

CANADA / JUDGMENT

Henshaw v. Henshaw

2020 BCSC 1379

COURT

Supreme Court of British Columbia

DECIDED

16 September 2020

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

2020 BCSC 1379 Henshaw v. Henshaw

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Henshaw v. Henshaw,

2020 BCSC 1379

Date: 20200916

Docket: S182217

Registry: Victoria

Between:

Harry Roy Henshaw, Trustee under The Roy and Eleanor Joint Partner Trust and Arthur Lloyd Henshaw, Trustee under The Roy and Eleanor Joint Partner Trust, and Arthur Lloyd Henshaw, Attorney for Eleanor Henshaw

Plaintiffs

And

Joshua Russell Henshaw, Heather Janine Henshaw, Russell Keith Henshaw, Russell Keith Henshaw, Trustee under The Roy and Eleanor Joint Partner Trust and Russell Keith Henshaw, Attorney for Eleanor Henshaw

Defendants

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiffs:

P.B. Newman

Counsel for the Defendants, Joshua Henshaw and Heather Henshaw:

M. Mark

Counsel for the Defendant, Russell Henshaw:

K. McGhie

Place and Date of Hearing:

Victoria, B.C.

August 26, 2020

Place and Date of Judgment:

Victoria, B.C.

September 16, 2020

Introduction

- [1] This litigation involves a dispute among members of the Henshaw family following the death of the patriarch, Roy Henshaw. Intending no disrespect, for readability, I will refer to the family members by their first names.
- [2] Roy was married to Eleanor. They had six children: Harry, Lloyd, Russell, Janet, Kathy, and Bruce. Joshua is Russell's son. Heather is married to Joshua.
- [3] In 2011, Roy and Eleanor established The Roy and Eleanor Henshaw Joint Partner Trust (the "Trust"). Roy and Eleanor were beneficiaries of the Trust. It owned the family home on Asquith Street in Victoria and funds in bank accounts. There are issues as to who were the trustees of the Trust at various relevant times. It is not disputed that Roy and Russell were trustees in the spring of 2016, but the plaintiffs maintain that they were not the only trustees.
- [4] In the years leading to 2016, Roy and Eleanor had been living for many years in the home on Asquith Street. They shared the house with Kathy, who is developmentally disabled and was cared for by her parents. By 2016, this living arrangement was becoming untenable. Roy and Eleanor were in their 90s. Roy was suffering from a heart condition. Eleanor had become frail and incompetent. A dispute arose among Roy and the children as to what should be done.

- [5] Harry, Lloyd and Janet were on one side. They thought that the Asquith property was no longer suitable for Eleanor and Kathy. Roy, Russell, and Joshua were on the other. They thought that arrangements could be made to maintain Roy, Eleanor, and Kathy at the Asquith property.
- [6] Joshua negotiated with Roy to buy the Asquith property from the Trust for \$600,100. An agreement of purchase and sale was concluded on May 20, 2016. Joshua and Heather were the purchasers. Roy and Russell signed on behalf of the Trust. In the agreement, Joshua and Heather undertook to permit Roy and Eleanor to occupy the property for their lifetimes without financial responsibility. The purchase was concluded, and Joshua and Heather took title to the Asquith property, on June 9, 2016.
- [7] Roy died in October 2016.
- [8] In May 2018, Harry and Lloyd commenced this action on behalf of the Trust and Eleanor against Russell, Joshua, and Heather. They allege that they were trustees of the Trust in the spring of 2016 and that the sale of the Asquith property to Joshua and Heather required their consent. They further allege that the sale was induced by undue influence. As against Russell, they seek relief including damages for breach of trust, tracing, and an accounting. As against Joshua and Heather, they seek relief including a declaration voiding the transfer of the Asquith property to them, a declaration that Joshua and Heather hold the Asquith property on a resulting trust for the Trust, damages, tracing, and an accounting.
- [9] The matter now comes before the Court on an application brought by Joshua and Heather to have the claims against them dismissed on a summary trial. The application does not touch Harry and Lloyd's claims against Russell, which would still have to be tried.
- [10] In response, Harry and Lloyd maintain that their claim against Joshua and Heather is not suitable for disposition on a summary trial.

Issue

- [11] The principal and, in my view, determinative issue on this application is whether the claim against Joshua and Heather is suitable for disposition on a summary trial. For the reasons that follow, I have concluded that it is not.

