
CANADA / JUDGMENT

Taherkhani v. Este

2020 BCSC 101

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 101 Taherkhani v. Este

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taherkhani v. Este,

2020 BCSC 101

Date: 20200128

Docket: E131501

Registry: Vancouver

Between:

Mehran Taherkhani

Claimant

And

Rosa Donna Este also known as Rosa Donna Taherkhani also known as Donna Este

Respondent

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

Counsel for the Claimant:

J.M. Richter

A. James

Counsel for Francis Amir Este and Mina Esteghamat-Ardakani in their personal capacities and as trustees of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1, and Vitality Holdings Corp.:

K. McEwan, Q.C.

E. Kirkpatrick

Place and Dates of Hearing:

Vancouver, B.C.

November 4-6, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2020

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Introduction

- [1] These reasons relate to an application by the claimant in this family law matter to add parties to the action and to amend the Notice of Family Claim ("NOFC"). The proposed new parties are the mother and brother of the respondent, and corporations and trusts controlled by them.
- [2] Throughout these reasons, I will refer to the claimant as "Mehran", the respondent as "Donna", the respondent's mother as "Mina", and the respondent's brother as "Francis". I do so for purposes of clarity and, in so doing, I mean no disrespect for anyone. I further intend to mostly refer to the proposed new parties collectively as Mina and Francis.
- [3] The proposed amended NOFC alleges that various properties and bank accounts held in the names of one or more of the proposed parties are, in fact, legally or beneficially owned by Donna. Mehran seeks declarations concerning the ownership of those properties and claims an interest in those properties as "family property" pursuant to the provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. He also seeks ancillary relief, including declarations that transfers of property by Donna to one or more of the proposed new parties are void and of no effect, and damages for fraudulent misrepresentation and civil conspiracy. Donna consents to the addition of the proposed new parties and the amendments to the NOFC. Mina and Francis adamantly oppose their addition as parties and raise several objections to the content of the proposed amended NOFC.
- [4] For the reasons that follow, I am of the view that the application should be allowed.

Background

- [5] Mehran and Donna were married on or about July 23, 2004. Prior to the marriage, they each signed a handwritten agreement which stipulated, among other things, that each party would hold property separately and that neither would claim any interest in the property of the other, including any appreciation in the value of the property.
- [6] On April 26, 2006, a more formal marriage agreement was entered into to roughly the same effect (the "marriage agreement").
- [7] Mehran and Donna separated on March 17, 2013.
- [8] The NOFC was filed by Mehran on May 22, 2013. In the NOFC, he sought to set aside the marriage agreement and requested equal division of family property and family debt. The original NOFC specifically referenced three West Vancouver properties as being family assets, namely [address redacted] Bellevue Avenue, [address redacted] Travers Avenue, and [address redacted] Constantine Place (collectively, the "West Vancouver properties").

- [9] On August 12, 2013, Mehran filed a financial statement which listed the three West Vancouver properties as family property as well as a bank account said to contain approximately \$3 million and Donna's interest in 0831295 B.C. Ltd., a corporation controlled by Mina and Francis.
- [10] On September 16, 2013, Donna filed her financial statement in which she deposed that the three West Vancouver properties were 100% beneficially owned by Mina. Her financial statement made no mention of a bank account containing \$3 million. Also, at some point during the discovery process, Donna produced three Declarations of Trust in respect of the West Vancouver properties, all of which acknowledged that the Donna's interests in the properties were held in trust for Mina.
- [11] On May 27, 2014, a consent order was made by Justice Skolrood granting Mehran and Donna a divorce, ordering Donna to pay \$70,000 to Mehran in full and final settlement of all of the claims in the NOFC respecting property and spousal maintenance, and dismissing all other claims as if tried on the merits. The terms of the order addressing the payment and dismissal of all other claims were as follows:

THIS COURT ORDERS that

- 1 The Respondent will pay \$70,000 to the Claimant in full and final settlement of all of claims in the Notice of Family Claim respecting property and spousal maintenance, BY CONSENT.
 2. All other claims in the Claimant's Notice of Family Claim and in the Respondent's Counterclaim (except divorce) are dismissed as if tried on the merits, BY CONSENT.
 3. Each party will bear their own costs, BY CONSENT.
- [12] Approximately nine months after the settlement of the family law claim, on February 6, 2015, Donna filed a Notice of Civil Claim ("NOCC") with the Vancouver Registry under Action S151066 (the "Civil Action") against Mina, Francis, and Craig Blackburn, Mina's common-law partner. The NOCC was later amended on February 6, 2015.
- [13] In the Civil Action, and contrary to the positions that had been taken in the family law matter, Donna claimed that she was and had always been the 100% beneficial owner of the three West Vancouver properties and of approximately \$3.4 million in a HSBC bank account in the name of Mina. Donna further alleged that she was counseled and encouraged by Mina to hide her true ownership of these properties and the funds from Mehran in the family law matter. Donna sought various forms of relief to restore her ownership. Mina, Francis, and Craig Blackburn filed Responses to Civil Claim denying the allegations made against them.

- [14] The Civil Action proceeded to trial before Justice Funt from March 27 to May 1, 2017. At the close of Donna's case, Mina and Francis applied to dismiss the claim on the grounds that it was an abuse of process. On May 9, 2017, in reasons reported at 2017 BCSC 878, Funt J. granted the application. In the course of his reasons, he found that Donna had perpetrated a fraud on Mehran as well as the Court:
- [63] If the plaintiff's relationship with her mother and brother had not broken down in November 2014, the current action would not be before the Court. The Court would also not be aware that the plaintiff had perpetrated a fraud designed to cheat financially in the divorce proceedings her then husband, using the Court and its processes. Her fraud would still be extant with the plaintiff able to rely on the family's arrangements to have the properties and funds placed in her name.
- [64] With the breakdown in her relationship with her mother and brother, the plaintiff now asks the Court to recognize her legal title and beneficial ownership in the properties and funds.
- [65] Prior to the divorce proceedings, the plaintiff sought to have properties and funds held in the names of her mother and brother in order to defeat potential creditors generally: Further Amended Notice of Civil Claim, para. 11C.
- [66] With the divorce proceedings, she took further steps to defeat her then husband's claim specifically. At paragraphs 61 to 68 of her Further Amended Notice of Civil Claim, the plaintiff pleads the further steps taken to hide \$3,400,000 in funds. At paragraph 90(c) of her Further Amended Notice of Civil Claim, the plaintiff pleads using "fake, back-dated trust declarations" to hide assets.
- [67] With respect to the fake, back-dated trust declarations, the plaintiff pleads that they were created for the purpose "of providing a false documentary record for use" in the divorce proceedings. The plaintiff also pleads that she gave "false evidence at her examination for discovery" in the divorce proceedings "propounding the false story" that her mother was the sole beneficial owner of properties and funds which were actually owned by the plaintiff: Further Amended Notice of Civil Claim, para. 90(e).
- [68] The false Form F8 Financial Statement, the banking documents, the false back-dated trust declarations, and her false discovery evidence enabled the plaintiff to mislead her counsel and opposing counsel, each of whom is an officer of the Court: Quebec (Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26 at para. 18.

