IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Continental Appraisals Ltd. v. Stewart,* 2023 BCSC 1968

Date: 20231109
Docket: 20411
Registry: Nelson

Between:

Continental Appraisals Ltd.

Petitioner

And

Scot Darville Stewart, Bronze Wines Ltd.
Air Touch Communications Ltd.
Frances Jean Walbey Canfield,
John Doe (Tenant) and Jane Doe (Tenant)

Respondents

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Continental Appraisals Ltd.:	R.R.W. Sookorukoff
Counsel for Air Touch Communications Ltd. and Frances Canfield:	T.W. Pearkes
Appearing in person and on behalf of Bronze Wines Ltd.	S. Stewart
Place and Dates of Hearing:	Nelson, B.C. October 5–6, 2023
Place and Date of Judgment:	Nelson, B.C. November 9, 2023

Introduction

[1] This is an unusual foreclosure proceeding. The petitioner, Continental Appraisals Ltd. (Continental), is the first mortgagee on a parcel of land in Grand Forks, British Columbia. The land was owned by Bronze Wines Ltd. (Bronze).

[2] Bronze and its principal, Scot Stewart, mortgaged the land to Alpine Credits in 2013. Alpine Credits transferred that mortgage to Continental a month later. Bronze and Mr. Stewart granted a second mortgage to Alpine Credits later in 2013. Alpine Credit transferred the second mortgage to Air Touch Communications Ltd. (Air Touch) shortly thereafter. Bronze and Mr. Stewart ceased making payments to both mortgagees in 2015.

[3] Continental commenced this foreclosure proceeding in 2018. In the usual course, there would be no question that Continental is entitled to a declaration that its mortgage ranks in priority, that the mortgage is in default, and to judgment against Bronze. The land has long since been sold, and the proceeds from its sale are held in trust, awaiting the court's decision in this foreclosure proceeding.

[4] What makes this case unusual are the circumstances surrounding Bronze's purchase of the property from its previous owner, Jean Canfield, in 2012, and the litigation that has ensued from that most unfortunate agreement of purchase and sale. Under the agreement of purchase and sale, Bronze was to pay Mrs. Canfield a purchase price of $465,000. Bronze was not required to make any immediate

payment to Mrs. Canfield for the transfer of the property. Instead, it was to pay her monthly payments of $2,500 per month starting 24 months after the date of transfer. The property was transferred to Bronze. Bronze never made a single payment to Mrs. Canfield.

[5] In 2014, Mrs. Canfield filed a notice of civil claim (the "Action") against Bronze; Mr. Stewart; Continental; Air Touch; and Howard Engman, the notary public who witnessed Mrs. Canfield's signature on the Form A freehold transfer.

[6] Mrs. Canfield's Action went to trial in 2021 and 2022. In reasons for judgment indexed at *Canfield v. Bronze Wines Ltd.*, 2022 BCSC 546 (the Trial Judgment), Madam Justice Horsman, then of this court, held that the agreement between Mrs. Canfield and Bronze was unconscionable. At para. 92, Horsman J. held that Mrs. Canfield was situationally vulnerable, as an elderly widow with health problems who felt pressure to sell a property she could no longer manage. Justice Horsman further held at para. 92 that Mr. Stewart, and Mrs. Canfield's son-in-law, Max Bottoni, who brokered the deal and had aligned himself with Bronze's interests, deprived Mrs. Canfield of information that was critical to her exercise of autonomous decision-making. At para. 93, Horsman J. held:

> [93] This contracting process did not take place on a level playing field. As a practical matter, only Mr. Stewart and Mr. Bottoni could understand and appreciate the full import of the contractual terms, as well as the extent to which the bargain imperilled Mrs. Canfield's interests. Unbeknownst to her, she was agreeing to transfer her only asset of any significant value to Bronze Wines in return for an unsecured stream of future income that was dependent on the financial success of a wine-making business operated by someone with no income, assets, or wine-making experience.

[7] Justice Horsman further held at para. 98 that she had no difficulty concluding that the transaction was improvident.

[8] Justice Horsman concluded her unconscionability analysis at para. 99:

> [99] In effect, Mrs. Canfield agreed to transfer the only asset she owned of any significant value, with no assurance of receiving anything in return. The potential for undue disadvantage as a result of the inequality of bargaining power was thus realized in this case. The Agreement was an improvident

> bargain that was the product of an unfair bargaining process for Mrs. Canfield.

[9] As a result, Horsman J. ordered the agreement rescinded. Her conclusions and orders are summarized at para. 245 of the Trial Judgment, and include that Bronze was liable to Mrs. Canfield in the amount of $465,000, less any amounts Mrs. Canfield recovered from the proceeds of sale. Continental's mortgage was held to have priority over Mrs. Canfield's unregistered equitable interest in the proceeds of sale. Mrs. Canfield's action in negligence against Mr. Engman was allowed, and he was held liable to Mrs. Canfield in the amount of $465,000, again less any amounts Mrs. Canfield recovered from the proceeds of sale. Mr. Engman and Bronze's liability was concurrent.

[10] As of September 30, 2023, the proceeds of sale held in trust amount to $395,576.97. This is less than the secured amount of Continental's mortgage, so Mrs. Canfield would not recover anything from the proceeds of sale.

[11] Subsequent to the Trial Judgment, Continental was successful in its application for double costs against Mrs. Canfield from the date of its $5,000 offer to settle: *Canfield v. Bronze Wines Ltd.*, 2022 BCSC 1435 (the "Costs Decision"). Mrs. Canfield sought leave to appeal the Costs Decision to the Court of Appeal. That application was denied: *Canfield v. Continental Appraisals Ltd.*, 2023 BCCA 61.

[12] Meanwhile, Mr. Engman appealed the judgment against him to the Court of Appeal. The Court of Appeal granted the appeal: *Engman v. Canfield*, 2023 BCCA 56. Mrs. Canfield sought leave to appeal to the Supreme Court of Canada, which was denied on October 12, 2023, shortly after the hearing of the present petition and application.

[13] Mr. Stewart has made an assignment in bankruptcy and Bronze is not operating and has no ability to pay. In the result, Mrs. Canfield is left with a hollow judgment against Bronze for the unconscionable agreement.

[14] In her response to Continental's amended petition, Mrs. Canfield pleads that the Form A transfer was void due to alterations made to it, after she signed it, and without her knowledge or authorization. She pleads that Mr. Stewart authorized the Form A transfer form to be altered as to the applicant, the identity of the transferee, and the name of the signatory. She further pleads that, as a result, Continental's mortgage is not enforceable as a charge against the property in priority to her interest.

[15] Air Touch settled with Mrs. Canfield prior to the trial, and under the terms of that settlement, she agreed to dismiss her claim against Air Touch in the Action, and Air Touch agreed to cap its claim in the foreclosure proceeding at $106,555. Air Touch's response to Continental's amended petition essentially mirrors Mrs. Canfield's in respect of the Form A issue.

[16] Continental filed an application to strike the response pleadings relating to the Form A transfer being void on the basis that that issue is *res judicata*. It is Continental's position that the amended responses are a collateral attack on a mid-trial ruling made by Horsman J., and are barred either as a result of issue estoppel or cause of action estoppel. Continental set its application down for hearing together with its foreclosure petition, in which it seeks final judgment.

[17] Mrs. Canfield and Air Touch, both now represented by a single counsel, deny that the Form A transfer issue has been decided and say that they are entitled to pursue the claims pleaded in their amended responses. Their position is that the Form A transfer issue should be decided now, on the basis of the materials filed in this hearing.

[18] Continental says in reply that if it is unsuccessful in its application to strike the amended responses, the petition needs to be referred to the trial list.

[19] Mr. Stewart, on his own behalf and on behalf of Bronze, made limited submissions. In essence, he accepts that Continental is entitled to payment out of

the court of the proceeds of sale, and resists any further proceedings being permitted against him by Mrs. Canfield.

[20] For the reasons that follow, I have concluded that Mrs. Canfield and Air Touch are not estopped or otherwise barred from litigating the Form A transfer issue in this foreclosure proceeding. I do not consider it appropriate to decide the Form A transfer issue on the materials filed, and give directions with respect to the next steps to be taken to permit that issue to be determined.

Analysis

The Form A transfer issue

[21] In this part of my judgment I will summarize the substance of the Form A transfer issue as put forward by Mrs. Canfield and Air Touch. In doing so, I am not making any findings of fact or determining the legal issues raised. The evidence relied upon by Mrs. Canfield and Air Touch on this issue all comes from the trial of the Action, and was attached as exhibits to an affidavit sworn by counsel's administrative assistant.

[22] Two, different, copies of the Form A transfer were introduced as exhibits at trial. The first was the version signed by Mrs. Canfield. It stated in box 1 that Mr. Stewart was the applicant, and provided his contact information. In box 6, it stated that Bronze was the transferee, and provided its address. Mrs. Canfield signed as the transferor in box 7, and her signature was witnessed by Mr. Engman. The second version was altered in three ways. In box 1, Mr. Stewart's name and contact information was blacked out, and Mrs. Canfield's name and address, and the phone number of her daughter and son-in-law was written in. In box 6, Bronze's business number was written in. In box 7, Mrs. Canfield's full name was handwritten below her signature.

[23] Portions of Mrs. Canfield's evidence-in-chief and cross-examination by counsel for Mr. Engman were attached to the administrative assistant's affidavit. In chief, Mrs. Canfield identified her signature on both copies of the Form A. She

denied authorizing anyone to make changes to the Form A after she signed it. She was asked if she applied to the Land Title Office to transfer the property to Bronze, and denied that she did so or that she authorized anyone else to do so. She identified the phone number that was written in box 1 after she signed as belonging to her daughter and son-in-law. In cross-examination, Mrs. Canfield testified that she did not know who filed the Form A with the Land Title Office.

[24] A portion of Mr. Stewart's examination-in-chief was attached to the administrative assistant's affidavit. He represented himself and Bronze at trial, and led himself through his own examination-in-chief. He testified that Mr. Engman invited Mrs. Canfield to sit down and go through the document before signing it. He testified that Mr. Engman asked Mrs. Canfield some questions, which she answered. She signed the Form A and he paid the fee. He testified that he sent the Form A to the Land Title Office by courier. Mr. Stewart further testified:

> I received a phone call a few days later from the office telling me that there were some non-critical mistakes on the Form A and asking for my permission to address them before filing. The agent told me the form could not be filed as it was presented. And so I had a choice of approving the changes or having a new Form A sworn. As I recall, the main issue was that I had put myself as the applicant and it should have been the plaintiff. I believe that is the origin of the changes between the form signed and witnessed by the plaintiff… versus the changed Form A … which shows the changes to the plaintiff as the applicant and some other changes as well.

[25] Portions of Mr. Engman's examination-in-chief and cross-examination by Mr. Stewart and counsel for Mrs. Canfield were also attached as exhibits to the administrative assistant's affidavit. In chief, Mr. Engman testified that he witnessed Mrs. Canfield's signature on the original version of the Form A. He denied making any changes to it after she signed it, and said that he absolutely would not have done so. He testified that if changes were made to the Form A it might not be a registerable document. Mr. Engman testified that he had never seen the second version of the Form A prior to the litigation. He identified the changes that were made and testified that he did not have anything to do with making any of those changes. He also testified that he did not file the Form A with the Land Title Office.

[26] In cross-examination by counsel for Mrs. Canfield, Mr. Engman testified that he obtained the altered Form A after the litigation commenced. The first time he looked at it was at his examination for discovery by counsel for Mrs. Canfield. He testified that his invariable practice when doing attestations was not to read the form or the document before attesting, and that he did not understand what the form or document was doing because he had not read it. Mr. Engman testified that he knew that the Form A was transferring an equity interest, and that he understood that the transferee could take the document and complete the transfer.

Relevant Procedural History

[27] In order to put the application to strike in context, it is necessary to provide some further detail with respect to some of the procedural steps taken and decisions made in the Action and in this foreclosure proceeding.

[28] The Form A transfer issue was not raised in Mrs. Canfield's notice of civil claim.

[29] On September 22, 2020, Mrs. Canfield filed a trial brief in the Action. In Part 11 of her brief, she identified the following order to be applied for at the trial management conference ("TMC"):

> Petition in action no. 20411 be tried with this trial so that all matters in issue may be resolved in one block of trial time, or alternatively that the limitation issue be tried at the same time.

[30] A TMC was held in October 2020. I will return to what occurred at the TMC shortly.

[31] The trial commenced in July 2021. At trial, Mrs. Canfield applied to amend her notice of civil claim after the close of her case, and the dismissal of a "no evidence" motion made by the defendants. In oral reasons for judgment indexed at *Canfield v. