

CANADA / JUDGMENT

Lee v. Chau

2022 BCSC 1676

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1676 Lee v. Chau

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lee v. Chau,

2022 BCSC 1676

Date: 20220824

Docket: E210338

Registry: Vancouver

Between:

Nu Lee

Claimant

And

Tan Chau, Deceased and The Estate of Tan Chau, Deceased and

My Linh Chau aka Helen My Linh Chau aka

Lira Lee aka Lira Harmony Anestan Lee aka

Lira Harmony Anestan Aidrian Yingling Lee and

Li Hau Chau aka Jack Li Hau Chau,

My Linh Chau aka Helen My Linh Chau aka

Lira Lee aka Lira Harmony Anestan Lee aka

Lira Harmony Anestan Aidrian Yingling Lee and

Li Hau Chau aka Jack Li Hau Chau, the Joint Administrators of the Last Will and Testament of Tan Chau, Deceased

Respondents

Before: The Honourable Justice Kirchner

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

W.M. Wong

Counsel for the Respondent Li Chau:

J.P. McStravick

J. Kennedy (A.S.)

Counsel for the Respondents My Chau and Tan Chau:

D.P. Dahlgren

G.R. Fraser

Place and Date of Hearing:

Vancouver, B.C.

August 22, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 24, 2022

- [1] THE COURT: Two of the respondents in this family law proceeding, My Linh Chau who is also known as Helen Chau, and Li Hau Chau who is also known as Jack Chau, apply to dismiss this claim in its entirety or, in the alternative, as against themselves in their personal capacities and as administrators of the estate of their late father, Tan Chau. Tan Chau's estate is also named as a respondent in this proceeding.
- [2] In the further alternative, they seek security for costs of the trial. They argue the claimant is barred from bringing the claims - or at least her central claim - in this proceeding, by the doctrine of res judicata and on the basis that it is an abuse of process and a collateral attack on a previous order made by Justice Douglas in a civil proceeding involving substantially the same parties.

- [3] As the applicants and their late father share the same last name, for clarity I will refer to the applicants as "Helen" and "Jack," and I intend no disrespect in using these first names. I will refer to the two of them collectively as "the applicants," and I refer to their late father as "the deceased."

Background

- [4] The claimant, Nu Lee, is the deceased's late widow from his second marriage. She is not the applicants' mother. She and the deceased were married on May 30, 1995, but as I will explain in a moment, they had been living separate and apart for at least three years before the deceased died. Indeed, the facts as found by Justice Douglas suggest there never was much, if any, of a relationship between the claimant and the deceased at all. The marriage was never consummated, and the claimant spent most of her time in Taiwan, away from the deceased. When she returned to Canada, she stayed with a cousin for the most part. She was not aware that the deceased had contracted pancreatic cancer and was not aware of his death until well after he had passed.
- [5] Justice Douglas found as a fact that the claimant played no meaningful role in the deceased's life for many years before he died. The applicants assert the marriage was nothing but a sham, entered into by the plaintiff for the purpose of obtaining entry into Canada as a landed immigrant and ultimately citizenship. Justice Douglas stopped short of making a finding that the marriage was a sham, but it was certainly left open on the facts as she found them.
- [6] At the heart of this family law claim, as well as the civil action that came before Douglas J., is a property located on Aubrey Street in Burnaby (the "Aubrey Property"). The Aubrey Property was owned outright and mortgage-free by the deceased when he met the claimant. Justice Douglas found that the claimant had made no financial contribution to the purchase, maintenance or ongoing costs of the Aubrey Property.
- [7] In 1995, the year after the marriage, the deceased made a will dividing his estate three ways in equal parts to be given to the claimant and to each of the two applicants. However, the following year, he made a second will revoking all former wills and leaving the entirety of his estate to the two applicants. In that second will, he explained that he was leaving nothing to the claimant because, although they were married, the marriage was never consummated, the claimant had left him to return to Taiwan on March 1, 1996 and had not returned, and he believed that she married him to facilitate entry into Canada as a landed immigrant. He also said they had never lived together in a husband-and-wife relationship.

