In late February and March 2023, the parties provided written submissions on costs to Justice Loo. It does not appear that Epic or Travelers sought any relief against Rudyard personally with respect to costs.
- [25] Epic's Notice of Application was filed on May 4, 2023. The outstanding amount owing to Epic by the Fuller Estate at the time was \$41,394.62.
- [26] Justice Loo released his decision on costs on May 12, 2023. The Costs Reasons are indexed at 2023 BCSC 810. Justice Loo ordered the Fuller Estate to pay Travelers and Epic costs of the proceeding to be assessed at Scale B. He also ordered the Fuller Estate to pay Epic double costs for steps taken after November 26, 2020.
- [27] Travelers filed its Notice of Application on May 17, 2023.
- [28] Rudyard filed Application Responses to Epic's NOA and Travelers' NOA, on May 12 and May 23, respectively.
- [29] This hearing proceeded on May 31, 2023. Due to inaccurate time estimates, the matter did not complete and was set for continuation in September 2023. When the parties appeared before me on September 22, 2023, the matter had to be adjourned due to insufficient time estimates.
- [30] The hearing was then re-set for continuation on April 5, 2024. At the start of the hearing, I was advised that the parties had come to an agreement that the costs payable to Epic by the Fuller Estate would be \$67,103.62. This figure includes interest that would be payable pursuant to Justice Loo's order, to April 5, 2024.
- [31] As at the date of this hearing, no agreement had been reached regarding the amount of costs payable to Travelers Insurance by the Fuller Estate.

III. Procedural Concerns

- [32] Epic's Notice of Application seeks to collect from Rudyard personally, any remaining amounts from the Trial Order, as well as all amounts owed under the Costs Order. Consequently, it asks for the following orders:
1. An Order and Declaration, pursuant to s. 149(1) of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, that Rudyard Kippling Fuller is personally liable to Epic Restoration Services Inc. for all amounts ordered to be paid by the Estate of Desmond Fuller, deceased, to Epic Restoration Services Inc. in this proceeding;
 2. An Order and Declaration that the property bearing PID 009-520-937 and having a municipal address of 1112 Spruce Avenue (the "Spruce Avenue Property") is an asset that previously belonged to, the Estate of Desmond Fuller, deceased, and came into the possession and control of Rudyard Kippling Fuller in his capacity as the Personal Representative of the Estate of Desmond Fuller, deceased;

3. An Order and Declaration that the Registrar of Land Titles shall immediately cause the Order after Trial made by Justice Loo on February 16, 2023 to be registered against title to the Spruce Avenue Property, upon presentation of the Court's Order in that regard;
 4. Costs;
- [33] Epic submits that these declarations and orders are needed to permit Epic to begin enforcement and execution proceedings.
- [34] Travelers' Notice of Application seeks the identical relief claimed by Epic, except that Term 1 asks for an order and declaration that Rudyard be held personally liable "to the Third Party for all costs ordered to be paid by the Estate of Desmond Fuller to the Third Party in this proceeding".
- [35] There are two orders implicated in these Applications. As they raise different procedural issues, I will address them separately. I begin with the Trial Order.

A. Relief Related to the Trial Order

- [36] The Notice of Civil Claim sought compensation from Desmond for breach of contract, unjust enrichment, and breach of fiduciary duty. The Trial Order provides substantive relief flowing from the issues raised in the trial. The Trial Order was entered on March 27, 2023, prior to this hearing commencing.
- [37] The specific terms of the Trial Order are as follows:
1. The defendant, the Estate of Desmond Fuller, deceased, shall pay the plaintiff, Epic Restoration Services Inc. the sum of \$39,683.80 on account of the plaintiff's contract claim;
 2. The defendant, the Estate of Desmond Fuller, deceased, shall pay the plaintiff, Epic Restoration Services Inc. interest pursuant to the contract in the amount of \$43,957.00, for the period of June 6, 2017 to and including February 16, 2023.
 3. The defendant, the Estate of Desmond Fuller, deceased, shall pay the plaintiff, Epic Restoration Services Inc. interest on the principal sum of \$32,124.60 at the per diem rate of \$21.12 from February 17, 2023 to the date on which full payment under paragraph 1 above is made.
 4. The plaintiff, Epic Restoration Services Inc. shall pay the defendant, the Estate of Desmond Fuller, deceased, the sum of \$1,990.67 on account of the defendant's claim for damaged chattels, which amount shall be set-off against the amount payable by the defendant to the plaintiff under paragraph 1 above.
 5. The remainder of the defendant's counterclaim against the plaintiff be and hereby is dismissed.

