

CANADA / JUDGMENT

Wilson v. Koch

2023 BCSC 549

COURT

Supreme Court of British Columbia

DECIDED

9 March 2023

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2023 BCSC 549 Wilson v. Koch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wilson v. Koch,

2023 BCSC 549

Date: 20230309

Docket: S212996

Registry: Vancouver

Between:

Matthew Timothy Wilson

Plaintiff

And

Doreen Koch, Colin Jenkins (deceased) aka Collin Jenkins,

Woody Kuroaka, and Century 21 Executives Realty Ltd.

Defendants

And

Colin Jenkins (deceased) aka Collin Jenkins,

Woody Kuroaka, Steven Tate and

Century 21 Executives Realty Ltd.

Third Parties

Before: The Honourable Madam Justice Hardwick

(via videoconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

N.A. Rayan

Counsel for D. Koch:

J.D. Keeley

Counsel for W. Kuroaka, S. Tate and Century 21 Executives Realty Ltd.:

S. Gladders

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 7-9, 2023

Place and Date of Judgment:

Kelowna, B.C.

March 9, 2023

- [1] THE COURT: These are my oral reasons for judgment on the preliminary issue of suitability for summary determination, pursuant to R. 9-7 of the Supreme Court Civil Rules. These are oral reasons for judgment, which will be briefer than I might have otherwise delivered, for two specific reasons:
- a) I have heard over two days of submissions from counsel already, and if I conclude the matter is suitable for summary determination, there is at least the possibility that the matter could be heard tomorrow, substantively, as there were four days scheduled for this application.
 - b) There is also a trial management conference in this matter, scheduled for March 28, in anticipation of the trial which is currently scheduled for May 15, 2023, for five days. If I were to reserve, to prepare lengthier reasons, it would put the presider of the trial management conference potentially in a virtually impossible position of being able to know whether the summary trial is proceeding or not and what to do about the currently scheduled conventional trial.

- [2] Of significance, that trial may still proceed, regardless of my determination on suitability under R. 9-7, as this application pertains specifically to the dismissal of the in rem or specific performance claims as against the defendant, who I will identify later, and does not deal with what I will broadly describe as the real estate negligence claims. As these are oral reasons for judgment, I further reserve my right to edit the transcript for grammar and style and to include citations or pinpoint references to the materials which I may have omitted, but the substance of my decision will not change.
- [3] I am also going to direct that a copy of these oral reasons for judgment be prepared at the court's expense, as I consider them necessary for the record moving forward, and I do accept that the defendant Ms. Koch is on a limited pension income. Finally, I am going to refer to Ms. Koch as "Doreen" and the third party Colin Jenkins as "Colin". I do so with no disrespect, but for efficiency and because they were generally referred to that way by some of the counsel, that tracks my notes and assisted in the preparation of these reasons for judgment in a timely way. I will refer to the other parties by their surnames. Those parties are the plaintiff Mr. Wilson, the defendant Mr. Kuroaka, and Mr. Kuroaka's real estate brokerage firm Century 21 Executive Realty Ltd.

General Overview

- [4] This is an extremely unfortunate case. Doreen, who is currently 92 years of age, is the most sympathetic of litigants. Doreen is Colin's mother. He was her only child. Colin's father passed away in a logging accident when he was only two years of age. Doreen raised Colin as a single mother for many years. Colin was, I accept, a very intelligent child, but not necessarily the easiest child to raise. Conflict arose when Doreen remarried and Colin left the home for a period of time, in his teens, to reside with a friend. That friend has actually provided an affidavit in this proceeding and continued to be a lifelong friend. Doreen's second spouse predeceased her. She is thus twice widowed.
- [5] As I will come back to, Colin also predeceased Doreen, passing away within just days of the property transaction which is at the root of this litigation. He passed away due to liver failure, arising from having contracted Hepatitis C while working as a critical care nurse. Doreen is thus left in the extremely undesirable position of having to spend the latter years of her life enmeshed in litigation which is intimately connected to the passing of her only child and his conduct which, it is alleged, evolved the abuse of his fiduciary obligations owed to her and his obligations owed statutorily to her, pursuant to the Power of Attorney Act, R.S.B.C. 1996, s. 19.
- [6] Doreen has the support of her niece, Ms. Penny Treen. It is apparent she provides care for Doreen and that they are very close. Ms. Treen has an indirect interest in these proceedings, as the sole beneficiary of Doreen's estate, in light of Colin's passing.
- [7] The notice of application of Doreen seeks the following relief:

1. Pursuant to Rule 9-7 of the Supreme Court Civil Rules:
 - a. an order that the claims pertaining to the applicant, Doreen Koch, in Part 2 of the Plaintiff's Notice of Civil Claim, amended on June 10, 2022, be dismissed;
 - b. costs; and
 - c. such further and other relief as this Honourable Court deems just.

The Facts

- [8] Doreen is the owner of a property located at 1650 Vernon Street, in Lumby, British Columbia. The legal description is included in the pleadings. I will not read it out for the record, but will define it as the "Property". Doreen's parents came to live on the Property in or about the 1930s. Doreen, who was born in 1931, was raised on the Property with her six siblings and then purchased the Property from her mother's estate in 1990. I accept that Doreen has a genuine sentimental attachment to the Property. With some limited exceptions in the time leading up to the events at issue, the evidence is that she has lived there for her entire life. Considering that she is 92 years of age, her sentimental attachment to the Property is completely understandable. Doreen still has capacity. She requires care and assistance, but it is not suggested that she is not able to manage her own affairs. She wishes to live out the rest of her life at the Property. It is not submitted that this is physically impossible or unmanageable, based upon her current circumstances and the assistance of Ms. Treen. Obviously, circumstances may change, but at present the evidence indicates that Doreen is able to fulfill that wish.
- [9] Colin, as noted, was Doreen's only child. In 2002, after a lengthy stint of living and working elsewhere, he returned home to live at the Property with Doreen. This was because his contracting hepatitis precluded him from being able to continue his work fully as a critical care nurse. It does appear that he was employed in some capacity, on his return, but not necessarily in the full capacity way. At this time, Doreen was approximately 71 years of age. For the next approximately 18 years, Doreen and Colin lived together at the Property. Colin provided assistance to Doreen. There is evidence before me that Colin was not always kind and respectful to Doreen in providing that assistance, but he clearly did provide some assistance, and the evidence suggests that his poor treatment of Doreen was primarily in the latter years of his own life.
- [10] Returning to the chronology, shortly after Colin moved back to the Property, Doreen transferred it into joint tenancy with Colin. This was a gratuitous transfer. At this point in time, Colin had not, based on the evidence before me, provided any monetary assistance to Doreen, and his assistance to her in her daily living was very limited, given that he had only returned to the Property several months prior. I accept that it was part of certain estate planning on the expectation that Colin would outlive Doreen.

