

CANADA / JUDGMENT

Mand v. Cheema

2021 BCSC 1854

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1854 Mand v. Cheema

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mand v. Cheema,

2021 BCSC 1854

Date: 20210922

Docket: S205263

Registry: Vancouver

Between:

Gurdarshan Singh Mand, Jagpal Kaur Mand, Kuldeep Singh Gill and Suhkminder Kaur Gill

Plaintiffs

And

Harjinder Singh Cheema, Cheema Brothers Trucking Ltd. and Cheema Bros. Transport Ltd.

Defendants

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiffs, via videoconference:

D.S. Parlow

N. Baharian

Counsel for the Defendants Harjinder Singh Cheema, Cheema Bros. Transport Ltd. and the Proposed Defendant Gurdave Kaur Cheema, via videoconference:

J.D. Shields

Place and Date of Hearing:

Vancouver, B.C.

August 18, 2021

Place and Date of Judgment:

Vancouver, B.C.

September 22, 2021

- [1] The plaintiffs apply to add Gurdave Kaur Cheema ("Ms. Cheema") as a defendant and to amend the notice of civil claim ("NCC"). Ms. Cheema is the wife of the defendant Harjinder Singh Cheema ("Mr. Cheema").
- [2] Mr. Cheema, Cheema Bros. Transport Ltd. ("Cheema Transport") and Ms. Cheema oppose her being added as a defendant and oppose amendments related to the proposed claim against her and the Cheema family home. Mr. Cheema and Cheema Transport consent to the balance of the proposed amendments.
- [3] The defendant Cheema Brothers Trucking Ltd. ("Cheema Trucking") has been dissolved due to a failure to file annual reports, it is not represented by counsel and it did not file an application response.

Background

- [4] The plaintiffs are beneficiaries of a trust. Collectively, they hold a 20% beneficial interest in land located at 6728 152 Street, Surrey (the "Current Trust Property"). Mr. Cheema is registered owner of that property and the trustee. At the material times he was also sole director, officer and shareholder of Cheema Transport and Cheema Trucking.
- [5] The Current Trust Property is a successor parcel, following a land "reconfiguration" which occurred in 2013. The original trust property (the "Original Trust Property") was purchased in 1996 for \$2.5 million, also with Mr. Cheema as registered owner / trustee and the plaintiffs having a 20% beneficial interest in it. For each of the two trust properties, a formal declaration of trust was executed.
- [6] Where the distinction between the Current Trust Property and the Original Trust Property is not material, I will simply refer generically to the "Trust Property" in the balance of these reasons.

- [7] On May 15, 2020, the plaintiffs commenced this action, which includes a claim against Mr. Cheema for partition and sale of the Current Trust Property, a declaration of constructive trust over certain property and profits, damages for breach of trust and breach of contract, a tracing order and a claim for disgorgement of 20% of mortgage proceeds, profits and traced property.
- [8] The plaintiffs allege that starting in about 2003, Mr. Cheema used the Original Trust Property and subsequently the Current Trust Property, without their knowledge or consent, to obtain mortgage financing, proceeds of which were used by him and his relatives in several business ventures. The unauthorized financing included a 2003 Vancouver City Savings Credit Union ("VanCity") mortgage securing a line of credit and, in 2011 and 2012, two Toronto Dominion Bank ("TD Bank") mortgages totalling \$4 million. The ventures included a commercial truck parking business on the Trust Property and acquisition, development and re-sale of several residential properties. The plaintiffs allege they are entitled to 20% beneficial interest in these ventures and properties into which the mortgage proceeds were invested and any profits generated from those, amongst other relief.
- [9] The plaintiffs had limited knowledge of what Mr. Cheema had done when they started this action. The NCC included a paragraph stating they reserved the right to apply to add further parties related to Mr. Cheema or who otherwise benefitted from his breaches, as and when their identities and participation are discovered by the plaintiffs - see NCC, Part 1, para. 37.
- [10] In the course of prosecuting this claim, from disclosures made by the defendants, the plaintiffs say they have learned that Mr. Cheema used the Trust Property for additional purposes, including:
- a) Securing a 2008 VanCity Line of Credit;
 - b) Using one or both of the TD Bank mortgages in 2012 to purchase, subdivide and redevelop a property at 3162 West 8th Avenue, Vancouver; and
 - c) Using one or both of the TD Bank mortgages in 2018 to purchase and renovate a property at 33 Howard Street, Burnaby.
- [11] They also discovered that Mr. Cheema entered into a 2012 Ground Lease of the Current Trust Property with Cheema Transport for an initial 5 year term and subsequently in 2017 for a 5 year renewal, both at rental rates which they allege were below market rates. They say that Mr. Cheema allowed Cheema Transport to repeatedly default by failing to pay rent due under the leases, without requiring his company to remedy those defaults and he did not disclose any of this to the plaintiffs.
- [12] Mr. Cheema and Cheema Transport consent to all of the proposed pleadings amendments relating to the foregoing allegations.

