

CANADA / JUDGMENT

Testar Estate v. Leslie

2023 BCSC 611

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 611 Testar Estate v. Leslie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Testar Estate v. Leslie,

2023 BCSC 611

Date: 20230417

Docket: S188573

Registry: Vancouver

Between:

The Estate of Williams James Testar and Wm. J. Testar Ltd.

Plaintiffs

And

James Bruce Leslie and Hean Wylie & Company

carrying on business as Hean Wylie Peach DeStefanis

Defendants

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Plaintiffs:

B. Carpenter

Counsel for the Defendant Hean Wylie & Company carrying on business as

Hean Wylie Peach DeStefanis:

L.D. Karr

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

November 25, 2022 and

March 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 17, 2023

Overview

- [1] The plaintiffs, the Estate of William J. Testar and Wm. J. Testar Ltd., bring this application to add a defendant and to amend their claim of solicitor's negligence to include additional allegations of negligence and new claims sounding in breach of fiduciary duty, equitable fraud, and conspiracy. They also seek to rely on the doctrine of spoliation. Some of the amendments relate to the defendant they seek to add, the estate of a now deceased lawyer, Thomas Peach. Some of the amendments relate to Mr. Peach's law firm at the relevant times, Hean Wylie & Company.
- [2] Hean Wylie is currently a defendant. The other current defendant is James Bruce Leslie, another lawyer who is now deceased. Mr. Leslie was not associated with Hean Wylie.
- [3] Hean Wylie opposes the orders sought on the basis that the amendments do not disclose causes of action because they do not plead elements of the causes of action and/or the material facts to support the claims. Hean Wylie asserts that given the amendments do not disclose a cause of action against Mr. Peach, he should not be added. Alternatively, Hean Wylie submits that the delay in adding Mr. Peach is such that it is not just and convenient to do so.
- [4] Mr. Leslie has not taken a position on the amendments, some of which relate to claims against him.

Application to Amend

The Claim and the Proposed Amendments

- [5] In the original notice of claim filed August 17, 2018, the plaintiff was the estate of Mr. Testar. On October 11, 2019, a further amended notice of claim was filed, adding Wm. J. Testar Ltd., a company controlled by the late Mr. Testar, as a plaintiff. I note that in some of the pleadings the company has been referred to as "W.M.J. Testar Ltd.", but I understand that "Wm. J. Testar Ltd." is the correct name. I will refer to the plaintiffs collectively as the plaintiffs, and to them separately as the Testar Estate and the corporate plaintiff. Where I refer to "plaintiff" (in the singular) in reference to the current pleading or proposed pleading, that is because the referenced pleading uses the word "plaintiff" or "Plaintiff" without specifying which plaintiff.
- [6] In addition, although the plaintiffs have different interests and entitlements based on their ownership interests of the properties, through most of the current claim and the proposed further amended notice of civil claim, the pleading does not specify which plaintiff is making which plea. In these reasons I describe the pleas as being those of the "plaintiffs" because they are. This is an issue that makes the pleadings difficult to understand, or at the very least, imprecise.
- [7] The proposed amendments will result in the fourth amended notice of civil claim.
- [8] The factual underpinnings to the claims are wills that Mr. Testar made in 1988 and 1992, both of which were allegedly lost, and real properties owned by the plaintiffs which they allege were disposed of due to the wrongdoing of the defendants and proposed defendant. The properties are an apartment building on Cassie Street owned by the late Mr. Testar and his wife as joint tenants (the "Cassie Property"), and two properties on Commercial Drive owned by the corporate plaintiff (the "Commercial Drive Properties").
- [9] The Cassie Property and the Commercial Drive Properties are defined in the proposed fourth amended notice of civil claim in the same manner as I have defined them. When I refer to assets, property or properties other than those defined properties, I am referring to assets or property not specified or defined in the fourth amended notice of civil claim. This is a matter of lack of clarity and confusion which is relevant to this application.
- [10] The plaintiffs assert that in the course of making the 1988 will, Mr. Testar made it known to Hean Wylie that he did not wish to dispose of the Cassie Property.
- [11] The proposed amendments include a pleading that Mr. Testar made a will in 1983 in which he bequeathed the Cassie Property to his wife and said that a management company should be appointed to manage it on his death.
- [12] In the amendments, the plaintiffs seek to allege that in 1988, Mr. Testar informed Mr. Peach that his 1983 will had been lost. The amendments assert that he told Mr. Peach that he regarded the Cassie Property to be a good long-term investment. Through the amendments, the plaintiffs seek to allege that Mr. Testar instructed Mr. Peach to prepare a will bequeathing the Cassie Property to his wife and the assets of the corporate plaintiff, which

included the Commercial Drive Properties, to his son. The proposed amended pleading asserts that Mr. Testar told Mr. Peach that the Cassie Property should not be disposed of by his wife in her lifetime and should pass to their son on his wife's death. The proposed amendments include that Mr. Testar's 1988 will bequeathed the Cassie Property to his wife and expressed the hope that Royal LePage would be appointed to manage it.

