

CANADA / JUDGMENT

Liu v. Borden Ladner Gervais LLP

2020 BCCA 50

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 50 Liu v. Borden Ladner Gervais LLP

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Liu v. Borden Ladner Gervais LLP,

2020 BCCA 50

Date: 20200210

Docket: CA45787

Between:

Jiukang Liu and Tony Liu Notary Corporation

Respondents

(Plaintiffs)

And

Borden Ladner Gervais LLP

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

November 21, 2018 (Liu v. Borden Ladner Gervais LLP, 2018 BCSC 2049, Vancouver Docket S175046).

Counsel for the Appellant:

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R.V. Wickett, Q.C.

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Counsel for Steven Ping Li and Royal Pacific Realty Corp.:

K.A. Murray

Place and Date of Hearing:

Vancouver, British Columbia

November 18, 2019

Place and Date of Judgment:

Vancouver, British Columbia

February 10, 2020

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Mr. Justice Abrioux

Dissenting Reasons by:

The Honourable Mr. Justice Willcock (p. 18, para. 48)

Summary:

Majority (per Justice Butler and Justice Abrioux): The appellant law firm appeals the dismissal of its application to strike the notice of civil claim brought by the respondents, a notary public and his firm. The respondents acted for purchasers in a land transaction for which a certificate of compliance pursuant to s. 116 of the Income Tax Act should have been obtained. No certificate was obtained and the purchasers were assessed a withholding tax. The appellant acted for the party selling the property under an order for conduct of sale. In a separate action, the respondents were found liable to the purchasers for breaching their duty of care by failing to make reasonable inquiries about the residency of the registered owners and failing to advise the

purchasers of their potential liability for the withholding tax. In that action, the respondents alleged that the appellant in this action was required to pay the withholding tax and sought to add the appellant as a third-party. The appellant was not added as a third-party although the trial judge acknowledged that the respondents could bring a separate claim for contribution and indemnity against the appellant. The respondents appealed that decision but settled with the purchasers before the appeal was heard and entered into a consent order that purported to allow the appeal and remit the purchasers' claims for retrial. There was no retrial but the respondents proceeded with the present action seeking contribution or indemnity from the appellant and others. The chambers judge dismissed the appellant's application to strike the notice of civil claim on the basis that the consent order permitted rehearing of the claims and because the respondents' claims against the appellant were not determined in the prior action. The appellant says the chambers judge erred in finding that the consent order permitted rehearing of the issues determined in the separate action. It says the consent order was administrative only. Further, it argues that it would be an abuse of process to permit the respondents to relitigate issues that were conclusively decided against them. Held: Appeal dismissed, Justice Willcock dissenting. The consent order is not relevant to the claims advanced in the notice of civil claim. The respondents are not attempting to relitigate their claims against the purchasers. They are advancing claims for contribution and indemnity against the appellant and others and those issues were not determined in the prior action.

Dissenting (per Justice Willcock): The judge could not have granted judgment to the purchasers in the prior action without dismissing the respondents' argument that the appellant was obliged to pay the withholding tax. The consent order made on the appeal was purely administrative and did not have the effect of setting this finding aside. The respondents' current claim is an attempt to relitigate that decided issue and should be struck as an abuse of process.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Borden Ladner Gervais LLP ("BLG") appeals the dismissal of its application to strike the Notice of Civil Claim (the "NCC") brought against it by Juikang Liu and the Tony Liu Notary Corporation (the "Notaries"). In 2014, Jun Mao and Jing Li (the "Purchasers") bought a \$5.56 million property in Vancouver. In that transaction, the Notaries acted for the Purchasers and BLG acted for CE International Resources Holdings LLC ("CEIR"). CEIR was a creditor of the registered owners of the property and had conduct of sale pursuant to an order of the British Columbia Supreme Court made on November 5, 2014 (the "Fisher Order"). One of the registered owners of the property was not a Canadian resident at the time of the transaction, so a certificate of compliance with s. 116 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) was required. However, no such certificate was obtained. Canada Revenue levied a \$695,000 withholding tax on the Purchasers.

- [2] In Vancouver Registry action No. S160498, the Purchasers sued the Notaries for not obtaining the certificate of compliance. In *Mao v. Liu*, 2017 BCSC 226, Justice Affleck (the "trial judge") found the Notaries liable. The Notaries appealed to this Court but arrived at a settlement with the Purchasers prior to the hearing of the appeal. Counsel for the parties spoke to a consent order before the division of this Court scheduled to hear the appeal (the "Consent Order").
- [3] The Notaries then brought this action against BLG. BLG applied to strike the NCC, arguing that the NCC was the Notaries' attempt to relitigate claims that had been finally decided in BLG's favour in *Mao*. Justice DeWitt-Van Oosten (as she then was) (the "chambers judge") rejected BLG's argument, finding there was no principled basis for striking the NCC. She concluded that, on the facts of the case, neither issue estoppel nor cause of action estoppel could reasonably arise. She also rejected BLG's argument that the action against it was an abuse of process.
- [4] At the hearing of the application before the chambers judge and on this appeal, BLG and the Notaries relied on the wording of the Consent Order and the brief submissions made by the parties to the division of this Court that granted that order. The chambers judge set out the terms of the Consent Order and portions of the transcript of those discussions in her reasons:
- [27] The order entered with the Court of Appeal appears to have been issued by the Division that was scheduled to hear the appeal and reads:

THIS COURT ORDERS that, BY CONSENT, the appeal from the order of Mr. Justice Affleck granting judgment to the plaintiff in these proceedings is allowed and the plaintiff's claims are remitted to the Supreme Court of British Columbia for retrial; and

THIS COURT FURTHER ORDERS that, BY CONSENT, the appeal from the order of Mr. Justice Affleck dismissing the defendants' application for leave to issue a third party notice in these proceedings is dismissed.