- [13] The contentious issues relate to the proposed addition of Ms. Cheema as a defendant and a proposed amendment relating to the April 2004 purchase of the property at 2970 - 168 Street, Surrey (the "Cheema Residence"). That property was purchased for \$890,000 and registered in Ms. Cheema's name. It has been Mr. and Ms. Cheema's family home since it was purchased. The plaintiffs wish to amend the NCC to allege Mr. Cheema used \$490,000 raised from the 2003 VanCity Mortgage registered on the Trust Property in the purchase the Cheema Residence and that this entitles the plaintiffs to claim a 20% constructive trust interest in it.
- [14] The plaintiffs go on to allege that four mortgages were later registered on title to the Cheema Residence and proceeds from those were used to fund further ventures and property acquisitions, particulars of which are not yet known to them. The plaintiffs want to claim a 20% constructive trust interest in those 'downstream' ventures, acquisitions and profits. The mortgages registered on the Cheema Residence include:
- a) November 4, 2004, Coast Capital Savings Credit Union mortgage in the sum of \$200,000;
 - b) March 17, 2011, TD Bank mortgage in the sum of \$2.2 million;
 - c) March 17, 2011, TD Bank mortgage in the sum of \$2.5 million; and
 - d) December 2, 2020, TD Bank mortgage in the sum of \$2 million.
- [15] Mr. Cheema, Cheema Transport and Ms. Cheema raise a variety of objections, including saying that the limitation period for the claims relating to Ms. Cheema and the Cheema Residence have expired and arguing that the affidavit evidence the plaintiffs tendered in support of this application is inadmissible. They have also tendered affidavit evidence of Mr. Cheema in an effort to show that the funds used to purchase the Cheema Residence in 2004 came from sources other than the 2003 VanCity mortgage.

Law - Amendment of Pleadings

- [16] The plaintiffs seek leave to amend pleadings, pursuant to Rule 6-1(1)(b)(i).

When pleadings may be amended

- (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party, other than to change parties or withdraw an admission,
 - (a) once without leave of the court, at any time before service of the notice of trial, or
 - (b) after the notice of trial is served, only with
 - (i) leave of the court, or
 - (ii) written consent of the parties.
- [17] In *Thomas v. Rio Tinto Alcan Inc.*, 2019 BCSC 107 at para. 18, Mr. Justice Kent summarized principles relating to amendment of pleadings:

THE TEST FOR AMENDING PLEADINGS

18 Some of the basic principles governing applications for leave to amend pleadings have been summarized in *Continental Steel Ltd. v. CTL Steel Ltd.*, 2014 BCSC 104 at para. 26 and in *British Columbia (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372 at para. 41 [citations deleted]:

1. The court has a wide discretion to permit amendments so as to enable the real issues between the parties to be determined;
2. The discretion to permit amendments is unfettered, subject only to the general rule that it be exercised judicially;
3. The overriding consideration is the interests of justice generally and to direct what is just and convenient between the parties;
4. While useless amendments that do not advance a reasonable cause of action or defence are to be avoided, justice is generally best served by permitting amendments that will allow the real controversy between the parties to be decided on the merits;
5. Amendments may not be allowed if they will cause actual and meaningful prejudice to the opposing party --mere potential prejudice is insufficient. Rather the party resisting an amendment must prove actual and significant prejudice;
6. Additional considerations include any delays in applying for the amendment, the reasons for such delay and whether deliberate or voluntarily dilatory conduct is involved, particularly when a new cause of action is proposed to be added that would otherwise preclude the operations of a limitation defence;
7. Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy; and
8. Courts should only disallow an amendment as a last resort.