- [13] The claim as currently framed contains a plea that Hean Wylie failed to notify the Testar Estate of Mr. Testar's 1988 will, causing financial loss to the plaintiff. In the proposed amendments, the plea is that Mr. Peach's failure to notify the Testar Estate of Mr. Testar's 1988 will caused financial loss and damage to the plaintiffs.
- [14] The proposed amendments include allegations that Mr. Leslie knew of Mr. Testar's longstanding plan to keep the Cassie Property and the Commercial Drive Properties in the family and drafted wills for Mr. Testar and his wife in 1992.
- [15] The current claim includes an allegation that when Mr. Leslie moved law firms, he failed to undertake the proper notifications of the will he made for Mr. Testar in 1992, as a result of which its existence was not known to the Testar Estate when Mr. Testar died in 1999.
- [16] The claim as currently framed alleges that in 1994, Mr. Leslie certified Mr. Testar's signature on the Form A transfer selling the Cassie Property but Mr. Testar did not sign the Form A transfer, that Mr. Testar did not have the capacity to sign the transfer, and that Mr. Leslie knew that. The plaintiffs allege that the signature on the Form A transfer for the Cassie Property is not that of Mr. Testar. The plaintiffs allege that the Cassie Property was sold for under market value.
- [17] In the proposed amendments, the plaintiffs seek to assert that Mr. Peach and Hean Wylie represented the purchaser of the Cassie Property in the 1994 sale and in doing so, they acted fraudulently and in breach of their fiduciary obligations, because Mr. Testar was still a client of the firm and they had knowledge of his confidential information about his testamentary intentions. The proposed amendments assert that neither obtained informed consent from Mr. Testar to act on the purchase and sale transaction.
- [18] The amendments sought include a pleading that Mr. Testar did not have capacity to execute a transfer of the property in 1994 and that he was suffering from dementia when he died in 1999. The proposed amendments assert that Mr. Leslie, Mr. Peach and Hean Wylie knew Mr. Testar did not have capacity at the time of the sale of the Cassie Property.
- [19] The plaintiffs also seeks amendments to advance claims that Mr. Leslie did not verify Mr. Testar's identification or verify Mr. Testar's signature when Mr. Leslie certified the Form A transfer. The plaintiffs also seek to plead that neither Mr. Testar or his wife were paid the purchase price for the Cassie Property.

- [20] With regard to the Commercial Drive Properties, the claim, as currently framed, includes that in 1996, Mr. Leslie improperly certified Form A transfers that Mr. Testar's wife signed selling the Commercial Drive Properties when she was not authorized to do so, to the knowledge of Mr. Leslie, and contrary to the certification he made.
- [21] Through the proposed amendments the plaintiffs seek to claim that the retainer agreement between Mr. Leslie and Mr. Testar and the corporate plaintiff included an implied term that Mr. Leslie would carry out his duties in compliance with all applicable legislation, which Mr. Leslie breached on the transfer of the Commercial Drive Properties because he failed to comply with ss. 43 and 44 of the Land Title Act, R.S.B.C. 1996, c. 250.
- [22] In the proposed amended pleadings, the plaintiffs allege that Mr. Leslie, Mr. Peach and Hean Wyle conspired to divest Mr. Testar of the property for their own benefits and the benefit of their clients.
- [23] The claims as to the relationship between the loss of the wills and the claims pertaining to the disposal of the Cassie Property and the Commercial Drive Properties are not clear. One of the proposed amendments is that the loss of the 1988 will made it impossible to locate assets that were identified in that will. The current pleading alleges that the loss of the 1992 will caused or contributed to loss of property or financial loss suffered by the Testar Estate.
- [24] In sum, the amendments seek to add Mr. Peach to the claims of negligence and add claims against Mr. Leslie, Mr. Peach and Hean Wylie in breach of contract, equitable fraud, breach of fiduciary duty and conspiracy. The amendments also refer to "spoliation", which I will address below.

Legal Principles

- [25] Amendments are allowed as are necessary to determine the real question between the parties. It is a generous approach, allowing for pleadings as they are presented or could be presented so that all matters in controversy between the parties may be completely and finally determined: *Morriss v. British Columbia*, 2010 BCCA 95 at para. 17, and *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1988), 30 B.C.L.R. (2d) 45 (S.C.) at p. 46. The court does not hear evidence and considers the pleadings assuming the facts pled are true: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.) at paras. 22-27. Novel pleadings are permitted.
- [26] Pleadings must disclose a cause of action. So long as they do so, and material facts have been pled, amendments should be permitted and the case should be permitted to proceed so the court can consider whether it is successful based on the facts as proven at trial: *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 at para. 17, *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980.

- [27] Despite the generous approach to pleadings, the appellate authorities have held that claims that have no reasonable chance of success ought to be struck before trial: *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 19, citing *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 18 and *Imperial Tobacco* at para. 19. In undertaking this assessment, it is very important that the court only strike pleadings or disallow amendments where the claim is bound to fail as pled or as sought to be pled, otherwise the court runs the risk of pursuing efficiency at the expense of the development of the common law: *Grove v. Yukon (Ministry of the Environment)*, 2022 YKCA 8 at paras. 15-16.
- [28] It is an abuse of process for a party to subject another party to multiple rounds of amendments precluding that party from knowing the case it has to meet. In such cases, proposed amendments that have not been properly drafted but could logically be redrafted to meet the tests of pleading material facts that disclose a cause of action may not be allowed: *Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2012 BCCA 196.

Elements of the Causes of Action and Material Facts to Support the Causes of Action

- [29] In order to disclose a cause of action, a notice of civil claim must not simply name that cause of action, but also set out the elements of that cause of action.
- [30] Rule 3-1(2)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, provides that a notice of civil claim must set out the material facts in support of a claim. Material facts are the means by which the claimant will prove the elements of the cause of action and thus are "comprised of every fact that would be necessary for the plaintiff to prove in order to support their claim" and in so doing, are integral to pleadings meeting their role of providing notice and defining the issues to be tried: *Frazier* at paras. 69-70, citing *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227 at paras. 16-20; *Workers Compensation Board v. Sort*, 2022 BCCA 318 at para. 102; *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 21-23; and *Kindylides v. Does*, 2020 BCCA 330 at para. 34.
- [31] At para. 71 of *Frazier*, the Court of Appeal also made clear that bare allegations based on speculation and assumptions are not material facts, citing *Kindylides* at para. 33.
- [32] In *Imperial Tobacco* at para. 22, the Supreme Court of Canada stressed the importance of pleading material facts with the now often cited phrase "plead them they must", explaining that while a claimant may not be able to prove facts at the time they are pled, the claimant must plead them nonetheless. It is not open to the claimant to wait and see how the evidence develops before pleading material facts.

- [33] The distinction between evidence and material facts is emphasized in the Supreme Court Civil Rules which require material facts be pled (R. 3-1(2)) while prohibiting pleading evidence (R. 3-7(1)). Material facts are the who, when, where, how and what that gives rise to liability: Frazier at para. 70, while evidence is the means by which the material facts will be proved.
- [34] In Frazier at paras. 72 and 75, the Court of Appeal explained that where material facts are not pleaded, an application to strike may be allowed because the claim is not capable of supporting a cause of action and the court cannot properly evaluate whether there is a chance of success. The same analysis applies to applications to amend pleadings.

Negligence

- [35] Hean Wylie asserts that the proposed amendments seek to plead negligence against Hean Wylie and Mr. Peach on two bases: the 1988 will and Mr. Peach's representation of the purchasers on the sale of the Cassie Property.
- [36] With regard to the 1988 will, the proposed fourth amended notice of civil claim asserts that:
- a) Mr. Peach and Hean Wylie owed a duty of care to the Testar Estate;
 - b) they failed to care for the property stored for the Testar Estate, including the 1988 will, in breach of the standard of care;
 - c) Mr. Peach and Hean Wylie's loss of the plaintiffs' property or failure to notify of its location in a timely manner caused loss to the plaintiffs by improperly depriving them of their property;
 - d) the defendants breached the standard of care in the circumstances by destroying some or all of Mr. Testar's will files.
- [37] One of the elements of negligence is damage. The proposed pleading does not plead any material facts that allow the reader to understand what claim is made in relation to damage, in particular, what property the plaintiffs were improperly deprived of due to the loss of the 1988 will. In the facts section of the proposed fourth amended notice of civil claim, the plaintiffs plead that:
16. The failure of Peach and Hean Wylie to notify the plaintiff Estate of the relocation of the Grandfather's 1988 will and the Grandfather's Hean Wylie File caused financial loss and damage to the Plaintiff, because certain assets identified in that will have been impossible to locate due to passage of time.
 23. The defendants Peach and Hean Wylie neglected or otherwise failed to notify the Grandfather of the location of the 1988 Will when the defendant Peach retired from the practice of law.

24. The Grandfather's legal file with Hean Wylie was incomplete when it was discovered by the Grandson in 2017. The loss or destruction of parts of the Grandfather's legal file by either or both of Peach and Hean Wylie caused damage to the plaintiff's estate.
- [38] Given the pleading that the late Mr. Testar made a further will in 1992, this pleading is a bare assertion that lacks material facts supporting the element of loss or damage.
- [39] I conclude that the amendments pertaining to negligence of Mr. Peach and Hean Wylie in relation to the 1988 will and the Hean Wylie file are not permissible.
- [40] With regard to the Cassie Property, at para. 19 of the proposed amended pleading, the following appears:

Further and in the alternative, the retainer agreements between Leslie, Peach, Hean Wylie and the Grandfather and Wm. J. Testar also included an implied term that Leslie, Peach, Hean Wylie, would carry out their duties in a manner consistent with a reasonable lawyer in the circumstances, and in compliance with all applicable legislation. Peach, Hean Wylie, and Leslie breached [sic] of the standard of care required of them as set out above, and by breaching s. 43 and 44 of the Land Title Act RSBC 1996, c 250 caused financial damage to those parties and therefore amounts to an actionable breach of contract.