- [8] In 1996, the deceased filed a petition seeking divorce from the claimant, but for reasons that are not clear, in 1997 he filed a notice of discontinuance and in a praecipe citing reconciliation as the reason the discontinuance. None of the parties can offer an explanation for that discontinuance other than what might be inferred from the reference to reconciliation. Regardless, as Douglas J. found, to the extent there was or believed to be a reconciliation, it did not last.
- [9] In 2010, the deceased was diagnosed with pancreatic cancer, and Helen became his primary caregiver. The claimant was not aware of this diagnosis. On February 14, 2014, about five months before the deceased died, and long past the time that Douglas J. had found he and the claimant had been living separate and apart, the deceased transferred the Aubrey Property to himself and the applicants as joint tenants. Justice Douglas found this transfer was a gift. When the deceased died in July 2014, the applicants became the owners of the Aubrey Property through the right of survivorship. On April 18, 2015, Jack transferred his one-half interest in the property to Helen for \$500,000.
- [10] On October 30, 2015, the claimant filed a notice of civil claim in the action that eventually came before Douglas J. challenging the deceased's transfer of the Aubrey Property to the applicants and seeking to vary his will under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. The notice of civil claim named the applicants as defendants in the civil action in their personal capacities and as administrators of the estate. The claimant did not name the estate itself in the civil action but, as noted, she named the applicants in their capacity as administrators of the estate.
- [11] In the notice of civil claim, the plaintiff (the claimant in this proceeding) alleged that the Aubrey Property was the former matrimonial home and claimed the deceased transferred it to the applicants on a resulting trust. She therefore claimed the estate continued to hold an interest in the property. She further claimed the applicants had been unjustly enriched by the transfer at her expense and claimed a constructive trust in respect of the property. She further claimed that the transfer was a fraudulent conveyance that is null and void, thus placing the property in the hands of the estate. She also alleged that the parties were married for 19 years and that the marriage lasted until the deceased's death. She claimed to be the deceased's spouse for the purposes of WESA and she denied they were separated at the time of death or any other time. Though the estate was not specifically named as a defendant, as I have said the notice of civil claim makes claims against the estate and seeks relief in respect of the estate.
- [12] In conjunction with the civil action, the claimant also registered a Certificate of Pending Litigation ("CPL") against the Aubrey Property. The applicants in this proceeding filed a response to civil claim on November 30, 2015, denying most of the allegations in the notice of civil claim, maintaining the deceased transferred the Aubrey property as a valid gift, and asserted that the deceased and the plaintiff had been separated since March 1, 1996. Thus, the applicants pled that the plaintiff had no standing to apply for a variation of the will, and the deceased had no moral or legal duty or obligation to provide for her. In short, they

claimed in their response to civil claim that the plaintiff had ceased being a spouse for the purposes of WESA in accordance with s. 2(2) of that Act.

- [13] Thus, from the date that the responses to civil claim were served on the claimant, the claimant and her counsel were on notice that the applicants considered that she and the deceased had been separated for some time and were claiming she was not a "spouse" within the meaning of WESA. In fact, during examinations for discovery held on September 22, 2016, Jack's former counsel advised counsel for the claimant that the claimant had no standing to bring a WESA claim because of the separation and that she ought to have commenced her claim under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Despite being put on notice by the response to civil claim and the advice of Jack's former counsel, the claimant did not pursue a family law claim at that time.
- [14] On April 30, 2018, Helen sold the Aubrey Property for, as I understand it, \$1.1 million. To effect the removal of the CPL for the sale, the parties entered into a consent order by which \$265,000 of the sale proceeds would be held in trust by Helen's solicitors pending resolution of the civil claim. There were other terms as well.
- [15] In 2020, with the claimant having taken no significant steps to advance the civil claim beyond the 2016 discoveries, the applicants brought a motion for summary trial. They sought a dismissal of the civil claim in its entirety and a declaration that the plaintiff, now the claimant, has no legal or beneficial interest in the Aubrey Property or the proceeds of the sale of that property.
- [16] The summary trial application, as I have said, was heard by Douglas J. on October 8 and 9, 2020. She states at para. 4 of her reasons:

The plaintiff abandoned her constructive trust and fraudulent conveyance claims on the second day of this summary trial.

