

CANADA / JUDGMENT

Fry v. Fry

2018 BCSC 1018

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1018 Fry v. Fry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fry v. Fry,

2018 BCSC 1018

Date: 20180620

Docket: S181582

Registry: Vancouver

Between:

Peter Michael Jeremy Fry in his capacity as representative for the Estate of Marjorie Vivian Fry,
Deceased and the Estate of Peter Ivor Fry, Deceased and in his personal capacity

Plaintiff

And

Vivian Rebecca Fry, as the Executrix of the Will and Trustee of the Estate of Marjorie Vivian Fry,
Deceased and as Executrix of the Will and Trustee of the Estate of Peter Ivor Fry, Deceased and
Vivian Rebecca Fry, in her personal capacity, Jeremy Nicholas Fry, Susan Mary Philippa Storey

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

E. Clavier

Counsel for the Defendant, Vivian Rebecca Fry:

T. Louman-Gardiner

The Defendant, Jeremy Nicholas Fry appearing:

In Person

Counsel for the Defendant, Susan Mary Philippa Storey

S. Boucher

Place and Date of Hearing:

Vancouver, B.C.

May 17, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 20, 2018

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I. Introduction

- [1] The plaintiff, Peter Michael Jeremy Fry ("Michael"), has commenced this action seeking to address what he alleges to be irregularities in the administration of the estates of his late parents. The defendants in the action are his three siblings. At the core of Michael's claim is an allegation that his sister, the defendant Vivian Rebecca Fry ("Rebecca"), must account to the parents' estates for her misconduct in managing their affairs both as a trustee with a power of attorney during their lifetimes and as executrix of both estates thereafter.

- [2] Some, but not all, of the claims that Michael seeks to pursue in this action are purported to be advanced in the name and on behalf of the parents' estates. In order to bring those claims in that manner he first needs leave of this Court under s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. That is what he seeks on this application.
- [3] The application is opposed not just by Rebecca but also by the other two siblings, Jeremy Nicholas Fry ("Jeremy") and Philippa Winchester Storey ("Philippa" - that is her correct name; the name appearing in the style of cause, i.e., "Susan Mary Philippa Storey" is apparently not correct). Rebecca, Jeremy and Philippa oppose the application on various grounds.
- [4] First, they submit that Michael has not satisfied the statutory preconditions for obtaining leave under WESA - i.e., he has not made reasonable efforts to cause Rebecca to bring the action herself and he is not acting in good faith.
- [5] More fundamentally, they submit that the claims against Rebecca that Michael seeks leave to pursue in the name and on behalf of the parents' estates have not been shown to have sufficient merit to justify the attendant cost and inconvenience to the estates that would flow from allowing Michael to proceed with them.
- [6] Finally, they submit that the allegations that Michael has raised, to the extent they warrant further investigation at all, can and should be addressed either in a separate proceeding that Rebecca has already commenced seeking approval of her accounts or by pursuing the remainder of the claims advanced in this action, for which he does not require leave of the court.
- [7] For the reasons that follow, I have concluded that leave should not be granted.

II. The Facts

- [8] On July 27, 2016, the parties' father, Peter Ivor Fry ("Peter") died leaving a will naming Rebecca as executrix of his estate and gifting his entire estate to the parties' mother, Marjorie Vivian Fry ("Marjorie"). Marjorie died on January 7, 2017 leaving a will naming Rebecca as her executrix and gifting her estate to the four children in equal shares.
- [9] According to Rebecca, the following assets were in Marjorie's estate at that time:
- (a) the parents' former residence at 4855 Smith Avenue, in Burnaby (the "Smith Avenue Property");
 - (b) a half share in an investment property at 2927 Eddystone Crescent in North Vancouver (the "Eddystone Property");
 - (c) various investment accounts, primarily with Odlum Brown;
 - (d) miscellaneous bank accounts; and

(e) a minivan.

[10] Both parents had, before their deaths, given Rebecca a power of attorney. Rebecca says that she never used the power of attorney given to her by Peter because Peter was able to manage his own affairs until his death. Rebecca says that she did gradually come to use the power of attorney given to her by Marjorie, as Marjorie grew less able to manage her affairs by herself.

[11] Rebecca says that, for reasons of administrative convenience, she was added as a joint tenant to the parents' investment and bank accounts during the parents' lifetimes. She caused a declaration of trust to be prepared. She also took title to the Smith Avenue Property in trust for her parents.

[12] Although Michael is the oldest of the siblings, Rebecca was named as the executrix of the parents' estates. According to Rebecca, she was chosen for that role because she was the sibling who was closest to the parents and was the most familiar with their financial affairs. Michael had been estranged from the rest of the family for a period beginning some time during or soon after the 1970's and lasting until approximately 2010, although there appears to be some disagreement among the parties as to the extent and duration of that period of estrangement.

[13] Shortly after Marjorie's death on January 7, 2017, Rebecca provided a cursory accounting and made an interim distribution to each of the four siblings in the amount of \$116,051.75.

[14] Michael says that he retained counsel in May 2017 because he was "concerned that Rebecca was not being as open and forthcoming with information and documentation as her role as executrix required, and I wanted further insight into the [parents'] Estates affairs." Rebecca acknowledges that immediately following Marjorie's death her siblings may have felt that she was not being fully transparent with them. She explains that it took her some time to organize her thoughts and records and for their "family dynamics to settle down."