- [11] Ms. Treen moved to the Okanagan from another region, in or about 2016. Although they had always been close, this is when Ms. Treen started to be more actively providing care for Doreen. She ultimately moved into a trailer on the Property, in 2018. I am satisfied the evidence confirms that by the end of 2019 Colin's health was failing. This deterioration continued until July 2020. On July 13, 2020, he had a medical procedure that drained over 20 pounds of fluid pressing against his lungs. On July 17, 2020, Colin was flown by air ambulance from the hospital in Vernon to a hospital in Vancouver, to have what is described as a "work-up" done for a possible liver transplant. On August 1, 2020, Colin was flown back to the hospital in Vernon. He chose to discharge himself a few days later, on August 6, 2020, but was only at the Property for some two days before having to be ambulated back to the Vernon hospital. Colin sadly passed away only three days later, at the Vernon hospital. I go through these unfortunate series of events, because they are very relevant to the timeline of the disputed transaction and the decision that I have to make as to suitability.
- [12] In 2002, Doreen provided a power of attorney to Colin. This power of attorney was limited to when Doreen lacked capacity. As I already have established, Doreen did not and has not reached a position, despite being 92 years of age, where she lacks capacity. On April 4, 2018, during what I accept is the course of further estate planning, Doreen executed a different power of attorney. This is an enduring power of attorney, in which she named Colin as her primary attorney and Ms. Treen as her alternate attorney. After this power of attorney was executed, Doreen's evidence is that she stored the original power of attorney in her safety deposit box at the bank. Colin did have, the evidence supports, potential access to that safety deposit box. However, at no time, it would appear, did any party to this litigation, other than Doreen or Colin, whose evidence cannot be determined, given his passing, have the power of attorney in their possession. This is confirmed by the fact that Mr. Kuroaka came to the Property after Colin's passing, looking to obtain a copy of the power of attorney. Had any of the defendants other than possibly Colin had the power of attorney at that time, such a visit would not have been necessary. In any event, it is specifically clear on the evidence that neither the plaintiff nor the defendant realtor nor his brokerage firm ever saw or obtained a copy of the power of attorney, until it was produced in the course of this litigation, the timing of which I will return to later.
- [13] The plaintiff is a land developer. He is a sophisticated individual; that is clear from the evidence. In March of 2018, the evidence of Mr. Wilson is that he made an unsolicited offer to purchase the Property. That offer was brought to the Property at that point by Mr. Wilson's realtor, a Mr. William Hubbard, and discussed with Colin and his realtor, Mr. Kuroaka. Apparently, according to the evidence of Mr. Hubbard, Doreen was present at the time of this meeting, but she was seated in the living room while the discussions occurred at the kitchen table. There is conflicting evidence about what happened at the time of this meeting. Mr. Hubbard, who is no longer a party to this proceeding, says that Colin spoke to his mother, Doreen, but he does not know what they spoke about. He makes a fairly reasonable assumption as to the fact that they were discussing the contract, but ultimately there is no evidence about what Colin spoke to Doreen about that day when he left the

kitchen table and went to the living room. Doreen deposes that she only became aware of this March 2018 offer when the sale document was produced in the course of this litigation, which was commenced some years later. This March 2018 offer never came to fruition and only provides part of the factual background.

- [14] Starting in or about 2018 or 2019, Mr. Kuroaka started going more regularly to the Property to visit with Colin. I accept the evidence of Doreen that this was not entirely unusual, as Colin and Mr. Kuroaka had been childhood friends. It was not necessarily apparent to her that Mr. Kuroaka was attending, to the extent that that is true, in his capacity as a real estate agent. Doreen did interact with Mr. Kuroaka on a limited social basis, during his visits. She indicated that she would make them tea or serve them a piece of pie, but would generally retire to her room and leave Colin and Mr. Kuroaka alone, in order to have, what she said, privacy.
- [15] On or about July 17, 2019, Colin executed an exclusive listing agreement with Mr. Kuroaka, with respect to the Property. Colin signed his name as the seller, with the initial "POA" beside his signature. This document is included at Exhibit "B" of affidavit # 6 of Lisa Lewis, at tab 17 of the application record. Importantly, as part of the condition of the exclusive listing contract, there was no sign for sale or similar sign placed on the Property or near the driveway. Clearly, had that occurred, Doreen, given that she has capacity, would have been aware of the circumstances, but no such sign was ever placed.
- [16] Around this same time, and given the brevity of these reasons for judgment, I have not specifically identified the dates Colin executed certain documents, including a property disclosure statement and a notice of privacy and consent document, again which are signed as Doreen's power of attorney. Doreen's signature does not appear on any of these documents. Again, Doreen's evidence is that she only became aware of these documents, including the listing agreement and these other documents which I have just referred to, in the course of this litigation.
- [17] We then move forward to January of 2020. In or about January of 2020, there was an issue with the septic lines on the Property. They backed up. It was unsuitable for Doreen to continue to live there and this required Doreen to find temporary accommodation elsewhere. There were various moves for short periods of time, but Doreen primarily resided, during this period of time, at Silver Springs, which is a seniors' assisted living facility in or about Vernon, British Columbia. Shortly after Doreen commenced living at Silver Springs, which I accept she understood to be a temporary arrangement, Mr. Wilson made another offer to purchase the Property, this time for \$600,000. This, which I will refer to as the "February contract", was conditional upon Mr. Wilson purchasing an adjacent property located at 1788 Vernon Street.