6. The third party, The Dominion of Canada General Insurance Company, shall pay the defendant, the Estate of Desmond Fuller, deceased, the sum of \$1,205.25 on account of the defendant's claim for rental losses.
 7. The remainder of the third party claim of the defendant against the third party be and hereby is dismissed.
 8. Costs shall be subject to further order of this Court.
 19. Post-judgment interest is payable in accordance with s. 7 of the Court Order Interest Act, R.S.B.C. 1996, c. 79 in relation to paragraph 6 above and any order made in relation to costs.
 10. The sum of \$39,683.80 paid into Court by the third party pursuant to the Order of Master Muir made on August 7, 2019, together with all accrued interest, be paid out to Hirji Law Corporation, in trust, in satisfaction of the order made in paragraph 1 above and in partial satisfaction of the order made in paragraph 2 above.
- [38] By operation of Term 10, the award under Term 1 has been paid by the Fuller Estate in full. However, when Epic filed this Notice of Application, Terms 2 and 3 had not been fulfilled, such that there still remained over \$40,000 from the Trial Order that was required to be paid by the Fuller Estate.
- [39] Epic takes the position that Rudyard is personally liable for these remaining amounts, by operation of s. 149(1) of WESA, which provides as follows:
- 149(1) A personal representative is liable, to the extent of the assets belonging to the estate that come into the personal representative's possession or control, for the wrongful acts and omissions or breaches of legal duty of the deceased person, subject to this or any other enactment to the contrary.
- [40] Epic argues that in his capacity as an executor and personal representative of the Fuller Estate, Rudyard had a fiduciary duty to act in the best interests of the Estate and its beneficiaries. He breached that fiduciary duty by distributing the Property without regard to Epic's outstanding claim in this litigation. Through Rudyard's actions, the Estate no longer has assets sufficient to pay the amounts ordered by Justice Loo; consequently, Rudyard should be held personally liable to Epic for those outstanding amounts.
- [41] It is important to note here that in its Notice of Civil Claim, Epic did not plead any of this relief against Rudyard personally. Nor did Epic seek to have Rudyard added as a party in his personal capacity.
- [42] The first time the issue of personal liability of Rudyard was raised before the Court was through Epic's Notice of Application filed in May 2023. Epic defends its decision to pursue the relief in this manner, on the grounds that:

- a) this matter could not have been raised before the trial judge as it was not until after the trial orders had been made and the Fuller Estate had failed to make timely payment, that Epic had the appropriate factual basis for an application under s. 149(1) of WESA;
- b) Epic does not need to add Rudyard as a party to the proceeding to seek relief against him personally, as the Estate is not a separate legal entity; and
- c) liability attaches to Rudyard personally by operation of s. 149(1) of WESA.

[43] With respect to paragraph (a) above, Epic submits that it did not become aware that the Property had been transferred out of the Estate, until after the Trial Order had been rendered. On that basis, it may well be Epic did not have the factual foundation to bring a s. 149(1) WESA application until after the trial had concluded. However, there is a difference between the timing of an application seeking certain relief, and whether a party has standing to seek the relief in a proceeding where the purported defendant has not been named.

[44] Similarly, while I agree with the general proposition under paragraph (b) above, that the Estate is not a separate legal entity, I do not agree that this means that Rudyard does not need to be added as a party in his personal capacity. To that end, Epic's reliance on the following authorities is mis-placed: *Mayer v. Mayer Estate*, 2018 BCSC 2225[2]; *Braich Estate*, 2017 BCSC 1140; *Darlington v. Bernard*, 2018 ONSC 162; and *Doucette v. Jones Estate*, 2012 NBQB 136.

[45] Mayer does not stand for the proposition that the plaintiff can seek relief against the personal representative of the estate without adding them as a party. In *Mayer*, Justice Crossin dealt with a wills variation application brought by the deceased's daughter against the deceased's spouse and his estate. However, the daughter named only the estate as a defendant. In dismissing the application in its entirety, Justice Crossin raised concerns about the manner in which the action had been brought:

[176] I pause to note again that in my view Ms. Mayer should not have brought a wills variation action while she is also acting as a personal representative. The "estate" has been named as a defendant. The estate is not a legal entity capable of being sued. The proper defendant, in relation to a wills variation action, is Ms. Mayer as a personal representative.