[15] Michael's newly-retained counsel first wrote to Rebecca on May 3, 2017. The letter begins by stating that Michael was "seeking information about your parents' assets to which he is entitled as a beneficiary." With respect to the Eddystone Property, the letter asserted that:

title to the property was held at all material times amongst you, your mother and your father as joint tenants, each of an undivided one-third interest the net proceeds would need to be divided equally among the three owners.

[16] The letter concluded under the heading "Next Steps" as follows:

We look forward to an expeditious response and delivery of information and documentation. Our client has not yet requested that we deliver formal notice to you under section 99 of the Trustee Act for you to pass your accounts before the court ... If we can have your accounting resolved informally by timely production of information and satisfactory explanations, then we will not require a formal court passing.

- [17] The letter asks for responses to certain questions and production of certain documents. It contains no allegation that could form the basis of a claim by the estate against Rebecca, other than a potential demand for an accounting.
- [18] Rebecca responded through counsel by letter dated June 22, 2017 attaching approximately 418 pages of documents. According to Rebecca, Michael did not respond to that correspondence by questioning any of her answers, other than to request, by letters from his counsel dated July 12, 2017 and August 9, 2017, an immediate payout of the proceeds of sale of the Smith Avenue Property, on the grounds that it was not part of the estates but rather subject to a separate trust.
- [19] By letter from her counsel dated August 24, 2017, Rebecca sent her siblings the details of her proposed distribution of the estate assets and asked them to execute a form of release in her favour. Philippa and Jeremy signed the release but Michael did not.
- [20] Instead, by letter dated September 18, 2017, Michael's counsel wrote to Rebecca's counsel, stating as follows (among other things):

Our client does not accept your client's 'estate breakdown' attached to your letter of August 24, 2017 and will consequently not approve the accounts or sign any release and consent at this time. Our client maintains that there are assets that fall within the estate which your client has omitted to include as assets in the estate. In particular, his understanding is that:

Your client has taken for herself estate funds in the amount of \$375,000, claiming that she is entitled to this amount as payment for her alleged half-share of the proceeds from the sale of the [Eddystone Property]. In support hereof, your client has produced inter alia an entirely self-serving Declaration of Bare Trust and Agency dated September 23, 2016 (after Peter's death), which is signed only by your client. Our client disputes that your client is entitled [sic] any portion of the funds taken. Our client also disputes the correctness of the Declaration of Bare Trust and Agency.

It is our client's understanding that Eddystone was purchased as a business venture between Peter, Marjorie, your client and her estranged husband, Morie, using Peter's investment style of re-directing accumulating equity into financial instruments providing a blend of growth and income. Your client was to manage the property so that Peter and Marjorie would not have to do anything other than oversee the operation.

Peter and Marjorie loaned your client (and Morie) \$51,483 to pay for their share of the down payment on the property. This amount at all times comprised a loan that your client was required to repay. Peter, Marjorie, Morie and your client were registered on title for Eddystone as joint tenants.

Our client understands that your client subsequently struggled with meeting her repayment obligations throughout the joint venture. By 2005, after 9 years of payments, your client had paid down less than 9% of the principal and had accumulated an interest debt in excess of \$25,000.

It appears that the parties subsequently adopted a pragmatic approach to these arrears, treating the entire equity take-out from mortgage refinances in 2005 and 2009 as belonging to Peter, apart from a portion commensurate with the percentage of the loan that your client had actually paid down.

In light of the foregoing, it is our client's understanding that after mid-2010 your client was no longer entitled to any of the equity, proceeds or any benefit arising out of the property. It appears that it is only after Peter had died that your client on or about September 15, 2016 transferred the entire proceeds from the sale of Eddystone that were held in Peter's personal Odlum-Brown account to Odlum-Brown accounts held by your client alone. She then had the Declaration of Bare Trust and Agency prepared in which reference is made to her personal accounts as the accounts in which the proceeds are held, and in which she notes an ostensible agreement between Peter and her in terms of which she claims to be entitled to \$375,000 from the proceeds.

In our view, the parties' conduct is entirely consistent with an understanding between Peter, Marjorie, and your client that after mid-2010, the equity in Eddystone belonged entirely to Peter.

For this reason, your client is obliged to pay back into the estate the \$375,000 (plus all interest earned on this amount since your client transferred it into her personal accounts) that she has taken without being entitled thereto. These funds comprise an estate asset that must be included in the estate and is subject to division under the [parents'] Wills.

In the premises, there are assets belonging to the estate that have not been included in the estate assets. Our client demands that your client should put the amounts she has taken from the estate (\$375,000 plus all interest earned on this amount since your client transferred it into her personal accounts) back into the estate assets, and that she account for any and all loans that she received from Peter or Marjorie during their lifetimes.

If your client fails to comply with our demands, we have instructions to apply to have her removed or replaced as executrix, as she is evidently not neutral.

[21] Rebecca responded with a letter from her counsel dated October 10, 2017. The letter asserted that "your client's understanding of the facts is entirely incorrect" and proceeded from there to set out Rebecca's version of events. The letter attached another almost 60 pages of documents in an effort to respond to Michael's allegations.

[22] Michael did not respond to that letter before commencing this action.

[23] Having received no response to her letter, Rebecca sought again to complete the accounting and make a distribution. She again circulated releases under cover of a letter dated November 10, 2017, which, once again, only Philippa and Jeremy but not Michael signed. Again, there was no response from Michael.

- [24] On December 20, 2017, Rebecca commenced a proceeding in this Court by way of petition seeking an order that her accounts in respect of her administration and management of various trusts settled by the parents during their lifetimes and their estates (including her remuneration), be taken and passed before a registrar of the court. Michael opposed the relief sought in the petition, arguing that it was premature.
- [25] Instead, Michael commenced this action on January 31, 2018. In it, Michael advances several complaints about Rebecca's management of the parents' affairs. Those complaints fall into the following categories:
- (a) misappropriation of part of the proceeds of the sale of the Eddystone Property;
 - (b) wrongful use of those misappropriated funds to acquire and maintain another property located at #225 - 2888 Cambie Street in Vancouver (the "Cambie Street Property");
 - (c) refusal to distribute the proceeds of sale of the Smith Avenue Property;
 - (d) failure to account for the contents of various bank accounts, term deposits and other personal assets; and
 - (e) an unauthorized charitable donation to the Vancouver Hospice Society in the amount of \$18,589, less a tax credit that was received in the amount of \$5,332.81.
- [26] The most significant issue in dispute in Michael's action is whether Rebecca was entitled to keep any part of the proceeds of sale of the Eddystone Property for herself, or whether those proceeds belong entirely to the estates.
- [27] It is common ground that the Eddystone Property was originally acquired on June 1, 1996 as part of a joint venture among the parents, Rebecca and Rebecca's ex-husband ("Morie"). The two couples paid \$379,000 for the Eddystone Property, including a down-payment of \$102,966. Peter loaned Rebecca and Morie their share of the down payment, i.e., \$51,483.
- [28] On July 20, 2010, Morie's interest was transferred to the other three co-owners when he and Rebecca separated. According to Rebecca, after acquiring Morie's share, she held a half-interest in the Eddystone Property for herself. Her parents held the other half-interest. Rebecca says she paid half of the expenses on the Eddystone Property on that basis.
- [29] The Eddystone Property was sold in November 2015. When the sale completed on January 8, 2016, the net proceeds of \$756,233.62 were placed into a joint account held by Rebecca and the parents. Rebecca claims to be entitled to \$376,616.81 in her own name, net of any capital gains tax payable.
- [30] Michael alleges in this action that at some point in 2015, before the Eddystone Property was sold, the parents and Rebecca changed their former arrangement to stipulate instead that the proceeds of sale were to belong entirely to the parents. Rebecca's interest in the proceeds was surrendered, he alleges, in exchange for the parents':

- (a) paying the capital gains tax owing on the sale;
- (b) forgiving loans that Rebecca owed them so that she could acquire Morie's share; and
- (c) paying the cost to repair, maintain and upgrade the Eddystone Property before it was sold.

[31] Rebecca emphatically denies that any such re-formulation of the arrangement occurred.

[32] Michael has adduced no direct evidence in support of those allegations. The evidence he relies on in that regard is indirect and tenuous, at best.

[33] For example, Michael believes that Rebecca must have borrowed significant sums from the parents and that the loans remain outstanding because he is not aware of how she could otherwise have afforded to buy out Morie's share of the Eddystone Property and their own family home when the couple separated. Although Rebecca acknowledges that she did borrow money from her parents on several occasions over the years, she asserts that those loans were either forgiven or repaid during the parents' lifetimes. She says that she obtained the funds to buy out Morie's share of the family home by refinancing it. Michael submits that this explanation should not be accepted at face value because Rebecca has not yet produced the documents to support it.

[34] Another basis for Michael's suspicions comes from a "Quicken" accounting file he claims to have extracted from a floppy disc that he removed from Peter's records following Peter's death, without Rebecca's knowledge or permission. By Michael's own admission, the records he has analyzed are "incomplete." Nevertheless, he says they show that during the period from February 2010 to December 2011 (i.e., around the time he says that Rebecca and Morie were separating), Rebecca contributed only 25% to the Eddystone Property expenses tracked by that record, by his calculation.

[35] Michael also refers to an email from Peter to the siblings dated January 4, 2016 in which Peter describes a loan that he proposed to extend to a friend of his named Boris King. That loan, Peter told them, "may utilise much of the proceeds from our sale of the North Vancouver property". In a subsequent email in the chain dated June 1, 2016, Rebecca reported to the other siblings about a conversation she had since had in person with Peter about the proposed loan. She reported having told Peter that "we do NOT have a stake in his money at the moment and he is intellectually capable to make his own financial planning decisions, so he should do whatever he wants to do." From this, Michael infers that both Peter and Rebecca were treating the proceeds of the Eddystone Property as belonging entirely to the parents.