- [28] A transcript of the appearance before the Court of Appeal contains the following explanation for the order:

THE COURT: Well, maybe you'd like to tell us why this is happening.

[Counsel for Notaries]: Yes. Well, we've reached a - the short answer is we've reached a settlement insofar as the [Purchasers] are concerned ...

[Counsel for Notaries]: The effect of the settlement is, My Lady, that the [Purchasers] will be taken out of the litigation. They will be indemnified in respect of any liability that arises in respect of the - the tax appeal. And I should advise the court that the Canada Revenue Agency assessed a tax against the [Purchasers] in the amount of 695,000. That has been taken on appeal to the tax court ...

[Counsel for Notaries]: The notaries are carrying that appeal. And that appeal remains outstanding [sic] - it has been accepted for appeal but - but then there's been no decision rendered with respect to it. So whether or not there will be damages resulting from any of this is yet to be determined. If the appeal's successful, obviously there'll be no tax paid.

But in any event, whatever liability may arise in the tax proceeding will be carried by the notary in the first instance. So there will be an indemnity provided to the [Purchasers] and likewise an indemnity in respect of any other costs that may accrue with respect to litigation on a going forward basis. And in consideration for that the [Purchasers] have assigned their cause of action to - to the notaries.

THE COURT: Okay. And the ...

THE COURT: -- notaries are to be able to join the third parties?

[Counsel for Notaries]: Well, if the notaries pursue the claim in the name of the [Purchasers] they would - they would add them as defendants, presumably, and deal with proceedings in supreme court in the ordinary way ...

[Counsel for the Notaries]: That's the object of the settlement. And - and - and of course that's the reason we are seeking a joint order that the appeal be allowed to kind of clear the playing field, if I can say that, for litigation down the road, if any ...

[Emphasis in original.]

[5] BLG says that the proper interpretation of the Consent Order is governed by the decision of McEachern C.J.S.C. in *Saskatoon Credit Union v. Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.). *Saskatoon Credit* has some similarity to the present case in that an earlier trial decision involving some of the same parties was appealed to this Court. In the earlier decision, a lease of a golf course and transfers of mobile homes were set aside on the basis that the transfers between the two defendants were fraudulent. The defendants appealed that decision but the parties arrived at a settlement and the appeal did not proceed. The parties entered into a consent order that read, "[t]his court doth order that the Appeal herein be and the same is hereby allowed without costs to either party". The consent order was granted by way of desk order without any appearance before a division of the Court.

[6] In *Saskatoon Credit*, McEachern C.J.S.C. found that the same defendants to the first action could not raise as a defence to the second action by a different plaintiff, that the transfers were not fraudulent. The court found that the defendants were attempting to relitigate the principle issues previously decided against them: at 92. He concluded that the consent order was made in an "administrative sense" to give effect to the settlement between parties. In those circumstances, the defendants could not rely on the consent order to "undecide" issues that had been solemnly decided by the trial judge: at 93.

- [7] BLG argues that the Consent Order, like the order in *Saskatoon Credit*, is an "administrative" order that was made to effect a settlement. Accordingly, it cannot be relied upon to "undecide" issues that were finally determined in *Mao*. The Notaries argue that *Saskatoon Credit* is distinguishable from the present case because the Consent Order specifically remitted the Purchasers' claims to the British Columbia Supreme Court to be retried.
- [8] The parties' arguments about *Saskatoon Credit* and the terms of the Consent Order are, in my view, not determinative of the issue raised on this appeal. I would dismiss the appeal but would do so for reasons that are somewhat different than those of the chambers judge. She distinguished *Saskatoon Credit* on the basis that the Consent Order provides for a retrial. I do not accept that the Notaries can rely on that provision in the Consent Order. However, the chambers judge also concluded that the potential claims against BLG, and other third parties, were not determined in *Mao* and that neither issue estoppel nor cause of action estoppel could reasonably arise: at paras. 62, 64. I do not see any error in that conclusion and would dismiss the appeal on that basis.

On Appeal

- [9] On appeal, BLG raises a single error in judgment:

Madam Justice DeWitt-Van Oosten committed an error of law in finding that *Saskatoon Credit Union* did not apply and that the Consent Order in BCCA File No. CA 44288 set aside all of the legal and factual findings of Mr. Justice Affleck in *Mao*

- [10] BLG argues that *Saskatoon Credit* is directly on point and relies on the observations of McEachern C.J.S.C. at 97:

... it is my conclusion that subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing

- [11] BLG says that the Notaries are attempting to relitigate an issue that was decided against the Notaries in *Mao*. BLG argues that it would be an abuse of process to permit the Notaries to do so. An appellate court will not lightly set aside findings of a trial court and direct a new trial. BLG notes that the division that granted the Consent Order in *Mao* did so on the basis that the appeal had not been heard on its merits. Accordingly, BLG says that the chambers judge erred in not treating the Consent Order as administrative and in failing to find that it only served to facilitate the settlement.

