

CANADA / JUDGMENT

Wilkinson v. Chartier

2025 BCCA 53

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 53 Wilkinson v. Chartier

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Wilkinson v. Chartier,

2025 BCCA 53

Date: 20250225

Docket: CA48554

Between:

Diane Ruby Wilkinson on behalf of the

Estate of Ruby Elizabeth Johnston Whiffin and Diane Ruby Wilkinson

Appellants

(Plaintiffs)

And

Elaine Janet Whiffin Chartier and the

Estate of Ruby Elizabeth Johnston Whiffin

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Horsman

The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated
August 18, 2022 (Chartier v. Chartier, 2022 BCSC 2155, Victoria Docket S195449).

Counsel for the Appellants:

J.M. Hutchison, K.C.

Counsel for the Respondents:

G.T. Palm

D. Hunter

Place and Date of Hearing:

Vancouver, British Columbia

December 4, 2024

Place and Date of Judgment:

Vancouver, British Columbia

February 25, 2025

Written Reasons by:

The Honourable Madam Justice Horsman

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Justice Edelmann

Summary:

The appellant appeals the chambers judge's order, issued after a summary judgment application, dismissing her trust claims as statute-barred under the Limitation Act. Held: Appeal allowed. The judge erred in law by weighing the evidence, which is not permissible on a summary judgment application. He also erred by applying the wrong test for the discovery of a claim. Section 12 of the Limitation Act applies to trust claims, and the relevant question under s. 12 was the appellant's actual knowledge of the alleged wrongful acts, not whether she could have drawn a plausible inference of liability from facts she knew or ought to have known.

Reasons for Judgment of the Honourable Madam Justice Horsman:

- [1] This appeal is from the decision of a chambers judge granting summary judgment to the respondent on certain claims advanced by the appellant in a proceeding brought under s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. The judge held that trust claims pertaining to the transfer of property to the respondent Elaine Chartier were statute-barred under the Limitation Act, S.B.C. 2012, c. 13.
- [2] Elaine Chartier and Diane Wilkinson are sisters. For ease of reference, I will follow the parties' lead and refer to them by their first names. Their mother, Ruby Elizabeth Johnston Whiffin ("Ruby") died in January 2017. Following Ruby's death, Diane discovered that she had changed her will to leave substantially all of her estate to Elaine, and also named Elaine as her executrix. During her lifetime, Ruby also transferred the main asset of the estate, the family home, to Elaine.
- [3] Diane was granted leave under s. 151 of WESA to commence a proceeding on behalf of Ruby's estate challenging the transfer of property to Elaine. The proceeding also included claims by Diane in her personal capacity challenging the validity of the will, or alternatively seeking to vary it and to remove Elaine as executrix. The chambers judge did not dismiss Diane's personal claims, and they are not in issue on this appeal.
- [4] Before the chambers judge, Diane alleged that her mother did not intend to transfer beneficial ownership of the property to Elaine, but rather intended it to stay in the estate. Alternatively, she alleged that Elaine exercised undue influence over her mother and that her mother lacked capacity to execute the transfer.
- [5] The judge concluded that by March 2017, Diane could have drawn a plausible inference of liability on the part of Elaine in relation to the transfer of the family home based on what he characterized as "the incontrovertible facts" that Diane knew or ought to have known: *Chartier v. Chartier*, 2022 BCSC 2155 at para. 26 [Reasons]. On appeal, Diane argues that his analysis reflects various errors of fact and law.
- [6] For the reasons that follow, I would allow the appeal. In my view, the judge erred in law by weighing the evidence, which is not permissible on an application for summary judgment under R. 9-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR]. He also erred in applying the wrong test for the discovery of a claim. As the claims brought on behalf of the estate were trust claims, s. 12 of the Limitation Act applied. The relevant question under s. 12 was Diane's actual knowledge of Elaine's allegedly wrongful acts, not whether she could have drawn a plausible inference of liability based on facts she knew or ought to have known. On the record before the judge, it could not be said that the trust claims were bound to fail because they were time-barred.