[36] Finally, Michael relies on certain emails from Philippa to the other siblings in which Philippa refers to an agreement signed by Michael Storey (i.e., Philippa's husband), reflecting a \$750,000 loan that Rebecca received and was supposed to repay to the estate. In an email dated January 30, 2017, Philippa relayed the following information to Michael:

The Eddystone property was between Rebecca and Dad. As she also said (to Michael, if it hadn't been sold, then it would not have gone into the Estate and the title would be totally hers. As it was, she got half and borrowed Dad's half to buy the new apartment on Main Street. Michael (and then Wendy [Jeremy's wife]) signed a document saying that the loan of \$750,000 would have to be repaid into the Estate. This looks like the only asset the Estate holds.

[37] That email is suspicious, argues Michael, because despite his requests, Rebecca has not produced the written agreement signed by Michael Storey. That missing agreement, he surmises, is likely to be the agreement by which Rebecca agreed to surrender her share in the proceeds of sale of the Eddystone Property.

[38] In a later email to Rebecca and copied to the other siblings, dated September 24, 2017, Philippa conveyed the following information:

We are all at a loss to understand Mike's motivations. Mike may be retaliating for what he believes was his right as eldest child to be Executor, although I believe that the close personal and business relationship you had with our parents, put you in the best position to understand and to execute the intention as of our parents' Estate to we beneficiaries as they would have wanted.

Regarding your queries:

1. We believe that Dad, Mom, Morie and Rebecca entered into an agreement to buy a property (Eddystone) where Dad paid all of the deposit and Rebecca and Morie paid 50% of the prepayments on the loan. I imagine that Morie and Rebecca repaid their share of the deposit over time. When Morie divorced, we understand that Rebecca bought out Morie's share. Therefore, Rebecca would now have 50% ownership of the property.
 - a. As another point, Rebecca said that if Dad & Mom predeceased the sale of the property, then Rebecca would benefit 100% of the sale of the property. This did not occur as the property was sold in January 2016, many months prior to Dad's passing.
 - b. In June 2016, Michael Storey witnessed an agreement whereby Rebecca was to borrow Dad & Mom's share of the net proceeds of the sale of the property to finance her purchase of the Cambie Street Property. The loan from memory was for \$720K-\$750K, and this was to be repaid to Dad or the Estate if Dad and/or Mom predeceased the repayment of the loan. We did not receive a copy of that agreement. This agreement was terminated and replaced with another agreement in July 2016 witnessed by Wendy Fry. I do not know the reason for the new agreement, why the previous one was terminated, or what was in the new agreement. Except that a few weeks ago, Rebecca said that she was now to receive 60% or 66% of the proceeds from the sale of the Eddystone property. This is my understanding, and based on that*, Rebecca should receive at least 50% of the Eddystone property proceeds.

2. I do not see the value in Mike Fry being appointed as Executor as he does not have the intimate details of the Estate that Rebecca holds. In addition, I would query the Executor remuneration and wonder if the 3% remuneration would be duplicated or forfeited. Please advise. It would be detrimental to all beneficiaries if either were the case, as the only ones to benefit from a change at this stage would be the lawyers.
 - a. *Again, it is my understanding that Rebecca should receive 50% of the Eddystone property. Plus 25% of the 50% that belongs to the estate, i.e., 62.5%
3. From my understanding, the Eddystone property is not a total Estate asset and therefore *Rebecca should receive at least 50% of the Eddystone property proceeds.

[39] Since then, Philippa has satisfied herself that Rebecca's accounting is correct, and in particular that Rebecca was entitled to retain half of the sale proceeds from the Eddystone Property, contrary to Michael's allegation. In an email to Michael dated November 3, 2017, she responded as follows to his earlier assertion that she ought to read his lawyer's letter:

You said I didn't read the last documents from your lawyer to Rebecca. I DID read them and they raised some valid queries. Then I got the response from Rebecca's lawyer which effectively answered and refuted all your claims with valid supporting documents. 67 pages of them. Did YOU read them?? If so, why are you persisting?

Dad and mom did trust Rebecca - with their lives! She was their primary caregiver for years! And they also were business partners and trusted her with their finances too. That is why dad set the Estate up the way he did - to ensure that there would be a clear and simple way for each of the beneficiaries to get a quarter share which would not involve accountants' and lawyer's fees, and would not go into probate for years.

Please let go of this pursuit, Mike, and let us all get the inheritance that our parent's wished for us.

[40] Jeremy is of the same view, based on the documents and information he has reviewed. Having come to that view, both Philippa and Jeremy oppose Michael's application.

[41] Following the commencement of this action, Rebecca's petition seeking approval of her accounts was heard on March 9, 2018. Justice Affleck ordered that the accounts be reviewed before a registrar of the court who was to make a recommendation to the court following a hearing. In anticipation of that hearing, the accounts were to be delivered to the respondent beneficiaries within 21 days of the order. Any respondent who objected was required to particularize his or her objections within 21 days after that.

[42] Rebecca delivered her statement of accounts on March 20, 2018, as ordered. Michael responded with his objections by letter of his counsel dated April 19, 2018. The matter has yet to be heard by the registrar.

