IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Epic Restoration Services Inc v. Fuller et al.,* 2024 BCSC 2245

Date: 20241211
Docket: S186318
Registry: Vancouver

Between:

Epic Restoration Services Inc.

Plaintiff

And

The Estate of Desmond Maurice Fuller, Deceased, By His Executor and Personal Representative Rudyard Kipling Fuller

Defendant

And

Epic Restoration Services Inc.

Defendant by way of counterclaim

And

The Dominion of Canada General Insurance Company and, In French, Compagnie D'Assurance Generale Dominion Du Canada also known as Travelers Canada

Third party

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the plaintiff and defendant by way of counterclaim Epic Restoration Services Inc.:	S.M. Hirji
Counsel for Rudyard Kipling Fuller:	M.S. Menkes
Counsel for the third-party Travelers Canada:	A.K. Taggar

Place and Date of Hearing:	Vancouver, B.C. November 12, 2024
Place and Date of Judgment:	Vancouver, B.C. December 11, 2024

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Introduction

[1] Parallel applications have been advanced by the plaintiff and third party in this action for orders that the executor of the defendant estate shall be personally liable for awards of costs made against the estate by this Court following the trial of the action.

Procedural and factual background

[2] This action arose as the result of a flood at a residential property in Coquitlam, British Columbia. The cause of the flood was a ruptured pipe.

[3] The third-party, Dominion of Canada General Insurance Company, also known as Travelers Canada, responded to an insurance claim made by the insured, Desmond Maurice Fuller.

[4] Epic Restorations Services Inc. was retained to perform restoration and repair work on the Property.

[5] Between January and June 2017, Epic performed work at the property, which gave rise to the disputes, which led to the trial.

[6] On June 1, 2018, Epic commenced this action. On June 22, 2018, Desmond Fuller filed a Response to Civil Claim, along with a Counterclaim against Epic and a Third-Party Claim against Travelers Canada.

[7] On January 30, 2019, Desmond Fuller passed away. The action was subsequently continued in the name of his estate (the “Estate”), by his executor and personal representative, Rudy Fuller. Rudy Fuller is Desmond Fuller’s son.

[8] Epic sought judgment against the Estate for approximately $38,600, as well as interest, costs, and an order that certain funds that had been paid into court be paid out to Epic in partial satisfaction of its judgment.

[9] The Estate advanced counterclaims against Epic for, among other things, poor workmanship, work not performed, and the unauthorized disposal of items.

[10] The Estate advanced various third party claims against Travelers, including allegations that Travelers breached a duty to defend owed to it under the Policy and a claim for lost rental income.

[11] I heard the trial of the action over 12 days in November and December 2022. On February 16, 2023, I issued reasons for judgment, indexed at 2023 BCSC 232 (the "Trial Reasons"). Epic and Travelers were substantially successful.

[12] Following submissions as to costs received in writing from the parties, I issued a decision as to costs on May 12, 2023, indexed at 2023 BCSC 810 (the "Costs Reasons"). I ordered the Estate to pay Travelers and Epic costs of the proceeding to be assessed at Scale B. I also ordered the Estate to pay Epic double costs for steps taken after November 26, 2020.

[13] After the Costs Reasons were issued, Epic and Travelers advanced separate applications before Justice Shergill. Those applications sought relief under s. 149(1) of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*], including an order that Mr. Fuller was liable for all outstanding amounts, arising from the Trial Reasons and the Costs Reasons, owed to them by the Estate.

[14] In reasons indexed as *Epic Restoration Services Inc v. Fuller Estate*, 2024 BCSC 1139 (the "Shergill Decision"), Justice Shergill declined to grant relief under *WESA,* holding that before the defendants could pursue a claim against him under *WESA,* they were required to either add Mr. Fuller as a party or commence a new action.

[15] Further, Justice Shergill declined to grant an order regarding Mr. Fuller's liability for costs because she concluded that the costs issue ought to be dealt with by the trial judge. She dismissed the applications before her, without prejudice to the parties' entitlement to take further steps under s. 149 or in respect of Mr. Fuller's personal liability for costs.

Issues

[16] The primary issue before this Court is whether it ought to make an order that Mr. Fuller is personally liable for the awards as to costs payable by the estate. It is undisputed that the Estate no longer has assets sufficient to pay the awards of costs made against it.