- [41] While this paragraph seems to be pleading breach of contract, it also refers to "breached [sic] of the standard of care required of them as set out above". The reference to "them" includes Mr. Peach and Hean Wylie. The paragraphs leading up to para. 19 reference the Cassie Property and the allegations against Mr. Leslie in relation to witnessing the Form A Transfer with multiple references to ss. 43 and 44 of the Land Title Act. There is no reference in those paragraphs to any conduct by Mr. Peach or Hean Wylie. Accordingly, the reference to their "breached of standard of care required of them as set out above" is unintelligible.
- [42] Prolix and confusing pleadings will be struck or will not be permitted as amendments: *Pyper v. The Law Society of British Columbia*, 2017 BCCA 410. Paragraph 19 of the proposed amendments is not allowed on the basis that it appears to allege breach of a standard of care against Mr. Peach and Hean Wylie in a manner that cannot be understood.

Breach of Fiduciary Duty

- [43] The proposed fourth amended notice of civil claim refers to a duty of care owed by Mr. Peach and Hean Wylie in paragraphs that also seem to be raising the legal concepts of breach of fiduciary duty and negligence.
- [44] Breach of fiduciary duty and breach of the standard of care (negligence) are different causes of action. Appellate courts have stated many times that not every breach of a duty by a fiduciary is a breach of fiduciary duty: *Meng Estate v. Liem*, 2019 BCCA 127 at para. 33 and cases cited therein; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 34. It is necessary to identify the nature of the duty owed and the breach alleged in order for the trial judge to

determine whether the plaintiff has discharged the onus of proving the elements of the cause of action: Meng Estate at paras. 3 and 7.

[45] In Strother, the Supreme Court of Canada addressed how fiduciary duty interacts with a solicitor-client relationship:

34 When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement. The solicitor-client relationship thus created is, however, overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The Davis factum puts it well:

The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency. [para. 95]

Not every breach of the contract of retainer is a breach of a fiduciary duty. On the other hand, fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. The foundation of this branch of the law is the need to protect the integrity of the administration of justice: MacDonald Estate v. Martin, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235, at pp. 1243 and 1265. "[I]t is of high public importance that public confidence in that integrity be maintained": R. v. Neil, [2002] 3 S.C.R. 631, 2002 SCC 70, at para. 12.

35 Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest, as set out in the jurisprudence and reflected in the Rules of Practice of The Law Society of British Columbia. As the late Hon. Michel Proulx and David Layton state, "[t]he leitmotif of conflict of interest is the broader duty of loyalty": Ethics and Canadian Criminal Law (2001), at p. 287.

[46] The constituent elements of breach of fiduciary duty are:

- a) the defendant was in a fiduciary relationship with the plaintiff;
- b) the defendant acted in a manner inconsistent with that fiduciary relationship which could include breach of the duty of loyalty, acting in the face of a conflict, preferring a personal interest, taking a profit, acting dishonestly;
- c) loss or damage, which could be remedied by monetary remedy or a proprietary remedy such as a constructive trust.

[47] It is possible to infer from the fourth amended notice of civil claim that the plaintiffs plead that Mr. Peach and Hean Wylie were in a fiduciary relationship with the late Mr. Testar even though that is not clearly stated. Counsel for the plaintiffs submits that it is not necessary to plead a fiduciary duty because solicitors are always fiduciaries.

- [48] The relationship between solicitors and client is overlaid with fiduciary responsibilities as a matter of law: Strother at para. 34. But because not every breach by a fiduciary is a breach of fiduciary duty, it is necessary to be clear about what are alleged to be breaches of the duty owed by a solicitor to exercise skill as opposed to the breach of fiduciary duty, which involves some element of dishonesty, disloyalty or self-preference. In Meng Estate, the Court of Appeal held that because the trial judge held that there had been a breach of fiduciary duty when there had been, arguably, want of skill, but no dishonesty, disloyalty or self-dealing, the plaintiff had not discharged its onus of proof to support the finding that the judge made.
- [49] I observe, again, that the pleadings are the crucial starting point for the defendant to know what case it is meeting and for the parties and the court to understand what the issues are. Without that clarity, the types of problems that arose in Meng Estate proliferate.
- [50] While the fourth amended notice of civil claim, read generously, allows the reader to understand that the plaintiffs claim that Mr. Peach and Hean Wylie were fiduciaries, and that they acted in the face of a conflict on the sale of the Cassie Property, the claim does not state whether that is said to be negligence, or breach of fiduciary duty, or both. The legal basis section of the proposed fourth amended notice of civil claim does not differentiate between a duty of care, arising out of the solicitor-client relationship; a standard of care, the breach of which may give rise to damages in negligence, and; fiduciary duties owed, the breach of which may give rise to monetary damages or proprietary remedies.
- [51] With regard to breach of fiduciary duty in relation to the 1988 will, the proposed amendments fail to explain how a fiduciary duty, i.e., concepts of loyalty and not putting one's own interest above those of a client, relates to the safekeeping of a will. In addition, as described above, the plaintiffs do not propose to plead material facts pertaining to loss or damage from failing to keep the will safe.
- [52] I conclude the proposed fourth amended notice of civil claim does not disclose a cause of action in breach of fiduciary duty in relation to the lack of safekeeping or loss of the 1988 will.
- [53] With regard to breach of fiduciary duty pertaining to the sale of the Cassie Property, the proposed pleading asserts that around the time of the 1988 will, Mr. Testar made it known to Mr. Peach and Hean Wylie that he did not want the Cassie Property sold after his death. The proposed pleading asserts that Mr. Peach and Hean Wylie did not have informed consent from Mr. Testar to act in a conflict of interest in relation to that sale.
- [54] The defendants submit that no fiduciary duty of care could be owed by Mr. Peach and Hean Wylie because Mr. Testar was represented by Mr. Leslie and the law is clear that no duty of care is owed to the opposing party on a legal transaction.