- [12] BLG argues that if the Consent Order is regarded in this light, then the doctrine of abuse of process is clearly engaged and the NCC should be struck. Further, BLG argues that the result is an absurdity. If the Notaries are permitted to retry the claim, it would mean that they would have "purchased" a new trial by entering into the settlement and could proceed with that trial to erase the findings made against them without any opposition.
- [13] In oral argument, BLG placed somewhat less reliance on the argument that the judge erred in applying *Saskatoon Credit*. Instead, BLG says that the chambers judge erred in law in failing to conclude that the decision in *Mao* raises an issue estoppel. It says that the only claim advanced against BLG in the NCC is that it breached the Fisher Order and its duties to the Notaries and the Purchasers by failing to pay all taxes (including the withholding tax) from the proceeds of sale before distributing those funds to CEIR. BLG says that the Notaries are estopped from challenging the conclusion reached on those issues by the trial judge in *Mao*.

Standard of Review

- [14] The application was brought pursuant to R. 9-5 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Whether a pleading discloses a cause of action is a question of law: *Union Road Properties Ltd. v. British Columbia (Agricultural Land Commission)*, 2019 BCCA 302 at para. 8. The standard of review on questions of law or principle is correctness: *Housen v. Nikolaisen*, 2002 SCC 33. However, a claim will be struck only if it is plain and obvious that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

Analysis

- [15] The issue that must be decided is whether the chambers judge erred in law in concluding that it was not plain and obvious that the NCC disclosed no reasonable cause of action. In order to answer that question, it is necessary to determine what was decided in *Mao* and what effect the Consent Order has on the finality of that decision. The final consideration is whether the Notaries are precluded from pursuing the claims in the NCC either because of issue estoppel or because it would be an abuse of process to permit the action to proceed.

Mao v. Liu, 2017 BCSC 226

- [16] In *Mao*, the Purchasers claimed against the Notaries based on the allegation that the Notaries breached the duty of care they owed to the Purchasers in acting for them to complete the conveyance of the property. Their engagement letter included provisions that the Notaries would "negotiate appropriate closing undertakings with solicitor/notary for the [registered owners]" and would "make inquiries as to the residency status of the [registered owners] pursuant to the Income Tax Acts [sic] as required".

- [17] The Purchasers did not pursue claims against any of the other parties involved in the conveyance of the property. They did not advance claims against BLG, Soon Sit Yeap and Atcharaphan Yeap, the registered owners, or Royal Pacific Realty Corp. and Steven Ping Li (the "Realtors"), the realtors they retained to assist with the purchase. At the time of the hearing of the Purchasers' summary trial application, the court also heard an application brought by the Notaries pursuant to R. 3-5 of the Supreme Court Civil Rules to issue a third-party notice against BLG, the Realtors and CEIR. Counsel for the Realtors appeared at the application but counsel for BLG did not.
- [18] The trial judge set out the Notaries' position in some detail and reviewed the pleadings. He identified the central issue on the question of liability at para. 17 of the reasons:
- [17] The central issue on the question of the liability of the defendants is whether it was their duty to make inquiries to determine whether the registered owners of the property were residents of Canada at the time of the purchase and if they breached that duty.
- [19] He reviewed s. 116(5) of the Income Tax Act that creates a potential liability for a purchaser of property who fails to withhold a portion of the purchase price when the property is acquired from a non-resident person. Subsection 116(5)(a) provides that a purchasers' liability can be avoided if, "after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada".
- [20] The trial judge noted that if the Notaries agreed to make the necessary inquiry into the owners' residency status but failed to do so, and failed to advise the Purchasers of their potential tax liability, they would be liable to the Purchasers for any loss: at para. 19. He reviewed the examination for discovery evidence of Mr. Liu and found a "clear acknowledgement of a breach of duty by the [Notaries]": at para. 22. He rejected the affidavit evidence of Mr. Liu that he found to be inconsistent with his discovery evidence: at para. 24.
- [21] After finding that the matter was suitable for determination by summary trial, the trial judge concluded that the Notaries contracted with the Purchasers to advise about whether the registered owners of the property were Canadian residents. Further, the steps taken by the Notaries, including making inquiries of BLG, were insufficient to satisfy the "reasonable inquiry" requirement in s. 116(5)(a) of the Income Tax Act: at paras. 28-30. Accordingly, he concluded that the Notaries failed to meet the standard of a reasonably competent notary public: at para. 31.
- [22] In response to the Notaries' assertion that BLG was required to pay the withholding tax, the trial judge stated at para. 29:
- [29] The defendants argue that from the purchase money it was BLG that was obliged to pay the non-resident withholding tax. There is nothing in the evidence to suggest BLG had agreed to do so. On the contrary it had expressly rejected any involvement with the non-resident tax implications of this conveyance. I do not accept the language of the contract of purchase and sale imposed a burden on BLG to withhold the non-resident portion of the purchase price.