[46] These comments do not advance the Plaintiff's position in this case.

[47] Nor does *Braich Estate*, which only addresses the contractual relationship between a personal representative and a solicitor acting on instructions in administering the estate. The case involved a claim made by a lawyer against the estate for legal services. At para. 48, Justice Maisonville noted that in light of the fact that "an estate cannot enter into a retainer agreement with counsel, the personal representative who retains counsel or trustee is personally liable to the solicitor for his or her fees".

- [48] Darlington is an Ontario case in which the plaintiff sought entitlement to the estate based on an alleged common law relationship with the deceased. She brought an application to preserve assets of the estate pending determination of her claim. The court ultimately found that the plaintiff did not provide sufficient evidence to obtain the injunction. However, at para. 22 the court set out the basic proposition that the trustee has an obligation to administer the estate properly and risks personal liability if the assets are depleted and the applicant's claim is prejudiced.
- [49] This proposition in Darlington was repeated by the Court in Doucette. In Doucette, the plaintiff was also asking the court to preserve certain assets of the estate pending determination of his claims. As in Darlington, the application for a preservation order was dismissed. However, the New Brunswick Court of Queens Bench noted at para. 29 that the administrator of the estate "cannot ignore the Applicant's potential claim against the Estate before disposing of the assets".
- [50] This general proposition about the duties of the administrator as expressed in both Darlington and Doucette, can assist with determining the question of whether Rudyard is personally liable to Epic under s. 149(1) of WESA. However, neither decision addresses the procedural issue that has been raised, i.e. whether the plaintiff has standing to seek personal liability of the personal representative without making him a party to the proceeding in his personal capacity.
- [51] I also do not agree that s. 149(1) can be interpreted to absolve Epic of the obligation to name Rudyard as a party if it wishes to seek relief against him personally under s. 149(1). Epic did not provide me with any authority that supports this proposition; nor does a fair reading of s. 149(1) or related provisions in WESA, lead to this conclusion.
- [52] While s. 149(1) can provide the legal basis for the relief sought, it does not provide the mechanism for how that is achieved. Indeed, when one looks at s. 150 of WESA it is evident that the existing proceeding cannot be used to bind the personal representative.
- [53] Section 150 provides a structure for allowing existing claims and causes of action against a deceased person to continue. It is by virtue of s. 150 that Rudyard was able to amend the Response to Civil Claim, Counterclaim, and Third Party Notice, following Desmond's death.
- [54] Section 150(8), stipulates that "[a]ll proceedings under this section bind the estate of the deceased person, despite any previous or subsequent appointment of a personal representative". When s. 150 is read within the context of the statute as a whole, this provision lends support to the idea that the existing proceeding only implicates the Fuller Estate.

- [55] I conclude that to obtain an order against Rudyard personally under s. 149(1) of WESA, the Plaintiff needed to have taken steps to bring Rudyard into the litigation in his personal capacity. This is because the allegation that Rudyard breached his fiduciary duty and is liable to Epic for the Trial Order by operation of s. 149(1), raises a new cause of action that must be specifically plead.
- [56] In my view, there are only two mechanisms for Epic to be able to seek personal liability of Rudyard for the Trial Order under s. 149(1) of WESA. These are:
- a) by adding Rudyard in his personal capacity as a party to the existing action, and concurrently amending the Notice of Civil Claim to specifically plead relief under s. 149(1); or
 - b) commencing a separate proceeding against Rudyard in his personal capacity.
- [57] Rule 6-2(7)(b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 permits the court, on application by any person, to order that a person be added or substituted as a party if that person ought to have been joined as a party or their participation is necessary to ensure that all matters in the proceeding may be effectually adjudicated on.
- [58] Rule 6-2(7)(c) further empowers this court to order the addition of a party "if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with (i) any relief claimed in the proceeding, or (ii) the subject matter of the proceeding that, in the opinion of the court it would be just and convenient to determine as between the person and that party".
- [59] Rudyard rightfully noted that the matter before me is not an application to add him as a party in his personal capacity. In his Application Response, Rudyard expressly raised the defence that Epic did not have standing to pursue relief against him personally in this litigation as he was not a party. This position was argued more fulsomely at the hearing of these Applications. Epic has been aware of this issue for almost a year and has chosen not to bring an application under Rule 6-2(7). Epic takes the position that it is not necessary to add Rudyard as a party because the Estate is not a person. Epic has not asked this Court to add Rudyard as a party in the alternative. Consequently, even if I was of the view that it is necessary to add Rudyard as a party to this proceeding, the prerequisite of having an application for the Court to entertain this relief, has not been met.
- [60] I have also considered whether the Court should add Rudyard as a party on its own motion, having regard to the object of the Rules to secure a just, speedy and inexpensive determination of the proceeding on its merits. In my view, even if the Court had the power to pronounce such an order on its own motion, I do not find it appropriate to do so in these circumstances.

