

CANADA / JUDGMENT

Martyn v. Walton

2023 BCCA 23

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 23 Martyn v. Walton

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Martyn v. Walton,

2023 BCCA 23

Date: 20230106

Docket: CA48359

Between:

Catherine Martyn

Appellant

(Plaintiff)

And

Heather Louise Walton

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Abrioux

The Honourable Justice Marchand

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

May 18, 2022 (Martyn v. Walton, 2022 BCSC 832, Victoria Docket S213190).

Oral Reasons for Judgment

Counsel for the Appellant:

M. Nied

Counsel for the Respondent:

R. Robertson

Place and Date of Hearing:

Vancouver, British Columbia

January 3, 2023

Place and Date of Judgment:

Vancouver, British Columbia

January 6, 2023

Summary:

The defendant applied to have a wills variation action dismissed as an abuse of process. On the application, submissions concentrated on issue estoppel and cause of action estoppel, with more general abuse of process arguments being confined to submissions on special costs. The chambers judge rejected the contention that issue estoppel or cause of action estoppel applied. She found, however, that the action was an abuse of process, concentrating on her view that the defendant should not have been made a party in her personal capacity. In addition to dismissing the claim, the judge awarded special costs and prohibited the plaintiff and her husband from filing further actions while costs remained unpaid. The plaintiff appealed. Pending appeal, this Court granted an order for security for a portion of the costs in the trial court. Held: Appeal allowed. The judge's finding of abuse of process was made on an erroneous basis and cannot stand. The defendant was a proper and, indeed, necessary party to a wills variation action. The order dismissing the action is vacated, as are ancillary orders which were dependent on the finding of abuse of process or were otherwise flawed. There are troubling aspects to this action, however, and it may constitute an abuse of process. The matter is remitted to the trial court for fresh determination of that issue. Justice requires that the amount being held as security for trial costs be transferred to the Supreme Court pending determination of the abuse of process issue.

[1] GROBERMAN J.A.: This is an appeal from an order in a wills variation action that:

- a) struck the notice of civil claim and dismissed the action;
- b) prohibited the plaintiff and her husband from filing further actions in the court against or "related to" the defendant without leave of the court;

- c) prohibited the plaintiff and her husband from filing any actions in British Columbia until such time as they paid the costs of the action and of a previous action;
 - d) awarded the defendant special costs; and
 - e) cancelled the registration of a certificate of pending litigation.
- [2] The provision listed as e) above is, for reasons I will come to, moot, and is not under appeal.

History of the Claim

- [3] The action concerns the estate of Peter Cockett Clarke, who died in 2013. Ms. Walton is Mr. Clarke's widow, the couple having married in 1994. Ms. Martyn is Mr. Clarke's daughter from a previous marriage.
- [4] Mr. Clarke's will made Ms. Walton the sole beneficiary of his estate as long as she survived him by 30 days, which she did. Mr. Clarke's main assets, however, were held in joint tenancy with Ms. Walton and became her property on Mr. Clarke's death without becoming part of the estate. The estate, it appears, was very small. The will was not probated.
- [5] More than five years after Mr. Clarke's death, Ms. Martyn's husband filed a civil claim against Ms. Walton, alleging that, as a result of a trust indenture executed by Mr. Clarke in 2012 or 2013, Ms. Walton held certain property in trust for Ms. Martyn. Mr. Martyn alleged that he was only advised of the trust in 2018, and that Ms. Martyn had assigned her interest in the trust property to him.
- [6] Mr. Martyn's claim was dismissed on a summary trial a few months after it was commenced (Martyn v. Walton, 2018 BCSC 2028). The judge found that the alleged trust indenture did not exist.
- [7] The original notice of civil claim in the current action was filed in October 2021, approximately 8½ years after Mr. Clarke's death and 3 years after the dismissal of Mr. Martyn's claim. Like the previous action, it alleged that Ms. Walton had entered into an agreement with Mr. Clarke to hold certain property in trust for Ms. Martyn. The claims were much the same as those that had been dismissed in Mr. Martyn's 2018 action.
- [8] Part 1 of the notice of civil claim (the statement of facts) concentrated exclusively on the alleged trust arrangements. Part 2 of the notice of civil claim (the relief sought) included reference to wills variation. It sought:
1. An order declaring that the Deceased by the Will failed to make just, equitable and adequate provision for his children, including Plaintiff;

2. An order varying or rectifying the Will of the Deceased to bring it into accord with the full and complete intention of the will-maker(s) at the time of making the mutual wills, by imposing a trust on [Ms. Walton's residence], so that the residence is held for eventual transfer to the children of the Deceased in equal shares following the later death of defendant (reserving a life tenancy in the property to defendant);
 3. A Certificate of Pending Litigation against [Ms. Walton's residence];
 4. Plaintiff does not seek any distribution from the estate of her late father during the lifetime of his wife. Instead, plaintiff seeks only that minimum variation necessary to assure that her father's true intention for an inheritance of the primary (or substitute) residence to his children following the later death of his wife -- and her contemporaneous agreement and promise to honor that arrangement -- will be protected and carried into effect following the death of the wife rather than diverted to other beneficiaries of the wife not contemplated by the father in making his will.
- [9] It is evident that the claim, as originally filed, relied heavily on the alleged trust agreement. It would be difficult to interpret it as a free-standing wills variation claim.
- [10] There were also some irregularities in the claim insofar as it sought variation of the will. As originally filed, the claim sought relief under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13. It should, instead, have referred to the Wills Variation Act, R.S.B.C. 1996, c. 490, which is the statute applicable to Mr. Clarke's will, since he died before the coming into force of the Wills, Estates and Succession Act. Further, as I will discuss, the claim failed to name all necessary defendants.
- [11] In December 2021, Ms. Walton filed an application to strike the claim. She alleged that the matter was *res judicata* and that the action was an abuse of process. The application was set to be heard in late January 2022, but was adjourned by consent to February 10 when the plaintiff appointed counsel to represent her.
- [12] One week before the scheduled hearing, the plaintiff made extensive amendments to the claim, eliminating almost all the original allegations and transforming it into a freestanding wills variation action under the Wills Variation Act.
- [13] Ms. Walton's application to strike the claim proceeded as scheduled. Unfortunately, the materials that were before the court on the application had been prepared with the original notice of civil claim in mind. They were not tailored to the amended notice of civil claim, which bore little resemblance to the original one.
- [14] Not surprisingly, given that it was directed at the original notice of civil claim, Ms. Walton's notice of application concentrated on *res judicata*. The argument before the chambers judge also concentrated on *res judicata*. To the extent that issues of more general abuse of process were raised, it was in the context of whether an order for special costs ought to be made.

The Judgment Below

- [15] After summarizing the background facts, the judge turned to the question of whether the claim was res judicata. She considered both issue estoppel and cause of action estoppel. While acknowledging that the claim as it was originally pleaded might well have been barred as res judicata, the judge found that the amended claim was not. Ms. Walton does not suggest, on this appeal, that the judge erred in respect of her findings on res judicata.
- [16] While the arguments had been directed at res judicata issues, the judge considered that she could not limit her focus to that issue in analyzing the question of whether the claim was an abuse of process:
- [35] The determination of whether the court should exercise its discretion to prevent an abuse of process must take into account the entire context and background of an action. In my view there are a number of concerning facts in the history of this litigation and the 2018 action which must be considered as part of this context.
- [17] The judge observed that the litigation was preventing Ms. Walton, who was in poor health, and whose mental faculties were in decline, from selling her residence. She also noted that the plaintiff had emailed Ms. Walton, seeking to be placed on title, even though the home was not part of Mr. Clarke's estate, and there is no suggestion that it was purchased using proceeds from the estate. Rather, it replaced property that Ms. Walton took by virtue of the fact that it was held in joint tenancy with Mr. Clarke.
- [18] The judge then turned to what she viewed as the most important factor in finding that the action was an abuse of process:
- [44] In my view Ms. Walton, the applicant and sole defendant, is not even a proper party to this WVA [Wills Variation Act] claim. If the plaintiff wishes to pursue a WVA claim, she must bring her action against the estate, or Ms. Walton and co-executor in their capacities as executors, not against Ms. Walton personally.
- [45] The reason that Ms. Walton is named in her personal capacity in this matter is that Mr. Martyn and/or Ms. Martyn carelessly began this action out of a misplaced confidence in his/their legal knowledge. This conduct goes beyond mere incompetency, and instead demonstrates a reckless disregard for the applicant, and the Court. I say this because there is ample documentary evidence of Mr. Martyn's representations to counsel and Ms. Walton of his legal sophistication and confidence in his abilities. His assertion to Ms. Walton's counsel that he is immune to the costs awards from the previous proceedings as an American resident is just one example.

- [47] Although the Martyns eventually retained counsel to amend their [notice of civil claim], and the [amended notice of civil claim] neatly avoids the application of res judicata, the [amended notice of civil claim] fails to fix a fundamental issue with the pleadings: the wrong party is named. The fact that Ms. Walton is named personally is a function of Mr. and/or Ms. Martyn's initial [notice of civil claim] and their reckless disregard for Ms. Walton and court processes. This obstacle was not overcome by their counsel's subsequent amendments.
- [48] The result of the Martyn's temerity is that Ms. Walton, the applicant, has wrongly been drawn into another set of legal proceedings in her personal capacity. This has caused her unnecessary emotional distress while she was already in a state of heightened vulnerability. Ms. Martyn's email to Ms. Walton clearly indicates Ms. Martyn is aware of Ms. Walton's health issues, and that she cannot pay for care as a result of the CPL.
- [19] It does not appear that Ms. Walton ever suggested to the court that she had been improperly joined in the action, or even that the action was defective in failing to name other parties. The proposition that Ms. Walton should not have been a party seems to have originated with the chambers judge and was not addressed during the hearing.

Analysis

- [20] It is clear that the judge misapprehended the law in ruling that Ms. Walton should not have been made a party. Rule 21-6(1) and (2) of the Supreme Court Civil Rules read as follows:

21-6 (1) A proceeding under section 60 of the Wills, Estates and Succession Act must be started by a notice of civil claim.

(2) In a proceeding referred to in subrule (1),

(a) the following persons must be parties to the proceeding:

(i) the surviving spouse and children of the will-maker;

(ii) all beneficiaries under the will-maker's will whose interest may be affected by the order sought;

(iii) the executor of the will, and

(b) the court may order that any other person be joined as a party.

- [21] Before the coming into force of the Wills, Estates and Succession Act, the Rule referred to the Wills Variation Act, but was materially identical:

21-6 (1) A proceeding under section 2 of the Wills Variation Act must be started by a notice of civil claim.

(2) In a proceeding referred to in subrule (1),

(a) the following persons must be parties to the proceeding:

- (i) the surviving spouse and children of the testator;
- (ii) all beneficiaries under the testator's will whose interest may be affected by the order sought;
- (iii) the executor of the will, and

(b) the court may order that any other person be joined as a party.

- [22] Thus, Ms. Walton was not only a proper party to the action, but also a necessary one, under both Rule 21-6(2)(a)(i) and (ii). The judge was wrong in describing the naming of Ms. Walton as a defendant as "incompetency" and as "a reckless disregard for the applicant and the Court". The judge was also incorrect in suggesting that the action should have been brought against the estate. As Justice Masuhara noted at para. 12 of *Mitchum Estate (Re) v. Wolfin*, 2019 BCSC 1486, an estate is not a person, and is not a proper party to litigation. The proper party is the personal representative of the deceased, or, where there is no personal representative, a litigation representative appointed under Rule 20-6(3) of the Supreme Court Civil Rules.
- [23] While Ms. Walton was properly named as a defendant, the action is technically defective in that other necessary parties were not included--in particular, Ms. Martyn's brother and the executor of the will. We are told that the brother is aware of the litigation and has no interest in participating.
- [24] We are also advised two executors named in the will were served with citations under Supreme Court Civil Rule 25-11 some time ago, and that they failed to respond to those citations. It is alleged that they are deemed, under Rule 25-11(5) to have renounced executorship, such that there is currently no executor.
- [25] If there is no executor, it may well be that Ms. Martyn is required to have a litigation representative appointed under Rule 20-6(3) of the Supreme Court Civil Rules, but it is not necessary to determine that issue on this appeal.
- [26] What is important to this appeal is that the failure to include a necessary party in the Wills Variation Act claim is an irregularity that can be cured by an application to add a party: *Cowan v. Cowan* (1987), 17 B.C.L.R. (2d) 114 (SC). It is not an abuse of process.
- [27] The judge's finding that Ms. Walton was wrongly made a party to this proceeding was an error, and appears to have been the most important factor that she considered in exercising her discretion to dismiss the action as an abuse of process. In the result this Court cannot defer to the judge's exercise of discretion.
- [28] There are, nonetheless, factors evident in the record that suggest that this action may constitute an abuse of process. It is troubling that the plaintiff did not raise the wills variation issue until many years after Mr. Clarke's death and raised it only at a time when Ms. Walton was vulnerable. Further, she appears to have used the litigation to interfere with a possible sale of Ms. Walton's home despite a complete absence of evidence to suggest that the home was purchased with assets that formed part of Mr. Clarke's estate. The very late

amendments to the notice of civil claim are also of concern: the original allegations were completely abandoned, and the failure to name necessary parties and to make specific allegations in support of a variation leads to some suspicion as to the sincerity of the plaintiff's claim. If (as appears to be the case) the estate is of very limited value, it is difficult to see any motive for this action other than to harass Ms. Walton. I do not suggest that this is a comprehensive catalog of the problems with the claim.