Background facts

The transfer of the family residence and execution of a new will

- [7] Ruby died on January 12, 2017, leaving a last will and testament dated February 12, 2010. Ruby was predeceased by her husband, Ronald George Whiffin ("Ronald") and her son James Allen Whiffin ("James"). Elaine and Diane are Ruby and Ronald's only surviving children.
- [8] Ruby and Ronald lived in a house in Burnaby, which they owned as joint tenants (the "Family Residence"). Ronald died in 1994. A few months prior to his death, Elaine moved into the Family Residence. At some later point, Elaine's children also began living in the Family Residence. When Ronald died, his interest in the Family Residence transferred to Ruby as the surviving joint tenant. She became the sole registered owner.
- [9] Until his death in December 2009, Ruby's son James handled her financial affairs and was granted power of attorney. James assisted Ruby in making a will, which she executed on October 12, 2006 (the "First Will"). The First Will named James as the executor, and James' son as alternate executor. It divided her estate equally between her children, or grandchildren in the event that Ruby was predeceased by any of her children.
- [10] After James died, Elaine took over responsibility for the management of Ruby's affairs, and replaced James under the power of attorney.
- [11] In 2013, Ruby suffered a stroke. Thereafter, her physical and mental health sharply declined. In October 2013, Ruby executed a document transferring title in the Family Residence to Elaine. Elaine did not file this document with the Land Title Office until May 2015.
- [12] In November 2014, Diane obtained a title search of the Family Property that showed Ruby was the registered owner.
- [13] In mid-2015, Ruby moved into a care home, where she remained until she died.
- [14] In January 2016, Diane obtained another title search, which indicated that the Family Residence was then registered in Elaine's name.
- [15] Ruby died on January 12, 2017. Shortly after Ruby's death, Diane obtained a further title search of the Family Residence, which confirmed that it was registered in Elaine's name.
- [16] In early March 2017, Diane received a letter from a lawyer advising her that she was a beneficiary under Ruby's will, a copy of which was enclosed with the letter, and that she had been bequeathed some jewelry. This will had been executed by Ruby on February 12, 2010 (the "Second Will"). The Second Will named Elaine as the executrix, and bequeathed Ruby's entire estate to her, other than the jewelry left to Diane and a model airplane left to James' son. Diane was unaware of the existence of the Second Will until receiving the letter from the lawyer.
- [17] After receiving the letter and a copy of the Second Will, Diane asked Elaine for an explanation concerning the estate and for an accounting. She received no response to these inquiries.

[18] In March 2017, Diane also obtained a copy of a property transfer document from the New Westminster Land Title Office, which indicated that the Family Residence had been transferred to Elaine for the nominal consideration of one dollar.

[19] Diane subsequently retained counsel, Mr. Hutchison. On April 8, 2019, Mr. Hutchison wrote to Elaine raising concerns about the Second Will, the manner in which title to the Family Residence was transferred to Elaine, and Elaine's performance of her duties as executrix. The letter stated:

If you do not take immediate steps to address the matters raised in my letter, my client reserves the right to commence proceedings including your removal as Executrix and otherwise to seek the intervention of the Supreme Court of British Columbia with respect to these matters. In light of the significant conflicts, you may wish to give consideration to surrendering your authority to as Executrix and thus permitting another family member to step into the role of Executor and Trustee to enable an orderly consideration of the matters which are discussed in this correspondence. I urge you to take appropriate legal advice at the earliest opportunity.

[20] On April 23, 2019, Mr. Hutchison received an email from a lawyer, Mr. Yusep, stating that he had been retained by Elaine and would respond to the April 8, 2019 letter to her. However, no response to the letter was ever provided.

The commencement of the action

[21] On October 25, 2019, Diane filed a petition seeking leave to bring an action pursuant to s. 151 of the WESA. She served the petition and supporting affidavits on Elaine. Elaine did not file a response, and did not appear at the hearing of the petition. By order issued December 5, 2019, Johnston J. granted Diane leave to commence the action.

[22] Diane filed her notice of civil claim on December 6, 2019. She advanced claims both on her own behalf and on behalf of Ruby's estate. In her personal capacity, Diane challenged the validity of the Second Will on the basis that Ruby did not have testamentary capacity. Alternatively, if the Second Will was valid, she sought an order varying the Second Will and removing Elaine as executrix. These claims are not in issue on this appeal.