[Emphasis Added.]

- [15] Justice Funt summarized his conclusions as follows:

- [76] In sum, in the divorce proceedings, the plaintiff chose to take steps to defeat her then husband's legal rights by representing falsely, including in Court documents and under oath, the properties and funds she now claims she rightfully owns. She now wishes to perfect her fraud in the divorce proceedings -- a fraud designed to cheat financially her then husband engaging the past unwitting help of officers and a judge of the Court.
- [77] Bluntly stated, the plaintiff now asks the Court to help her with her illegal artifice because her mother and brother no longer will. Such, the Court will not do.
- [78] Further, the plaintiff's claim, in large part, rests on her false evidence in her divorce proceedings. She now wishes to disavow her past false evidence because it no longer serves her purposes. The law does not allow a party to pursue inconsistent rights: [Vanmills Establishment v. Coles, [1992] B.C.J. No. 881 (S.C.).
- [79] To entertain the plaintiff's claim any further, the Court would be condoning the plaintiff's deliberate misuse of the court process in the divorce proceedings. This would bring the administration of justice into disrepute and is an abuse of process. A reasonable person, informed of all of the relevant circumstances, would not expect the Court to help a litigant claim Blackacre when that litigant, in previous divorce proceedings, deliberately did not make proper financial disclosure of Blackacre to the Court as so clearly required by law and oath. The plaintiff's claim will be dismissed.
- [Emphasis Added.]
- [16] Finally, at para. 86, Funt J. recognized that the effect of his ruling would be to allow Mehran to bring an action against Mina and Francis.
- [86] In the case at bar, taking the plaintiff's case at its highest, the plaintiff's then husband may now bring an action against the plaintiff, her mother, and her brother. Moreover, unlike a fraudulent conveyance simpliciter, in the case at bar, the Court was used by the plaintiff as part of a fraud and is now being asked to perfect that fraud.
- [Emphasis added.]
- [17] The involvement of Mehran in the Civil Action and his knowledge of the action is disputed. In paragraph 28 of his affidavit #1, he deposed that he did not learn of the fraud until he read Funt J.'s reasons in June of 2017. In his affidavit #3, he corrected the date he learned of Funt J.'s reasons to November of 2017. He explained in paragraphs 3 through 5 of his affidavit #3 that, in November 2017, he was advised by an acquaintance of a newspaper article about Donna and that the acquaintance knew things about his divorce he should not have known. As a result of this conversation, Mehran deposed that he conducted an internet search and found an article from the Vancouver Sun which referenced Funt J.'s decision. He later found and read the decision of Funt J. After reading it, he retained his current counsel in early December 2017.

- [18] Mina and Francis submit that Mehran was actively involved in the Civil Action. In support of this submission, they point to the following facts:
- a) On January 24 to 26, 2017, Mehran contacted the Supreme Court Registry in connection with efforts to obtain disclosure of the documents produced in the family law matter;
 - b) On January 30, 2017, Mehran filed an affidavit indicating his objection to documents produced in the family law matter being used in the Civil Action;
 - c) On February 28, 2017, Mehran was served with a Notice of Application in the Civil Action for production of documents which referenced the fraud committed on him by Mina; and
 - d) On March 8, 2017, Mehran attended the hearing of the application for the production of documents during which statements were made about the alleged fraud.
- [19] For the purposes of the present application, I do not accept that the above facts constitute active involvement by Mehran in the Civil Action. His involvement was peripheral and related only to his interests in protecting disclosure of his confidential information. Nor do I accept, without more, that the above facts establish any knowledge on the part of Mehran of the fraud. At best he would only have been aware that allegations of fraud were being made.
- [20] The order of Funt J. dismissing the Civil Action was appealed.
- [21] On February 8, 2018, Mehran applied to be added as a respondent to the appeal. The application was granted and in granting the application, Madam Justice D. Smith stated:
- [15] In my opinion, Mr. Taherkhani has met the test under R. 2(2). The outcome of Ms. Este's appeal could affect him. If this Court grants Ms. Este the order she has requested, the matter would be remitted and the issue of whether the property is owned by Ms. Este by Ms. Esteghamat-Ardakani and Mr. Este would be finally decided. If the appeal is dismissed, however, Mr. Taherkhani would need to add Ms. Esteghamat-Ardakani and Mr. Este to his family claim. He would be the one who had to prove that Ms. Este owned some or all of the property at the time they separated before he could proceed to make a claim that some of that property was family property that should have been divided between them.
- [Emphasis Added.]
- [22] Prior to the hearing before the Court of Appeal, Mehran brought an application before this court to rescind the settlement agreement in this action and to set aside those parts of the May 27, 2014 order of Skolrood J. dealing with corollary relief.
- [23] On February 7, 2018, Justice Pearlman granted the application and made the following orders on consent:
1. The settlement agreement in the within family law proceeding between Mehran Taherkhani and Donna Este be rescinded;

2. Paragraphs 1, 2 and 3 of the May 27, 2014 order of Mr. Justice Skolrood relating to the settlement agreement be set aside;
3. The claimant's notice of family claim filed May 22, 2013 proceed as if no settlement was reached and no court order for corollary relief made;
4. The time for response to this notice of application be abridged from 21 days to 14 days; and
5. Cost of this application be payable in the cause at Scale B.

[24] On February 21, 2018, before the Court of Appeal, Mehran brought an application to introduce new evidence. The evidence sought to be admitted consisted of the materials before Pearlman J. and Pearlman J.'s order of February 7, 2018. The application was allowed only in respect of the order of Pearlman J. Importantly, during the course of the hearing, an undertaking was given by Mina and Francis which is referenced in para. 68 of the Reasons of the Court of Appeal as follows:

[68] With the exception of the order setting aside the settlement agreement and the divorce order, the evidence Mr. Taherkhani seeks to adduce is not relevant to this appeal. That order should be before this Court to provide context to Mr. Taherkhani's submissions in regard to his ability to assert a claim to the properties and funds that are the subject matter of the within action. In that regard, it should be noted that during the hearing, Mina and Francis, through their counsel, gave an undertaking that in the event this appeal were to be dismissed, they would not take the position Mr. Taherkhani is in any way estopped by the trial judge's order from pursuing any rights he may have to those properties and funds.

[Emphasis added.]

[25] The evidence before me included parts of the transcripts from the hearing before the Court of Appeal. On March 6, 2018, counsel for Mina and Francis gave the following undertaking on their behalf:

THE COURT: You may need instructions on this. Are you essentially saying that your clients undertake that in any action Mr. Taherkhani may bring either independently or by joining your clients in the family law proceeding, that this judgment - the order in this case will not be relied on as a basis for precluding and determination on the merits of whatever forum his claim takes.

MR. McEWAN: Whatever rights Mr. Taherkhani has. That's correct, My Lord. And that was the position taken before Mr. Justice Funt because it was obviously a concern in the court below.

THE COURT: So I take it, then, that your clients -- you are advising us on behalf of your clients that they are giving that undertaking.

MR. McEWAN: Yes. And I will -- my client is here, and will confirm that for you again at 10 o'clock tomorrow morning, but that has been the position.