- [23] At the time of the summary trial application, the final amount owing by the Purchasers to Canada Revenue had not been determined. The trial judge observed that the Purchasers had a duty to mitigate damages which they were in the process of doing. He found the Notaries liable to the Purchasers with damages to be assessed.
- [24] The trial judge turned to the Notaries' application for leave to issue third-party proceedings. He was critical of the fact that the Purchasers' summary trial application had been adjourned and thus delayed by the Notaries' application. He refused to grant leave to issue the third-party notice stating:
- [44] If leave is now granted the plaintiffs will wait many more months for the determination of their claim when in my view the liability of the defendants is clear.
- [45] I am conscious that third-party proceedings are a means to avoid a multiplicity of proceedings and that dismissal of the defendants' application may lead to them taking separate proceedings against those they are advised may be liable to make contribution or to indemnify. However, the risk of separate proceedings cannot outweigh the prejudiced to the plaintiffs if the determination of their claim is long delayed. They have received a notice of assessment for in excess of \$600,000 and it has been payable for almost two years.
- [46] In the result, I exercise my discretion against granting leave to the defendants to issue a third party notice.
- [25] At para. 48, he reiterated that "[i]t will be for the defendants to take advice on bringing a separate action."
- [26] In summary, the court in Mao decided that:
- a) The Notaries breached their duty of care to the Purchasers resulting in a tax liability under the Income Tax Act;
 - b) The breaches of duty included the Notaries' failure to make reasonable inquiries about the residency of the registered owners and their failure to advise the Purchasers of their potential liability; and
 - c) Any claim that the Notaries may have for contribution and indemnity against BLG or the Realtors would have to be decided in separate proceedings.
- [27] The trial judge did not explicitly find that the Notaries failed to negotiate appropriate closing undertakings with BLG. However, based on the findings noted above, it seems apparent that the trial judge was satisfied that the Notaries failed to do so.

The Consent Order and Saskatoon Credit

- [28] BLG says that the chambers judge erred by finding that the principles expressed by the court in Saskatoon Credit "did not apply" to this case. The Notaries say that the circumstances presented here are distinguishable because the Consent Order provided that the claims are

to be remitted to the trial court for retrial. While I agree with the chambers judge that the circumstances here are distinguishable from Saskatoon Credit and that the purpose of the Consent Order was to clear the playing field for litigation down the road (at para. 60), I would not give any effect to the term of the Consent Order permitting "retrial" of the claims advanced in Mao.

- [29] The circumstances that led to the decision in Saskatoon Credit are distinguishable from those in the present case such that the decision does not assist BLG. In Saskatoon Credit, the court struck the defendants' allegations in their statement of defence denying that the transfers between them were fraudulent. This was the very issue decided in the first action. Here, the Notaries are not attempting to relitigate the issues decided in Mao. There is no allegation in the NCC that the Notaries did not breach their duty of care to the Purchasers. Rather, the Notaries allege that they and the Purchasers reasonably relied on the skill and judgment of BLG to pay all taxes required to be paid by the Fisher Order. They further allege that BLG breached the terms of the Fisher Order and their alleged duties to the Notaries and Purchasers by failing to pay taxes before distributing funds to CEIR. These allegations were not decided in Mao. The NCC raises claims for contribution and indemnity, the very claims that the trial judge recognized could be brought by the Notaries in a separate proceeding.
- [30] I should note that I agree with my colleague, Justice Willcock, that the NCC is problematic as it has not been amended to reflect the Consent Order and that the terms used ("Underlying Action" and "Judgment") are less than clear. However, I have understood the "Underlying Action" to refer to action No. S160498 and "Judgment" to refer to whatever amount is owed by the Notaries to the Purchasers.
- [31] If the Notaries were attempting, in the current action, to relitigate the finding that they breached their duty of care to the Purchasers, BLG's argument that the Consent Order was administrative in nature would have to be considered. In such circumstances, the fact that the Consent Order was made without consideration of the merits of the case would be relevant. However, the NCC raises allegations of breaches of duty alleged to be owed by BLG to the Notaries and the Purchasers and advances claims for contribution and indemnity. The NCC does not raise the issues decided in Mao and this Court need not consider this issue.
- [32] Further, I am of the view that it is not necessary to rely on the term of the Consent Order remitting the Purchasers' claims to the trial court for retrial to arrive at this conclusion. The NCC is not and does not purport to be a "retrial" or "relitigation" of the Purchasers' claims against the Notaries. The Notaries commenced a new action against the current defendants, including BLG. The Purchasers are not parties to this action. The Notaries are not attempting to retry the Purchasers' claims advanced in Mao. While this Court was advised that the Notaries may apply to add the Purchasers as parties to this action, the application is to add them as plaintiffs who will not be adverse in interest to the Notaries.
- [33] In short, I am of the view that the circumstances of this case are distinguishable from those in Saskatoon Credit.

Issue Estoppel

[34] In *Erschbamer v. Wallster*, 2013 BCCA 76, Justice Tysoe succinctly summarized the general principles of *res judicata* at para. 12:

[12] The general principles of the doctrine of *res judicata* were reviewed by this Court relatively recently in *Cliffs Over Maple Bay*. The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

[35] BLG's application to strike is not based on cause of action estoppel. Rather it says that issue estoppel should prevent the Notaries from raising the claims advanced in the NCC against it and that it would be an abuse of process to permit the claims to proceed.

