

CANADA / JUDGMENT

Mass v. Canada Trustco Mortgage Company (TD Canada Trust)

2019 BCCA 42

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 42 Mass v. Canada Trustco Mortgage Company (TD Canada Trust) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Mass v. Canada Trustco Mortgage Company (TD Canada Trust), 2019 BCCA 42 Date: 20190129 Docket: CA44354 Between: Shulamit Mass Appellant (Plaintiff) And Canada Trustco Mortgage Company (TD Canada Trust) and Jharna Chandok and Estate of Surjit Chandok Respondents (Defendants) Before: The Honourable Mr. Justice Frankel The Honourable Mr. Justice Willcock The Honourable Mr. Justice Savage On appeal from: An order of the Supreme Court of British Columbia, dated March 16, 2017 (Mass v. Canada Trustco Mortgage Company (TD Canada Trust), Vancouver Registry S165222). Oral Reasons for Judgment The Appellant appeared in person: S. Mass Counsel for the Respondents Canada Trustco Mortgage Company (TD Canada Trust): T. Louman-Gardiner The Respondent J. Chandok appeared in person: J. Chandok Place and Date of Hearing: Vancouver, British Columbia January 29, 2019 Place and Date of Judgment: Vancouver, British Columbia January 29, 2019 Summary: The respondents obtained orders in foreclosure proceedings against the appellant's property in 1999. Years later the appellant later commenced proceedings to challenge the validity of the mortgages. Her action was dismissed as statute-barred and as re-litigation of issues previously determined. Her appeal from that order was put on the inactive list after a year. Her application to have the appeal returned to the active list was dismissed. She missed the deadline to apply to the Court to vary the order. Her application to extend the time to do so was then dismissed. The appellant applied to the Court to vary that order and for an extension of time. Held: appeal dismissed. The appellant did not establish that the chambers judge made any error in principle or misconceived facts or that relevant information was not brought to his attention when he dismissed the application. He did not err in concluding there was no prospect a division of this Court would restore the appeal to the active list.

[1] WILLCOCK J.A.: This is an application pursuant to section 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, to vary the order of Harris J.A., made on October 19, 2018, dismissing the appellant's application to extend the time to vary the order of Newbury J.A. made May 24, 2018.

- [2] The standard of review is highly deferential. A review hearing is not a rehearing of the original application. The court will interfere only if there has been an error in principle, if the justice was wrong in a legal sense, the justice misconceived the facts or the relevant information was not brought to the justice's attention. *De Fehr v. De Fehr*, 2002 BCCA 139 at para. 6; *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at paras. 6-7.
- [3] The appellant was the victim of fraud that extended over 17 years and is described in detail in the judgment of Ballance J., pronounced on March 21, 2018, indexed at 2018 BCSC 464. That judgment brought an end to proceedings commenced in 2003 and prosecuted in fits and starts over the years, and at trial between June 2008 and September 2016. The appellant attempted to add Canada Trustco Mortgage Corporation and Surjit Chandok as parties to those proceedings. Her application to do so was dismissed on April 8, 2008.
- [4] Canada Trustco's involvement in the appellant's financial affairs is described at paras. 24-26 of the reasons for judgment of Ballance J. In 1991, the appellant was taken by the fraudster, a Ms. Wood, to Canada Trustco to arrange to place a first mortgage on her home in the Oakridge area of Vancouver. Proceeds of that mortgage were obtained by the fraudster and, together with other advances made by the appellant to Wood, were the subject of the trial heard by Ballance J.
- [5] The Canada Trustco mortgage went into arrears. Foreclosure proceedings were commenced. An Order Nisi of foreclosure was obtained by Canada Trustco on July 9, 1999. The appellant's appeal of the Canada Trustco Order Nisi was dismissed by Bowden J. on March 16, 2017.
- [6] Chandok's involvement in the appellant's financial affairs is described at paras. 43-56 of the reasons for judgment of Ballance J. In 1996, the appellant was taken by Ms. Wood to an individual who privately arranged to place a second mortgage on the Oakridge home. Chandok eventually replaced that second mortgagee. The second mortgage fell into arrears. Foreclosure proceedings were commenced. On August 19, 1999, an Order Nisi of foreclosure was made. An application to extend the time within which that order might be appealed was dismissed on November 25, 1999. On January 7, 2000 an Order Absolute of foreclosure was made.
- [7] On June 8, 2016, these proceedings were commenced by the appellant in the Supreme Court of British Columbia. The Notice of Civil Claim, amended on January 27, 2017, challenged the validity of the first and second mortgages.
- [8] On March 16, 2017, the proceedings in Supreme Court were dismissed by Bowden J.
- [9] The order of Bowden J. was appealed on April 4, 2017. The appeal was moved to the inactive list on April 9, 2018.
- [10] The appellant's application for an order removing the appeal from the inactive list was heard by Newbury J.A. on May 22, 2018 and dismissed. In her reasons dismissing the application Newbury J.A. held:

- [11] Ms. Mass has known about the frauds on the part of Ms. Wood and all the actions of the lenders since before the foreclosure took place in 1999. Thus at least 19 years have passed since the events she now complains of. All limitations, even allowing for postponement, have long since expired. In my opinion, the claims asserted are also statute barred and barred as *res judicata*. Cause of action estoppel may also apply to at least some of her claims.
- [12] In my opinion it would not be in the interests of justice to spend further public resources on the unfortunate events that have been explored at such great length in the fraud trial. I understand that Ms. Mass' judgment against Ms. Wood is a dry one, but unfortunately for Ms. Mass that does not change the facts I have described and the law that applies to those facts. I am therefore dismissing the applications.
- [11] Section 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides that the court may discharge or vary any order made by a justice other than an order granting leave to appeal. Section 34 of the Court of Appeal Rules provides that a party wishing to bring an application under section 9(6) of the Act must prepare a Notice of Application to vary the order in Form 15, file the Notice, and serve it on each of the other parties within seven days after the order was made. The appellant did not do so.
- [12] On October 16, 2018, the appellant appeared before Harris J.A. and sought an order extending the time within which to do so.
- [13] Harris J.A. held that the criteria that should apply on the application were well established:
- [3] I have to consider whether there was a bona fide intention to appeal, whether the respondents were informed that intention, any prejudice that might arise from extension of time in the merits of the proposed application. These factors are all encompassed by whether it is in the overall interests of justice to grant the extension.
- [14] He concluded:
- [10] Having examined the materials before Madam Justice Newbury, I am not persuaded that she misapprehended, in any material way, the facts underlying the exercise of her discretion. Ms. Mass has not persuaded me that there is new evidence, either that Madam Justice Newbury misapprehended, or that is capable of undermining her conclusion, in substance, that the appeal of the order Mr. Justice Bowden was bound to fail.
- [11] As a result I do not think there is any prospect that a division of this court could interfere with Madam Justice Newbury's order on a review application. The proposed review application is so lacking in merit that the interests of justice do not support extending time.
- [12] As well, I am concerned about the length of time that has elapsed before this application was brought. I accept that Ms. Mass did not understand the nature of her appeal remedies arising from Madam Justice Newbury's order. That is not, however, explain the delay in bringing the application once Ms. Mass learned of the true position in July of this year. Likely I would not have refused to extend time if this true if this delay were the sole

impediment to doing so. Rather, I ground my decision not to extend time on the lack of merit in the proposed application to review. I share Madam Justice Newbury's opinion that it is not in the interests of justice to spend more resources on this matter, which must come to an end.

- [15] In a lengthy written submission provided to us today, Ms. Mass seeks not only an order varying the order of Harris J.A. but other relief, including an order removing her appeal from the inactive list. The only matter properly before us is the application to vary the order of Harris J.A. by extending the time within which to seek a review under Rule 9(6).
- [16] In those written submissions, Ms. Mass argues that both Harris and Newbury J.J.A. were under a misapprehension with respect to the extent to which newly discovered evidence would enable her to make out a meritorious claim against the respondents. She claims that the full extent of the fraud perpetrated upon her by the fraudster was unknown to her until the trial before Ballance J. concluded in September 2016. However, the material substantiates rather than undermines Newbury J.A.'s conclusion that Ms. Mass has known about the fraud on the part of Ms. Wood and all the actions of the lenders since 1999. The appellant herself notes in para. 96 of the written submissions: With the commencement of the foreclosure actions I realized that I was defrauded by the mortgagees themselves and in hindsight they were perpetrators of the Fraud in participation with the fraudster.
- [17] It was not necessary for the appellant to fully comprehend the extent to which Ms. Wood had defrauded her in order to contest the validity of the mortgages that are the subject of these proceedings.
- [18] In my opinion, the appellant has not established any error in principle or that Harris J.A. misconceived facts or that relevant information was not brought to his attention when he dismissed the application to extend the time to seek a review of Newbury J.A.'s order. In particular, he did not err in concluding there was no prospect that a division of this Court could interfere with Newbury J.A.'s order on a review application. Newbury J.A., in turn, was not under a misapprehension when she concluded that all limitations, even allowing for postponement, have long since expired and the claims asserted are statute barred and barred as *res judicata*.
- [19] The appellant seeks leave to adduce new evidence on this application. The evidence the appellant seeks to adduce, set out in her affidavit filed on December 7, 2018, is a recital of evidence that was available to the appellant at the time the application came on for hearing before Harris J.A. and before her application came on for hearing before Newbury J.A. I would not grant leave to adduce new evidence. In any event, the evidence does not address the fundamental weakness of the appellant's case, set out in great detail in the judgment of Newbury J.A.
- [20] I would dismiss the application.
- [21] FRANKEL J.A.: I agree.

[22] SAVAGE J.A.: I agree.

[23] FRANKEL J.A.: The application is dismissed. "The Honourable Mr. Justice Willcock"

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