[Ohrn Aff. #4, Ex. A]

[26] On March 7, 2018, counsel for Mina and Francis confirmed and repeated the undertaking:

THE COURT: And what about the husband's position? What about his alleged or apparent prejudice or harm that's done to him on your position?

MR. McEWAN: Yes. So two things about that. The prejudice -- the initial prejudice to the husband is a consequence of the position taken by the appellant in the family law proceeding, number one. Number two, I have gone back to my client and I have confirmed that it is my instruction notwithstanding what law his counsel may have found that the order of Justice Funt if upheld by this court, they undertake they do not take a position that Mr. Taherkhani is in any way estopped by that order from pursuing whatever rights he may have.

[Ohrn Aff. #4, Ex. B]

[27] Later on March 7, 2018, counsel for Mina and Francis again confirmed that Mehran was not to be precluded from adding Mina and Francis to the family law matter.

THE COURT: It seems to me that what you're saying is that one of the results of the family trial if Mr. Taherkhani participates and succeeds in establishing that the assets that are in play here were in fact family assets and therefore should be considered in that action -- and I'll just pick a figure out of the air because I think Mr. Richter's mentioned it's something like \$10 million -- the judge is of the view of Ms. Este's assets Mr. Taherkhani's entitled to \$10 million. That order is made, but no order is made declaring any of the what we've been told are backdated trust documents. None of those are set aside. So Mina and Francis are unaffected by the order and Ms. Este has a judgment against her of \$10 million to be satisfied out of whatever other assets she has. Is that what you're saying?

MR. McEWAN: No. Because all of this is premised on Mina and Francis are joined as [sic] the action and the point of their being joined is that the recovery is against them directly. That's what we're saying is that Mr. Taherkhani is not precluded from adding my clients, and if he proves various things and there are family assets, including things outside the form 8, you know, and there's -- for example, I think you've heard Procter registered since 2001 in Francis's name -- then they can claim it against Mina and Francis. That's the point. [Emphasis added.]

[Ohrn Aff. #4, Ex. C]

[28] The appeal was dismissed by the Court of Appeal on July 16, 2018 in reasons reported at 2018 BCCA 290. During the course of its reasons, the court specifically addressed and contemplated that the family law action would be re-opened and Mina and Francis added to it as parties.

Re-opening of the Divorce Action

[120] Mr. Taherkhani submits it will be difficult for him to pursue his property claims against Donna. He notes that if this appeal is dismissed, then he will have to add Mina and Francis as parties to the divorce action and then, in the context of that action, carry the burden of

establishing the disputed assets are beneficially owned by Donna and are, therefore, family property. Mr. Taherkhani says he will have to expend considerable time and money in that regard. To avoid having to do so, he supports Donna's request for a new trial of the within matter; a trial in which Donna will bear the burden of establishing her beneficial ownership of those assets.

- [121] The lis at the trial of the within matter was between Donna on the one hand, and Mina, Francis, and Mr. Blackburn on the other. Donna's action was dismissed because she had abused the process of the court. That subsequent events in another action have opened the door for Mr. Taherkhani to advance a claim to the disputed assets does not, in any way, lessen the seriousness of Donna's misconduct, or militate in favour of her being allowed to proceed in the face of that misconduct.
- [122] In my view, the position Mr. Taherkhani finds himself in is not relevant to the disposition of this appeal.
- [29] On August 29, 2018, Mehran filed this application to add Mina and Francis as parties to this action and to amend the NOFC.

Issues

- [30] As I have indicated, Mina and Francis adamantly oppose being added as parties to this proceeding and make various objections to the content of the proposed amended NOFC. I will address the issues engaged in the following order:
- a) Are Mina and Francis necessary and proper parties?
 - b) Are the objections to the content of the proposed pleading valid?
 - c) Was the order of Justice Pearlman improperly obtained?
 - d) Does this court have jurisdiction?
 - e) Is this matter itself an abuse of process?
 - f) Is the claim statute barred?

Analysis

Are Mina and Francis necessary and proper parties?

- [31] Rule 8-2(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR] governs the addition of parties to a family matter. It provides:
- (7) At any stage of a family law case, the court, on application by any person, may, subject to subrule (9),
 - (a) order that a person cease to be named as a party if it is not appropriate or necessary for that person to be named as a party,

- (b) order that a person be named as an additional party or be named as a party in substitution for another named party if
 - (i) that person ought to have been named as a party, or
 - (ii) that person's participation in the family law case is necessary to ensure that all matters in the family law case may be adjudicated on, and
- (c) order that a person be named as an additional party if there may exist, between the person and any other person who is named as a party to the family law case, a question or issue relating to or connected with
 - (i) any relief claimed in the family law case, or
 - (ii) the subject matter of the family law case

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

[32] Rule 8-2(7) of the SCFR is almost identical to R. 6-2(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR]. In *Alexis v. Duncan*, 2015 BCCA 135, the Court of Appeal addressed the proper test for the addition of a party under the SCCR.

[15] Rule 6-2(7)(b) is concerned with remedying defects in the proceedings as they stood prior to the application to add a party. It has a narrow application. Under R. 6-2(7)(b) the court must decide if the person ought to have been joined as a party or the person's participation in the proceeding is necessary to ensure that all matters may be effectually adjudicated: see *Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd.* (1979), 13 B.C.L.R. 293 (C.A.). The discretion to add a party under R. 6-2(7)(b) exists if one of the conditions in subsections (i) and (ii) is established: *Enterprise Realty Ltd.* at 296. However, "if neither of the prerequisite conditions is established then there is no discretion in the chambers Judge and he must refuse the application": *Enterprise Realty Ltd.* at 296.

[16] The predecessor to R. 6-2(7)(c) was added to the Rules in 1980 shortly after and presumably to counter the narrow interpretation adopted in *Enterprise Realty Ltd.* I note that the broad interpretation considered but rejected in *Enterprise Realty Ltd.* by this Court was "that parties should be added if, after balancing the interests of all the parties, existing and prospective, it is just and convenient to do so": *Enterprise Realty Ltd.* at 296.

[17] Under R. 6-2(7)(c) the court can order a person be added as a party if there exists, between the person sought to be added and any party to the proceeding, "a question or issue relating to or connected with the relief claimed in the proceeding or the subject matter of the proceeding" and, "if in the opinion of the court, it would be just and convenient to do so" (emphasis added). The decision as to whether to add a party under R. 6-2(7)(c) is discretionary. It is up to the presiding judge to determine whether or not joinder of the new defendant is just and convenient in any particular case: see e.g., *Letvad v. Fenwick*, 2000 BCCA 630. It cannot be said with any assurance that a claim for professional negligence will

automatically be joined: see *Zymtech Development Inc. v. Sport Central Enterprises Ltd. et al.*, 2004 BCSC 309.