- [17] In reasons for judgment dated January 15, 2021, Douglas J. dismissed the plaintiff's claim in its entirety and granted the declaration sought by the applicants. With respect to the unjust enrichment claim, Douglas J. found the required elements of unjust enrichment had not been pled and, in any event, were not made out on the evidence.
- [18] With respect to the resulting trust claim, Douglas J. found the applicants had rebutted the presumption of a resulting trust and that the deceased had intended to gift the Aubrey Property to the applicants. She noted that the claims for fraudulent conveyance and constructive trust were abandoned. She found the claimant and the deceased were not spouses as contemplated by WESA at the time of death and thus dismissed claims to vary the will. Finally, she granted the declaration sought by the applicants that the claimant has no legal or equitable interest in the proceeds of the sale of the Aubrey Property. She did not make a declaration in respect of the property itself, only with respect to the proceeds of the sale, but I assume that is because the property had already been sold to a party (who was not before the court) under an arrangement that had been agreed to by the claimant under the

terms of the consent order that required Helen to retain \$265,000 of the sale proceeds in her lawyer's trust account.

- [19] In her order, which was drawn and entered after issuing a clarification by way of a memo to counsel, Douglas J. ordered that the \$265,000 held in trust be released to Helen. The claimant appealed Douglas J.'s order, but only with respect to the finding that she was not a spouse under WESA. The Court of Appeal dismissed that appeal in brief oral reasons.
- [20] On August 3, 2021, while the appeal of Douglas J.'s order was pending, the claimant commenced this present family law claim. The notice of family claim names the deceased and the estate as respondents. As with the notice of civil claim, it also names both applicants in their personal capacity and as administrators of the deceased's estate.
- [21] The notice of family claim alleges the Aubrey Property is a family asset and the claimant asserts an interest in it. She also claims an interest in properties located on Sawmill Crescent in Vancouver and Union Street in Burnaby. She alleges these properties were purchased by Helen and Jack respectively using the proceeds of sale of the Aubrey Property. In connection with the notice of family claim, she filed a CPL against each of the Sawmill Crescent and the Union Street properties.
- [22] She also claims an interest in "all other real and personal property acquired by the deceased during the marriage." The evidence suggests the estate had only approximately \$20,000 in cash, and that has since been disbursed by the applicants in their administration of the estate. The Aubrey property was the only substantial asset of the estate.
- [23] The notice of family claim also seeks relief that is substantially similar to that sought in the notice of civil claim including:
- A declaration that the applicants hold the sale proceeds of the Aubrey Property in trust for the claimant on a resulting trust;
 - An order that the applicants have been unjustly enriched by the sale of the Aubrey Property and a constructive trust in respect of those sale proceeds;
 - An order that the estate was unjustly enriched to the claimant's deprivation during the course of the marriage;
 - An injunction enjoining the applicants from distributing the assets of the estate and specifically the proceeds of sale of the Aubrey Property; and
 - A declaration that the claimant has an interest in each of the Sawmill Crescent and Union Street properties and various forms of relief relating to those properties on the basis that they were purchased using funds from the sale of the Aubrey Property.

- [24] In addition to the pleaded claims, in oral argument counsel for the plaintiff stated that she intends to challenge the deceased's transfer of the Aubrey Property to the applicants as a fraudulent conveyance, which also mirrors claims brought in the notice of civil claim. As can be seen, the vast majority of the relief claimed in this family proceeding is premised on the claimant's claim to an interest in the Aubrey Property. The exceptions to this are the claim for spousal support and the claim for other property in the estate.
- [25] The applicants now apply to strike the family law claim on the basis that it seeks to relitigate issues and causes of action determined in the civil claim. They argue this is a collateral attack on Douglas J's order, an abuse of process, and the subject matter of the family claim is *res judicata*.