- [18] On February 24, 2020, Mr. Hubbard emailed Mr. Wilson, telling him that, "Colin's mom", who is clearly Doreen, needed to sign the contract and that Colin would be dropping it back at the office. I understand this to be the Century 21 office, as Mr. Kuroaka and Mr. Hubbard were both agents with Century 21, Mr. Hubbard being, as I understand it, the managing broker.
- [19] On or about February 25, 2020, Colin brought this February contract to Doreen, while she was residing at Silver Springs. Doreen's evidence is that during this visit Colin told Doreen that the septic system could not be repaired and would have to be connected to the village, being the Village of Lumby, sewer, costing as much as \$70,000. Colin apparently told Doreen that she would have to sell the Property, because she could not afford this expense. Had this been true, that is accurate. Doreen's own evidence is that she has exhausted her savings and that her primary assets are her continued pension benefits and the Property. It would have been extraordinarily difficult for her to even borrow money against the Property, having regard to her limited pension income. The debt-service ratio simply does not make sense. Doreen then executed the document that was provided to her by Colin. Doreen, based on her evidence, says that she understood it was a listing agreement only, and it did not obligate her to sell. She indicates there were indicia of duress with respect to her signing it, and that she continued to be of the view that she did not want to sell the Property.
- [20] At some point, which is not actually specifically identified in the evidence, at least based upon my review, Doreen was told by Colin that the Property had been sold. Doreen was still residing at Silver Springs, at this point in time. The notion that the Property was being sold caused Doreen distress, which resulted in the Interior Health Authority assigning a social worker, namely Ms. Bonnie Richardson, to support Doreen. We have evidence from Ms. Richardson, in the form of an affidavit. It is quite important; however, she has not been cross-examined on that evidence.
- [21] Ultimately, the septic system servicing the Property was repaired for quite minor expense, in or about April of 2020. No connection to the village of Lumby sewer system was ultimately required. The evidence of Doreen is that she made a number of requests to return to the Property, after the septic system was fixed, between May and July of 2020, but Colin did not agree. To put this into context, Colin's own health, based on everyone's evidence, was rapidly declining during that period of time, and regardless of the circumstances he may simply not have been in a physical condition to be able to provide care to his mother, who at that point in time was approximately 89 years of age.
- [22] Turning now to the core of this litigation. On July 10, 2020, the plaintiff offered to buy the Property, again, for \$450,000. I note this is substantially lower than the \$600,000 offer that had been made in 2018. The offer was provided to Colin, who countered at \$490,000 on July 12, 2020, and then at \$475,000 on July 14, 2020. The plaintiff accepted Colin's counter-offer of \$475,000 on July 15, 2020. This was, relative to the above chronology, less than one month before Colin died. On July 15, 2020, that same day, Doreen returned to the Property to see Colin, having been informed by Ms. Treen that Colin's health situation was now grave. When Doreen arrived, Colin told Doreen and Ms. Treen that he had, and I am quoting from the

affidavit directly, "sold the place", saying that he needed money to pay for expenses he would incur if he were able to obtain a liver transplant.

- [23] I accept that prior to Colin telling her on July 15, 2020 that he had "sold the place", Doreen is clear in her evidence that she had no specific knowledge of the contract. In particular, Doreen was not residing at the Property, at that time. She had been residing at Silver Springs. The prior offer that she deposes she understood was a listing agreement, was signed by her, when she was at Silver Springs. On July 17, 2020, Doreen moved back into the Property. She continues to reside there.
- [24] On or about July 22, 2020, the plaintiff came to the Property. At this particular date, Ms. Treen informed the plaintiff that Colin was gravely ill and that Doreen had not consented to the sale of the Property. The evidence differs on this point, but it is quite clear that there was an unusual interaction between the plaintiff, the plaintiff's father, and Ms. Treen. Promptly thereafter, on July 24, 2020, Doreen retained legal counsel to advise her with respect to these matters. The following day, July 25, 2020, Mr. Kuroaka came to the Property, asking, amongst other things, that Doreen give him a copy of the power of attorney. The evidence of Doreen with respect to this conversation varies between her two examination for discoveries. Ultimately, though, it is clear she did not provide him with the power of attorney, because as noted the remaining defendants, excluding Colin, who is not an active participant, did not have a copy of the power of attorney until after the commencement of the litigation.
- [25] Again, moving promptly, on July 31, 2020, the counsel that Doreen had retained registered a caveat against title to the Property. It alleged, in an effectively similar way, to what Doreen alleges now in an albeit more simplified fashion, that Colin executed the contract to sell the Property without her knowledge, and that she did not want to sell the Property. In any event, on July 31, 2020, the plaintiff removed the subject conditions of the July 2020 contract and paid the requisite deposit several days later, on August 4, 2020.
- [26] On August 7, 2020, the close friend of Colin who I referred to above, who he had lived with during his teenage years and continued to be closely involved with, brought him home from the hospital. He facilitated bringing Doreen and Colin together, to, I will say, make amends. Fortunately, they did so, at least in some limited capacity. Colin ultimately passed away, however, as noted above, shortly thereafter, on August 11, 2020. The contract for the Property had a scheduled closing date on August 14, 2020. It ultimately did not complete, given Doreen's position.
- [27] Notably, it was not until March 26, 2021 that the plaintiff commenced this action seeking specific performance of the July 2020 contract. That is some eight months later. In the intervening time, Doreen did add Ms. Treen as a joint tenant on the Property, consistent with her prior estate planning. Interestingly, the plaintiff's testimony is that he only became aware of Doreen's role as an owner of the Property in February of 2020. However, the late-disclosed transcription of a telephone conversation between the plaintiff and Mr. Hubbard,