- [33] In *Lantzius v Lantzius*, 2015 BCSC 2066, at para. 26, Justice Kelleher noted that R. 8-2(7)(b) and (c) should be given a broad purposive interpretation. I accept R. 8-2(7)(c) is to be given a broad interpretation but that is not the case with R. 8-2(7)(b). As indicated in para. 15 of the above quotation from Alexis, R. 6-2(7)(b) of the SCCR is concerned with remedying defects in a proceeding and has a narrow application. The same must be so with R. 8-2(b) which is framed almost identically.
- [34] In any event, I have little hesitation in holding that Mina and Francis are necessary and proper parties to this matter and should be added as parties under either subsection (b) or (c) of R. 8-2(7).
- [35] The proposed amended NOFC directly puts in issue the ownership of various properties and assets, including the three West Vancouver properties, 0831295 B.C. Ltd., and the HSBC account containing approximately \$3.4 million. At the trial of this matter, the court will be called upon to determine who owns these assets, whether they are family property and, if so, how the family property should be divided as between Mehran and Donna. There will be a determination of the nature and extent of Donna's interest in properties and assets in which Mina and Francis also have an interest. The determination of Donna's ownership interest will also determine the extent of the interests of Mina and Francis. Such a determination can only be made with their full participation. They should have been parties from the outset. They are, therefore, not only necessary parties to ensure all matters can be adjudicated but they are, in my view, essential parties and ought to be added under Rule 8-2(7)(b).
- [36] Mina and Francis additionally, ought to be added pursuant to the two part test under R. 8-2(7)(c). The first part of that test is whether, between the person sought to be added and any party to the proceeding, there exists a question or issue relating to or connected with the relief claimed in the proceeding or the subject matter of the proceeding. Here, there is such an issue, namely, the relative ownership interests of Donna, Mina, and Francis in the properties and assets alleged to be family property over which Mehran has made a claim.
- [37] The second part of the test under R. 8-2(7)(c) is whether it is "just and convenient" to add the proposed parties. In my view, it is just and convenient to add Mina and Francis. I am of this view for several reasons. First, as submitted by Mehran, pursuant to R. 3-1(1), the claim for division of family property is one that must be brought by NOFC. It cannot be brought as a regular civil action. Hence, it is not merely just and convenient but essential to add Mina and Francis as parties to the family action.
- [38] Second, adding Mina and Francis as parties to the family action will avoid a multiplicity of claims consistent with the objectives of s.10 of the Law and Equity Act, R.S.B.C. 1996, c.253, which provides:

10 In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

[39] Third, the history of this matter and the related Civil Action unequivocally discloses that a fraud has been committed, including a fraud upon the Court. Donna was a party to that fraud and Mehran may have been a victim. Whether Mina and Francis were also parties to the fraud is an issue raised by the proposed amended pleading and one which is important to determine in the interests of the administration of justice.

[40] Finally, the undertaking given to the Court of Appeal is an important factor. Counsel for Mina and Francis expressly stated before the Court of Appeal that Mehran "is not precluded from adding my clients, and if he proves various things and there are family assets then they can claim it against Mina and Francis". The undertaking was given in circumstances where it was known that there would be an application to add Mina and Francis to this family matter. At para. 86 of his Reasons, Funt J. acknowledged that the effect of his ruling would be for Mehran to bring proceedings against Mina and Francis. At para. 15 of the Reasons relating to Mehran's application to be added as party to the appeal, D. Smith J.A. expressly recognized that Mehran would need to add Mina and Francis as parties to this family action. At para. 121 of their Reasons, the Court of Appeal recognized that events (presumably, the Order of Pearlman J.) had opened the door for Mehran to advance a claim to the disputed assets. Given that the undertaking was made under circumstances where it was known this application would be brought, it is just and convenient that the Mina and Francis be added as parties.

[41] I wish to emphasize that I am troubled by the nature and extent of the opposition to this application by Mina and Francis given the undertaking that was made to the Court of Appeal. Their counsel said that Mehran "is not precluded from adding my clients". Notwithstanding this undertaking, every possible argument appears to have been raised to preclude Mehran from adding Mehran and Francis. I make no comment on whether there has been a breach of the undertaking as it was given to the Court of Appeal, however, it is, in my view, an important factor in the just and convenient analysis.

Objections to the Content of the Proposed Pleading

[42] With respect to the content of the proposed amended NOFC, Mina and Francis have made submissions relating to parts of the amended pleading that they say should not be allowed. First, they submit that the following paragraph in Schedule 4 should be struck on the grounds that it is scandalous and there is no cause of action for "wrongful retention".

unequal division of family property and family debt with respect to that family property and family debt wrongfully retained by Mina Esteghamat-Ardakani and/or Francis Amir Este as a consequence of the decisions of Mr. Justice Funt and Mr. Justice Frankel (Mackenzie JA and Fisher JA concurring). To the extent the decisions resulted in Mina Esteghamat-Ardakani and/or Francis Amir Este retaining legal title to family property as a consequence of his/her/their conspiracy, deceit, fraudulent conveyance, fraudulent misrepresentation, perjury, fabrication of evidence and/or obstruction, perversion and/or defeat of the course of justice, the entirety of such proceeds should be wholly reapportioned in favour of the claimant as to do otherwise would be abhorrent to justice."

[43] I disagree that the above must be struck. The paragraph is perhaps not worded as well or as precisely as it could be but the meaning is clear. The claimant is requesting an order in relation to that part of the family property that is now held by Mina and Francis as a consequence of the decisions of Funt J. and the Court of Appeal. There is nothing scandalous about this. It does not allege a cause of action of "wrongful retention". Rather, the phrase "wrongful retention" is used in a descriptive sense.

[44] Mina and Francis further submit that the following from Part B of Schedule 4 of the proposed Amended NOFC is legally non-sensical in the sense that property owned by them is not, by definition, family property.

A full interest in all family property held legally and/or beneficially by Mina Esteghamat-Ardakani, Francis Este and/or 0831295 BC Ltd., including pursuant to a tracing, including but not limited to the \$3.4 million at HSBC transferred by Donna Este into joint names with Mina Esteghamat-Ardakani and later her name alone.

[45] Again, although the paragraph is not worded as well as it might be, I disagree that it is non-sensical and must be struck. The claimant is merely requesting an order that he be given title to any family property held by the proposed parties. The claimant is not requesting an order that property beneficially owned by the proposed parties be declared family property. The claim is limited to property that is ultimately determined to be family property.

[46] Mina and Francis make a similar submission in relation to paras. 2 through 5 of Schedule 5 of the proposed Amended NOFC. These paragraphs provide:

2. An order pursuant to section 97 of the Family law Act that such property of Donna Este, Mina Esteghamat-Ardakani, Francis Este, 0831295 BC Ltd., Vitality Holdings Corp., and/or John/Jane Doe as Trustee of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1 as may seem just and reasonable to this Honourable Court be vested in the claimant.
3. An order pursuant to section 97 of the Family law Act thereto for compensation payable from Donna Este. Mina Esteghamat-Ardakani, Francis Este, 0831295 BC Ltd., Vitality Holdings Corp., and/or John/Jane Doe as Trustee of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1 to the claimant to adjust the division of assets and to compensate the Claimant for assets disposed of by the Respondent.