- [29] In raising these causes for suspicion that the claim is an abuse of process, I am not purporting to make a finding. The record on this appeal is quite limited, and the parties have not had the opportunity to fully argue all of its nuances. The very late filing of the amended notice of civil claim interfered with the parties' abilities to file a complete record on the abuse of process issue. In my view, it is not a case where this Court should determine, itself, whether the action is an abuse of process. Instead, that issue should be returned to the trial court, where the parties will be able to ensure that the required record is before the court, and where full argument can be made.
- [30] Given that the order dismissing the claim must be set aside, it follows that the order for costs in the court below must also fall.
- [31] The order barring the plaintiff and her husband from commencing further actions against Ms. Walton must also fall with the order dismissing the claim. The order was in any event, problematic. There does not appear to have been any application served on the plaintiff's husband, nor was he a party to, or represented at the hearing. The plaintiff, herself, does not appear to have been given any real opportunity to address the issue.
- [32] The order precluding the plaintiff and her husband from commencing any litigation until costs were paid suffers from those same problems. Further, an order of that nature should provide that the litigant may apply for leave to commence proceedings even while the costs awards are outstanding (see *Gichuru v. Pallai*, 2018 BCCA 78 at para. 82). As the costs of the other action have now been paid, and as the special costs order in this proceeding is to be vacated, the order in question may now be moot, but it should nonetheless be set aside.
- [33] The order cancelling the certificate of pending litigation is not under appeal. I understand the certificate was cancelled, and that the property has been sold, so that order, too, is moot. The order cancelling the certificate of pending litigation appears, in any event, to have been properly made.
- [34] The appellant has succeeded in having the dismissal of her claim set aside, but has not succeeded in having the defendant's application for dismissal rejected. In my view, success has been divided, and each party should bear her own costs of the appeal. The costs of the proceedings to date in the trial court should be in the discretion of the judge who determines the abuse of process issue.

Security for Trial Costs

- [35] In reasons indexed as 2022 BCCA 351, Justice Abrioux made an order for security for appeal costs in the amount of \$8,000. In light of the disposition of the appeal, the appellant is entitled, on making the request, to have that security returned to her.
- [36] Justice Abrioux also ordered security for trial costs in the amount of \$11,000. Given that we are vacating the order for trial costs, that security would also, normally, be available to be returned to the appellant. In my view, however, the concerns that motivated Justice Abrioux's order remain. It is not clear that the proceedings are an abuse of process, but there are reasons to suspect that they may be. Further the plaintiff does not have assets in British Columbia.
- [37] In the unusual circumstances of this case, I am of the view that the interests of justice demand that the security posted for the trial costs be retained as security. The \$11,000 amount currently held in this Court for security for trial costs should be ordered transferred to the Supreme Court file (Victoria Docket S213190) to be held there as security for trial costs. Despite the fact that the security order is made by this Court, jurisdiction over the security should be transferred to the Supreme Court, which should have full authority to make modifications to the security order, and to make orders for the disposition of the security.

Disposition

- [38] I would dispose of this appeal as follows:
- a) The following orders of the chambers judge will be set aside:
 - 1. The Notice of Civil Claim and the Amended Notice of Civil Claim are struck and this action is dismissed;
 - 3. The plaintiff Catherine Martyn and her husband Jim Martyn are prohibited from filing any further actions in this Court related to Ms. Walton or naming her as a defendant without leave of this Court;
 - 4. The plaintiff Catherine Martyn and her husband Jim Martyn are prohibited from filing any further actions in British Columbia until they pay the Court costs relating to this action and the 2018 action brought by Jim Martyn on behalf of Catherine Martyn; and,
 - 5. The plaintiff Catherine Martyn shall pay to Ms. Walton special costs of this action.;
 - b) the application to dismiss this matter as an abuse of process will be remitted to the Supreme Court, with a direction that the parties should be allowed to file further evidence and argument prior to the matter being heard. It is not intended that the parties will have any right to make arguments with respect to the res judicata issues which were finally determined by the chambers judge;

- c) The costs of the proceedings to date in the trial court will be in the discretion of the judge who hears the abuse of process application;
- d) Each party will bear her own costs of this appeal;
- e) The amount currently held in this Court for security for trial costs (\$11,000) will be transferred to the Supreme Court (Victoria Docket S213190) to stand as security for trial costs, subject to further order of the Supreme Court, which will have full control of the security.

[39] ABRIOUX J.A.: I agree.

[40] MARCHAND J.A.: I agree.

[41] GROBERMAN J.A.: Order accordingly.

"The Honourable Mr. Justice Groberman"

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