in May of 2019, indicates that both the plaintiff and Mr. Hubbard knew that Doreen was an owner on title and that Colin was likely not able to sell the Property until Doreen passed away. Why this conversation is recorded is unknown. In any event, this information is publicly available. Mr. Wilson is a sophisticated individual in these matters and Mr. Hubbard is a real estate agent. Both of them could have conducted a title search to determine the state of title of the Property. That would have revealed that it was held in joint tenancy. One would also have presumed, in that regard, that they would require a copy of the power of attorney which allowed one joint tenant to deal with the Property in the absence of another.

The Law Regarding Suitability for Summary Trial

- [28] The rules regarding the suitability for summary trial, pursuant to R. 9-7 of the Supreme Court Civil Rules are to be interpreted broadly, favouring proportionality and access to the affordable, timely, and just adjudication of claims. This is set out very clearly in the opening paragraphs of *Hryniak v. Mauldin*, 2014 SCC 7:
- [1] . . . Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
- [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
- . . .
- [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.
- [29] During the course of submissions, I referred counsel to a case that was fairly recently decided by a five-member panel of our Court of Appeal, *Cepuran v. Carlton*, 2022 BCCA 76. Prior to *Cepuran*, *Saputo -- British Columbia (Milk Marketing Board) v. Saputo Products Canada*, 2017 BCCA 247, commonly known as *Saputo*, was the authority for converting a petition to an action under the Supreme Court Civil Rules. The "Saputo rule" was that a petition must be referred to the trial list, where there is a bona fide triable issue. The Court of Appeal in *Cepuran* states, however, that the existence of a triable issue is no longer a good reason to convert a petition into an action. The new approach advocated by the Court of Appeal is to tailor the procedure to the proceeding. This is in line with the modern approach

to civil procedure, as encouraged by the Supreme Court of Canada in *Hryniak*. The approach, as I have already quoted, is to allow parties and trial courts to tailor the pretrial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on its merits.

- [30] *Cepuran*, as noted, deals with the conversion of a petition to a trial. It is thus somewhat distinguishable. However, the Court of Appeal in *Universe v. Fraser Health Authority*, 2022 BCCA 201 follows the *Cepuran* decision and effectively, in my view, incorporates the same type of approach, albeit legally nuanced, into summary trial procedures under R. 9-7. Rule 9-7, in and of itself, does provide for greater flexibility than was provided for even under the *Saputo* test. However, I think the principles are good law. I am specifically going to refer to paragraphs 20 and 21 of the decision in *Universe*, although paragraphs 19 to 35 are generally instructive as to this issue, and I have reviewed this case in some detail:
- [20] . . . [T]he summary trial procedure initiated in cases such as *Inspiration Management* has served our judicial system well. This is reflected by the substantial number of summary trials that take place in the Supreme Court of British Columbia each year. As Tysoe J.A noted in *Brissette*, two developments in the last several years have added to the Court's willingness to take into consideration time constraints and the costs of litigation. First, the Supreme Court Civil Rules introduced the concept of proportionality in 2010 as an express objective of the Court. Most notably, R. 1-3(2) now recognizes that the efficient use of court time is an important objective of the justice system:

Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

- (a) the amount involved in the proceeding,
- (b) the importance of the issues in dispute, and
- (c) the complexity of the proceeding.