[23] On behalf of Ruby's estate, Diane alleges that Elaine holds the Family Residence in trust for the estate. While this is not obvious from the pleadings, it is common ground that Diane alleges two forms of trust claim. First, she says that Ruby did not intend to gift the Family Residence to Elaine, and because there was no consideration for the transfer there is a presumption that Elaine holds the property on a resulting trust for the estate. Second, and in the alternative, Diane maintains that a trust arose as a matter of law because the transfer of the Family Residence to Elaine was procured by undue influence and that Ruby did not have the necessary mental capacity to make the transfer. In relation to these claims, Diane seeks the following relief in Part 2 of the Notice of Civil Claim:

1. An order declaring that the family residence is held in trust for Ruby's estate.

2. Alternatively, an order declaring that the transfer of the title to the family residence is invalid by reason of undue influence of Elaine upon Ruby and vesting title to the family residence in the estate.

[]

4. An order that Elaine account to the estate for all proceeds of the borrowing secured by the mortgage she granted against title to the family residence.
5. An order that Elaine pay occupational rent to the estate from June 2015 for her occupation of the family residence.
6. An order that Elaine pay to the estate all liability for deferred property taxes in respect of the family residence as a result of the Land Tax Deferment Agreement she entered into and secured against title to the family residence.

[24] In her amended response to civil claim, filed March 16, 2020, Elaine pleads that the Second Will was prepared at Ruby's initiative, that Ruby transferred the Family Residence to Elaine to compensate her for her support or as a gift, and that Ruby possessed the necessary mental capacity to execute the transfer of property and the Second Will.

Elaine's application for summary judgment

[25] On October 4, 2021, Elaine filed a notice of application seeking an order summarily dismissing the relief sought in paragraphs 1, 2, 4, 5 and 6 of Part 2 of the notice of civil claim pursuant to Rule 9-6 of the SCCR. She argued that, in light of the facts known to Diane at the relevant times, her claims related to the transfer of the Family Residence had no chance of success because they were time-barred under the Limitation Act.

[26] Elaine did not personally provide evidence in support of this application. Instead, she relied on the affidavit of a legal assistant that appended various documents, including transcript excerpts from Diane's examination for discovery. By way of summary, Diane's examination for discovery evidence included the following points:

- Diane had concerns about Elaine from the time she moved in with Ruby and Ronald because she took money from her parents;
- Diane did not trust Elaine because when Elaine obtained the power of attorney for Ruby in 2010, she stated that she was trustworthy, yet at the same time would not share any of Ruby's financial information;
- Diane carried out the title searches on the Family Residence in 2014, 2016, and 2017 because she had suspicions about Elaine;
- her suspicions arose from what she was told by James, who lived closer to Ruby than Diane did;

- the 2016 title search--showing that Elaine was the registered owner of the Family Residence--confirmed Diane's suspicions; and

- between 2010 and 2017, Diane observed a decline in Ruby's physical and cognitive abilities.

[27] Diane relied on two affidavits: (1) the affidavit she swore for the petition seeking leave to bring the action; and (2) a second affidavit that she swore for the summary judgment application, which appended other transcript excerpts from her examination for discovery. Diane's affidavit evidence, again in summary form, included these points:

- The discovery of what transpired with respect to Ruby's assets and estate had been stressful for Diane, and she was nervous at the time of her examination for discovery;

- Diane did not answer the questions asked of her in her examination for discovery as fully or fairly as she had done in her affidavit;

- Ruby never indicated to Diane that she felt she was being taken advantage of, only that the presence of Elaine and her children in the Family Residence was a burden to her;

- Diane had never witnessed Elaine threaten or abuse Ruby, and had never been told by anyone else that they had witnessed such behaviour;

- Ruby did not complain to Diane about the way she was treated by Elaine;

- Diane believed that Elaine was taking advantage of Ruby only in the sense that she was benefitting from Ruby's indulgences, not that she would attempt to influence Ruby to give her estate assets to the exclusion of the other family members;

- Diane agreed to Elaine acting as power of attorney for Ruby after James' death because Diane had just moved to Victoria and she accepted Elaine's assurance that she could be trusted;

- Diane was not surprised when the 2016 title search showed that the Family Residence had been transferred into Elaine's name because she was aware, through her work as a realtor, that it is a common practice for some families to have property transferred from elderly parents to their children before their death to avoid probate; and

- Until Elaine failed to respond to the April 8, 2019 letter from Diane's counsel, Diane continued to believe that the Family Residence would properly fall within the estate.