The argument in favour of summary disposition

- [12] Joshua and Heather submit that the terms of their purchase of the Asquith property were freely negotiated between Joshua and Roy. They submit that Joshua's evidence shows that Roy knew his own mind and was acting independently. In the conveyance, the Trust was represented by a lawyer who had previously acted for the Trust, Roy and Eleanor.

- [13] Joshua and Heather say that this lawsuit embroils them in a dispute among Roy and Eleanor's children that has little or nothing to do with them and, if the issues concerning them are not addressed summarily, they will be required to attend an expensive trial involving issues that mostly do not concern them. The issues arising on this application, they submit, are discrete and simple, and questions of credibility are not engaged.

Analysis

- [14] I do not agree with Joshua and Heather that the issues engaged by the claim against them are discrete from the issues engaged by the claim against Russell. In my view, there are significant common issues as to Roy's competency and vulnerability, and whether the sale of the Asquith property to Joshua and Heather was induced by undue influence exercised by Russell, who is Joshua's father.
- [15] The notice of civil claim includes the following allegations against Joshua, Heather, and Russell in connection with the transfer:
35. At the time of the Family Home Transfer, Roy was in a relationship of dependency with Russell, Joshua and Heather. Roy was frail and vulnerable with diminished mental capacity and he relied upon Joshua and Heather to carry out his activities of daily living.
 36. At the time of the Family Home Transfer, Joshua and Heather were in a position to dominate Roy and Eleanor's will, and the circumstances indicate that Joshua and Heather procured the Family Home Transfer as a result of undue influence.
 38. At the time of the Family Home Transfer, Russell was the attorney and health care representative for both Eleanor and Roy, and as such had a duty to act in their best financial and personal interests.
 39. When Russell signed the transfer documents that effected the Family Home Transfer he breached the fiduciary duty that he owed to Eleanor and Roy, and he is liable personally to Eleanor and Roy for the losses they have suffered and continued to suffer.
 40. In the alternative, Russell unduly influenced Roy to sign the transfer documents that effect the Family Home Transfer, and the said transfer should be set aside.
 41. In the further alternative, at the time of the Family Home Transfer, Roy lacked the mental capacity to sign the transfer documents, and such transfer is void.
- [16] For the purpose of this application, I accept Joshua and Heather's contention that, in the spring of 2016, Russell and Roy were the trustees of the Trust.

- [17] The Trust was established by a professionally drafted Trust Deed made on June 16, 2011. Roy and Eleanor were defined collectively as the Settlor. Under s. 6.1 of the Trust Deed, either Roy or Eleanor could appoint additional or substitute trustees by instrument in writing. Under s. 6.2, "the Settlor", that is, Roy and Eleanor collectively, could remove a trustee by notice in writing to the trustee.
- [18] Harry was the initial trustee but, presumably by prearrangement, immediately after the trust was established, he resigned, and Roy and Eleanor appointed themselves as trustees in his place.
- [19] By a professionally drafted instrument dated November 12, 2015, Roy and Eleanor revoked all previous appointments of successor trustees and confirmed that they were the current trustees. They made provision for the appointment of Harry, Lloyd, and Russell as trustees in the event that either one of Roy and Eleanor was left as the sole trustee and that person died, resigned, retired, or was otherwise unable to act. Finally, they appointed Russell as a trustee. By a separate, professionally drafted instrument, Eleanor then resigned as a trustee, leaving Roy and Russell as the trustees.
- [20] The significance of this is that, as a trustee of the Trust, Russell owed Roy and Eleanor (the beneficiaries) a fiduciary duty of the utmost loyalty and good faith.
- [21] The plaintiffs claim, as against all three defendants, that the sale of the Asquith property was induced by undue influence. Undue influence is presumed where a fiduciary benefits from a transaction with a beneficiary; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 28 (Wilson J.). Accordingly, undue influence would be presumed in the case of a transaction involving the Trust for Russell's benefit. It is at least arguable that it should be presumed as well in the case of a transaction involving Russell's son and daughter-in-law. Assessment of this issue requires a close examination of all of the circumstances of the transaction and, in particular, the part played by Russell in bringing about the transaction.
- [22] The evidence on this application addresses only Joshua's dealings with Roy in connection with the purchase of the Asquith property from the trust, not Russell's dealings with Roy. Russell's dealings with Roy will have to be addressed at the trial of the Trust's claim against Russell for undue influence.
- [23] Whether or not the claim against Joshua and Heather is dismissed, the trial will have to address the familial dispute that is the backdrop to the sale and Joshua's involvement in that dispute. It will have to address Roy's failing health and his competence.