[18] In *Canadian Dewatering L.P. v. Directional Mining & Drilling Ltd.*, 2018 BCSC 517 at paras. 22-23, Master Keighley considered what constitutes prejudice:

22 As to what constitutes prejudice, the fact that an opposing party is affected negatively by an amendment does not necessarily mean that the party is prejudiced. In order to be considered as "prejudice" for the purposes of this analysis, "prejudice must affect the ability of the party to respond to the amended claim" *Bel Mar Developments Inc. v. North Shore Credit Union Square* [2001] B.C.J. No. 512, 2001 BCSC 388 (CanLII). In such a case, the court must balance the prejudices between the parties keeping in mind that in general terms, it is the plaintiff who will suffer more harm in losing the ability to prosecute a claim than a defendant who loses a "windfall opportunity" to prevent a claim from being asserted against it, *Takenaka v. Stanley*, 2000 BCSC 242 (SC Master).

23 The onus is on the defendant to show actual prejudice such as an impaired ability to defend itself through a loss of witnesses, loss of evidence or other factors relating to the passage of time. In *Middelaer, Jenkins J.* said at paragraph 28:

There is no evidence of any prejudice to Delta involving lost or destroyed evidence, witnesses who are no longer available, or any other prejudice caused by the passage of time beyond the limitation period. The only prejudice suffered by Delta is the opportunity to rely on the statutory limitation period. There is no unfairness to Delta because it has not lost its ability to defend itself in this action. The very same actions or inactions of Delta, which form the basis of their defence to the companion actions, would be at issue in this action.

[19] The applicants are not required to tender evidence in support of the proposed amendments. The draft amended pleading is sufficient, so long as it sets out a proper cause of action.

Law - Adding New Parties

[20] Rule 6-2(7) (b) and (c) address adding new parties.

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[21] In *Madadi v. Nichols*, 2021 BCCA 10 at paras. 21-16, the court of appeal discussed the applicable principles when applying these sub-sections:

21 Rule 6-2(7)(b) has been interpreted narrowly, as being concerned with remedying defects in the proceedings. A plaintiff applicant must establish either that the proposed defendant "ought to have been joined as a party" or that their "participation in the proceeding is necessary": *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 16-17; *Alexis v. Duncan*, 2015 BCCA 135 at para. 15; and *Byrd v. Cariboo* (Regional District), 2016 BCCA 69 at para. 36.

22 Rule 6-2(7)(c) is broader and therefore more commonly relied upon. A plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. This threshold is low. It is generally expressed as establishing a real issue between the parties that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45 [Neilson Architects]; *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578 [Acastina]; and *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.) [Binstead]. I would define a frivolous issue as an issue that does not go to establishing the cause of action, does not advance a claim known to law, or serves no useful purpose and would be a waste of the court's time and public resources. This is similar to the considerations for determining whether a claim should be struck as "unnecessary, scandalous, frivolous or vexatious" under Rule 9-5(1)(b): see, for example, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 65, citing in *Willow v. Chong*, 2013 BCSC 1083 at para. 20.

23 This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: *Neilson Architects* at para. 45, citing *Acastina* and *Binstead*. Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether the plaintiff has a possible cause of action against the proposed defendants. The pleadings must set out material facts sufficient to establish a real and not frivolous issue between the plaintiff and the proposed defendants: *Neilson Architects* at paras. 60, 62, and 75.

24 If this requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in the proceeding. It is in relation to this issue that evidence is more commonly provided. This is a discretionary decision, which discretion must be exercised judicially, and in accordance with the evidence adduced and the guidelines established in the authorities. In *Letvad*, this court adopted a list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.), a decision that addressed the amendment of pleadings after the expiry of a limitation period. These factors include the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims and the proposed new cause of action: *Teal Cedar* at para. 67; *Letvad* at para. 29; see also *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 21. In the context of adding parties, the last *Letvad* factor may be more accurately described as the extent of the connection, if any, between the existing claim and the parties to be added.

25 The existence of a limitation defence is an important factor, as such a defence is extinguished if the proposed defendant is added: Limitation Act, R.S.B.C. 1996, c. 266, s. 4(1)(d), repealed and replaced with Limitation Act, SBC 2012, c. 13, s. 22 (1)(d); and Anonson v. North Vancouver (City), 2017 BCCA 205 at para. 13. However, this is not determinative. In Neilson Architects, this court adopted the following approach to considering a limitation defence (at para. 47):

If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in Letvad.

26 These principles were recently reiterated in Smithe Residences Ltd. v. 4 Corners Properties Ltd., 2020 BCCA 227 at paras. 49-51.

[22] The factors identified in Letvad v. Fenwick, 2000 BCCA 630 ["Letvad"] at para. 29 are:

- the extent of the delay;
- the reasons for the delay;
- any explanation put forward to account for the delay;
- the degree of prejudice caused by delay; and
- the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[23] In Meade v. Armstrong (City), 2011 BCSC 1591 at paragraph 16, Mr. Justice Dley summarized how rules 6-1(1) and 6-2(7) are to be interpreted:

- 1) A party should be added where that party's participation is necessary for the proper determination of the case: Van de Perre v. Edwards [2001] 2 S.C.R. 1014 at para. 48;
- 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters: Northern Construction Co. v. British Columbia Hydro and Power Authority, [1970] B.C.J. No. 26 at para. 14;
- 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined: MacMillan Bloedel Ltd. v. Binstead, [1981] B.C.J. No. 1611 at para. 12;
- 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties: Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc., [1991] B.C.J. No. 2796 at para. 15;
- 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action: Harrington (Guardian ad litem) v. Pappachristos, [1992] B.C.J. No. 2600;

6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried: *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No. 550 at para. 43.

[24] The function of pleadings and the approach to be taken to assessing the sufficiency of pleadings was addressed by Madam Justice McLachlin (as she then was) in *McNaughton v. Baker*, [1988] B.C.J. No. 515:

To require a party seeking to bring a third party claim to adduce evidence supporting that claim in advance of trial, is to deprive him of his right to plead a cause of action first and defer proof of it until trial. It is to require him to produce evidence at the outset, without the aid of discovery or the other means afforded by the rules for obtaining evidence, under peril that if he does not do so his claim will be struck out. It confuses the function of pleading - to outline the claim or defence - and the purpose of the trial - to determine whether, on the evidence, the claim or defence is made out.

[25] With regard to the role affidavit evidence plays in an application under Rule 6-2(7)(c) to determine whether there is a question or issue between the parties relating to the relief sought or subject matter of the lawsuit, and whether it is just and convenient to determine the issue in the proceedings in question, this has been the subject of comment in several cases. In *Li v. Yan*, 2015 BCSC 1067 at para. 43, Master MacNaughton (as she then was) commented:

43 In *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, the court expressed the test at the first stage as requiring an applicant to establish that there may exist a real issue which is not frivolous or that she has a possible cause of action against the proposed party. That requirement may be satisfied by reference to the proposed amended pleadings or be supplemented by affidavit evidence. If affidavit evidence is presented, the court does not weigh it to determine the likelihood of proving the proposed allegations but merely to determine whether the evidence supports that a real issue exists between the parties (at paras. 3-5). [underlining added]

[26] In *Wong v. Spittal*, 2018 BCSC 1795 at para. 42, Mr. Justice Kelleher commented:

42 Mr. Lau has sworn an affidavit in these proceedings. Based on his evidence, it is unlikely that there is a partnership. But in an application like the present one, it is not my role to make findings or to weigh evidence. At this point, it is not the Court's concern whether or not the action will succeed against Super Coach. It is sufficient that there is an issue or question between the plaintiff and Super Coach: Meade at para. 16. The allegations are not frivolous.

[27] In *1112082 B.C. Ltd. v. Lightray Corp. (Canada)*, 2019 BCSC 1041 at para. 30, Mr. Justice Kent commented:

30 I agree with the plaintiffs' characterization that the Responses to this application are essentially seeking a summary determination of the merits as the basis for resisting the proposed addition of parties. I acknowledge there may well be a gatekeeping function to be performed in determining whether a real issue or a possible cause of action exists between all the parties and

whether it would be just and convenient to have the matter determined in the same action. Affidavit evidence is admissible in respect of that determination but, as with Rule 9-5 re striking pleadings, such evidence is only for the purpose of informing whether it is plain and obvious no issue/cause of action exists and whether any such claim is appropriately tried in the same action. If a possible cause of action exists on the pleaded facts, the Court cannot and will not weigh any evidence directed towards the merits.

Analysis

[28] As indicated, Mr. Cheema, Cheema Transport and Ms. Cheema resist the application to add Ms. Cheema as a defendant and the related amendments on two broad basis.

Objection re Admissibility of Affidavits and Exhibits

[29] Mr. Cheema, Cheema Transport and Ms. Cheema raised numerous objections to the admissibility of affidavit evidence the plaintiffs tendered in support of this application.

[30] The initial affidavit put forward by the plaintiffs was sworn by a paralegal working with counsel for the plaintiffs. Attached to her affidavit were copies of lists of documents produced in the litigation and copies of selected documents produced by each side, including without limitation copies of title search prints and land title filings including several mortgages, as well as excerpts from the plaintiffs' examination for discovery of Mr. Cheema.

[31] Counsel for the defendants argued that the paralegal did not have personal knowledge of the documentation attached to her affidavit. He referred me to numerous authorities which included cases criticizing the use of affidavits from legal assistants and paralegals, including:

- a) *Sharda v. Moran*, 2016 BCSC 538 at para. 12 and 15;
- b) *Drinkall v. Drinkall*, 2016 BCSC 373 at para. 36;
- c) *Olsen v. Barrett*, 2002 BCSC 877 at para. 8;
- d) *Albert v. Politano*, 2013 BCCA 194 at para 194; and
- e) *1112082 B.C. Ltd. v. Lightray Corp. (Canada)*, *supra*, at para 20.

[32] He argued that simply attaching a document to an affidavit does not make it evidence. For this proposition he cites Mr. Justice Bouck's reasons in *L.M.U. v. R.L.U.*, 2004 BCSC 95 at para. 32 and *Mallard v. Killoran*, 2005 SKQB 203 at paras. 11-12.

- [33] With respect to land registry documents in particular, he notes that the paralegal had not actually conducted the land title searches herself and she did not have knowledge of the contents of exhibits. Section 39 of the Evidence Act, R.S.B.C. 1996, c. 124 allows the court to receive as evidence certified copies of land title documents, but the exhibits in question were not certified copies. Counsel refers to *Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, 2014 BCSC 1186 at para. 22.
- [34] Counsel argued there is simply no admissible evidence on which to make the orders sought.
- [35] The plaintiffs sought to address some of these concerns in reply by tendering a second affidavit of the paralegal setting out in greater detail the search process through which some of the land title documents had been obtained by herself and another paralegal from whom she had taken over the file. The defendants objected that this was not proper reply, on the basis that amounted to splitting the plaintiff's case. See *British Columbia (Director of Civil Forfeiture) v. Vu*, 2020 BCSC 106 at para. 12.
- [36] An additional possible concern regarding the affidavit from Mr. Cheema tendered in opposition to the application arises from the fact that he appears to have required the assistance of an interpreter during his examination for discovery, but there is no indication on his affidavit that it had been translated for him when he executed it. This point is also addressed in *British Columbia (Director of Civil Forfeiture) v. Vu*, *supra* at paras. 8-11. Madam Justice Jackson found that failure to provide any indication that the impugned affidavits in that case were the product of translation was not a mere irregularity in form and rendered them inadmissible. As this issue was not addressed in argument, I do not intend to make a determination on this issue.
- [37] In view of the limited role that affidavit evidence plays in this particular application, I do not consider that it is necessary to address admissibility of the plaintiff's affidavit material in detail. Even if the majority of the exhibits attached to the paralegal's affidavit are not admissible to prove the contents of those documents, this is not fatal to the plaintiffs' application. It is not my role on this application to weigh evidence and the applicants are not obliged to prove their proposed new claims. Even if the exhibits to the paralegal's first affidavit are not admissible, the issues on this application can still be assessed based on the draft amended notice of civil claim.
- [38] Even if the exhibits are not admissible for proof of their contents, this does not mean they cannot be admitted for other purposes. In *L.M.U. v. R.L.U.*, *supra*, at para. 32, Justice Bouck observed that the documents in question might be admissible for some purpose other than establishing the truth of the statements contained in them.

32 Just because documents are marked as exhibits to an affidavit does not convert them into admissible evidence, particularly where they are tendered for proof of their truth: *Re: Koscot Interplanetary (U.K.) Ltd.*, [1972] 3 All E.R. 829 at 835, d to g Megarry J.

For the purpose of inspection and copying, I readily accept that there is no distinction between including a statement in the affidavit and exhibiting to the affidavit a document containing the statement; but I greatly doubt whether there is any deemed inclusion of the exhibit in the affidavit for all purposes. ...

It may also be that the documents might be admissible for some purpose other than establishing the truth of the statements contained in them. But for the purposes for which they were tendered, namely of establishing such truth, I hold them inadmissible.