- [55] There may be an exception to that where the lawyer is in a conflict of interest because he or she has clients who both have interests in the same matter and the lawyer acts for one to the detriment of the other and in doing so prefers the lawyer's interests to that of the client. That was the case in *Strother*.
- [56] As explained by Justice Binnie in *Strother*, a fiduciary duty may create obligations beyond the express term of the retainer for legal services. However, as *Strother* also demonstrates, the terms of the retainer and the duration of the retainer are crucial to determine whether the solicitor was actually in a conflict when acting on the other side of the transaction.
- [57] If the fourth amended notice of civil claim seeks to assert that a fiduciary duty was created by Mr. Testar's retainer of Mr. Peach and Hean Wylie to draft the 1988 will which included a duty to not act on any transactions pertaining to assets Mr. Testar had at the time he drafted the will, regardless of when they took place or the circumstances, then that needs to be pleaded. If the claim proposed in the fourth amended notice of civil claim is not so broad, but asserts there was a fiduciary duty to not act on certain types of transactions involving Mr. Testar's assets, or certain assets, then again, the pleading needs to define and describe that duty and the material facts said to give rise to its breach.
- [58] With regard to whether the plaintiffs claim that Mr. Peach and Hean Wylie were in conflict because they were still acting for Mr. Testar at the time of the sale of the Cassie Property, the proposed fourth amended notice of civil claim confuses rather than assists. Paragraph 35 of the proposed fourth amended notice of civil claim describes Mr. Peach and Hean Wylie as Mr. Testar's former lawyers at the time of the sale of the Cassie Property. Two paragraphs later, the proposed fourth amended notice of civil claim asserts that Mr. Testar never ceased to be a client of Mr. Peach and Hean Wylie.
- [59] The proposed fourth amended notice of civil claim does not clearly plead the elements of breach of fiduciary duty or the material facts supporting those elements, and does not delineate or address the relationship between Mr. Testar's retainer of Hean Wylie and Mr. Peach and the alleged fiduciary duty owed in relation to the sale transaction six years after the 1988 will was drafted.
- [60] I conclude that the proposed fourth amended notice of civil claim does not adequately plead breach of fiduciary duty in relation to Mr. Peach and Hean Wylie.

Equitable Fraud

- [61] Equitable fraud is a new cause of action in the proposed fourth amended notice of civil claim. However, the words "equitable fraud" do not appear in the legal basis part of the proposed fourth amended notice of civil claim. Paragraph 1 of the legal basis part of the proposed fourth amended notice of civil claim includes "fraud" in the list of law that the plaintiffs plead and rely on.

- [62] The relief sought in the proposed fourth amended notice of civil claim includes a claim for damages for equitable fraud.
- [63] In *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21, Justice Karakatsanis, speaking for a unanimous court, summarized the four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood on the part of the defendant; (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.
- [64] Equitable fraud, also known as "equivalent to fraud", was described by the Supreme Court of Canada in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, as transactions falling short of deceit but where it is unconscientious for a person to avail himself of an advantage obtained, citing *First City Capital Ltd. v. B.C. Building Corp.* (1989), 1989 CanLII 2868 (BC SC), 43 B.L.R. 29 (B.C.S.C.) per McLachlin C.J.S.C. While there has been debate as to whether equitable fraud requires a special relationship between the plaintiff and the defendant, the current view is that it does not; a commercial relationship will suffice: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at paras. 102-104.
- [65] The plaintiffs submit that it is not necessary to identify a special or commercial relationship because all of the relationships were solicitor-client and so all give rise to a special relationship.
- [66] The plaintiffs have not pled what conduct is said to be unconscionable in light of the solicitor-client relationships. The pleadings must allow the reader to understand what gives rise to the assertion that it would be unconscionable to allow a party to benefit from an advantage. There is more than one solicitor-client relationship involved in this case. Those relationships were entered into at different times and may or may not have overlapped. The reader of this claim cannot discern which relationship, and what unconscionable conduct, gives rise to a claim of equitable fraud because neither the elements of the cause of action nor the material facts have been pled.
- [67] If the claim is meant to advance fraud, as opposed to equitable fraud, there is no pleading of a false representation or the like.
- [68] I conclude that the amendments that refer to fraud or equitable fraud are inadequate because the elements and material facts have not been pleaded.