- [61] First, this issue was not argued by the parties, and it would be manifestly unjust for the Court to pronounce such an order in the absence of submissions from both parties. The importance of submissions is evident when one considers, for example, possible application of a limitation defence. There could be significant prejudice to Rudyard if he was unable to advance any limitation defences that might otherwise be available to him if an application had been brought to add him as a party.
- [62] Second, even if Epic had applied to add Rudyard as a party, it is extremely unlikely that this relief would have been granted at this late juncture, as the trial has concluded and the final order has been entered.
- [63] The second mechanism which is available to Epic is to start a separate proceeding seeking personal liability of Rudyard under s. 149(1) of WESA. Epic's ability to commence such a proceeding would of course be subject to any defences that may be plead by Rudyard which go to the validity of the newly instituted cause of action, and the merits of the case on substantive grounds.
- [64] Given my above conclusion, it is not necessary for me to address the various defences raised by Rudyard such as res judicata and abuse of process. Nor do I need to delve into the merits of the Plaintiff's position regarding liability of the personal representative under s. 149(1) of WESA. Though I find the Plaintiff's substantive arguments compelling, the matter is best left to be determined at another time should Epic decide to commence a proceeding against Rudyard in his personal capacity. However, it may benefit the parties to know that after having considered their submissions, I anticipate the likelihood of Rudyard succeeding in such a subsequent proceeding, as being very low.
- [65] I turn now to the Costs Order.

B. Relief Related to the Costs Order

- [66] The Costs Order was pronounced by Justice Loo on May 12, 2023. It relates to an award of costs made in favour of Epic and Travelers, against the Fuller Estate, and provides as follows:
1. The defendant, the Estate of Desmond Fuller, deceased, shall pay the plaintiff, Epic Restoration Services Inc. its costs of this proceeding, to be assessed at Scale B.
 2. The defendant, the Estate of Desmond Fuller, deceased, shall pay the plaintiff, Epic Restoration Services Inc. double costs for steps taken after November 26, 2020.
 3. The defendant, the Estate of Desmond Fuller, deceased, shall pay the third party, The Dominion of Canada General Insurance Company its costs of this proceeding, to be assessed at Scale B.
 4. Post-judgment interest is payable in accordance with s. 7 of the Court Order Interest Act, R.S.B.C. 1996, c. 79 in relation to paragraphs 1, 2, and 3 above.

[67] The Costs Order was entered on June 22, 2023, after this hearing before me had already commenced.

[68] Epic and Travelers argue that they are not required to add Rudyard in his personal capacity to seek the costs award be paid by him personally. On this narrow aspect, I agree that the law allows for costs awards against a trustee in their personal capacity despite the fact that they are not a named party.

[69] In *British Columbia (Civil Forfeiture Act Director) v. Nguyen*, 2009 BCSC 827, the court heard a costs application brought by the plaintiff who was successful in a summary trial application. In addition to arguing that it should be entitled to its costs, the plaintiff sought an order that the costs be payable by the trustee rather than the Estate. Although the trustee was not named personally, the court found the trustee personally liable. In support, Justice R. D. Wilson quoted the following general principles from *Vancouver Trade Mart v. Creative Prosperity Capital Corp.*, [1998] BCJ No. 2686, 1998 CarswellBC 2528 at para. 13:

... at common law, trustees in bankruptcy (like other trustees, executors, administrators, receivers and liquidators) are personally liable for costs if they unsuccessfully make a claim against another person, subject to the qualification that they are entitled to indemnity out of the estate unless they are guilty of misconduct.

[70] At para. 48 Justice R. D. Wilson cited with approval the following passages found at paras. 26 and 30 of *Vancouver Trade Mart* which support the notion that the personal representative does not have to be named in his personal capacity in order to be held liable for costs:

There is no duty to litigate, only the power to do so. The courts have never strayed from the general rule that the trustee litigates at his peril if there is no source of indemnity available to him. The possible sources are two-fold, the estate or a contract of indemnity from one or more creditors;

... trustees in bankruptcy should not be allowed to pursue litigation with immunity against personal liability for costs in circumstances where there is no statutory duty to prosecute the litigation and the trustee knows or ought to know that there will likely be insufficient assets in the estate to satisfy an award of costs in the event that the trustee is unsuccessful in the litigation.