Law pertaining to suitability for summary trial

[24] Supreme Court Civil Rules [Rules], R. 9-7 governs the summary trial procedure. It permits the court to grant judgment, on an issue or generally, on motion materials without hearing oral evidence tested by cross-examination before the court at a trial. R. 9-7(15)(a) imposes two conditions under which an application for judgment on a summary trial must be refused:

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application

[25] The first of these conditions requires the judge hearing the application to make a factual determination concerning the evidence before the court.

[26] The second condition engages an exercise of discretion as to whether it is unjust to decide the issues on a summary trial. Considerations bearing on the exercise of this discretion are canvassed in many cases, among them *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263 at para. 12, *aff'd* 2006 BCCA 369, and *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83 at paras. 28-37.

Assessment and conclusion

[27] I must dismiss Joshua and Heather's application for judgment on a summary trial because I am not in a position to make findings concerning Russell's dealings with Roy that are essential to an assessment of the claim that the sale of the Asquith property was induced by undue influence. If the sale was induced by Russell's undue influence, even independently of anything done by Joshua or Heather, it still opens the door to a challenge to the title obtained by them through the purchase, depending on what they knew or ought to have known concerning Russell's conduct; *Citadel General Insurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 804, paras. 48-51; *Waxman v. Waxman* (2004), 186 OAC 201, paras. 545-549; *Vancouver Coastal Health Authority v. Moscipan*, 2019 BCCA 17 at paras. 57-61; *Snell's Equity* (31st ed.) (2005: Sweet & Maxwell, London), para. 8-35. Joshua and Heather's affidavits sworn for this application does not address their awareness of Russell's actions. Russell has not sworn an affidavit and has not yet been examined for discovery.

[28] Even if I could make the necessary findings of fact, I do not think it would be just to decide the claim against Joshua and Heather in isolation. It is not truly discrete from the claim against Russell. In my view, the consequences of a potential finding that the sale of the Asquith property was induced by Russell's undue influence should be addressed in the context of a proceeding in which the present owners of the property, Joshua and Heather, remain parties.

- [29] If I gave judgment on the claim against Joshua and Heather now, the evidence considered on this application would end up being examined again, and my factual findings would be subject to re-evaluation on a much more comprehensive record; *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at paras. 97-102; *Ferrer* at para 34.
- [30] I think it likely that Joshua will be a witness at the trial of the claim against Russell. There are conflicts in the evidence concerning the family dispute that is the backdrop to the property transfer. Each of Joshua and Janet dispute evidence given by the other. Credibility will be an issue at trial, and if Joshua's credibility is called into question, it may affect the trial judge's assessment of evidence given by Joshua that is uncontradicted. This is important because Joshua is the only living witness to his dealings with Roy.
- [31] I doubt that giving judgment in Joshua and Heather's favour now would ultimately result in a saving of much court time. In *Coast Foundation v. Currie*, 2003 BCSC 1781 at para. 17, Justice Groberman, as he then was, observed that it is important to consider whether allowing the application will ultimately result in saving court time. He stated:
- [17] Summary trial applications that will not, even if successful, reduce the length of trial, should, in general, be discouraged. The court must recognize the reality that judicial time is a scarce resource.
- [32] Justice Groberman further observed at para. 18, that piecemeal decision-making is rarely efficient and multiple appeals may impede, rather than hasten, the orderly determination of the action. These observations were cited with approval in *Kaler v. Kaler*, 2013 BCCA 57 at para. 24-25 and in *Ferrer* at para. 34.
- [33] These considerations lead me to conclude that, even if I were in a position to make the necessary findings of fact, I would not exercise my discretion in favour of granting judgment on a summary trial.

Disposition

- [34] For these reasons, Joshua and Heather's application for judgment is dismissed.

"Gomery J."

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/20/13/2020BCSC1379.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/henshaw-v-henshaw-2020>

Prepared on 26 October 2026 · Esheria