Conspiracy

- [69] In the factual section of the proposed fourth amended notice of civil claim, the plaintiffs seek to plead that Mr. Leslie, Mr. Peach and Hean Wylie entered into an agreement to act in concert to divest Mr. Testar of the "Property" for their own benefit and the benefit of their clients. They seek to plead that the conduct in carrying out the conspiracy was intended to injure Mr. Testar and the conspiracy did cause injury to him.

- [70] In *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 126-128, the Court of Appeal addressed sufficiency of pleadings in relation to "predominant purpose" conspiracy. The Court of Appeal explained that the tort of conspiracy with the predominant purpose of the intention to injure must be strictly pleaded and consists of the following elements:
- a) defendants with an identified relationship between them acted in concert;
 - b) committed an overt act that has been identified;
 - c) with the intention to injure the plaintiffs; and
 - d) the overt act caused an injury to the plaintiff.
- [71] The proposed fourth amended notice of civil claim sets out the elements of the tort of conspiracy adequately.
- [72] However, the proposed conspiracy pleading is confusing because it is not possible to understand what the "Property" that the defendants are said to have conspired to deprive the plaintiffs of is in reference to. The Cassie Property and the Commercial Drive Properties are defined terms in the current pleading and the proposed fourth amended notice of civil claim. There is nothing defined as the "Property".
- [73] In addition, the legal basis section of the proposed fourth amended notice of civil claim does not refer to conspiracy. This is problematic because the legal basis section of the notice of civil claim is where a plaintiff is required to commit to a cause of action and inform the defendant of the foundation for the claim: *Tiamzon v. Vandt*, 2020 BCCA 336, citing with approval *Fletcher v. British Columbia (Public Safety and Solicitor General)*, 2013 BCSC 554 (Master) at paras. 26-28.
- [74] Hean Wylie submits that the pleading that the defendants entered into an agreement to act in concert is a bald assertion. There are no material facts pled as to when this agreement was made and there are no material facts about the intention to injure Mr. Testar. I agree with these submissions.
- [75] I conclude that the fourth amended notice of civil claim does not disclose a cause of action in conspiracy because it is bereft of material facts, because conspiracy is not raised in the legal basis section of the proposed fourth amended notice of civil claim, and because it is not possible to understand what "Property" is referred to.

Spoliation

- [76] Paragraph 1 of the legal basis section of the proposed fourth amended notice of civil claim includes "spoliation" in the list of law that the plaintiffs "plead and rely on".
- [77] I assume that the word "spoliation" is a typographical error and the plaintiffs meant to refer to spoliation. In British Columbia, spoliation is not a cause of action. It is an equitable doctrine by which a party that can prove that another party destroyed evidence for the

purpose of making it unavailable in litigation is entitled to a rebuttable presumption that the evidence would have been favourable to the party who complains of its destruction and not favourable to the party who destroyed it: *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90, 1998 CanLII 6489 at para. 22 (B.C.C.A.), citing *St. Louis v. Canada* (1896), 25 S.C.R. 649. The presumption only arises if the evidence was intentionally destroyed for the purpose of gaining an advantage in litigation: *Patzer v. Hastings Entertainment Inc.*, 2010 BCSC 426 at para. 87, citing *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 18.

- [78] While the plaintiffs have pled that the 1988 will and 1992 will were lost, as was the Hean Wylie file, they have not pled that they were lost intentionally and in a manner related to pending litigation.
- [79] The plaintiffs have not proposed adequate amendments pertaining to spoliation in relation to Mr. Peach and Hean Wylie.

Whether to Permit Amendments to the Proposed Amendments

- [80] In *Jones v. Bank of Nova Scotia*, 2018 BCCA 381, the Court of Appeal, per Justice Willcock, set out factors a chambers judge should consider when determining whether to permit amendment of pleadings that are bound to fail:
- a) the degree to which the pleadings are deficient;
 - b) the extent to which the deficiencies may be addressed by an obvious or straightforward amendment to the pleadings;
 - c) the apparent merit of the claim; and
 - d) prejudice by dismissal of the claim.
- [81] To this list I would add that if the party whose claim is to be struck is self-represented, so long as the plaintiff credibly asserts that amendments will be forthcoming, the court should lean heavily towards allowing amendments instead of striking: *Beach Estate v. Beach*, 2019 BCCA 227, and *Gadsby v. British Columbia (Attorney General)*, 2019 BCSC 1596 at paras. 99-106, citing *Nederland Holdings Inc. v. British Columbia*, 2018 BCCA 373 at para. 12.
- [82] However, this approach has its limits. Where a self-represented person has had ample opportunity to present a pleading that complies with the Rules and the object of pleadings as described, the court may not grant another opportunity to amend even where the result is that the plaintiff will lose the opportunity to pursue a matter: *Sze Hang Holding Inc.*
- [83] Some background to the pleadings is necessary on this issue. The Testar Estate filed the notice of civil claim on August 7, 2018. On January 18, 2019, the Testar Estate obtained default judgment against Hean Wylie. On April 24, 2019, the Testar Estate filed an amended notice of civil claim redrafting the claim extensively. On October 11, 2019, the plaintiffs filed a further amended notice of civil claim adding the corporate plaintiff. In June 2020, the

plaintiffs applied to amend the notice of civil claim alleging additional facts relating to Hean Wylie, resulting in the third amended notice of civil claim.