Analysis

- [26] I am satisfied that all the claims in the family law proceeding that relate to the Aubrey Property and the proceeds of sale of the Aubrey Property, including claims respecting the Sawmill Crescent and Union Street properties, are a collateral attack on Douglas J's order and are *res judicata*. I would therefore dismiss those aspects of the family claim for the following reasons.

Collateral Attack

- [27] Critically, all the claimant's claims respecting the Aubrey Property and the proceeds from its sale depend on the claimant having an interest - legal or equitable - in the property or in the proceeds of its sale. Those issues were determined by Douglas J. who specifically made an order that the claimant has "no legal or beneficial interest in the proceeds of the sale of the [Aubrey] property." In order for the claimant to succeed in making the claims for the proceeds of sale of the Aubrey Property in this family law claim, she must establish that she has a legal or equitable interest in the proceeds of sale. That is a direct attack on Douglas J's order.
- [28] The law of collateral attack was summarized by the Court of Appeal in *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261 [M.K.]. At para. 1, Justice Dickson writing for the court said this:

As Justice Binnie explained in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the law seeks a finality to litigation. For this reason, litigants must put their best foot forward when first called upon to establish a claim. In subsequent proceedings, a litigant may not attack an order pronounced by a court of competent jurisdiction except as provided by law for that express purpose. In other words, generally speaking, litigants are entitled to only one "bite at the cherry" when they bring a claim: *Danyluk* at para. 18.

- [29] At para. 35 of the same decision, Dickson J. wrote:

Rooted in public policy, the collateral attack doctrine is intended to advance the interests of justice by avoiding duplicative or inconclusive litigation, potential inconsistent results and undue costs, and by preventing a party from avoiding the consequences of an unfavourable decision: Krist at para. 46; Danyluk at para. 18.

- [30] The claimant says that the family law claim is not a collateral attack because Douglas J's order did not deal with a claim based on the FLA. However, her order is not qualified in this respect. Moreover, when a litigant seeks to establish a claim, they must put their best case forward on all grounds: M.K. at para. 1. They cannot relitigate the same issue relying on a different legal ground. This is precisely what the claimant seeks to do in this proceeding as it relates to the proceeds of sale of the Aubrey Property.
- [31] The claimant argues that it would have been unduly cumbersome to bring two separate proceedings, one under WESA and the other under the FLA, and there is no authority that specifically required her to do so when she brought the civil claim, apart potentially from the general principles relating to collateral attack or res judicata.
- [32] She also argues that she could not have advanced claims under the FLA in a civil proceeding because doing so would require her to take inconsistent positions. That is, she maintained in the civil proceeding that she was the deceased's spouse for the purposes of WESA. That required her to maintain that the parties were not separated. If she brought a family law claim, she would have to say that they were separated.
- [33] In the context of this case, I am not persuaded by these arguments.
- [34] With regard to bringing a parallel alternative family law claim, I would not rule out the possibility of it being too cumbersome or potentially unworkable in some cases. In this case, however, the nature of the relationship (or non-relationship) between the claimant and the deceased was an obvious issue. This was clear from the responses to the civil claim and on the facts of the relationship as they were known or must have been known to the parties. Both reveal the very real potential that the court in the civil proceeding would find claimant was not a spouse for the purposes of WESA. This had to be obvious at the time the civil claim or at least when the summary trial application was brought. As Douglas J.'s reasons for judgment show, this was not a marginal case on that issue.
- [35] I do not accept that the claimant would have been precluded from making what she says are inconsistent claims. There is no reason why claimant could not have maintained that she was a spouse under WESA while also advancing an alternative position that, if she is found not to be a spouse for the purposes of WESA, she nevertheless has an entitlement to the Aubrey Property under the FLA. It is well established that a family law claim and a civil action respecting the same subject matter can be joined for trial together: Tomic v. Tough, 2013 BCCA 355, at para. 14.