[71] When one considers Justice Loo's Costs Reasons at para. 39, the implications of *Nguyen* go beyond the third party claim against Travelers, and also impact the actions taken by Rudyard in defending the action brought by Epic.

[72] While *Nguyen* dealt with a bankrupt estate, the principles upon which the court determined that the trustee could be held personally liable, apply equally to personal representatives in estate matters. Such was the determination by the court in *Shafer (Administrator of Shafer Estate) v. Jones* (No. 2), [1950] 2 W.W.R. 625, 1950 CanLII 461 (A.B.K.B.).

[73] In Shafer, Justice Shepherd found the plaintiff who was the administrator of the estate, to be personally liable for the defendant's costs despite the fact that the plaintiff was a party in the litigation as an administrator of the estate and not in his personal capacity. In so doing, the Court noted as follows at p. 626:

The principal question for decision here is: Is the plaintiff liable in his personal capacity for the costs awarded against him as administrator, he having sued as administrator of his father's estate? It appears from the examination of the plaintiff as a judgment debtor that the estate of the deceased had no assets, and the only asset owned by the plaintiff personally which might be exigible under execution is his interest as a partner in a beekeeping and honey business at Rainer, Alberta, in partnership with one Wright.

With reluctance I feel bound by the authorities cited in argument to grant the order asked for, which I do. See *Boynton v. Boynton* (1879) 4 App Cas 733, 41 LT 450:

"In ordinary cases an executor or administrator who sues as such and fails is personally liable for the costs of the action."

And Halsbury, vol. 4, p.435.

(cited at para. 6 of *Hall Estate v. Marshall*, 2002 BCSC 893)

[74] In *Cherry v. Delmar Customs Brokers Ltd.*, 62 B.C.L.R. (2d) 243, 1991 CanLII 2137 (B.C.S.C.), the defendants sought an order to name the trustee in bankruptcy in his personal capacity as well as in his capacity as a trustee, so that they could recover costs against him if the litigation was unsuccessful. Justice Donald held that there was no need to make such an order, as the law permitted the defendants to seek costs against the trustee personally in the circumstances. Relying on *Sigurdson v. Fidelity Insurance Company of Canada*, 20 B.C.L.R. 345, 1980 CanLII 404 (B.C.C.A.), Justice Donald noted that when a trustee advances a civil action on behalf of the estate he or she is personally responsible for costs.

[75] The challenge for the Applicants in this case, is that they are seeking an order related to the award of costs. The Costs Order is an order ancillary to the proceeding. I agree with Rudyard that such an application should have been brought before the presider who decided the case on its merits. In this case, that would be Justice Loo. Thus, while the Applicants are correct that they can seek costs against Rudyard personally without adding him as a party to the proceeding, they must bring that application before Justice Loo.

[76] I have come to this conclusion reluctantly, as I am aware that the parties have expended considerable resources on this issue thus far. However, the parties were advised at the commencement of the hearing before me of my concerns that this matter should properly be before Justice Loo. Plaintiff's counsel submitted that given the nature of the relief sought he was of the view that the Applications could be heard by any justice. Counsel for the Third Party agreed. Counsel for Rudyard asked that I hear submissions on the entire application rather than determining the procedural issues in isolation. As I was not familiar with the file material, I advised the parties that I would proceed to hear the Applications but that I may

determine at the conclusion that the matter should be brought before Justice Loo. Counsel were content to proceed on that basis.