- [84] The default judgment against Hean Wylie was set aside by order of Justice Skolrood (as he then was) on March 30, 2022.
- [85] Hean Wylie brought an application to strike after which the plaintiffs acknowledged the claim was not adequately pleaded. The plaintiffs proposed these amendments to address problems they acknowledged with the third amended notice of civil claim, to add Mr. Peach, and to add the claims and causes of action I have described above. However, the plaintiffs have not proposed any amendments to address the shortcomings identified by Hean Wylie in response to the application to amend, including pleading material facts that support the elements of the cause of action.
- [86] In *Kindylides*, the Court of Appeal upheld the exercise of discretion to strike a claim without allowing for the possibility to amend where the plaintiff did not propose amendments but rather made submissions consistent with the position that the notice of civil claim did not need to be amended.
- [87] In this case, the matter before the Court is not an application to strike, it is an application to amend. The amendments sought will result in the fourth amended notice of civil claim. However, *Kindylides* is an apt precedent because of the background to these proposed amendments which includes that they were made in the face of an application to strike the latest of a series of amended claims and which still does not cure significant problems with the notice of civil claim.
- [88] The plaintiffs submit that the Court must take into account that the original notice of civil claim was filed when the plaintiffs were self-represented. Counsel asserts that the amended notice of civil claim was filed by counsel but under significant time pressures. Those circumstances provide some leniency for those two iterations of the notice of civil claim. However, the plaintiffs have filed two versions since then (the second and third amended notices of civil claim). This proposed fourth amended notice of civil claim is the fifth version. Counsel for the plaintiffs has conceded that the third amended notice of civil claim does not properly particularize the claim against Hean Wylie and so he seeks these amendments to do that and to add Mr. Peach. The circumstances of these proposed amendments, that the claim as currently pleaded is deficient, coupled with the finding that these proposed amendments will not result in an adequately pled claim, weighs against allowing these amendments and further amendments.
- [89] Some of the problems, like those identified pertaining to conspiracy, could be readily addressed. The fact that they could be readily addressed means that they are obvious problems. This leads to the conclusion that either the material facts cannot be pled because the plaintiffs do not seek to prove them, or the plaintiffs are unable to articulate a comprehensible claim that gives the defendants notice of the claims they must meet.

- [90] Notwithstanding that the proposed fourth amended notice of civil claim is proposed, in part, in response to an application to strike, the pleading has several problems with clarity, some of which are longstanding. One problem is that there are two plaintiffs, two defendants, and one defendant sought to be added, but in some parts of the pleading, it is not possible to know which plaintiff is being referred to and which defendants are being referred to. Some of these problems may have arisen from the amendment that added the corporate plaintiff. For example, at para. 5 under legal basis, the pleading refers to the Plaintiff Estate, a readily identifiable reference to the plaintiff named as the Estate of William James Testar. Later in that paragraph, the pleading refers to the "loss of the Plaintiff's property" without referring to which plaintiff. Later in the same paragraph, the proposed pleading is that "Peach, Hean Wylie, and Leslie's loss of Plaintiff's property also caused losses to the Plaintiffs by improperly depriving them of their property". This pleading cannot be confidently understood.
- [91] In addition, in the current pleading and the proposed amendments, in most cases, all the pleas are made by both plaintiffs, or appear to be because no specific plaintiff makes the pleas. That is so even though they are different entities with different interests and entitlements.
- [92] The para. 5 example above shows that the problem goes beyond understanding which party is being referred to. What property of which plaintiff was lost? While one could infer that the pleading is referring to the 1988 will or the 1992 will and so referring to the property of the Testar Estate, how did loss of that property cause loss to both plaintiffs? This causes the reader to wonder if there is other unidentified property lost especially since the pleading, at the same paragraph, refers to property including the 1988 will, the late Mr. Testar's Hean Wylie file, and the 1992 will. The word "including" suggests that there is property referred to other than the three pieces of property specifically identified.
- [93] The use of imprecise or confusing language and structure is throughout the pleading. In order to be a pleading that provides notice to the defendants of the case they have to meet and defines the issues to be addressed at trial, it will have to be completely re-written to address the types of problems I have just described.
- [94] The problems with not clearly setting out the elements of each cause of action and the material facts in support of those elements will also require a thorough re-writing of the pleading. It is not a matter of simply adding material facts. The lack of material facts is emblematic of greater problem of a pleading that does not address each cause of action element by element with supporting material facts. I conclude these are not problems that can be readily addressed.
- [95] There is no explanation for why the claims against Hean Wylie were not properly pled in iterations of the notice of civil claim filed after the first amendments. There is no acknowledgement of the problems with the notice of civil claim that persist.