[17] The applicants also seek ancillary relief that will be addressed at the end of these reasons.

Discussion

[18] To the extent that there are facts that must be considered in the analysis, I will address them below. That said, in large part, these applications turn on the relevant legal principles.

[19] For the reasons that follow, I have concluded that the executor, Rudyard Fuller, is partially liable for the award of costs payable by the Estate to Epic, and fully liable for the award of costs payable by the Estate to Travelers.

[20] In defence to the applications, Mr. Fuller makes arguments that either seek to distinguish the cases relied upon by the applicants or to establish that the applicants are barred from advancing this application at this stage in the proceedings. I will address these arguments in turn.

The liability of the executor for costs arising from a claim of the Estate

[21] The applicants submit that it is clear, as matter of law, that trustees and executors who bring legal actions on behalf of an estate and are unsuccessful in those actions are liable for costs payable by the estate, except in certain specific circumstances.

[22] They make this submission based on a series of decisions starting with the decision in *Shafer v. Jones*, [1950] 2 W.W.R. 625, 1950 CanLII 461 (ABKB), wherein the Court applied the principle that “[i]n ordinary cases an executor or administrator who sues as such and fails is personally liable for the costs of the action.”

[23] Shafer has been cited by this Court with approval in *Hall Estate v. Marshall,* 2002 BCSC 893 at para 12; *Dyson Estate v. Moser*, 2004 BCSC 500 at para 6; *Ace Life Insurance Co v. Li*, 2015 BCSC 2533 at para 37; and the Shergill Decision at para 72.

[24] In *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.*, [1998] B.C.J. No. 2686 at para. 13, 1988 CanLII 1827 (S.C.) [*Vancouver Trade Mart*], the Court of Appeal cited the decision in *Sigurdson v. Fidelity Insurance Co. of Canada*, 110 D.L.R. (3d) 491, 1980 CanLII 404 (B.C.C.A.) for the proposition that "at common law trustees in bankruptcy (like other trustees, executors, administrators, receivers and liquidators) are personally liable for costs if they unsuccessfully make a claim against another person, subject to the qualification that they are entitled to indemnity out of the estate unless they are guilty of misconduct."

[25] In *Vancouver Trade Mart*, the Court of Appeal indicated that a trustee would not be liable if it advanced a claim because it was required to do so by a statutory duty: paras. 15–16. Similarly, in *Dyson*, this Court held that it was not appropriate to order costs personally against an executor where, had the estate failed to pursue the litigation, it would have breached its fiduciary duty. However, these exceptions have no application here. In this case, the executor had the power to advance the counterclaim but was not required to do so either by statute or duty.

[26] In *British Columbia (Civil Forfeiture Act Director) v. Nguyen*, 2009 BCSC 827 at para 39, this Court cited with approval the principles from *Vancouver Trade Mart*, cited above.

[27] Mr. Fuller seeks to distinguish *Shafer* on the basis that the trustee in that case was a plaintiff, not a plaintiff by counterclaim, and that Mr. Fuller continued a counterclaim started by his father rather than commencing one on his own. Mr. Fuller argues that the only step that he took on the pleadings was to amend the counterclaim to change the name of the defendant from his father, Desmond Fuller, to the name of the Estate. He submits that he did not initiate a legal action.

[28] In my view, these are distinctions without a difference, in that Desmond Fuller commenced a counterclaim. There is no principled reason why the law regarding the personal liability of an executor for costs ought to apply to a claim but not a counterclaim. Similarly, there is no principled reason to distinguish between the initiation of a claim and the continuation of a claim. Following Desmond Fuller's passing, Mr. Rudyard Fuller continued to pursue the counterclaim, to his own potential benefit, as he was a beneficiary of the Estate. He took a personal risk in doing so that he might be liable for costs, if the Estate were unsuccessful.

[29] That said, the law as stated in decisions such as *Vancouver Trade Mart* is that executors are personally liable for costs in respect of claims they *advance*. There is nothing in the law to say that executors ought to be liable for costs if they fail in successfully *defending* an estate against claims.

[30] For this reason, in my view, any costs awarded in favour of Epic against Mr. Fuller personally must distinguish between costs arising as a result of the Estate's counterclaim and Epic's claim against the Estate. Mr. Fuller is liable only for the costs arising out of the counterclaim. I will address below how the costs arising from the Estate's unsuccessful counterclaim against Epic are to be differentiated from the costs ordered in relation to the Estate's unsuccessful defence of Epic's claim.