- [77] Counsel did not point me to any authority in which a judge other than the trial judge, considered the issue of personal liability of a trustee or executor of an estate for costs. In Nguyen, the plaintiff sought the order for personal liability of the trustee before the trial judge. The application was brought at the same time that he made his submissions on costs.
- [78] In Shafer, the application for personal liability of the administrator of the estate was also brought before the same judge tasked with determining the substantive issue regarding liability. In that case, the plaintiff was successful in the action at the trial and appellate level. However, the appeal from the lower court decision was allowed by the SCC who dismissed the action. Consequently, the plaintiff was held liable for the defendant's costs throughout the proceeding. The defendant applied for an order before the original trial judge to enforce the costs award against the plaintiff personally.
- [79] I was able to locate only one decision in which a judge other than the trial judge, determined the issue of personal liability of the executor. However, the circumstances of that decision are distinctly different than what is before me.
- [80] In *Hall Estate v. Marshall*, 2002 BCSC 893, the defendants applied before Justice Cole for a declaration that the executor of the estate be held personally liable for the costs awarded to the defendants in the proceedings, and that the certificate of judgment issued in the proceedings be found valid and enforceable. The action was tried before Justice E.R. Edwards, who dismissed the action and awarded the defendants their costs. Before the final order was entered, the plaintiff (who was the executrix of the Estate) applied before Justice Edwards for a variation of the costs order. Justice Edwards noted that the plaintiff sought to avoid having to bear costs personally as "there is no estate here to bear the costs" but dismissed the application, finding that there was no miscarriage of justice in awarding the defendants their costs. When the parties appeared before Justice Cole, he advised that the matter should be heard by Justice Edwards. On the parties' insistence, Justice Cole agreed to hear the matter (at para. 4). However, it was clear from his Reasons, that he did so based on the fact that Justice Edwards had considered the issue of whether the plaintiff should have to bear the costs of the defendants' personally and declined to vary the award (at para. 11).
- [81] The case of *Stobbe Estate v. Insurance Corp. of British Columbia* (1994), 24 C.C.L.I. (2d) 250, 1994 CarswellBC 834 (B.C.S.C.), which is cited in *Hall Estate*, is also instructive. Similar to the case at bar, the defendant brought an application to seek a direction that the executor be held personally liable for the defendant's costs. Although the application for personal liability was dismissed, it is notable that the application was brought before the trial judge and framed as an application to amend the costs order.

- [82] In my view, the Applicants should have proceeded in a similar manner. The orders that are sought have the impact of amending or varying the costs award that was made by Justice Loo. That is an issue that is properly before the trial judge who pronounced the original order.
- [83] After having considered the submissions of the parties, and reviewing the authorities, I have come to the conclusion that the issue with respect to the personal liability of Rudyard for the costs awards to Epic and the Third Party, is not properly before me. This is a matter that should be determined by the trial judge.
- [84] As there are procedural matters that might arise (given that the Costs Order has already been entered) the appropriate relief is for the application to be dismissed, without prejudice to the parties' right to bring the issue of personal liability of Rudyard for the costs awarded to the Applicants before the trial judge.
- [85] I pause here to note that I have not addressed the defences advanced by Rudyard such as abuse of process, collateral attack or res judicata. Those are matters that are more appropriately addressed by the court that hears the substantive application.

IV. Orders Made

[86] I therefore order as follows:

1. The application of Epic filed May 4, 2023, is dismissed, without prejudice to:
 - a) Epic's right to seek an amendment of the existing proceeding or to commence a separate proceeding naming Rudyard Kipling Fuller in his personal capacity, to seek liability against him pursuant to s. 149(1) of WESA;
 - b) Epic's right to bring an application before Justice Loo to seek personal liability of Rudyard Kipling Fuller for the Costs Order pronounced by Justice Loo on May 12, 2023; and
 - c) Rudyard Kipling Fuller's right to defend the proceeding or application referenced at paras. (a) and (b) respectively, on procedural or substantive grounds.
2. The application of Travelers filed May 17, 2023, is dismissed, without prejudice to:
 - a) Travelers right to bring an application before Justice Loo to seek personal liability of Rudyard Kipling Fuller for the Costs Order pronounced by Justice Loo on May 12, 2023; and
 - b) Rudyard Kipling Fuller's right to defend the application referenced at para. (a) on procedural or substantive grounds.

V. Costs

- [87] Costs ordinarily follow the event. In this case, Rudyard Kipling Fuller was successful and is entitled to his costs of these Applications. However, I decline to award the costs at scale C or to order special costs.

[88] I find that the matter was of ordinary difficulty and does not warrant an award at scale C. I also do not find that there is sufficient basis to order special costs against the Applicants.

[89] Rudyard Kipling Fuller is entitled to his costs of the Applications payable by Epic and Travelers, at Scale B.

"Shergill J."

[1] As some of the parties share the same last name, to avoid confusion I will refer to them by their first names. No disrespect is intended.

[2] An appeal of the Mayer trial decision was dismissed as abandoned in 2019 BCCA 363.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/11/2024BCSC1139cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/epic-restoration-services-inc-v-fuller-2024>

Prepared on 29 October 2026 · Esheria