4. An order pursuant to section 91 of the Family law Act restraining Donna Este, Mina Esteghamat-Ardakani, Francis Este, 0831295 BC Ltd., Vitality Holdjngs Corp., and/or John/ Jane Doe as Trustee of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1 from disposing of, transferring, converting or exchanging into another form any property at issue under Part 5 or Part 6 of the Family Law Act without agreement between the parties or further court order.
 5. An order for possession, delivery, safekeeping and preservation of property pursuant to section 90 (2) of the Family law Act.
- [47] When these paragraphs are read together with the relevant provisions of the FLA, it is clear that the orders requested are limited to what is determined to be family property.
- [48] Mina and Francis submit that the relief claimed in paragraph 2(a) of p. 16 of the Amended NOFC should be struck on the grounds that "constructive" fraudulent misrepresentation is not a cause of action. Paragraph 2 provides in its entirety:
2. Further or in the alternative, damages for fraudulent misrepresentation against Donna Este, Mina Esteghamat-Ardakani and Francis Este on the basis that:
 - a. The respondent, Mjna Esteghamat-Ardakani and Francis Este constructively or expressly represented to the claimant properties were beneficially owned by Mina Esteghamat-Ardakani, Francis Este, 0831295 BC Ltd., Vitality Holdings Corp. and/or John/Jane Doe as Trustee of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1, the \$3.4 million HSBC account was not owned by Donna Este, the \$480,000 mortgage was a legitimate debt and such other matters as shall be shown;
 - b. the representations were false in fact;
 - c. Donna Este. Mina Esteghamat-Ardakanj and Francis Este knew the representations were false;
 - d. Donna Este. Mina Esteghamat-Ardakani and Francis Este made the representations with the intention that they should be acted upon by the claimant: and
 - e. the claimant was induced by, and relied upon, the false statements in settling his matrimonial claim with Donna Este;
- [49] I agree that the use of the word "constructively" in paragraph 2(a) was a poor choice. A better choice would be "impliedly". However, this can easily corrected by amendment.
- [50] Mina and Francis submit that the relief claimed in paragraph 3 of Schedule 5 should be struck on the grounds that a claim for conspiracy cannot be made in a family law matter. This paragraph provides:

3. Further or in the alternative, damages for the tort of civil conspiracy by Donna Este, Mina Esteghamat-Ardakani and Francis Este on the basis they entered into an agreement to deceive the claimant about the ownership of the properties and the validity of the mortgage with:
- a. the predominant purpose of Donna Este, Mina Esteghamat-Ardakani and Francis Este, and each of them was to cause injury to the claimant;
 - b. Donna Este, Mina Esteghamat-Ardakani and Francis Este, and each of them should have known that in the circumstances injury to the claimant was likely to, and in fact did take occur because of their unlawful conduct: or
 - c. both.
- [51] Mina and Francis refer me to *Waters v. Michie*, 2011 BCCA 364 for the proposition that civil conspiracy claims cannot properly be made in the family law context. However, *Waters* does not stand for a blanket prohibition of conspiracy claims in family law matters. At para. 31, Madam Justice Levine wrote:
- [31] In light of these comments, *Frame v. Smith* does not stand for the proposition that a conspiracy claim pleaded in the family law context must be struck, as a matter of policy, as disclosing no reasonable claim. If, as the appellant argued, the chambers judge struck the appellant's claim on that basis, I would disagree.
- [52] *Waters* and the decision of the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99 referred to therein, address at some length conspiracy claims in the family law context. I do not intend to address these authorities in detail as only one paragraph was devoted to this issue in the otherwise extensive written submissions of Mina and Francis. However, *Frame* involved a claim of alleged interference with access to children of the marriage and *Waters* involved transfers of property that were alleged to deprive the appellant of child support. Both concerned children and in both the alleged co-conspirator was a new spouse. Moreover, in both, a significant concern was the best interests of the children. This matter does not involve a conspiracy with a new spouse, does not involve children of the marriage, and does not raise any concerns about the best interests of the children. In my view, these differences are such that, at this stage of the proceeding, it is premature to strike the conspiracy claim. In reaching this conclusion, I am guided by the principle that novel or controversial claims should not be struck at the pleadings stage.

Other Objections Raised to Joinder

- [53] Mina and Francis make multiple additional submissions in opposition to the application, namely:
- (1) Justice Pearlman's order was improperly obtained;
 - (2) this court is without jurisdiction to make the orders sought in the proposed Amended NOFC;

- (3) this matter is an abuse of process; and
- (4) the claim is statute barred.

I now address each of these submissions in turn.

Was the Pearlman J. order improperly obtained?

[54] Mina and Francis submit that the order of Pearlman J. dated February 7, 2018, reinstating the family law case was improperly obtained and is, therefore, without effect. In essence, they say that the order was made on consent and that material facts and argument were not before the court. More specifically, at para. 28 of their written argument they say:

28. In addition to overlooking the jurisdictional limits to the family law regime, discussed below, neither party before Justice Pearlman disclosed any of the following to the Court:

- (a) The order dismissing the Civil Action by Justice Funt was on the basis of assumed facts and there was no finding that the Respondent had, in fact, given false evidence in the family action or misled either the Claimant or the court;
- (b) The record before him did not include any evidence of fraud by the Respondent in the family action but rather:
 - (i) the Claimant's evidence referring to Justice Funt's conclusion on abuse of process in the Civil Action (itself based on assumed facts); and
 - (ii) the Respondent counsel's representation that the Respondent accepted that her evidence in the family action "was misleading and did mislead [the Claimant]" - a representation made without being sworn to by the Respondent and which was in fact was directly contrary to her sworn evidence at trial in the Civil Action;
- (c) The Respondent had defended the family proceeding on the basis of the Marriage Agreement, which she gave evidence in the Civil Action was "very good" and "solid";
- (d) The Respondent had given evidence in the Civil Action that the Claimant was not misled by her claimed deception, including (by way of example) the following:

Mehran had knowledge of the facts. Just because some fake documents are produced doesn't change his position But my understanding is, My Lord, that Mehran knew me well. Mehran knew these are not my doings. And Mehran lived with me for a number of years and knew that this is a scam. So it just, thank God, resolved itself

All I think both of us did with the settlement was get out of that mess that he knew wasn't caused by me ;

- (e) The Claimant had participated in the Civil Action through pre-trial applications, that he had been ordered to produce documents, and that he had been an anticipated witness for the Respondent;

- (f) The Respondent had financed the purchase of a multi-million dollar property located at [address redacted] 23rd Street, West Vancouver and registered in the Claimant's name just weeks before filing the civil claim, and had testified that she did so out of a sense of "obligation" to the Claimant; and
- (g) Neither that the Respondent had given evidence in the trial of the Civil Action that she and the Claimant remained close, lived at the same house (the 23rd Street Property)¹, worked together, and that "he's one of my lifelines right now", nor any other advice as to agreements that may exist between them.

[Citations to evidence omitted.]

