
CANADA / JUDGMENT

Smithson v Hansen

2005 BCSC 305

COURT

Supreme Court of British Columbia

DECIDED

4 March 2005

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2005 BCSC 305 Smithson v. Hansen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smithson v Hansen,

2005 BCSC 305

Date: 20050304

Docket: 01/1354

Registry: Victoria

Between:

Betty Jean Smithson as Executrix of the Estate of

Beulah Hansen and Betty Jean Smithson

Plaintiff

And:

Neil Robert Hansen

Defendant

Before: Master McCallum

Reasons for Decision

Counsel for the Plaintiff

Fiona Hunter

Counsel for the Defendant

Peter Ramsay, Q.C.

Date and Place of Hearing:

February 23rd, 2005

Victoria, B.C.

- [1] The Plaintiff Betty Jean Smithson ("Plaintiff") and the Defendant Neil Robert Hansen ("Defendant") are co-executors of the wills of their parents, Henry and Beulah Hansen. Henry Hansen ("Henry") died in March 1994. Beulah Hansen ("Beulah") died in September 2000. This proceeding was commenced in 2001 by the Plaintiff's former counsel on her instructions.
- [2] In this proceeding the Plaintiff, in her capacity as executor of Henry Hansen's will and in her personal capacity claimed that she was entitled to an order vesting Henry and Beulah's matrimonial home in her name on account of services she had provided to Henry and Beulah during their lifetimes. That appears to be the essence of the claim in the Statement of Claim that is plead in the alternative and is, kindly put, confusing.
- [3] The Plaintiff's motion asks for an order that she be allowed to amend the Statement of Claim, remove herself as Plaintiff in her capacity as executor, remove the Defendant as a defendant and add the Defendant and the Plaintiff in their capacity as executors of the Will of Henry Hansen. The Plaintiff says the amendments should go in order to "clarify" the issues including the facts, the remedy and the parties. She says the original Statement of Claim refers to the appropriate facts and the remedy but could be made clearer by the proposed amendments.
- [4] The Defendant says the proposed amendments are a not so thinly veiled attempt to bring a claim which is statute barred and not plead in the original claim. He says the real essence of the Plaintiff's claim is unjust enrichment which was statute barred when it was commenced as it involved Henry's estate. Claims against Henry's estate for unjust enrichment ought, he says, to have been commenced no later than March 2000. The Defendant concedes that the limitation defence is not currently plead in the Statement of Defence.
- [5] The Plaintiff lived with and cared for her parents from 1993 until Beulah's death in 2000. Henry's will gave a life interest in the matrimonial home to the Plaintiff on the condition that if she ceased to reside in the property for 60 days or upon her death the property was to go to the Defendant. The Plaintiff and Defendant obtained probate of Henry's will in March 1995 and have administered his estate since then.
- [6] In the Statement of Claim the Plaintiff says she is entitled to compensation for her services to Henry and Beulah and that the house should be conveyed to her as compensation for those services. The Plaintiff says in the alternative that Beulah was entitled to the house in Henry's will for a variety of reasons that are not material to this application. The essential claim appears to be one of unjust enrichment although it is not specifically plead in that way.

- [7] The proposed amendments are based on the proposed change in parties. The Plaintiff now says her claim is based on the doctrine of unjust enrichment and the proposed pleadings are framed in that way. There are no amendments to the Statement of Claim in the classic sense as none of the original is to be retained. Given the drafting of the original it is easy to understand why the Plaintiff would wish to amend but this proposal goes far beyond the usual amendment. That said, were it not for the change in parties, the Plaintiff could amend without leave pursuant to Rule 24(1)(a) and cast her claim as she wished since the matter has not been set for trial. In this case, the amendments cannot go without the change in parties that does require leave.
- [8] The Plaintiff wishes to remove herself as plaintiff in her capacity as executrix and continue the proceeding in her personal capacity claiming relief under the proposed plea of unjust enrichment. The Plaintiff wishes to add the estate of Henry as a defendant alleging that Henry's estate was unjustly enriched by her efforts. She says she had no claim against the current defendant in any event and wishes him removed as a party. The change in parties and the proposed pleadings are both sensible and understandable given the circumstances. That is not to say the change in parties can be allowed.
- [9] The real issue is the addition of the estate of Henry as a defendant. The Defendant objects to the addition given that he is both an executor of Henry's will and a beneficiary of Henry's estate. He is the only person whose ox may be gored if the estate is added as a defendant and the claim succeeds.
- [10] The test for adding parties is well established. Rule 15(5) provides as follows:

Removing, adding or substituting party

- (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,
- (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
- (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
- (A) with any relief claimed in the proceeding, or
- (B) with the subject matter of the proceeding,
- which in the opinion of the court it would be just and convenient to determine as between the person and that party.

- [11] The authorities provide that the factors to be considered in deciding whether parties should be added when a limitation period is involved include: the extent of the delay in applying, the reasons for the delay, any explanation for the delay, the degree of prejudice caused by the delay and the extent of the connection between the existing causes of action and the new cause of action. (*Letvad v. Finley* (2000), 82 B.C.L.R. (3d) 296.)
- [12] In the case at bar, the Plaintiff says the claim for unjust enrichment was brought within the 6 year limitation period that she says commenced to run in September 2000 on the death of Beulah. (Limitation Act s 3(5)). Alternatively, she says the claim is one against the personal representative of a deceased person for a share of the estate and the limitation period is 10 years. (Limitation Act s 3(3)(a)). Finally, she says the claim is for a declaration about title to property by a person in possession of property and no limitation period applies. (Limitation Act s 3(4)(j)).
- [13] The difficulty with the Plaintiff's application is that she proposes, in essence, to abandon entirely her existing claim and bring forward a new claim. That can be readily seen from a comparison of the existing and proposed statements of claim. Although the Plaintiff refers to the issue of compensation for her unpaid service to her parents in the existing statement of claim and transfer of the house she did not sue Henry's estate. She brought the action against the Defendant who stood to take the house only in the event the Plaintiff ceased to reside there or on her death. The Plaintiff had no claim against the defendant personally and says the real claim was for an in rem remedy against the house owned by the estate.
- [14] The Defendant says the Plaintiff's claim for compensation for her services is claim for compensation pure and simple and cannot proceed as an in rem claim. He says that the remedy of a constructive trust sought in this case can only succeed if the Plaintiff establishes a link between the services rendered by the Plaintiff and the house as an asset of the estate. (*Guzzo v. Corcorch* [1989] B.C.J. No. 1265 (C.A.)) I agree with that submission.
- [15] The Plaintiff does not allege in the original or the proposed pleadings that there is any link between the services alleged to be provided and the house at issue. As was the case in *Guzzo* (supra), this is a case where the court can only give a monetary judgment against the estate. In those circumstances, the limitation period for a claim of unjust enrichment is 6 years. (*Guzzo*, supra). The Plaintiff says the period commenced to run on the death of Beulah since services were provided to her until her death. That cannot be so since the claim is against Henry's estate and it must have matured upon his death. The Plaintiff says herself that the purpose of Henry's will was to ensure that the Plaintiff would continue to provide the services to Beulah if Henry predeceased Beulah.
- [16] In those circumstances, the claim of unjust enrichment falls within the 6 year limitation period which commenced to run on Henry's death in 1994. It is not a claim for a share of the estate but a claim for a money judgment against the estate. It is not a claim for a declaration about title to property.

- [17] The question then is whether the estate should be added given that the limitation period has expired given the factors to be considered. There is no evidence put forward about the delay in applying, the reasons for the delay or any explanation for the delay. There is similarly no evidence of possible prejudice to be suffered by the proposed defendant although the loss of the limitation defence if the application succeeded would be significant. The final factor to be considered is the connection between the existing cause of action and the proposed cause of action.
- [18] It seems almost inevitable that the Plaintiff's claim will fail at trial because of the state of the current pleadings. The proposed cause of action has some possibility of success, absent limitation defences, but that is not sufficient, in these circumstances, to found the proposed order.
- [19] The application to remove and add parties is dismissed. The application to amend the pleadings, based as it is on the change of parties, is dismissed. Costs of this application go to the Defendant in any event of the cause.

"Master William McCallum"

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