The chambers judgment

[28] The chambers judge first set out the principles that govern an application for summary judgment under R. 9-6, relying on *Beach Estate v. Beach*, 2019 BCCA 277 and *Robinson v. Kuypers*, 2020 BCSC 770. As set out in *Beach*, a defendant can succeed on a R. 9-6 application by showing the case pleaded by the plaintiff is unsound, or by adducing evidence that gives a complete answer to the claim. Where "the plaintiff submits evidence contradicting the defendant's evidence in some material respect", the application for summary judgment must be dismissed: *Reasons* at para. 16, quoting *Beach* at para. 48. The ultimate question is

whether there is a genuine issue for trial.

- [29] The judge then set out the relevant provisions of the Limitation Act, including the general two-year limitation period in s. 6(1). He noted that s. 12 of the Limitation Act contains specific provisions that apply to the discovery of fraud and trust claims, and he quoted these provisions.
- [30] In his analysis, the judge first addressed Diane's submission that the relief sought in paragraph 1 of Part 2 of the notice of civil claim--a declaration that the Family Residence is held in trust for Ruby's estate--was not governed by the Limitation Act. This argument was based on s. 2(1)(d) of the Limitation Act, which provides that the Act does not apply to "a court proceeding in which the only relief sought is to obtain a declaration". The judge rejected this argument. He found that s. 2(1)(d) of the Limitation Act did not apply where the declaratory relief is merely ancillary to consequential relief which is statute-barred. The judge noted that in this case, if the Court were to make the declaration of trust, Diane would still need the Court's assistance to enforce the declaration if Elaine did not return title in the Family Residence to Ruby's estate.
- [31] Having found that the Limitation Act applied to the relief in issue, the judge turned to address what he characterized as the "two critical questions to answer" (at para. 23):
- a) What incontrovertible material facts did Diane know or ought she have known and when did she know them?; and
 - b) Could Diane have drawn a plausible inference of liability on Elaine's part based on the incontrovertible facts which she, Diane, had or ought to have had knowledge of?
- [32] The judge answered these questions in the following paragraphs:
- [25] I have reviewed all of the evidence presented on this application and I am satisfied that:
- a) Diane knew that dating back to the 1990s, Ruby was reliant on others, like her husband, Ronald, and then her son, James, for the management of her financial affairs;
 - b) Since the time Elaine moved into the Family Residence in or around 1994, Diane was suspicious of Elaine's motives and her concerns about Elaine continued to grow as Elaine became more involved in the management of her parents' finances, especially Ruby's;
 - c) Diane knew that following James' death in 2009, Elaine took on the responsibility of managing Ruby's financial affairs;
 - d) Shortly before James' death in 2009, Diane began to notice clear signs indicating a decline in Ruby's cognitive abilities and that those abilities declined even further and quicker after James had died;
 - e) Diane knew there was a dramatic reduction in Ruby's cognitive functioning, especially her memory, after the stroke she suffered in 2013;

- f) Because of her immense distrust of Elaine and her suspicion that she might transfer the Family Residence into her name, in 2014 Diane obtained a title search for the property and confirmed that it was still registered in Ruby's name;
- g) On or about 4 January 2016, with her distrust of Elaine undiminished, Diane again had a title search conducted on the Family Residence. It was at this point that she became aware that title to the property had been transferred into Elaine's name;
- h) A year later, in February 2017, Diane obtained a third title search on the Family Residence, again confirming that it was registered solely in Elaine's name;
- i) In early March 2017, Diane's counsel obtained a transfer document from the Land Title Office, which indicated that the Family Residence had been transferred to Elaine for the nominal consideration of one dollar; and
- j) In early March 2017, Diane obtained a copy of the Will and became aware of its contents, including that Elaine was named as the principal beneficiary. It was around this time that Diane sought legal advice relating to her options vis-à-vis her mother's estate and the property in question.

[26] Based upon these incontrovertible facts, facts that I am satisfied Diane had actual knowledge of, I conclude that she could have drawn a very plausible inference of liability on the part of Elaine by early 2017.

[Emphasis added.]

[33] The judge concluded that "given Diane's knowledge of these facts and the strong suspicions she had of Elaine's motives", Diane discovered the potential claims against Elaine "no later than early March 2017": Reasons at para. 27. In other words, he found that by March 2017 at the latest, Diane "actually knew that it was plausible that Elaine had improperly received the Family Residence from Ruby": Reasons at para. 30. Given that Diane did not seek leave to file the present action until October 2019, and did not file her notice of civil claim until December 2019, the judge found the claims in issue were commenced outside of the limitation period. The judge dismissed the claims in paragraphs 1, 2, 4, 5 and 6 of Part 2 of the notice of civil claim.

On appeal

[34] On appeal, Diane alleges the following errors:

- (1) the judge erred in law in dismissing the claims under R. 9-6 by weighing evidence;
- (2) the judge erred in fact and law by determining that the limitation period started to run against her in March 2017; and
- (3) the judge erred in law by finding that the trust declaration Diane sought was subject to the Limitation Act.

[35] As noted, in my view the judge erred in his approach to the evidence on a summary judgment application, specifically by making findings about Diane's state of knowledge that were inconsistent with much of the evidence. He also erred in failing to apply the discovery rule set out in s. 12(2) of the Limitation Act, which the parties agree governed the claims. Given that these errors are sufficient to dispose of the appeal, I find it unnecessary to address the third ground of appeal.

Standard of review

[36] On a summary judgment application, a judge's decision of whether there is a genuine issue for trial is a matter of mixed fact and law. Unless the appellant establishes an extricable question of law, the standard of review is palpable and overriding error: *Lyons v. Canadian Imperial Bank of Commerce*, 2025 BCCA 22 at para. 12.

Discussion

The first ground of appeal: the judge's approach to the evidence

[37] The constraints on a judge in granting summary judgment are well-established. As explained by this Court in *Beach* at paragraph 65, in order to grant summary judgment, a judge must be satisfied "beyond a reasonable doubt" that there is "no genuine issue" for trial. The "beyond a reasonable doubt" standard sets a high bar. Although a court may consider evidence on a summary judgment application, a judge is not permitted to weigh the evidence beyond determining whether the evidence is incontrovertible: *Beach* at para. 49. If a judge ruling on a R. 9-6 application must assess and weigh the evidence in order to grant summary judgment, the "plain and obvious" or "beyond a doubt" test is not met: *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 12.

[38] In the present case, the "incontrovertible material facts" listed by the judge in the Reasons overlook the nuances and inconsistencies in the evidence as to Diane's state of knowledge at the relevant time. By way of example, the list includes this (at para. 25):

b) Since the time Elaine moved into the Family Residence in or around 1994, Diane was suspicious of Elaine's motives and her concerns about Elaine continued to grow as Elaine became more involved in the management of her parents' finances, especially Ruby's;

[39] However, the evidence on this point was not incontrovertible. In her sworn evidence on the summary judgment application, Diane stated that she believed Elaine was taking advantage of Ruby only in the sense that she was benefitting from her mother's indulgences. Diane's evidence was that although she was in frequent contact with her mother, Ruby never expressed concern to her about the manner in which Elaine was managing her finances. Specifically, Diane deposed:

27. Until after my mother died, I had no concern that my sister, [Elaine], would attempt to influence my mother or attempt to obtain for herself, to the exclusion of other family members the assets that would be my mother's estate, and in particular, the [Family Residence].

[40] The judge also listed the following as an incontrovertible fact:

f) Because of her immense distrust of Elaine and her suspicion that she might transfer the Family Residence into her name, in 2014 Diane obtained a title search for the property and confirmed that it was still registered in Ruby's name;

[41] The judge's description of Diane's "immense distrust" of Elaine as the motivator for the title search is not an incontrovertible fact, but rather the judge's interpretation of the evidence. Further, it is an interpretation that implicitly rejects contrary evidence from Diane. Diane's evidence disclosed a reluctant but nevertheless genuine desire to trust Elaine with a power of attorney based on Elaine's assertions that she could be trusted. Diane stated that she had suspicions about Elaine, but had no concern, prior to her mother's death, that she would try to obtain assets in Ruby's estate to the exclusion of other family members. Diane gave the following sworn evidence about her motives for the property searches, and her understanding of the significance of what they disclosed, in her affidavit:

28. As I was a realtor, at the time, it was easy for me in 2014, as I did, through my Realty office in Victoria to obtain a search of the title to the [Family Residence], which at that time I saw remained in my mother's name as I had understood it had been shortly after my father's death. I conducted that search in part out of curiosity and in part to satisfy myself that my sister had not taken any improper steps.