- [55] I do not need to embark on an analysis of the veracity of the above allegations or to determine whether Pearlman J. was or could have been misled by any of the allegations. Justice Pearlman made the order that he did. The order was entered and has not been appealed. I do not sit in appeal of Pearlman J. nor can I review his order.
- [56] Nevertheless, I note that I have serious reservations as to whether disclosure of the above allegations would have altered the result. The material facts that led to the order, and which are amply supported by the evidence, were: (1) that Donna filed false financial statements and failed to disclose her interests in certain properties and assets; (2) that the consent order of Justice Skolrood was premised, at least in part, on this faulty disclosure; and (3) that the faulty disclosure was a fraud upon Mehran and the Court.
- [57] The validity of the marriage agreement was not a relevant issue before Pearlman J. Whether Mehran was, in fact, misled by the deception was not something that could have, or should have, been finally determined at the hearing before Pearlman J. It was sufficient that there was evidence he was deceived. It will be for this court to determine upon the trial of this matter whether there was, in fact, deception. The involvement of Mehran in the Civil Action was also not relevant but, in any event, as I have found, it was minimal. Finally, the purchase of the 23rd street property was not relevant and neither was whatever continuing non-spousal relationship exists as between Mehran and Donna.
- [58] I would add that Mina and Francis were not strangers to what was happening in this family law matter. They knew of the application to re-open the family law matter. In fact, their counsel wrote to counsel for Donna and Mehran advising them of their duty, as officers of the court, to fully apprise the court of all material matters. They could have done more. They could have applied for standing at the hearing.
- [59] Accordingly, it is not open to me to sit in appeal of, or otherwise review, the order of Pearlman J. dated February 7, 2018. However, if I was to review the circumstances that led to it, I would conclude that it was properly obtained.

Does this Court have jurisdiction?

[60] The proposed parties submit that this application must be dismissed because the underlying proceeding lacks jurisdictional foundation. More specifically, they submit:

- 1) that this court's jurisdiction is time-limited and has expired; and
- 2) that the jurisdiction to make orders in respect of division of property can be exercised only once and cannot be resurrected.

They, therefore, say that Pearlman J.'s order is without effect.

Is the court's jurisdiction time limited and has it been spent?

[61] Mina and Francis submit that this family law matter is governed by the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] pursuant to s. 61(4) of that act, and further submit that the time limit for bringing a claim for division of property is two years from the date of the divorce. They rely upon *Halliday v. Halliday*, 2015 BCCA 82, in particular on paras. 33 and 34.

[33] Division of assets is a matter regulated entirely by provincial legislation. Parties can decide to divide their assets between themselves by way of separation agreement or, alternatively, to seek the assistance of the court. In cases where the parties have entered into an agreement dividing their assets, the agreement can be challenged in court.

[34] The FRA and FLA contain provisions that effectively limit when claims for division of property or applications for spousal support can be brought. While the FRA did not have a specific limitation provision, a limitation period was read into the legislation by way of the definition of "spouse". Only a "spouse" could seek spousal support or challenge a property division. By definition, a person ceased to be a "spouse" 2 years after a divorce was pronounced, becoming instead a "former spouse". In the result, there was no jurisdiction to hear applications for spousal support or division of assets under the FRA if proceedings were brought more than two years after the parties were divorced: see *Suckau v. Suckau*, 2002 BCCA 300, *Tatlock v. Tatlock* (1994), 88 B.C.L.R. (2d) 197 (C.A.). The FRA contained no provisions pursuant to which the time to bring an action could be extended.

[Emphasis added]

[62] The two-year time limit under the FRA is similar to the two-year limit now statutorily imposed under the FLA. This was also noted in *Halliday* at paras. 36 and 37.

[36] The FLA has taken a somewhat different approach with regard to limitation periods. The FLA, like the Divorce Act, defines "spouse" as including a former spouse. Unlike the FRA, it does not rely on the definition of spouse to import a limitation period. Instead, it has express limitation provisions. The relevant provisions are as follows:

Time limits

198 (2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,

- (a) in the case of spouses who were married, the date
 - (i) a judgment granting a divorce of the spouses is made, or
 - (ii) an order is made declaring the marriage of the spouses to be a nullity, or
- (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
- (3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

[37] Section 198(2) of the FLA requires, in the case of spouses who have been married, that a spouse who seeks an order to divide property or family debt, a pension, or for spousal support bring the claim within two years of the parties' divorce.

[63] Mina and Francis submit that the FRA must govern this family law dispute and that pursuant to the FRA, all jurisdiction in this court to address issues of family property expired on May 27, 2016, being the two-year anniversary of Skolrood J.'s divorce order. (In fact the expiration date would be June 27, 2016 as Mehran and Donna ceased to be spouses on June 27, 2014, thirty-one days after the order of Skolrood J.) Therefore, they say, when the parties appeared before Pearlman J., any family rights and obligations had been extinguished and there was no further jurisdiction in this court to order property division.

[64] I defer discussion of whether the FRA or FLA governs this matter but assume, for present purposes, that the FRA governs. Even with this assumption, I do not accept the submission that this court is without jurisdiction. This submission conflates issues of time limitation with questions of jurisdiction and fails to distinguish between the continuation of an existing proceeding and a new proceeding.

[65] The proposed parties rely heavily on the words used by Justice Goepel in para. 34 of Halliday where he said that because of the expiry of the two-year period "there was no jurisdiction to hear applications for spousal support or division of assets under the FRA". They say this recognizes a time-limited jurisdiction.

[66] I do not consider that the words used by Goepel J. in para. 34 were truly intended to be understood as addressing the jurisdiction of the court. The main issue in Halliday was whether an application to vary or set aside a separation agreement was time-barred. The issue was time limitation not the jurisdiction of the court. This is also apparent when one

looks at the authorities cited by Goepel J. for the proposition that there was no jurisdiction. The authorities cited were *Suckau v. Suckau*, 2002 BCCA 300 and *Tatlock v. Tatlock* (1994), 88 B.C.L.R. (2d) 197 (C.A.), both of which address time limitation. The courts in *Suckau* and *Tatlock* did not address jurisdiction and did not say the court lacked of jurisdiction.

- [67] I consider it inaccurate, confusing, and misleading to characterize the issue as being one of jurisdiction. There is no doubt that this court has both territorial and subject matter jurisdiction in this proceeding. The question is whether the claim is time barred because the limitation period expired on June 27, 2016, two-years from the date Mehran and Donna ceased to be spouses.
- [68] Justice Pearlman's order provides a complete answer to the submission that the property claims are time barred under either the FRA or the FLA. His order set aside those parts of the Order of Skolrood J. addressing corollary relief. The effect of this was to resurrect the family action, without more. Nevertheless, to remove any doubt, the Order included as a term that the "notice of family claim filed May 22, 2013 proceed as if no settlement was reached and no court order for corollary relief made". The clear effect of this term is to resurrect or re-open the family claim filed May 22, 2013. Therefore, we are not concerned here with the commencement of a new claim but the continuation of an existing claim for division of family property that was originally filed on May 22, 2013. It is the May 22, 2013 date that is the relevant date for time limitation purposes and this date obviously preceded the date Mehran and Donna ceased to be spouses. Therefore, the two-year time limit under the FRA is not engaged and neither is the two-year limit under the FLA.

Can the jurisdiction to order property division be exercised only once?