Cause of action estoppel, abuse of process, and functus officio

[31] In support of his position, Mr. Fuller relies on the doctrines of cause of action estoppel, abuse of process, and *functus officio*. Broadly speaking, Mr. Fuller argues that these applications ought to have been brought much earlier. He submits that the applicants knew that probate had been granted and that Desmond Fuller's estate had been distributed before the parties made submissions as to costs following the trial, and they failed to advance applications seeking to make Mr. Fuller personally liable at that time.

[32] In relation to the doctrine of cause of action estoppel, Mr. Fuller cites the decision of the British Columbia Court of Appeal in *Reliable Mortgages Investment*

Corp v. Chan, 2014 BCCA 14 [*Reliable*] at para. 44 for the proposition that "[c]ause of action estoppel is concerned with ensuring that parties bring forward all claims and defences with respect to the cause of action in a proceeding, such that, if they fail to do so, they will be prevented from claiming these in a subsequent proceeding."

[33] In *Reliable*, the Court cited with approval from the decision in *Hoque v. Montreal Trust Company of Canada*, 1997 NSCA 153, wherein Cromwell J.A. (as he then was), held:

> [64] My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action.
>
> [Emphasis in original.]

[34] In *M.K. v. British Columbia (Attorney General)*, 2019 BCSC 166, this Court described the doctrine of collateral attack as follows:

> [30] …The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal. Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).

[35] In *GC Parking Ltd v. New West Ventures Ltd.*, 2004 BCSC 1700, this Court set out the principles in relation to, and the exceptions to, the doctrine of *functus officio*:

> [12] After an order has been entered, the general rule is that the court which declared the order is *functus officio* so that the order can not be set aside or amended. There are three exceptions to this general rule: (a) Rule 41(24) of the Rules of Court, commonly known as the "slip rule"; (b) where the entered order does not deal with a matter which was dealt with in the Reasons for Judgment; and (c) where, under the inherent jurisdiction of the Court, it is necessary to correct an order where there has been an error in expressing the manifest intention of the court.

[36] Although these decisions are undoubtedly authoritative pronouncements of the general principles in relation to these doctrines, no cases have been provided to

the Court in which these principles have been applied in the context of a costs award or on application seeking to find a party liable for the judgment debt of another.

[37] In my view, the cases do not support the proposition that an entered order as to costs or an earlier opportunity to advance an argument that an executor is personally liable precludes the applicants in a case such as this from pursuing the personal liability of the executor.

[38] In *Shafer*, it is evident from the brief reasons that the plaintiff estate had already submitted to an examination in its capacity as judgment debtor, meaning that costs had already been ordered against it and that those costs had been assessed. Those circumstances did not preclude the Court from awarding costs against the administrator in that case.

[39] Mr. Fuller seeks to distinguish *Shafer* on the basis that the original costs order in that case was made by the Supreme Court of Canada and not by the trial court, in that the Supreme Court had allowed an appeal dismissing the action, which resulted in the plaintiff being held liable for the defendant's costs throughout. However, it is unclear how or why this difference ought to change the result. Section 45 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, provides:

> **Appeal may be dismissed or judgment given**
>
> **45** The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded.

[40] In my view, there is no reason to regard a decision as to costs made by the Supreme Court of Canada as different from a similar decision made by a trial court for the purposes of cause of action estoppel, collateral attack, or *functus officio*.

[41] In *Hall Estate*, Justice Edwards dismissed the plaintiff estate's action, and awarded costs in favour of the defendants against the estate. The estate then sought to vary the original trial order, submitting that the parties ought to bear their own costs, and Justice Edwards dismissed the estate's application to vary. Following the dismissal of the variation application, the defendants sought a further order that

the executor of the estate be held liable for the costs award. Notwithstanding the fact that the defendants could have sought an order when the plaintiff went back to court in relation to costs for the first time, the Court subsequently made a costs award in favour of the defendants against the executor personally, relying on *Shafer*.

