

CANADA / JUDGMENT

# P.A.H. v. L.W.H. and E.A.H.

2003 BCSC 70

## COURT

Supreme Court of British Columbia

## DECIDED

14 January 2003

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2003BCSC0070

Citation: P.A.H. v. L.W.H. and E.A.H.

Date: 20030114  
2003 BCSC 70

Docket: 17539/02  
Registry: Prince George  
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: P.A.H.  
PLAINTIFF

AND: L.W.H. and E.A.H.  
DEFENDANTS

REASONS FOR JUDGMENT OF MASTER BAKER Counsel for the plaintiff: D. Kavka Appearing for the defendant E.A.H.: Counsel for the defendant L.W.H.: E.A.H., in person No Appearance Date and Place of Hearing: December 16, 2002 Prince George, BC

- [1] In these family law proceedings, the plaintiff P.A.H. applies to strike the following paragraph of the counterclaim of E.A.H.:
3. An Order that E.A.H. be removed as a party to this proceeding It is P.A.H.'s position, simply put, that the Rules of Court and law relating to pleadings do not permit such a request, and that E.A.H. may only plead for a dismissal of the claims against her. E.A.H., in reply, filed affidavit evidence to justify her assertion that she should not be a party to these proceedings at this or any other stage. Ms. Kavka, for P.A.H., argues that the court may not have recourse to these affidavits in this application. AFFIDAVIT MATERIALS
- [2] P.A.H.'s motion cites sub-rules 19(24) and 60(16) as authority to strike the impugned paragraph. Sub-rule 19(24) provides:

- (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence as the case may be,
  - (b) it is unnecessary, scandalous, frivolous or vexatious,
  - (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
  - (d) it is otherwise an abuse of the process of the court, and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs. The applicant does not specify in her motion upon which subsection of sub-rule 19(24) she relies, so I must assume she relies upon all subsections.
- [3] It is clear no affidavit material is admissible in respect of sub-rule 19(24)(a); sub-rule 19(27) provides
- (27) No evidence is admissible on an application under sub-rule (24)(a). Notwithstanding the specific reference in sub-rule 19(27) to sub-rule 19(24)(a), however, the same restriction applies to the balance of sub-rule 19(24); viz. Taylor J.A.'s comments in *Kripps v. Touche Ross & Co.*(1992), 69 B.C.L.R. (2d) 62, at para. 10, where the court said: I am therefore in agreement with Madam Justice Boyd when she characterizes the issue raised by these applications as being "whether there is a question fit to be tried, regardless of the complexity, or novelty, of that question" and that issue must be decided on the basis of the pleadings as they stand or as they might be amended . . ." (emphasis added) It is clear, from preceding references at para. 9 of that decision, that Taylor J.A. was referring to sub-rule 19(24) as a whole, and not only to sub-rule 19(24)(a). The facts or evidence contained in E.A.H.'s affidavits are therefore inadmissible in this application. PROPRIETY OF PLEADING
- [4] In P.A.H.'s statement of claim the only references to E.A.H. are as follows -- Para. 6.1: E.A.H. is identified by address; Para. 15: P.A.H. alleges adultery between her spouse (the co-defendant L.W.H.) and E.A.H.; Para. 36: P.A.H. specifies relief sought against E.A.H. in several sub-paragraphs:
- (b) A declaration that the Defendant E.A.H. holds certain assets in trust for the plaintiff;
  - (c) An Order that the Defendant E.A.H. be restrained from disposing of or encumbering any property that is in issue in this proceeding; and
  - (d) An Order that the Defendant E.A.H. transfer to the Plaintiff any assets held in trust by the Defendant E.A.H. for the benefit of the plaintiff. . . . Finally, these sub-paragraphs are recited, verbatim, under the portion of the statement of claim titled "Summary of Relief". This latter reiteration confirms something that sub-paragraphs (b)-(d), on their own, suggest, i.e. that they are not really pleadings per se, but are better described as prayers (or demands) for relief. The distinction is important, as a simple prayer for relief or summary of relief sought does not, in my view, conform with the elementary requirement of a pleading, succinctly stated in Rule 19(1):