- [21] Second, the Supreme Court of Canada in *Hryniak v. Mauldin*[,] 2014 SCC 7 had referred to the need for a "shift in culture" in the legal system. In the words of Justice Karakatsanis:

The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. [Emphasis in original.]

...

- [31] I will also make reference to the often-quoted seminal authority in *Inspiration Management*, which stands for the proposition, in particular at paragraphs 46 and 47, that every effort is to be made to ensure a just result.
- [32] I will now turn to the decision of our Court of Appeal in *Gichuru v. Pallai*, 2013 BCCA 60, in particular at paragraph 30. In that case, the Court of Appeal outlines, helpfully, what factors this court should consider when determining whether a matter is suitable for summary determination. They are as follows:
- a) the amount at issue in dispute;
 - b) the complexity of the matter;
 - c) the urgency;
 - d) any prejudice likely to arise by reason of delay;
 - e) the course of the proceedings;
 - f) the cost of taking the case forward to a conventional trial in relation to the amount involved; and
 - g) whether credibility is a critical factor in the determination.
- [33] I am going to, as I indicated, deal with the issues somewhat more summarily than I would otherwise do, given these are oral reasons for judgment, which I am rendering on the same day that we concluded hearing submissions. I have, however, reviewed the materials, and they are clear, from the evidentiary record, so I will, as indicated, be brief.
- [34] The amount in issue, technically speaking, is \$475,000. That is not an insignificant amount of money, but more importantly the amount is not equivalent to the sentimental value of the Property and its connection to Doreen. So, there is both a monetary component and a subjective attachment component to the Property. In terms of the complexity of this matter, there are a variety of legal issues, some of which I think it is effectively conceded by counsel for the parties, to be somewhat legally novel. This is definitely not a particularly straightforward case. Counsel for the plaintiff very helpfully took me through a lay of the land with respect to this matter, but that took almost an entire day, on the basis of affidavit evidence--affidavits which conflict--and so there are a lot of moving parts with respect to this matter.
- [35] I am going to, as I alluded to, conflate the factors of urgency and prejudice, because in this particular case they cannot be necessarily parsed out. Doreen is clearly desirous of resolving these proceedings. That is entirely understandable, and the last thing that this Court wants to do is have Doreen live out what is the latter years of her life enmeshed in litigation. At the same time, Doreen's prejudice is mitigated by the fact that Doreen is living in the Property. Doreen is doing exactly what she wants. There is no suggestion that she is going to be ousted from the Property, unless the specific performance claim is successful. So, this litigation

hangs over her head as an unpleasant black cloud, but ultimately the only real prejudice to Doreen is the cost of ongoing litigation, because she currently continues to live in the home on the Property with the assistance of Ms. Treen.