[underlining added]

[39] In this instance, one of the issues is when the plaintiffs became aware of the additional disclosures which inspired this application. In my view, the lists of documents, copies of significant documents and discovery excerpts are admissible for the limited purpose of showing the timing of key new disclosures which led to this application.

Objection re Limitation Period

[40] Mr. Cheema, Cheema Trucking and Ms. Cheema argue that because the events relating to Ms. Cheema and the purchase of the Cheema Residence date back some 17 years to 2003-2004, the applicable limitation period has expired. They say that none of the plaintiffs have tendered affidavit evidence stating they were unaware of the alleged events prior to 2021 and that an adverse inference ought to be drawn from their failure to do so. The application respondents do not identify a specific limitation statute or section(s) they are relying on as establishing the applicable limitation period.

[41] Plaintiffs' counsel submitted that the addition of Ms. Cheema and related amendments arose from disclosures received since the action was started. The affidavit evidence tendered supports this by helping to show the time-frame for the plaintiffs' receipt of what they assert were disclosures that helped to precipitate this application.

Extent of the delay / Reasons for the delay / Explanation to account for the delay

[42] I now consider the Letvad factors. I am considering these three initial factors together. In my view, the appropriate measure of the plaintiffs' delay in making this application is based on the timing of the disclosures received after commencement of this action. The application was made within a reasonable time following initial discovery and disclosures.

Degree of prejudice caused by delay

[43] Mr. Cheema, Cheema Transport and Ms. Cheema did not tender evidence or argument indicating that they have suffered actual prejudice in terms of their ability to defend the proposed new causes of action relating to Ms. Cheema and the Cheema Residence. Mr. Cheema's affidavit attaches financial records which date back to the purchase of the Cheema Residence, so it appears they have access to some evidence which they assert is relevant. Loss of a limitation defence is clearly prejudicial, but that alone is not determinative.

Neither party made submissions on this issue. Based on my review of the draft amended notice of civil claim, I conclude it is just and convenient to add Ms. Cheema as a defendant and to allow amendments relating to her and the Cheema Residence, notwithstanding the possible loss of a limitation defence.

Extent of the connection between existing claims and proposed new cause of action

- [44] The plaintiffs have pleaded in the proposed amended notice of civil claim that funds used to purchase the Cheema Residence were derived from one of the mortgages registered on Original Trust Property.
- [45] The defendants did argue that particular passages from the discovery of Mr. Cheema had effectively been adopted by the plaintiffs and that they were exculpatory of Ms. Cheema or contradicted the proposed amendments. Read in the broader context of all the passages that were read in, Mr. Cheema's evidence is perhaps better characterized as arguably inconsistent. The plaintiffs tendered it in an effort to demonstrate his evidence has internal contradictions and that the plaintiffs reject his explanations. Even if one were to accept that submission, the discovery excerpts fall short of establishing that VanCity mortgage proceeds were used to purchase of the Cheema Residence. That said, at this stage the plaintiffs are not required to tender proof of the proposed new claims.
- [46] The defendants also tendered affidavit evidence from Mr. Cheema attaching as exhibits financial records purporting to show that funds used to purchase the Cheema Residence came from sources other than the VanCity mortgage. As Justice Kent noted in 1112082 B.C. Ltd. v. Lightray Corp. (Canada), it is not my task on this application to make a summary determination of substantive issues.
- [47] I am satisfied that the plaintiffs have adequately pleaded a real issue and that a cause of action exists between all of the parties. The proposed new claims are not clearly frivolous.
- [48] I am also satisfied that there is a close connection between the existing claims in the action and the proposed new claim relating to Ms. Cheema and the Cheema Residence. The plaintiffs have pleaded that proceeds from a mortgage on the Original Trust Property were used to purchase the Cheema Residence. They also allege that as beneficiaries, they are entitled to 20% of the property purchased and any 'downstream' use of the new trust property. In my view, it is appropriate to try the proposed new claims with the existing claims.

Conclusion

- [49] The plaintiffs' application for leave to add Ms. Cheema as a defendant is granted and the style of cause is amended accordingly.
- [50] The plaintiffs' application for leave to file the Amended Notice of Civil Claim attached as Schedule "A" to their Notice of Application filed July 22, 2021 is granted.

[51] Mr. Cheema, Cheema Transport and Ms. Cheema will pay the plaintiffs costs of this application, in the cause.

"Master Bilawich"

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