29. As a realtor, I was familiar with a relatively common practice on the part of some families to have property transferred from elderly parents to their children, specifically to simplify and avoid probate in order to deal with the transfer of such property after the death of the parents.

30. In 2016, I was not surprised when I conducted a further title search on the [Family Residence] to see that it had been transferred into my sister's name. I thought that to be consistent with the practice I had seen as a realtor, and that the property would ultimately pass into the hands of the beneficiaries of my mother's estate.

[42] This sworn evidence was overlooked by the judge, and is inconsistent with his list of incontrovertible facts.

[43] Elaine argues that Diane's alleged lack of knowledge of the fact that the transfer of the Family Residence into Elaine's name meant the property was no longer an asset of the estate is not a material fact. Elaine says that the material fact is the transfer itself, and that Diane's subjective understanding of its consequences is irrelevant. I am not persuaded by this argument.

- [44] In addressing this point, it is necessary to consider the nature of Diane's claims as they relate to the Family Residence. Diane's first position is that Elaine holds the Family Residence in trust for the estate because it was transferred without consideration, and that Ruby did not intend to gift the property to Elaine but rather intended it to remain in the estate. In the alternative, Diane says the transfer was procured by Elaine's undue influence over Ruby. Under either theory, Diane's state of knowledge of the circumstances of the transfer--including her knowledge of Elaine's motives--is relevant to the limitation defence. This is particularly so given that Diane's claims in relation to the Family Residence are governed by the specific discovery rules in s. 12 of the Limitation Act. I will return to this point in addressing the second ground of appeal.
- [45] The judge correctly considered Diane's state of knowledge about the circumstances of the transfer to be relevant because his list of incontrovertible material facts is premised on his characterization of Diane's state of knowledge. The list of facts in paragraph 25 of the Reasons refers to Diane's "concerns" and "suspicions" about Elaine's management of Ruby's finances, to her "immense distrust" of Elaine, and to her suspicion that Elaine would influence Ruby to transfer the Family Residence into Elaine's name. However, as I have explained, the judge's description of the facts must necessarily have involved an assessment and weighing of the evidence because his description overlooks directly contrary evidence.
- [46] Elaine further emphasizes that the inconsistent evidence that Diane highlights amounts to an inconsistency between Diane's own examination for discovery and affidavit evidence. Elaine argues that such an inconsistency cannot be a basis for defeating a summary judgment application or parties would be incentivized to "swear incomplete, confusing, contradictory, or obfuscatory affidavits in order to immunize themselves from summary judgment". I am also not persuaded by this argument. It is fundamentally an argument about Diane's credibility, which cannot be addressed on an application for summary judgment.
- [47] Diane has not engaged in any apparent subterfuge. The affidavit she swore for the summary judgment application provided additional context to the evidence she gave on her examination for discovery, and attempted to explain why her evidence may not have been as precise as it could have been. The determination of whether Diane's evidence is internally inconsistent, and, if so, whether that affects her credibility is a question for trial, not for a summary judgment application. It is an error for a judge to reject the sworn evidence of a party on a summary judgment application on the basis that it is inconsistent with their examination for discovery evidence and therefore not credible: *Nourifard v. Emadzadeh*, 2024 BCCA 240 at paras. 72-73.
- [48] In order to consider the full impact of the judge's error in weighing the evidence, it is necessary to address the second ground of appeal, which includes the question of whether the judge erred in applying the wrong test for the discovery of a claim.