- [36] In terms of the course of the proceedings, this matter is not overly long in the tooth, and although there are some issues that have arisen from time to time, I do not consider there to be any evidence before me that one party is intentionally dragging this matter out. In particular, I do not accept that there is an attempt by Mr. Wilson to make this litigation as expensive as possible, in order to facilitate his position. His counsel cooperated with respect to having the summary trial issue hived off, and there appears to be, generally, cooperation between counsel in terms of disclosure of documents and provision of affidavits. The one challenge that arises is that counsel agreed on a five-day trial date which, it seems to be agreed by everyone and certainly found by the court, to be totally insufficient with respect to all of the issues. So, that presents a problem, but I do not think that was done intentionally. As the claims have evolved, the matter has become more complicated and counsel was perhaps overly optimistic in terms of being able to fit this matter into a five-day trial.
- [37] The most significant issues, from my perspective, are factors (f) and (g) from Gichuru. That is the cost of taking the case forward to a conventional trial, in relation to the amount involved, and whether credibility is a factor in the determination of this dispute. The cost of taking this matter forward to what will inevitably, I think, be a 10 day trial and possibly somewhere between and 10 to 15 day trial, unless there can be admissions or other things done to limit the evidentiary record, is significant. I accept the submissions on behalf of Ms. Koch that she is, having regard to her advanced age, limited to living on her pension income and her only substantive asset is the value of the Property. So, her ability to fund this litigation is extremely limited, and so I have considered that at some length.
- [38] The other part about it is where credibility is a critical factor in the determination of the dispute. This ultimately, as I will return to, is where this case rises and falls for summary determination. I have considered as best as possible what orders I could make for a hybrid proceeding, in accordance with Cepuran, and as very recently endorsed by our Court of Appeal in Universe, as I do clearly see the engagements of principle and cost efficiency and proportionality engaged. The fatal flaw in making this possible, however, is I find that counsel for Doreen and counsel for Mr. Wilson both listed in their notice of application and application responses the entirety of the examination for discovery transcripts conducted in this proceeding. Indeed, counsel for the plaintiff even purported to rely upon his own client's entire discovery transcript.
- [39] The reliance on discovery transcripts in a R. 9-7 summary trial can be extremely helpful for the court. In the normal course, however, counsel list those specific questions in the transcript of a party adverse in interest that they consider to be relevant or probative, or provide certain key admissions. The remainder of the transcript is redacted or entirely omitted. A responding party may include, if appropriate, some of the surrounding portion of the transcript, as might be needed to provide context. By tendering the entire transcripts,

counsel have put before this Court as evidence statements which are highly contradictory. I will not, given the brevity of these reasons, go through all of the contradictions, but there are stark conflicts in the evidence between the discovery evidence of one party and their affidavits. I have spent literally hours reading those transcripts over the portion of yesterday and specifically last night in anticipation of having to make this ruling on suitability for summary determination.

- [40] Having read those transcripts, which form part of the case as tendered, it is simply not possible for me to make the necessary findings of fact, even considering the possibility of hybrid procedures contemplated in the Supreme Court Civil Rules, as endorsed in *Cepuran* and in *Universe*. The application ultimately fails on paragraph (g) of the test under *Gichuru*, which is that credibility is a key factor, given there are some very material discrepancies in the factual record.
- [41] As such, I must, with some regret, simply conclude that this matter is not suitable for summary determination, based upon the record before me. Doing so would push the boundaries of R. 9-7, even as flexible and broadly interpreted, too far in my discretionary view. This matter needs to be re-set for a conventional trial, at the earliest opportunity. At my request, counsel for the plaintiff did make inquiries of Supreme Court Scheduling and it appears there are 10 to 15 day trial dates available in Abbotsford, commencing in and about October of 2023. Those dates, if convenient with all counsel should be secured forthwith. This black cloud over Doreen needs to be resolved.
- [42] Having generally ruled out specific performance as a suitable summary trial issue, I do want to briefly address a new submission made by counsel for Doreen this morning that this matter could be resolved summarily by determining whether the claimant's specific performance should be summarily struck. I understand entirely where counsel is coming from, but as I stated during my comments in the course of the hearing, I previously directed that the Court would deal with suitability for summary determination as a preliminary issue, and I did not hear fulsome submissions from counsel on the availability of specific performance as a remedy generally.
- [43] In any event, I am satisfied that this case is about the Property and not about damages. This is made clear by the lack of any expert evidence, at least before me, and I understand generally, to support a claim for damages. Mr. Wilson wants the Property and he has reasons for wanting it. He is further aware that Doreen has no other assets of significance, other than the Property, so I am concerned about making any finding of fact that binds the ultimate trial judge in this regard. I simply cannot in the circumstances summarily dismiss the claim against Doreen on the basis that the Property is not unique. The evidence before me supports that there is an arguable issue about that, and the credibility issues, as I have referred to above, override.

Costs

[44] As I have indicated, this is truly a most unfortunate case. I understand why counsel for Doreen attempted to bring it forward for resolution, given the costs of litigation and her client's circumstances. I was simply unable to conclude, based on the evidentiary record before me, that I can determine it summarily under R. 9-7. In the circumstances, I am going to make an order that costs of this application shall be at the discretion of the trial judge. Those are my reasons for judgment.

"Hardwick J."

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Prepared on 29 October 2026 · Esheria