- [36] But regardless of whether she should have or could have commenced a separate parallel family law claim as an alternative, I find she at least could have raised the potential of a FLA entitlement in response to the applicant's summary trial application. As noted, when the claimants brought their summary trial application, they also sought a declaration that the claimant had no legal or equitable interest in the Aubrey Property or the proceeds of the sale of that property. Faced with that application and the prospect of a sweeping declaration to that effect, it was certainly open to the claimant to assert in response to the application that even if she had no entitlement to the property or the proceeds of sale under WESA, she nevertheless had an entitlement under the FLA. She did not do that.
- [37] I would add that finality in litigation, as described in para. 35 of M.K., is also a significant factor in this case. The deceased died more than eight years ago, and his children, the applicants, sold their interest in the Aubrey Property more than seven years ago in Jack's case, and more than four years ago in Helen's case. They have already faced one lawsuit from this claimant challenging those transactions and sought finality on the issue by seeking the declaration from Douglas J. Despite that, now eight years after their father died, this new lawsuit makes substantially the same allegations and effectively seeks to set aside Douglas J.'s order that brought the applicants finality in the last proceeding. Forcing them to start again in a new proceeding with essentially the same case some eight years after their father's death is not in the interests of justice.

Res Judicata

- [38] I am also satisfied that the claim respecting the Aubrey Property and its proceeds is barred by the doctrine of res judicata.
- [39] In *L.M. v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCSC 275 [L.M.], Justice Choi summarized the principles of res judicata. She said at paras. 37 and 38:
- [37] Res judicata prevents the re-litigation of issues already addressed by the court and also demands that parties bring forward all claims and defences with respect to the matter in the first instance: *Lim v. Lim*, 1999 BCCA 596. The policy reasons behind res judicata are settled: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 [C.U.P.E.]; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460.
- [38] The policy reasons can be described as advancing the objective of finality in litigation to avoid duplicative litigation requiring "litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so" (*Danyluk* para. 18). This objective must be balanced with the competing principle that litigants have the opportunity to have their cases decided on the merits: *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 26.
- [40] And at para. 40:

Central to the res judicata argument is that parties must raise all issues in the first instance and cannot litigate in a piece-meal fashion. There are two branches of res judicata: (1) issue estoppel; and (2) cause of action estoppel.

[41] Issue estoppel precludes re-litigation of issues that were previously decided. Cause of action estoppel precludes the re-litigation of a cause of action. "Cause of action" has been defined as follows in a passage quoted by Justice Choi in L.M. at para. 52:

A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

[42] In both issue estoppel and cause of action estoppel, a litigant is precluded from bringing forward in a second action matters which could have been brought forward in the first action but were not only because of the negligence, inadvertence or accident of the party or their counsel. It goes without saying that a deliberate choice not to advance the matter earlier could also be subject to res judicata.

[43] Issue estoppel requires the court to be satisfied of the following:

- 1) The issue must be the same as the one decided in the prior decision;
- 2) The prior judicial decision must have been final;
- 3) The parties to both proceedings must be the same, or their privies.

L.M. at para. 41.

[44] Cause of action estoppel requires the court to be satisfied of the following:

- 1) There must be a final decision of a court of competent jurisdiction in the prior action;
- 2) The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action;
- 3) The cause of action in the prior action must not be separate and distinct;
- 4) The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

L.M. at para. 49.

[45] I am satisfied the criteria for both issue estoppel and cause of action estoppel are met in respect of the claims regarding the Aubrey Property. First, Douglas J.'s decision was a final judgment in a civil claim.

[46] Second, the parties to the present action were parties to or privy with parties in the civil action. Although the estate it was not named as a defendant in the civil action, the applicants were named as defendants in that action not only in their personal capacities but also in their capacities as administrators of the estate. Moreover, the relief sought in the notice of civil claim included relief against the estate itself, even though it was not technically named

as a party. I am satisfied the family law proceeding thus involves the same parties as the civil action or their privies.