[42] Mr. Fuller relies on *Stobbe Estate v. Insurance Corp. of British Columbia* (1994), 24 C.C.L.I. (2d) 250, 1994 CanLII 2424 (B.C.S.C.) [*Stobbe*], but in my view, that decision does not assist in the determination of this application. In that case, after an order as to costs was entered, the defendant applied pursuant to what is now Rule 13-1(17) (the "slip rule") to amend the original order to include a direction that the executor be held personally liable for the defendant's costs. The judge considered the tests in relation to the slip rule and held that none of them was applicable. As a result, he dismissed the application to amend.

[43] However, the Court did not address the issues of *functus officio* or cause of action estoppel, and therefore assumed, without considering the point directly, that the application of the slip rule was necessary in order for the applicant to succeed. Further, the Court in *Stobbe* did not refer to *Shafer*. In *Hall Estate,* the Court declined to follow *Stobbe* because the judge in that case did not refer to *Shafer*; in my view, that was the correct course.

[44] The applicants' position, which I find persuasive, is that enforcing a judgment as to costs obtained against an estate against its executor does not undermine and is not a challenge to the validity of the original costs order (which would be required to invoke the doctrine of collateral attack), and does not seek to amend or to set aside the original costs order (which would be required to invoke the doctrine of *functus officio*).

[45] Further, I am not persuaded that the applicants were required by the doctrine of cause of action estoppel to advance their personal claims against Mr. Fuller at the time that they originally made submissions as to costs, or before. The relief sought on these applications are orders as to the enforcement of a costs award. As is

evident from *Shafer,* the Court is entitled to make such an order after the original costs order has been made and the costs assessed.

[46] In my view, for these reasons, the doctrines of cause of action estoppel, collateral attack, and *functus officio* do not preclude the applicants in this case from advancing these applications and from seeking the enforcement of the awards of costs in their favour against Mr. Fuller.

Determining the quantum of liability for costs

[47] As discussed above, in relation to Epic, Mr. Fuller is liable only for the costs arising out of the Estate's counterclaim; therefore, the costs arising from the Estate's unsuccessful counterclaim against Epic must be differentiated from the costs ordered in relation to the Estate's unsuccessful defence of Epic's claim.

[48] Given the relatively small amounts at issue, one might hope that the parties could resolve this issue between them without further intervention of the Court. However, if they are unable to do so, I am prepared to receive written submissions on the extent to which the costs award is payable to Epic, related to Epic's claim, as opposed to the Estate's counterclaim.

[49] Counsel shall have liberty to make submissions regarding this sole issue by means of written submissions delivered first by Epic on or before January 10, 2025. Mr. Fuller shall be entitled to deliver responsive written submissions on or before January 24, 2025.

[50] The submissions shall be limited to three pages from each party. The submissions shall be delivered to my attention at the Court registry, by email, at the same time that they are exchanged between the parties.

Other issues

[51] In the alternative to their arguments discussed above, the applicants rely on the slip rule and inherent jurisdiction of the Court to submit that if an order making

Mr. Fuller liable for the costs ought to have been made at the time of the Costs Reasons, then this Court ought to amend its original cost order to that effect.

[52] Given my conclusions above, it is not necessary to address these arguments and I decline to do so.

[53] Finally, the applicants seek two additional alternative forms of relief which come into play only once they are successful on the main applications described above.

[54] They seek an order that Mr. Fuller be added as a defendant to these proceedings for the purpose of enforcement, and an order that the Land Title Office be directed to register a charge against the property for the amount of the costs award. These prayers for relief are premised on the proposition that the Land Title Office will be unwilling to register the cost judgments against Mr. Fuller's property unless the Court specifically directs it to do so or Mr. Fuller is made a party to this action.

[55] However, there is no evidence before the Court that either of these forms of relief are necessary, either in order to register the costs award against the property or to collect the costs award from Mr. Fuller at all. Further, these applications are premature, as collection efforts against Mr. Fuller have not been initiated.

[56] I have concluded that these latter two forms of relief ought to be adjourned generally.

Conclusion

[57] Mr. Fuller is personally liable for the award of costs payable by the Estate to Epic, but only to the extent that those costs arise out of the Estate's unsuccessful counterclaim. Unless the parties can agree upon the quantum for which Mr. Fuller is personally liable, that quantum is to be determined as described above.

[58] Mr. Fuller is personally liable for the award of costs payable by the Estate to Travelers arising out of the estate's unsuccessful third-party claim.

[59] Costs of this application shall be payable by Mr. Fuller personally to the applicants at scale B.

"The Honourable Justice Loo"