- [96] With regard to the merits of the claim, the matter is hard to assess given the content of the pleadings. One can certainly understand how the family members of a deceased person who was incapacitated by the time he passed away are concerned that wills he made were allegedly not kept safe by the lawyers and law firms that made them. One can understand that once the family discovered that he wanted to hold on to a valuable piece of property, the question of how he came to dispose of it, at a time he is alleged to have been incapacitated, raises concerns. However, there is no obvious relationship between the loss of the wills and the disposition of any of the properties except that at the time of the 1988 will, Mr. Testar did not want to sell it, did not want it sold on his death, and so advised Mr. Peach. Other than this factual relationship, separated in time by six years from the sale, the pleading consists of a series of allegations that are not tied to a cohesive and comprehensible legal claim because of failure to plead the elements of the causes of action and the material facts. The shortcomings in the pleadings make it impossible to make any sort of assessment of the merits.
- [97] With regard to prejudice, if these amendments are not allowed, the claims against Hean Wylie will not be broadened to include the new causes of action. As described below, the application to add Mr. Peach will fail because the proposed pleadings fail to disclose a cause of action against him. This appears to be significant prejudice. However, I note that the failure to identify a loss in relation to the negligence claim and the breach of contract claim ameliorates the prejudice to be considered. The real prejudice relates to the alleged loss of the Cassie Property through what amounts to a pleading that it never ought to have been sold. That claim is made against Mr. Leslie and so the claim will not be lost completely, but the ability to pursue it in the manner sought in the proposed fourth amended civil claim will be lost.
- [98] Considering the number of amendments, the lack of explanation for addressing problems in serial amendments, the ongoing problems with the notice of civil claim as drafted and the proposed amendments, there can be no confidence that the plaintiffs will make amendments that address these problems. Despite the prejudice that I have described, I am of the view that the application to amend should be dismissed without leave to re-apply to amend.

Application to Add the Peach Estate

- [1] Rule 6-2(7) provides:
- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
- (b) order that a person be added or substituted as a party if

- (i) that person ought to have been joined as a party, or
- (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

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

- [2] Rule 6-2(7)(b) has narrower application than R. 6-7(c). It has been interpreted as being concerned with remedying defects in the proceedings: *Madadi v. Nichols*, 2021 BCCA 10 at para. 21. An applicant must establish either that the proposed party "ought to have been joined as a party" or that their "participation in the proceeding is necessary": *Madadi* at para. 21, citing *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 16-17; *Alexis v. Duncan*, 2015 BCCA 135 at para. 15; and *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69 at para. 36.
- [3] Rule 6-2(7)(c) has been interpreted to have broader application and a low threshold: an applicant need only establish that there is a question or issue between the applicant and the proposed party that relates to or is connected with the relief, remedy, or subject matter of the proceeding: *Madadi* at para. 22. This threshold is satisfied where the court finds that there is a real issue between the parties that is not frivolous, or that an applicant plaintiff has a possible cause of action against a proposed defendant: *Madadi* at para. 22, citing *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45; *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578; and *MacMillan Bloedel Ltd. v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.).
- [4] This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: *Neilson Architects* at para. 45, citing *Acastina* and *Binstead*.
- [5] Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether a plaintiff applicant has a possible cause of action against the proposed defendant. The pleadings must set out material facts sufficient to establish a real and not frivolous issue between the plaintiff and the proposed defendant: *Madadi* at para. 23, citing *Neilson Architects* at paras. 60, 62, and 75. The merits are not examined other than to ensure that the pleading raises a legal issue in relation to the proposed party that is supported by sufficient material facts: *Madadi* at para. 45.

- [6] The pleadings must also include material facts relating to the proposed parties and the claim. Although pleadings may be general, "they must be specific enough to show on what grounds the proposed defendant is being sued": *Forde v. Interior Health Authority*, 2007 BCSC 1706 at para. 15. The court in *Forde* said, at para. 16:

it is inappropriate to lump defendants together and make blanket allegations against them, unless those defendants were in an identical relationship to the plaintiff. Standard or "boilerplate" allegations in a statement of claim will often not satisfy the requirements under the first stage of the Rule 15(5)(a)(iii) test.

- [7] If the threshold is met, the court must determine whether it would be just and convenient to decide the issue between the parties in the proceeding. This requires the court to exercise discretion judicially in accordance with the guidelines established in the authorities and the evidence: *Madadi* at para. 25.
- [8] In this case, the threshold test has not been satisfied because, for the reasons given above, the proposed fourth amended notice of civil claim does not set out the elements of the causes of action (except conspiracy) or the material facts relating to the causes of action. The failure to plead material facts relates to the proposed conspiracy pleading, as do the other failures in relation to the conspiracy pleading that I have identified above.

Disposition

- [9] The application to add Mr. Peach as a defendant is dismissed. The application to amend the pleadings in relation to claims against Mr. Peach and Hean Wyle is dismissed.
- [10] Mr. Leslie did not take a position on the application. The proposed pleadings pertaining to Mr. Peach and Hean Wyle are, in many instances, interwoven with the proposed amendments pertaining to Mr. Leslie. The proposed amendments are not allowed in their current form. I dismiss the application to amend the pleadings with leave to reapply to amend in relation to the claims pertaining to Mr. Leslie.

"Matthews J."

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