The second ground of appeal: discovery of the claim

- [49] It is common ground on this appeal that the discovery rules in s. 12 of the Limitation Act apply to the claims that were dismissed on the summary judgment application. Section 12 applies to a "fraud or trust claim", which is defined to include a "claim to recover from a trustee trust property, or the proceeds from the trust property". As noted, Diane alleges that: (1) Elaine holds the Family Residence in trust because Ruby intended beneficial ownership to remain with her estate; or (2) alternatively, the transfer was void when it was made because of Ruby's lack of capacity or Elaine's undue influence on Ruby. If the transfer was void when it was made because of a lack of capacity or undue influence, then the law would impose a trust obligation on Elaine: *Ewart v. Abrahams*, 22 B.C.L.R. (2d) 138, 1988 CanLII 2945 (C.A.) at 142.
- [50] The particular discovery rules that apply to fraud and trust claims are set out in s. 12(2) of the Limitation Act:
- (2) A fraud or trust claim is discovered when the beneficiary becomes fully aware
 - (a) that injury, loss or damage had occurred,
 - (b) that the injury, loss or damage was caused by or contributed to by the
 - (i) fraud,
 - (ii) fraudulent breach of trust,
 - (iii) conversion, or
 - (iv) other act or omissionon which the claim is based,
 - (c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and
 - (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.
- [51] Thus, the limitation period for a breach of trust claim runs from when the beneficiary becomes "fully aware" of the facts set out in s. 12(2)(a)-(c), and is also fully aware that a court proceeding would be an appropriate means to seek to remedy the loss: *Nourifard* at para. 26. Section 12(3) of the Limitation Act provides that for the purpose of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.
- [52] The chambers judge quoted s. 12 of the Limitation Act, but he did not apply these special discovery rules. Instead, the judge stated that the question to be answered was whether Diane could have drawn a "plausible inference of liability" on Elaine's part, based on facts that she knew or ought to have known: *Reasons* at paras. 24, 26. It appears that the judge drew this language from the decision of the Supreme Court of Canada in *Grant Thornton*

LLP v. New Brunswick, 2021 SCC 31 [Grant Thornton]. However, Grant Thornton was concerned with the general discovery rule in s. 5 of the New Brunswick Limitation of Actions Act, S.N.B. 2009, c. L-8.5, which is similar in scope to s. 8 of B.C.'s Limitation Act.

- [53] Grant Thornton has been applied in this jurisdiction where the issue is one of the general discovery rules under s. 8 of the Limitation Act: *Rooney v. Galloway*, 2024 BCCA 8 at paras. 193-199, leave to appeal to SCC ref'd [2024] S.C.C.A. No. 83. The respondent has cited no case in which a court in this Province has applied the Grant Thornton test where the question is whether a claim has been discovered under s. 12. On the contrary, a number of Supreme Court judgments have specifically distinguished the discovery standard in s. 12(2) of the Limitation Act from the general rule in s. 8: *Hunter v. Leblond*, 2024 BCSC 846 at para. 154; *Ali v. Ali*, 2022 BCSC 1022 at para. 21; *Maussion v. Maussion*, 2021 BCSC 530 at para. 23.
- [54] Section 12(2) requires actual, not constructive, knowledge on the part of the plaintiff before the limitation period begins to run. The relevant question under s. 12(2) is not when Diane could have drawn a plausible inference of liability based on facts she knew or ought to have known. The question is when she became fully aware of the facts set out in s. 12(2)(a)-(c), and fully aware that a court proceeding was an appropriate means to seek to remedy the loss. The judge did not ask this question. If he had asked this question, in my view he could not have concluded it was beyond doubt that by March 2017 Diane had actual knowledge that: (1) Elaine was asserting an interest in the Family Residence that was inconsistent with a trust; or (2) alternatively, that Elaine had exercised undue influence over Ruby or that Ruby lacked capacity. The evidence supporting these conclusions was not incontrovertible. For instance, one view of the evidence was that Diane had suspicions, but that she required more information from the respondent in order to gain awareness of the circumstances. While there may be other inferences that could be drawn from the evidence, it was not for the judge to weigh the evidence on the summary judgment application.
- [55] Accordingly, I conclude that the judge made interrelated legal errors in engaging in a weighing of the evidence and in failing to apply the more stringent standard for discovery under s. 12(2) of the Limitation Act. Based on the record, it cannot be said that Diane's claims in relation to the Family Residence are bound to fail because they are time-barred.

Disposition

- [56] I would allow the appeal and set aside the order of the judge summarily dismissing the claims.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Edelmann"

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