- [47] Third, with respect to issue estoppel, the issues in the civil claim are the same as the issues in the family claim, including whether the claimant has a legal or equitable interest in the Aubrey Property or the proceeds of its sale, whether the estate holds an interest in the property or the proceeds of sale by way of a resulting or constructive trust, and whether the transfer of the Aubrey Property to the applicants was a bona fide gift or a fraudulent conveyance. The fact that the claimant chose to abandon claims based on constructive trust and fraudulent conveyance in the civil action does not change this conclusion. Rather, it demonstrates that those claims could have been brought in the prior proceeding but ultimately were not or at least were not pursued.
- [48] With respect to cause of action estoppel, the cause of action in the family law proceeding is not separate and distinct from the cause of action in the civil proceeding. The factual situation that formed the basis of the civil action is identical to the family law claim. It is only the legal basis for that claim that is different. As I have noted earlier, that legal basis could have been advanced in or in conjunction with the civil claim.
- [49] Finally, in the circumstances of this case, I find that the cause of action in the family law claim could have been argued in the civil claim. There was a very clear potential in the civil claim that the court may find the claimant and the deceased had long separated. There was also the application for a declaration that the claimant had no legal or beneficial interest in the Aubrey Property or the proceeds of its sale. In this context, the claimed interest on the basis of the FLA could, with reasonable diligence, have been raised in response to the summary trial application and the application for declaratory relief.

Conclusion on the Aubrey Property

- [50] For all these reasons, I would order that all claims respecting a legal or equitable entitlement to the Aubrey Property or the proceeds of sale of that property be struck, as well as all claims respecting the Sawmill Crescent property and the Union Street property. I will also order that the CPLs for those two properties should be cancelled.

The Balance of the Family Law Claim

- [51] I am not prepared to order that the family claim be struck in its entirety. The evidence indicates that the estate had some \$20,000 in cash, which I understand the applicants have now paid out in their administration of the estate. Nevertheless, the family law claim seeks an order respecting all family property, and there has been no determination made as to entitlement to the \$20,000 or any other property the estate might have had. I have received no evidence or argument as to when the estate acquired property other than the Aubrey Property and particularly whether it was acquired during the course of the marriage. These are all matters that remain outstanding. The family claim also seeks an order for spousal

support, which of course was not addressed by the civil proceeding as well.

- [52] Thus, while I find the substantial part of the family law claim as it relates to the Aubrey Property and the proceeds of its sale should be struck, I am not prepared to strike the remainder of the claim.

Security for Costs

- [53] I will, however, make an order that the claimant post security for costs in the amount of \$20,000 in order to proceed with the family law claim. An order for security for costs ought to be exercised cautiously and only under special or egregious circumstances in family law cases: *L.S. v. G.S.*, 2016 BCSC 1130, at para. 32. Such circumstances may include a weak claim or a failure to pay costs from prior proceedings. The applicants were awarded costs for the civil action in the appeal. I am told that these are in the range of \$60,000 and have not been paid. Counsel for the claimant states his client is impecunious. In my view, given the challenges with the family law claim, Douglas J.'s findings of fact regarding the nature of the relationship which, in my view, create substantial uncertainty with regard to the potential success of a family law claim, the low value of the claim with the removal of the Aubrey Property as an issue, and the unpaid costs from the civil claim, I accept this is an extraordinary case where security for costs is warranted.
- [54] The applicants have not presented a draft bill of costs or at least not directed my attention to one to substantiate their request for security in the amount of \$40,000. In my view, \$20,000 in the circumstances is reasonable. I would order that the family case, after the claims respecting the Aubrey Property are struck, be stayed until such time as security is posted. Obviously that stay does not apply to any appeal that might be taken of this judgment.
- [55] The applicants will have their costs of this application in any event of the cause assessed as ordinary difficulty.

"Kirchner J."

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