- [69] Mina and Francis further submit that this court lacks jurisdiction because orders in respect of division of property can be exercised only once and once exercised, the jurisdiction is spent. I repeat the most relevant parts of their submission.
55. The jurisdiction under both the Family Relations Act and the Family Law Act to make orders in respect of division of property can only be exercised once. In this regard, neither legislative regime authorizes further recourse to its jurisdiction when recourse has already been made once and resulted in an order. On the contrary, both make explicit that, once an order is granted in respect of family property, no further orders can be made (thereafter, the ordinary civil property regime is engaged). The Family Relations Act provides:

Subject to this Act, if a court has made an order under this Act, except an order under Part 5 [Matrimonial Property] or 6, the court may, on application, vary or rescind the order if circumstances have changed since the order was made or last varied.

Family Relations Act, s. 20

56. Similarly, the Family Law Act, while it expressly provides a mechanism for setting aside agreements in respect of property division 5, prohibits setting aside an order in respect of division of property (except in certain circumstances none of which applies in this case). Section 215(2) states:

A court may not change, suspend or terminate an order made under Part 5 [Property Division] or 6 except as provided under those Parts.

Family Law Act, s. 215

57. While Justice Pearlman may have had the inherent jurisdiction to set aside Justice Skolrood's order, which presumably might assist in advancing a civil proceeding against the Respondent, there was no jurisdiction to authorize returning to the infrastructure of either the Family Relations Act or the Family Law Act. Put differently, Justice Pearlman's Order cannot have created a jurisdiction that does not exist and, to the extent that this action is premised on any such jurisdiction, it is a nullity. Both statutes provide that the jurisdiction to make orders respecting family property is spent once it has been exercised. There is, of course, good reason for this - the security of property transaction and, in particular, land transactions that are founded on security and transferability of title under the Land Title Act would otherwise be undermined.
- [70] These submissions directly put in issue the validity of Pearlman J.'s order and must fail for the reasons given above in relation to whether Pearlman J.'s order was improperly obtained. The order was entered and has not been appealed. I do not sit in appeal of Pearlman J. nor can I review his order.
- [71] In addition, the effect of Pearlman J.'s order is that this court must be taken to have not yet made an order in respect of property division. This follows from the setting aside of those parts of the order of Skolrood J. relating to corollary relief, with or without the added term that this matter "proceed as if no settlement was reached and no court order for corollary relief made".
- [72] Finally, in my view, Mina and Francis mischaracterize the basis for Pearlman J.'s order. He was not exercising a power under the FLA or the FRA or making a second property division order. He was exercising a well recognized power under the inherent jurisdiction of the court to set aside an order that had been obtained by fraud or perjury: *Long v. Red Branch Investments Limited*, 2018 BCCA 115. I have been referred to no authorities that suggest a property division order obtained by fraud cannot be set aside in the exercise of the court's inherent jurisdiction. Indeed, any such rule would create a very dangerous precedent in that it would encourage and reward dishonest and fraudulent conduct in family law matters involving property claims.

Is this family law claim an abuse of process?

- [73] Mina and Francis submit that the application should be dismissed on the grounds that this application and the intended proceeding are an abuse of process. They say that there is collusion between Mehran and Donna and there is a failure to disclose a cooperation agreement between them. Although I will address this submission in more detail, in my view, the evidence before me on this application is not sufficient to support a finding of collusion or abuse of process. There is no direct evidence of collusion or abuse of process. There are facts and circumstances that might raise a suspicion of collusion but many of those facts and circumstances have alternative explanations and, in any event, a suspicion of collusion is not enough. The issue of whether there is an abuse of process is one that is better addressed at trial on a full record.
- [74] I accept that the court has inherent jurisdiction to control its own processes to prevent abuse, and in the exercise of that jurisdiction it is open to me to dismiss the application if I am satisfied that there is an abuse of process unfolding. This power is summarized in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, at paras. 16-17:
- [16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).
- [17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 Can. Crim. L.R. 97, at p. 126.
- [75] Mina and Francis submit that the proceedings before Pearlman J. demonstrate the existence of a collusive agreement between Mehran and Donna. They say that the application to re-open the family law matter proceeded by consent and that there was no "controversy" between the parties. This, they submit, was demonstrated by a failure to bring relevant jurisdictional and substantive law to the court's attention, by a failure to fully disclose all relevant facts, and by the fact the third parties whose interests were affected were not before the court. They further submit that prior to the hearing before Pearlman J., there was agreement that Donna would not rely upon the marriage agreement as a defence and that this constitutes further evidence of collusion.

- [76] I accept that there was little in dispute as between Donna and Mehran in the proceeding before Pearlman J. However, I do not accept that this is necessarily evidence of collusion or abuse of process. Both Donna and Mehran were represented by counsel before Pearlman J. Given the reasons of Funt J. that Donna had committed a fraud on Mehran and the court, and given the comments that had been made by the Court of Appeal on February 8, 2018, Mehran's decision to apply to re-open the family law matter and Donna's decision to consent to the order sought were both reasonable. The fact that there was consent and little controversy between the parties before Pearlman J. is not necessarily evidence of collusion or abuse of process.
- [77] The submission that Donna and Mehran failed to bring relevant jurisdictional and substantive law to Pearlman J.'s attention and failed to fully disclose all relevant facts before him has been partially addressed above. In my view, the salient facts and the applicable law were put before Pearlman J.
- [78] Donna's agreement to not rely upon the marriage agreement as a defence to the family law claim is another fact relied upon as evidencing collusion and abuse of process. However, Mehran's counsel submits that the decision communicated by Donna's counsel to withdraw any defence based upon the marriage agreement was merely recognizing an untenable position. Mehran's counsel submits that the evidence in this matter discloses that any defence based upon the marriage agreement was bound to fail.
- [79] I do not intend to address in any detail the validity of the marriage agreement as that could be an issue at the trial of this matter. For the present purposes, it is sufficient to address some of the evidence. The evidence of Mehran in his affidavit sworn January 19, 2018 is that he signed the marriage agreement without reading it. It was further his evidence that approximately one month after signing the agreement, Mina told him that she had made an appointment for him with a lawyer and drove him to a lawyer's office to have a certificate of independent legal advice signed. He deposes that this lawyer refused to sign the certificate. This process repeated for two other lawyers until finally a fourth lawyer agreed to sign the certificate. Mehran deposes that he did not read the agreement and that the lawyer did not explain it to him. Based on this evidence, which I accept for the purposes of this application only, I am satisfied that there is a valid issue as to the validity of the marriage agreement. I am further satisfied that the decision to withdraw any defences based on the marriage agreement may have been based on an assessment that the agreement could not withstand scrutiny by the court. Hence, the decision to withdraw the defence is not necessarily evidence of collusion or abuse of process.
- [80] Mina and Francis further submit that there is an apparent agreement as to what constitutes family property and that Mehran is entitled to at least an equal division of that property. Based on the evidence and the submissions, it is reasonably clear that Donna does not intend to defend Mehran's claims to an interest in the properties. She says that she now acknowledges her actions were wrong and that Mehran has a right to whatever he is entitled. This position may be motivated by contrition. On the other hand, it may be

motivated by a hope that, through Mehran, she can somehow regain some of her property. Whatever her motivation, it cannot and should not affect Mehran's entitlement to proceed with his claim. What is important, is that the evidence does not establish any express or implied "agreement" involving or implicating Mehran. Donna's motives may be suspect but Mehran is merely pursuing his rights.