[36] Issue estoppel arises when three criteria are met:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies....

The issue that gives rise to the estoppel must be central or fundamental to the decision in the earlier proceeding: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 255. Here, the issue must be "so fundamental" that decision in *Mao* could not stand without it.

[37] Another expression of the principle is found in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 24:

24. Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.), at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

[Emphasis added.]

- [38] However, these "rules" of issue estoppel must not be applied too rigidly. The guiding question should be the balance between the public interest in the finality of litigation and the public interest in ensuring justice is done on the facts of the case. Even if a moving party establishes the three criteria, a court may still exercise its discretion to determine whether issue estoppel ought to be applied: Danyluk at para. 33.
- [39] As I have already indicated, it is important to distinguish between those issues that were and were not decided in Mao. The "central issue" decided was that the Notaries owed a duty to the Purchasers to make reasonable inquiries to determine whether the registered owners of the property were residents of Canada at the time of the purchase, and that the Notaries breached that duty. Further, as noted above, the decision in Mao implicitly suggests that the Notaries failed to negotiate appropriate closing undertakings with the solicitor for the registered owners (BLG) as they agreed to do in the engagement letter.
- [40] BLG relies on the judge's comments at para. 29 that there was nothing in the evidence to suggest that BLG agreed to pay the withholding tax or that the contract of purchase and sale required the solicitor for CEIR to do so. However, it is important to put those statements in context. In light of the central issue considered, the comments of the trial judge go no further than finding that the Notaries could not avoid the consequences of their acknowledged breach of duty by reference to the circumstances of the sale and the role of parties who were not before the court. The two parties before the court were the Purchasers and the Notaries. The trial judge did not purport to decide whether BLG, the Realtors or the registered owners were liable to the Purchasers or whether the Notaries had a claim for contribution or indemnity against them.
- [41] On this issue, I disagree with my colleague. I am of the view that the trial judge did not decide if the Fisher Order required BLG to pay the withholding tax. While the trial judge did note that there was nothing in the evidence to suggest BLG was obliged to pay the withholding tax, his comments at para. 29 about the obligations of BLG were not determinative of the issue before him. He was rejecting a defence the Notaries had raised regarding their dispute with the Purchasers. He did not engage in a complete analysis, as between the Notaries and BLG, of who was liable for the tax. In essence, para. 29 of Mao is obiter dicta and cannot ground BLG's application to strike. I am further of the view that he concluded that he could grant judgment against the Notaries given their obvious breach of duty without deciding whether the Fisher Order required BLG to pay the tax. Indeed, he recognized that the dismissal of the Notaries' application for leave to issue a third-party notice "may lead to them [taking] separate proceedings against those they are advised may be liable to make contribution or to indemnify": at para. 45. The decision in Mao thus anticipated and allowed for these proceedings.
- [42] In addition, I am of the view that the scope of the claims advanced by the Notaries in the NCC is broader than suggested by my colleague. Counsel for BLG conceded at the hearing of the appeal that there are claims for breaches of duty that could be brought by the Notaries or the Purchasers including those for contribution and indemnity. With that concession, I

cannot accept that the broad allegation in the NCC that BLG breached both the Fisher Order and duties owed to the Notaries and Purchasers does not raise claims beyond those determined in Mao.

- [43] Applying the three criteria for issue estoppel here, I am not satisfied that it is plain and obvious that the same question raised by the allegations in the NCC was decided in Mao. The trial judge did not embark on any analysis of what was required by the Fisher Order. It was not necessary for his decision that the Notaries breached their duty of care to the Purchasers. He was aware that the Notaries intended to bring claims for contribution and indemnity against BLG and he did not decide that issue which he left for future consideration.
- [44] The third criteria for issue estoppel is also absent here. BLG was not a party to the Mao action and the Purchasers were not a privy to BLG.
- [45] Finally, I do not see that the chambers judge erred in concluding that this action is not an abuse of process. BLG is not inconvenienced or twice vexed by having to face the allegations raised in this action. They have yet to respond to the Notaries' claim, the very claim for contribution or indemnity that was contemplated at the time of the Mao decision.
- [46] In summary, I am of the view that the chambers judge did not err in concluding that issue estoppel and abuse of process do not reasonably arise on the facts of this case. Further, I am of the view if for somewhat different reasons, that the chambers judge did not err in concluding that it is not plain and obvious that the NCC discloses no reasonable cause of action.
- [47] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [48] I have had the opportunity to read the judgment of Mr. Justice Butler in draft form. I adopt his description of the facts in this case and adopt the terms he has defined. With respect, I am unable to agree with his conclusion that the chambers judge correctly dismissed the application to strike the pleadings in this case as an abuse of process. I would allow the appeal and dismiss the respondents' claim.
- [49] For the reasons that follow, I am of the view that the Notaries and the Purchasers consented to the order obtained in this Court on November 22, 2017, allowing the appeal from the judgment of Justice Affleck, with a view toward doing something they could not do:

relitigating an issue that had been resolved on the merits against the Notaries without appealing that decision. I am, further, of the view that the pleadings as they now stand in these proceedings describe no claim other than one founded upon an allegation that was necessarily dismissed in the summary trial proceedings before Justice Affleck and not set aside on the merits.