III. The Legal Test for Leave

[43] Section 151 of the WESA states in relevant part as follows:

151 (1) a beneficiary may, with leave of the court, commence proceedings in the name and on behalf of the personal representative of the deceased person

- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
 - (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
 - (3) The court may grant leave under this section if
 - (a) the court determines the beneficiary seeking leave
 - (i) has made reasonable efforts to cause the personal representative to commence the proceeding,
 - (ii) has given notice of the application for leave to
 - (A) the personal representative,
 - (B) any other beneficiaries or intestate successors, and
 - (C) any additional person the court directs that notice is to be given, and
 - (iii) is acting in good faith, and
 - (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a beneficiary for the proceeding to be brought .
 - (4) On application by a beneficiary, an intestate successor or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.
- [44] The starting point in the analysis is that the provision confers an overriding discretion on the court - if the enumerated branches of the test are made out, the court "may" grant leave: s. 151(3); *Bunn v. Bunn Estate*, 2016 BCSC 2146 at para. 48.
- [45] In *Bunn*, Gray J. concluded that the test to be applied in deciding whether leave should be granted is akin to that applied under corporate legislation in determining whether leave should be granted to commence a derivative action on behalf of a corporation.
- [46] In most of the leave applications that have come before the court under this provision, the focus of the debate has been on whether the proposed action is "necessary and expedient" within the meaning of s. 151(3)(b).
- [47] In *Gordon Estate (Re)*, 2018 BCSC 487, I summarised that aspect of the test as follows:

- [38] Justice Gray held that the terms "necessary" and "expedient" are disjunctive, such that the applicant need only establish that the proposed action is either necessary or expedient. A proposed proceeding will be considered necessary if the personal representative is unwilling or unable to proceed. It may be expedient if it is in the best interests of the estate.
- [39] Justice Gray drew an analogy between s. 151 and the test for leave to commence derivative actions under corporate legislation. Under that test, the court does not attempt to try the case on the merits, but rather determines whether the proposed action has a reasonable prospect of success or is bound to fail. The applicant must establish that the potential for relief in the proposed action is sufficient to justify the cost and inconvenience to the estate of being involved in such litigation and that it is in the best interests of the estate.
- [48] Although the defendants in this case likewise oppose the application relying primarily on their submission that the proposed action would be neither necessary nor expedient, they also dispute that Michael:
- (a) has made reasonable efforts to cause the personal representative (i.e., Rebecca) to commence the proceeding; and
 - (b) is acting in good faith.
- [49] The parties were unable to find clear authority on what "reasonable efforts" must be made to satisfy the condition in s. 151(3)(a)(i) where, as here, the personal representative is intended to be a defendant in the proposed proceeding and is therefore in an inherent conflict of interest. Michael argues that in such circumstances, he cannot reasonably be expected to have made any such effort.
- [50] Michael cites *Rodgers v. Rodgers Estate*, 2017 BCSC 518, in which Young J. stated that:
- [58] The court may grant leave under this section if the court determines that the beneficiary has made a reasonable effort to cause the personal representative to commence or defend the proceeding ...
- [59] Obviously the personal representative is not going to bring an action against herself for breach of fiduciary duty. If the court determines that this is a valid claim then this may be a ground for having the personal representative removed.
- [51] Nevertheless, the statute clearly requires the applicant to make "reasonable efforts" to cause the personal representative to commence the proceeding. At least one previous decision of this Court appears to hold that the requirement cannot be ignored even when the personal representative is an intended defendant. That was the approach taken in *Re MacRae and Daon Development Corp.* (1984), 10 D.L.R. (4th) 216 (B.C.S.C.) [Daon], in dealing with a similarly-worded provision under corporate legislation. In that case, the applicant was seeking leave to commence a derivative action against the directors of a company for having wrongfully declared a dividend when the company was insolvent. The applicant had merely written to the directors after bringing the leave application, inviting them to assume conduct

of the action. That was sufficient to satisfy the condition, the applicant argued, because any real effort to cause the directors to commence the action would have been futile in view of the obvious conflict.

[52] In refusing to grant leave, Wallace J. rejected that submission, explaining his decision as follows at p. 221-222:

Section 225 [of the former Company Act, R.S.B.C. 1979, c. 59] provides in part:

Derivative action

225(1) A member or director of a company may, with leave of the court, bring an action in the name and on behalf of the company

- (a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself; or
 - (b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a), whether the right, duty or obligation arises under this Act or otherwise.
- (3) A member or director may, on notice to the company, apply to the court for the leave referred to in subsection (1) or (2) and, if
- (a) he has made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action;
 - (b) he is acting in good faith;
 - (c) it is prima facie in the interests of the company that the action be brought or defended; and
 - (d) in the case of an application by a member, he was a member of the company at the time of the transaction or other event giving rise to the cause of action,

the court may require that notice of the application be served on those persons, and may grant the leave on terms it considers appropriate

Counsel for Daon asserted that the applicant, Gordon MacRae, did not "make reasonable efforts to cause the directors of the company to commence or diligently prosecute the action" as required by s.225(3)(a).

The material filed in the application reveals the notice of motion was filed on March 29, 1984, and that subsequently, on April 9th, Mr. Wilder, counsel for the applicant, wrote to Daon forwarding the affidavit of Mr. MacRae. Mr. Wilder wrote:

it discloses a possible cause of action by Daon against its Directors for paying out dividends when the Company wasn't solvent or the payment of the dividends would make it insolvent.

Unless the Company is prepared to join in the writer's application in Supreme Court for leave to commence that action, or undertake before the Court to carry that action then such failure will be deemed to be a refusal to prosecute the action pursuant to the provisions of the Company Act.