- [81] Finally, Mina and Francis submit that there exists between Mehran and Donna a co-operation agreement which they have failed to disclose. They rely upon *Aecon Buildings, a Division of Aecon Construction Group Inc. v. Brampton (City)*, 2010 ONCA 898, *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2014 BCSC 1560, and *Northwest Waste Solutions Inc. v. Super Save Disposal Inc.*, 2017 BCCA 312 for the proposition that agreements between parties that "change the landscape of the litigation" must be disclosed to the court and that failure to do so amounts to an abuse of process of the court. The types of agreements that must be disclosed are set out in para. 160 of *Bilfinger* which is quoted with approval in para. 56 of *Northwest Waste Solutions*.
- [56] It appears that the first case in which a British Columbia court required immediate disclosure of this type of agreement was *Bilfinger #1*, where the court, after a thorough review of the law relating to Mary Carter-type agreements said:
- [160] Since the court must never be misled about the position of a party in the adversarial process, I conclude that it is necessary to disclose immediately any agreement which affects the party's position in a way that is different than that revealed by the pleadings. An agreement between parties who are adverse on the pleadings, such as between a plaintiff and defendant, or a defendant and third party, which contains a full or partial settlement or release or reservation of rights, or a degree of cooperation not to be expected between adverse parties, should therefore be disclosed immediately.
- [82] I accept that any agreement between Mehran and Donna that meets the above test must be disclosed to the court and that failure to do so constitutes an abuse of process. However, the question is, does such an agreement exist? Mina and Francis rely on various pieces of evidence as establishing such an agreement, including:
- a) The February 21, 2018 letter from Donna's counsel to Mehran's counsel advising that the marriage agreement would not be relied upon as a defence to the claim for division of property;
 - b) Donna's consent to setting aside Skolrood J.'s order; and
 - c) During a small claims trial, Donna gave evidence that she was living in a part of Mehran's house and when asked whether she was paying rent to Mehran she replied that they had to work out a financial arrangement.

- [83] In my view, none of the above establish such an agreement. As I have indicated elsewhere, the decisions to consent to Pearlman J.'s order and to withdraw the marriage agreement defence are not necessarily indicative of collusion or abuse of process. The evidence Donna gave at the small claims trial also falls short of establishing the existence of any such agreement. In fact, her evidence seems to indicate that they do not have an agreement.
- [84] My comments above in relation to an alleged agreement concerning what is family property have equal application to this submission that there is a co-operation agreement. The motives of Donna may be suspect but the evidence does not establish any express or implied "co-operation agreement" involving or implicating Mehran.
- [85] On the basis of the evidence before me, I am not prepared to find that there is a collusive arrangement or agreement in place as between Mehran and Donna and I am not prepared to dismiss the application on the basis of abuse of process.

Is the claim statute barred?

- [86] Mina and Francis submit that Mehran knew or ought to have known of the fraud committed by Donna and of the potential claims as against them by March 8, 2017 and that the two-year limitation period applicable pursuant to s. 6 the Limitation Act, S.B.C. 2012, c. 13 expired on March 8, 2019. Mehran submits that the relevant limitation period is 10 years under the old Limitation Act, R.S.B.C. 1996, c. 266.
- [87] I do not need to address whether the applicable limitation statute is the new act or the old act or whether it is ten years. Assuming the applicable act is the new Limitation Act and the limitation period is two years, the submission of Mina and Francis must still fail. The expiry of a limitation period is not a bar to adding parties but is a factor to be considered in deciding whether it is just and convenient to add the new parties.
- [88] Sections 6 and 8 of the new Limitation Act are relevant and provide as follows:

Basic limitation period

- 6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
- (2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.

General discovery rules

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;

(b)that the injury, loss or damage was caused by or contributed to by an act or omission;

(c)that the act or omission was that of the person against whom the claim is or may be made;

(d)that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[89] The relevance and proper treatment of a limitation defence in the context of an application to add parties is addressed in multiple cases to which I have been referred and is summarized in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329.

[47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:

1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
2. 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 v. Fenwick*, 2000 BCCA 630].
3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.

[48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.

- [90] The first question is whether it is clear that there is a limitation defence. This depends on the applicable period and the commencement and termination dates.
- [91] With respect to the commencement and termination dates of the limitation period, Mina and Francis say that the commencement date is March 2017, being when Mehran had some involvement in the Civil Action. I have referred elsewhere to the evidence of Mehran and his involvement in the Civil Action. I am not satisfied that he had sufficient knowledge of the Civil Action in March 2017 such that he knew or reasonably ought to have known that he may have a cause of action against Mina and Francis or that a court proceeding was an appropriate remedy. In my opinion, the earliest date by which he could have had sufficient knowledge for the limitation period to commence running was in November 2017 when he learned of and read Funt J.'s Reasons. Therefore, assuming a two-year limitation period applies, it did not expire until sometime in November of 2019.
- [92] However, this application to add the proposed parties and to amend the NOFC was filed on August 29, 2018, well within the two-year limitation period. It is, therefore, clear that there is no limitation defence and the only question to consider is whether it is more convenient to have one or two actions. It is clearly more convenient that the issues raised be addressed in the family action rather than have yet another action.
- [93] I would also add that in my view there has been no delay by Mehran in bringing this application and that the delay in the hearing of this application is not due to any fault on his part. Through his counsel he has consistently sought to have this application heard as quickly as possible. It was not heard until November 2019 because of the re-assignment of this matter to a new case management judge, the need to address a multiplicity of matters once the new case management judge was assigned and because of routine court scheduling difficulties.

Disposition

- [94] Before concluding, I wish to note that if this application was dismissed and this matter was to proceed to trial without Mina and Francis as parties, the court would be required to make a declaration as to the ownership of the disputed properties and assets. I do not see how the court could possibly do this without their involvement. Additionally, this proceeding does appear to lack a sufficient adversarial quality, either because of Donna's alleged contrition or because she hopes to somehow regain what she has lost by conceding to Mehran's claims. The addition of Mina and Francis as parties will ensure that the process is sufficiently adversarial, will allow the court to fully determine the necessary ownership issues and will allow the court to determine in a single action whether Donna acted alone in committing the fraud.
- [95] Accordingly, I make the following orders:

- a) Mina Esteghamat-Ardakani also known as Mina Estegahamat-Ardakani, Francis Amir Este, 0831295 BC Ltd., Vitality Holdings Corp. and John/Jane Doe as trustee of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1 are hereby added as respondents to this action; and
- b) The claimant has leave to file Amended Notice of Family Claim attached as Schedule "A" to his notice of application but with the word "impliedly" substituted for the word "constructively" at paragraph 2(a) of page 16.

Costs

[96] Counsel and self-represented parties have leave to speak with me regarding the costs of this application, if necessary.

"Giaschi J."

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