- [50] BLG's application to strike the claim was dismissed for reasons indexed as 2018 BCSC 2049. The chambers judge held:
- [45] In the case before me, the order allowing the appeal placed no limitations on the retrial of the "plaintiff's claims". The only restrictions endorsed by the Court of Appeal related to a reconsideration of Justice Affleck's discretion to not allow third-party notices.
- [46] Consistent with the principles enunciated in *Coulter v. Ball*, [2007 BCSC 720] this means that all questions of law and fact surrounding the "plaintiff's claims", including the conveyancing-related interactions between the Purchasers, the Notaries and BLG, may be "considered afresh".
- [60] The stated purpose of the consent order was to "clear the playing field for litigation down the road". [Emphasis added.] I see this as fundamentally different from the purely "administrative" nature of the order in *Saskatoon Credit Union* [(1988), 22 B.C.L.R. (2d) 89].
- [62] In light of my conclusion on the legal effect of the consent order from November 2017, the requirements for issue estoppel have not been met.
- [63] The question of who bears legal liability for the losses sustained by the Purchasers in the conveyance of the Vancouver property, based on non-compliance with Income Tax requirements, can no longer be said to have been "decided" within the context of a "final" judgment: *Cliffs Over Maple Bay Investments Ltd. (Re)*, 2011 BCCA 180 at para. 31.
- [64] Nor does cause of action estoppel reasonably arise on the facts of this case.
- [65] The Notaries raised BLG's alleged responsibility for not withholding the impugned taxes as a defence to the claims made against them in the Purchaser's summary trial application: see *Mao* at para. 29. Justice Affleck found against them. However, the order for a retrial has set that finding aside. As such, the "cause of action" advanced against BLG in action S175046 is no longer the subject of a "final decision of a court of competent jurisdiction in the prior action": *Cliffs Over Maple Bay* at para. 28. Instead, on this issue, the parties are back at first instance.
- [66] Finally, I do not see action S175046 as an abuse of process.
- [68] I have found, in the circumstances of this case, that there is no final determination of the issues raised in the Notaries' Notice of Civil Claim.

- [51] The November 22, 2017 order made by this Court allowing the appeal and setting aside the judgment of Justice Affleck was expressly made for the purpose of effecting a settlement between the parties that clearly rested upon a finding of liability. This Court did not address the merits of the appeal. To the contrary, the Court was advised the Purchasers' claim had been settled. They would be indemnified and "taken out of the litigation." There were further proceedings in the Tax Court and the Notaries were "carrying that appeal". There was apparently no remaining lis between the Notaries and the Purchasers. Further, the parties did not seek to set aside the dismissal of the application to add BLG as a third party to the proceedings, so there could be no remaining lis between the Notaries and BLG in the proceedings. In my view, in the words used in *Saskatoon Credit*, the Court of Appeal should be considered to have "only discharged an administrative function by disposing of a pending appeal in order to effect a settlement which had been disclosed to the court".
- [52] In my opinion, the principles enunciated in *Coulter v. Ball*, 2007 BCSC 720 have no application in such circumstances. That case, like *Bobolas & Another v. Economist Newspaper Ltd*, [1987] 3 All E.R. 121 (C.A.), the authority it cites, considers whether rulings in a trial that must be reheard because of a mistrial, or because the judgment has been set aside on the merits on appeal, are binding on the second judge. In *Bobolas*, Lloyd L.J., at para. 31, considered the submission that there should be an end to litigation and one should not be vexed more than once in relation to the same cause of action, but held:

...I find it difficult to apply those principles to a ruling given or an issue decided in the course of a trial when ex hypothesi a second trial is called for.

[Emphasis added.]

- [53] Here, it cannot be said that a second trial is called for. The order should not permit the Notaries to relitigate an issue that has previously been decided against them in the same court in the matter in which they participated unless some overriding question of fairness requires a rehearing. There is clearly no such question here.
- [54] In my view, the order of November 22, 2017 does not permit the Notaries to say the liability of BLG to pay the withholding tax from the proceeds of sale can no longer be said to have been decided.

Issues Resolved in *Mao v. Liu*

- [55] The Purchasers commenced proceedings in Vancouver Registry action No. S160498 (the "Underlying Action") against the Notaries by notice of civil claim filed on January 19, 2016. They alleged the Notaries, despite undertaking to make inquiries as to the residency status of the registered owner of the property, did not do so, which resulted in the Purchasers being assessed taxes in the amount of \$695,000. They contended that if the Notaries had made proper inquiries into the residency status of the registered owners of the property, the Purchasers would not be liable for the tax and the Notaries had breached a duty set out in an engagement letter by failing to make a "reasonable inquiry" to determine whether the

registered owners of the property were non-residents for tax purposes.