It is apparent that this letter is a demand that the company either "join in the writer's application" or "carry on that action". No other effort was made by or on behalf of the applicant to cause the directors of the company to commence the action. In my opinion such a letter, written after the motion was filed, does not constitute "reasonable efforts" on the part of the applicant "to cause the directors of the company to prosecute the action". Rather it reflects the view of the applicant, or his counsel, that one would be naive to expect that the directors would accede to a request that they sue themselves for damages for having authorized the payment of dividends contrary to the provisions of the B.C. Company Act. Mr. Wilder submitted that the law should not compel a person to perform a futile act before granting the relief to which one would otherwise be entitled.

I do not accept this proposition as applied to the facts of this case. Firstly, it is a statutory requirement that the applicant make reasonable efforts to cause the directors to prosecute the claim and that, in my view, at the very least involves giving reasonable notice to the directors of the request together with details of the nature of the claim it wishes the directors to prosecute. Secondly, the condition can be easily performed without undue expense or effort and, if performed, any suspected futility in making the request, if such exists, would be readily exposed.

I consider it would be an error to relieve the applicant of the obligation to comply with the requirements of the statute simply because counsel presumed that the directors would decline to bring an action, designed to benefit the company, because they might be personally involved -- I adopt this view particularly in the circumstances of this case when such speculation could have been easily resolved by an appropriate and timely request.

Accordingly, I find the applicant has failed to comply with the provisions of s. 225(3)(a) of the Company Act, which requirement constitutes a condition precedent to the applicant's right to apply to the court to commence a derivative action on the company's behalf.

[53] I note that Wallace J. was careful to restrict his remarks to the specific facts of the case before him. Those facts appear to have included the possibility that the directors could have been persuaded to proceed with the proposed claim, despite their personal involvement, had the applicant given them proper notice of it and an opportunity to pursue the matter themselves. Such a possibility is, it must be acknowledged, even less realistic here. The analogy to the derivative action setting, as applied to a board of directors, can only be taken so far in the context of a s. 151 application such as this, involving a lone personal representative who would also be the sole defendant in a proposed action involving members of the same family. The decision in *Daon* must be considered in light of that distinction.

- [54] Although I appreciate that an effort to cause the personal representative to commence an action against herself may not be a reasonable one, to paraphrase Wallace J., the WESA provision still requires, at a minimum, giving the personal representative reasonable notice of the request together with details of the nature of the claim that the applicant wishes her to pursue - even if the circumstances may be such as to make it impossible for the personal representative to commence the action herself.
- [55] Like the parallel provision under the former Company Act that was considered in Daon, WESA requires an applicant, before seeking leave under s. 151, to make "reasonable" efforts to cause the personal representative to commence the proposed action. The purpose of that provision appears to be twofold: first and foremost, to avoid an unnecessary application for leave (in the usual case, because the personal representative might be willing to commence the action herself). A secondary rationale, one that is particularly apposite where the personal representative is also an intended defendant, appears to be to give the personal representative prior notice of the claim and the opportunity to attempt to resolve the matter herself.
- [56] Those statutory objectives remain relevant even where there is little or no possibility that the personal representative will personally commence the proceeding against herself. For example, reasonable efforts by the applicant may cause the personal representative to resolve the matter by agreement, to submit the matter to an alternative dispute resolution process or, if the matter must go to court, to agree to let someone else bring the action on behalf of the estate, any of which could render the leave application unnecessary.
- [57] In summary, I conclude that in a case such as this where the personal representative is an intended defendant, the applicant must, before commencing an action in the name or on behalf of the estate or seeking leave to do so:
- (a) inform the personal representative of the specific allegations being made; and
 - (b) request that the personal representative take, or allow others to take, specific remedial action to address them.
- [58] The kind of effort that will suffice for this purpose will vary with the context of each case. In the absence of a reasonable effort to notify the personal representative of the specific allegations being made and to cause the personal representative to address those allegations in some way, the statutory prerequisite for leave under s. 151(3)(a)(i) would not be met.
- [59] Finally, the requirement in s. 151(3)(a)(ii) that the applicant be acting in good faith was explained by Pearlman J. in the context of an application for leave to commence a derivative action in *Luft v. Ball*, 2013 BCSC 574, as follows at para. 46:
- [46] The applicant bears the onus of establishing that it is acting in good faith in bringing derivative proceedings. Good faith is not presumed; the applicant must adduce evidence to establish good faith: *Creative Realty Corp. v. 333 Terminal Holdings Ltd.*, 2011 BCSC 638 at para. 19. The test of good faith is whether the action is brought primarily for the purpose of

pursuing the claim on the company's behalf. The factors to be considered include the applicant's belief in the merits of the proposed claim, existing disputes between the parties, and alleged ulterior motives: *Bennett v. Rudek*, 2008 BCSC 1278 at para. 46. As Adair J. observed in *Lost Lake Properties Ltd. [Lost Lake Properties Ltd. v. Sunshine Ridge Properties Ltd., 2009 BCSC 938]* at para. 56, ultimately good faith is a question of fact to be determined on all of the evidence and the particular circumstances of the case.

[60] Having set out the legal framework governing the dispute, I turn next to the issues in dispute.