- (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved. The prayer is only one element (although an essential one) of a proper pleading.
- [5] In their current form, the sub-paragraphs of the statement of claim do not state any material facts upon which P.A.H. relies to establish any alleged trust. It is hard to see how E.A.H. could possibly defend against any of the three sub-paragraphs without any facts alleged.
- [6] That, then, describes the pleadings that E.A.H. faced when served with the statement of claim. Her response, in part, was as above. Not surprisingly, I suppose, E.A.H. also neglected to plead any facts upon which her defence might be based. She, too, compiled a list of relief sought, segregated it into seven paragraphs, and repeated the paragraphs, again verbatim as "Other Relief" which was, actually, a summary of or prayer for the relief sought.
- [7] Neither of these parties has produced proper or adequate pleadings. Each, one supposes, may argue that she is constrained by sub-rule 60(9) which, in part, directs the form of family law pleadings, and that pleadings be in the form of Forms 127 through 130. That argument would misconstrue sub-rule 60(9). Rule 60 addresses the very particular context of matrimonial litigation and directs the basic and necessary information that matrimonial pleadings must contain. It does not somehow supplant or replace the requirements of Rule 19. To the contrary, there are two specific provisions emphasizing this; firstly, sub-rule 60(2) provides that:
- (2) Except as provided in this rule, the Rules of Court apply to a family law proceeding. Secondly, Form 128 provides In completing an applicable Part, the plaintiff must omit those paragraphs that are not relevant and must make changes and additions to the retained paragraphs as necessary. (Form 130, a counter-claim, has a similar endorsement). Clearly these two provisions work together to preserve and incorporate into family law pleadings the basic requirement of sub-rule 19(1).
- [8] In the particular case of non-typical relief (i.e. in the context of family law proceedings) such as that sought against E.A.H., attention should have been paid to the requirements of Rule 19, and P.A.H. should have pleaded the facts upon which she bases her allegations of trust. E.A.H. would then have had (hopefully) an alleged factual matrix within which she could plead. It is, at least, "the pot calling the kettle black", so that in these circumstances it would hardly be appropriate to strike E.A.H.'s pleadings which attempt to respond to inadequate pleadings.
- [9] There is a more direct and specific aspect to P.A.H.'s challenge; her counsel argues that it is simply inappropriate, in a counter-claim, to ask the court to remove the defendant/ plaintiff by counter-claim from the proceedings. It is argued that the only relief that can be requested is a dismissal.

- [10] It is hard to understand this perspective. Sub-rule 15(5)(a)(i) states: (5)(a) At any stage of a proceeding, the court on application by any person may
- (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party . . . A party is required to advise, by its pleading, of relief he or she is seeking of the court; if that party's position is at the outset that he or she is not a proper party, why should he or she not advise of that position from the start, and why should he or she not use pleadings to do so? It may well be true that defendants' counsel frequently prepare and file statements of defence and then, through negotiations, argue with opposing counsel that their clients have been improperly joined, thereby seeking a discontinuance or consent dismissal, but that practise does not preclude a party from setting out his or her position in his or her initial pleadings.
- [11] P.A.H.'s argument suggests that a dismissal is either preferable to, or supplants, an order removing a party. It may well be that counsel has his or her reasons to specifically plead for one or the other of the two separate forms of relief, but it is not for me to decide, at this stage, the advisability of either form of relief. It is enough to conclude that they are not equivalent or fungible, and that their two separate results may be obtained by separate means and for separate reasons.
- [12] Moreover, a dismissal may give rise to a subsequent defence of res judicata, whereas a removal might not (albeit the defence of abuse of process may still be available).
- [13] Given the difference in the two forms of relief and given that the specific relief sought by E.A.H. is mandated by Rule 15(5), I cannot agree that it is incorrect to plead the relief sought. This, of course, ignores the lack (in either party's pleadings) of the factual context or foundation for the claim. In that failing E.A.H. is not alone.
- [14] Although E.A.H. is substantially successful in this application, both parties' pleadings are lacking. That being the case, each party shall bear her own costs. "Master D. Baker"

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