- [56] In their defence in the Underlying Action, the Notaries argued the property was sold pursuant to the Fisher Order which provided that the proceeds of sale would be received and disbursed through a BLG trust account in accordance with priorities including the following provision: "first in payment of taxes, arrears of taxes, interest and penalties on arrears of taxes in respect of the property". They argued they had received an undertaking from BLG that it would pay to Revenue Canada the amount it required to issue and release to each seller a clearance certificate, and that notes to the seller's statement of adjustments included a term that stated that the seller certified and warranted that it was a Canadian resident and would not be a non-resident of Canada, as defined by the Income Tax Act at the time of the sale. These arguments were advanced as defences to the Purchasers' claim, not solely as claims in support of an apportionment of liability or for contribution from others.
- [57] The first of these arguments amounted to a plea that the Notaries' duty had been discharged by seeking and obtaining a satisfactory undertaking from BLG. The second defence was that, regardless whether the Notaries had breached a duty of care to the Purchasers, that breach had not caused damages because BLG was required to pay the tax from the proceeds of sale in trust.
- [58] As my colleague notes, Justice Affleck, at para. 29 of his judgment, concluded that BLG had not agreed to pay the withholding tax. Further, he held: "I do not accept the language of the contract of purchase and sale imposed a burden on BLG to withhold the non-resident portion of the purchase price".
- [59] My colleague is of the view that Justice Affleck "did not purport to decide whether the Fisher Order required BLG to pay the withholding tax". He is of the view that that issue was not before the court. I disagree.
- [60] In their response to civil claim in Action S160498, the Notaries cited the terms of the Fisher Order (at para. 5) and pleaded, at para. 15 "BLG was required to pay any taxes from the proceeds of sale pursuant to the Court Order and BLG's undertaking "
- [61] Justice Affleck referred to that plea at para. 11 of his reasons for judgment, noting:
- [11] The defendants allege this Court approved the sale and that out of the proceeds of sale BLG was to pay "taxes, arrears of taxes, interest and penalties on arrears of taxes in respect of the [property]". I understand this allegation to mean it was BLG that was obligated to withhold a portion of the sale proceeds to satisfy the CRA.
- [Emphasis added.]
- [62] At para. 16 of the judgment, the trial judge characterized these allegations by the Notaries as defences to the claim raised in opposition to the summary trial application:
- [16] Lastly the defendants plead that:

- a) any loss or damage suffered by the plaintiffs was the fault of the registered owners, CEIR, BLG "and/or others";
- b) if any tax was owed pursuant to the Income Tax Act it is payable by the registered owners, BLG or CEIR and that BLG "was required to pay any taxes from the proceeds of sale in accordance with the court order";

[Emphasis added.]

- [63] The claim in negligence against the Notaries required the Purchasers to show the Notaries breached a duty of care and that that breach was causative of the damages claimed. The trial judge, implicitly dismissing all defences but for the argument that the Purchasers' tax liability might be reduced on appeal, found the Notaries liable to the Purchasers and made an order for judgment with damages to be assessed. While I agree with the respondents' submission that Justice Affleck left open the question of the extent of the Purchasers' tax liability, he left it open only to the extent that it was a matter for assessment. That assessment did not and could not involve questions with respect to whether BLG was obliged to pay the tax.
- [64] While I agree with my colleague's view that the trial judge "did not embark on any analysis of what was required by the Fisher Order" (in fact Justice Affleck only expressly dealt with the argument that BLG was contractually obliged or had undertaken to pay the relevant tax), it is my view that the trial judge could not have granted judgment unless he concluded that the Fisher Order did not require BLG to pay the taxes from the sale proceeds before disbursing them. The summary trial was argued on the footing that the Notaries would not be liable if BLG was obliged by the Fisher Order to pay the tax. At para. 29, Justice Affleck dismissed the argument that "it was BLG that was obliged to pay the non-resident withholding tax."

The Claim Now Advanced

- [65] BLG says that finding lies at the heart of its appeal. It argues the trial judge could not have granted judgment to the plaintiff on the summary trial application if the Purchasers had not satisfactorily addressed the defences advanced by the Notaries.
- [66] By notice of civil claim filed on May 29, 2017, initiating these proceedings, the Notaries sought the following relief against, among others, BLG:
- a) A declaration that the loss damage and expense suffered by the Purchasers "as determined and quantified by the court in the Underlying Action" was caused or contributed to by BLG;
 - b) A declaration the Notaries are entitled to contribution and indemnity from BLG for any and all liability "arising from the Judgment" the Notaries may be under to the Purchasers; and
 - c) Judgment against BLG for any amount that may be found due from the Notaries to the Purchasers in the Underlying Action.