IV. The Issues

A. Did Michael make reasonable efforts to cause Rebecca to commence the action?

[61] Michael submits that he has satisfied this condition because there is nothing more he could reasonably have done to cause Rebecca to commence the action, given that the action would be against herself.

[62] The defendants submit that Michael has not satisfied the condition. Instead, they argue, Michael has been "lying in the weeds" - i.e., commencing this action and seeking leave to bring it in the name and on behalf of the estates without having given Rebecca adequate notice of the specific allegations he wishes to pursue against her, let alone making reasonable efforts to cause her to commence the action herself.

[63] I am satisfied that by his counsel's letter of September 18, 2017, Michael gave sufficient notice to Rebecca of the claim he wanted to see made against her in the name and on behalf of the estates. In the same letter, he demanded that she repay the funds into the estates, failing which Michael told her that he would apply to the court to have her replaced as the personal representative (presumably so that such an action could be commenced by someone else).

[64] The defendants argue that the September 18, 2017 letter does not satisfy the statutory condition because, among other things, the allegations advanced in it are fundamentally different from the allegations that he now seeks to advance in this action. For example, the defendants say that in the letter of September 18, 2017, Michael was alleging that Rebecca had forfeited her equity in the Eddystone Property as of 2010, whereas now his allegation is that it was surrendered by way of an agreement in 2015.

[65] Notwithstanding the evolving nature of Michael's allegations, I find that the essential elements of the claim he wishes to bring in the name and on behalf of the estates were set out in the letter of September 18, 2017. At the core of it is an allegation that Rebecca wrongfully kept some portion of the proceeds of sale of the Eddystone Property for herself when all of the proceeds properly belonged, ultimately, to Marjorie's estate. Michael communicated to Rebecca through that letter that he believed the estates had a claim against her in that regard and that she should take action to address it. She disagreed and refused to do so. There is nothing more that Michael could reasonably have done to cause

Rebecca to commence such an action before bringing this application.

[66] In summary, I find that Michael made the requisite reasonable efforts to cause Rebecca to commence the action. I therefore find that the condition in s. 151(3)(a)(i) has been satisfied.

B. Is Michael acting in good faith?

[67] Michael submits that the evidence adduced on this application demonstrates that he is acting in good faith because it shows that he genuinely believes that the claim is a meritorious one that should be pursued by the estates.

[68] The defendants contend that Michael has not met the onus on him to show that he is acting in good faith. They submit that it cannot be sufficient for the applicant simply to assert in an affidavit that he is acting in good faith. Here, they say, there are several factors suggesting that Michael is not acting in good faith, which tend to undermine his bald assertion that he is.

[69] First, they argue that Michael's lack of good faith is apparent from the fact that his allegations against Rebecca have not been consistent and he has not explained the reasons for the numerous and frequent changes in his position. Initially, in an email dated February 3, 2017, Michael appeared to accept that Rebecca was entitled to a beneficial interest in the Eddystone Property. In his counsel's letter of May 3, 2017 (i.e., after having received the emails he now relies on), Michael asserted through his counsel that the proceeds of the Eddystone Property were to be "divided equally amongst the three owners." Then, in his counsel's letter of September 18, 2017, his contention was that Rebecca had lost her equity entirely as of mid-2010. In this action, he now asserts that all of her equity was lost pursuant to an alleged agreement in 2015. The defendants say that Michael has raised yet more new issues for the first time in the context of this application, even as late as during the oral hearing.

[70] Michael responds that his allegations have evolved as he has acquired more information and has been able to digest it. He explains that it has taken a significant amount of time for him to acquire the documents and information he has been seeking from Rebecca. He believes that Rebecca is still withholding important and relevant evidence. He should not be held to such a strict standard of consistency, he argues, when Rebecca has all of the information and he has been trying to uncover it.

[71] Second, the defendants refer to a number of communications in which Michael is said to display a malicious animosity towards Rebecca, rather than genuine concern about the status of estate assets. For example, in an email to Philippa dated January 31, 2017, Michael departed from a discussion about the substance of the issues to make the following aside: "it's not going to go well for Reb[ecca] the more omnipotent she feels, the harder she'll fall."

- [72] Michael responds that his estrangement from the rest of the family is now a decade old and that his sole motivation for bringing this action is to recover for the estates, rather than any personal animosity towards Rebecca.
- [73] A third basis put forward by the defendants for questioning Michael's good faith is said to arise from his disingenuous suggestion that he is not the only one who questions Rebecca's handling of the estates' affairs. In his affidavit, Michael attempts to bolster his suspicions about Rebecca's conduct with the observation that Philippa too has expressed similar concerns. He neglects to mention that Philippa has since come around to Rebecca's position and no longer shares Michael's suspicions. In any event, the defendants say, the fact that Michael has chosen to pursue this application without consulting them before proceeding on his own is likewise indicative of his bad faith.
- [74] To this, Michael responds that Philippa did, at least for a time, share his suspicions. He is unable to explain why she has since changed her mind and sided with Rebecca, but he should not have to do so in order to establish his own good faith.
- [75] Despite the defendants' submissions to the contrary, I am satisfied that Michael genuinely believes that the estates have a meritorious claim that should be pursued and that he is bringing this application for that reason.
- [76] Although the details of Michael's allegations have evolved over time, the core allegations have generally been consistent and appear to be honestly believed. There is no sound basis to conclude that Michael secretly believes the allegations to be groundless or that he is advancing them for an ulterior purpose.
- [77] Although the siblings are obviously divided and there is apparently a lengthy history of acrimony in the family, I am not persuaded on that basis that Michael is advancing what he knows to be a spurious claim out of spite.
- [78] I am satisfied that Michael has brought this application in good faith, in the sense that he genuinely believes that Rebecca is indebted to the estates and that the estates should seek to recover what is owed from her.

[79] I therefore find this condition to be satisfied.

C. Is the proposed action necessary and expedient?

- [80] Michael asserts that his proposed action in the name and on behalf of the estates is both "necessary" and "expedient." The meaning of those terms in this context was explained in the following paragraphs of the judgment of Gray J. in Bunn:
- [50] In my view, a proceeding may be "necessary" under s. 151 of WESA if the personal representative is unwilling or unable to proceed. It may be "expedient" if it is in the best interests of the estate.

- [51] In this case, the applicant is a beneficiary of the Estate and seeks the order under s. 151 of WESA on the basis that the claim, if successful, will increase the value of the Estate. In such a case, in my view, to satisfy the court that it should exercise its discretion to grant leave to commence litigation on behalf of the estate, the applicant must show not only that there is an arguable case, but also that the potential relief in the action is sufficient to justify the inconvenience to the estate of being involved in the action, and that proceeding is overall in the best interests of the estate. In my view, that must involve a consideration of the costs of proceeding, including the potential of a costs award against the estate if it fails. Further, in my view, in determining whether the proposed lawsuit appears to be in the best interests of the estate, the court can consider the strength of the proposed claim based on a limited weighing of the evidence.
- [81] Michael submits that his proposed action is "necessary" because Rebecca is in an inherent conflict of interest and cannot bring an action against herself. It is also "expedient," he argues, because it offers the chance to enhance the value of Marjorie's estate by at least several hundred thousand dollars, if not more.
- [82] The defendants submit that most of the allegations that Michael seeks leave on this application to advance could and should be dealt with in the parallel proceeding Rebecca has already commenced for approval of her accounts. They submit that it is only the claim to recover part of the proceeds of sale of the Eddystone Property that must be brought in the name and on behalf of the estates. It is open to Michael to seek an order in this action to replace Rebecca as the personal representative, without obtaining leave of the court.
- [83] I agree with the defendants that the only claim for which Michael truly needs leave is the one relating to the Eddystone Property, including the related tracing claim involving the Cambie Street Property.
- [84] The defendants submit that allowing that claim to proceed would not be "expedient" because Michael has not made out the requisite arguable case - certainly not enough of a case to justify the attendant inconvenience and expense to the estates.
- [85] I agree with the defendants that Michael has not adduced sufficiently compelling evidence to support his allegations. They rest almost exclusively on conjecture and his unsubstantiated suspicions and mistrust of Rebecca.
- [86] There is, in particular, no compelling evidence to support the existence of the alleged agreement by which Rebecca is supposed to have surrendered her equity interest in the Eddystone Property at any time.
- [87] On the contrary, the only direct documentary evidence suggests that:
- (a) the parents, Rebecca and Morie originally purchased the Eddystone Property together, to be held as joint tenants;
 - (b) Peter loaned Rebecca \$51,842 for her share of the down-payment;

- (c) by a series of amendments, the interest rate on Rebecca's loan was modified to reflect changes to the interest rate on the mortgage;
- (d) the parties created a joint account for the Eddystone Property expenses and entered into an agreement governing how that account would be funded;
- (e) by transactions carried out in 2005 and 2009, Peter and Rebecca refinanced the loans and split the proceeds 50/50, with Rebecca using her share to repay the balance owing on the original down-payment loan; and
- (f) when the Eddystone Property was sold, the parties, by a written agreement made January 29, 2016, specifically acknowledged that Rebecca was to receive half of the proceeds, with the other half going to the parents.

[88] I find that the emails and other documents upon which Michael relies in support of his allegation to the contrary are at least equally capable of being understood in a manner consistent with Rebecca's version of events. The prospects for recovery on that claim therefore appear remote.

[89] I am also troubled by the lack of a workable litigation plan. As the defendants point out, Michael seeks to fund the litigation from the estates, which means that the as yet unquantified litigation cost will only serve to diminish the ultimate recovery for all of the beneficiaries if, as appears likely, the claim is unsuccessful.

[90] Another significant factor weighing against granting leave in this case is the fact that the two "neutral" beneficiaries adamantly oppose the application. Although, as Michael argues, WESA allows for leave to be granted if the proposed action would be in the interest of "a beneficiary" rather than "all beneficiaries," it would take a very compelling case to outweigh the opposition of the neutral beneficiaries, on whose behalf and at whose expense the action is proposed to be advanced. This is not such a case.

[91] I have therefore concluded that the condition in s. 151(3)(b) has not been satisfied.

V. Summary and Conclusion

[92] Having found that Michael has failed to satisfy the test for leave, I am refusing the application with costs to the defendants.

[93] The parties have leave to speak to costs should they be unable to agree on the appropriate order in light of these reasons for judgment.

"Milman J."

The Honourable Mr. Justice Milman

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