- [67] The notice of civil claim, while it is clearly referring to what I have described in these reasons as the Underlying Action, and uses the words "Underlying Action" and "Judgment" as though they are defined terms, does not define the terms and makes no explicit reference to the judgment of Justice Affleck. The notice of civil claim was drafted before the appeal was allowed by consent, and is therefore problematic because it seeks declarations with respect to the effect of a judgment which has since been set aside and indemnity for a judgment which is no longer effective.
- [68] The pleadings were not amended after the consent appeal was heard and before the motion to strike the pleadings was brought. That is yet another indication that the Notaries and the Purchasers do not, in fact, seek the retrial referred to in the November 22, 2017 order, but for some purposes consider the liability of the Notaries to the Purchasers to have been determined.
- [69] The claim against BLG in those problematic pleadings is said to be founded upon "breaches of duties owed by that firm to the [respondents and to the purchasers] directly". The duty of care said to be owed by BLG to the Notaries and the Purchasers and the alleged breach of that duty are set out as follows in paras. 27-31 of the notice of civil claim:
27. At all material times, BLG acted as the solicitors for CEIR in the conveyance of the Property.
 28. At all material times, BLG possessed special skill, knowledge, and/or opportunity not available to the plaintiffs or Mr. Mao and Ms. Li in relation to the conveyance of the Property and, in particular, in relation to the payment of the taxes required by the Order to be paid.
 29. At all material times, the plaintiffs and Mr. Mao and Ms. Li reasonably relied on the skill and judgment of BLG in paying all of the taxes required to be paid by the Order.
 30. In breach of the Order and in breach of its duties to the plaintiffs and to Mr. Mao and Ms. Li, BLG failed to pay from the proceeds of sale paid under the Contract, prior to distributing any funds to CEIR from the same proceeds all taxes, arrears of taxes, interest, and penalties on arrears of taxes in respect of the Property.
 31. As a result of BLG's failure to pay all taxes in respect of the property from the proceeds of sale paid under the contract, Mr. Mao and Ms. Li suffered loss and damage.

[Emphasis added.]

- [70] BLG concedes that there is no bar to a claim against it for contribution or indemnity founded upon the breach of any alleged duty it may be said to have owed to the Notaries. Such claims clearly remain open to the Notaries, and were addressed when the chambers judge dismissed the application to commence third party proceedings by saying that separate independent claims may be brought in relation to an allegation BLG breached a duty of care to the Notaries. It says, however, that no such claim is identified in the pleadings before us. BLG says the only breach of a duty of care said to give rise to a claim against it, is the failure to pay the withholding tax from the proceeds of sale. That is the precise allegation the

Notaries relied upon as a defence in Action S160498 (as summarized at para. 11 of Justice Affleck's reasons for judgment).

- [71] BLG acknowledges the position it takes is a relatively narrow one: that it is not open to the Purchasers or the Notaries to seek to relitigate the question whether BLG is obliged to pay the withholding tax from the proceeds of sale. It does not seek to bar the Notaries from making any other claim against BLG. It says, however, that there is only a narrow claim advanced in these proceedings against it, and that narrow claim is confined to and dependent upon the argument that BLG was required to pay the tax.
- [72] It says it is an abuse of process to seek to relitigate that claim. I agree. Following the trial before Justice Affleck, the Notaries had the option of seeking a determination from the Court of Appeal that the trial judge was wrong in his conclusion about the effect of the Fisher Order. If the Notaries were correct, the appeal would be allowed and the case against the Notaries would be dismissed. However, BLG contends the Notaries chose the option of accepting the trial judge's conclusion and paying the Purchasers' claim, but only on the basis that the Notaries could relitigate the very same question in the court below, rather than seek a decision of the Court of Appeal.
- [73] In my view, allowing the Notaries to relitigate the issue that was already decided in *Mao* would constitute an abuse of process. The Supreme Court of Canada discussed this doctrine in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63:
- [35] Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice"
- [37] the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added by Arbour J.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice

[74] My colleague finds that the doctrine of issue estoppel does not preclude the Notaries' claims because they were not decided in Mao and because BLG, in any event, was not privy to those proceedings. These are not barriers to striking the pleadings. I am of the view that BLG's obligation to pay the withholding tax has been finally determined, and the doctrine of abuse of process does not rest on the requirement of mutuality. As the court noted in Saskatoon Credit:

[30] Abuse of process has also been used in Ontario, to prevent a retrial of issues previously decided even though the parties or issues were not precisely the same in both actions, in *Bank of Montreal v. Crosson* (1979), 23 O.R. (2d) 625, 11 C.P.C. 30, 96 D.L.R. (3d) 765 (H.C.), and *Demeter v. Br. Pac. Life Ins. Co.*, 43 O.R. (2d) 33, 37 C.P.C. 277, 2 C.C.L.I. 246 (sub nom. *Demeter v. Occidental Life Ins. Co. of California; Demeter v. Dom. Life Assur. Co.*), [1983] I.L.R. 1-1689, 150 D.L.R. (3d) 249, affirmed 48 O.R. (2d) 266, [1985] I.L.R. 1-1862, 13 D.L.R. (4th) 318, 7 O.A.C. 143 (C.A.).

[31] Many authorities are reviewed by Hardinge L.J.S.C. in *Bank of B.C. v. Singh* (1987), 17 B.C.L.R. (2d) 256 (S.C.), who based his decision against allowing a fresh action to proceed against parties to the former action on the ground of issue estoppel and on the ground of abuse of process against defendants who were not parties to the former proceedings.

[32] Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.

[Emphasis added.]

[75] In my opinion, for reasons set out in the underlined passage, the Notaries are precluded from bringing this claim unless they can point to some overriding question of fairness. No such question arises here. The only cause of action described in the notice of civil claim is founded upon the allegation that BLG breached a duty of care by failing to pay the withholding tax from the proceeds of sale. Having unsuccessfully argued that case once, it is not open to the Notaries to relitigate the question by paying the Purchasers' claim and obtaining their consent to set aside the judgment. To do so amounts to an abuse of process.

[76] I would allow the appeal and dismiss the Action.

"The Honourable Mr. Justice Willcock"

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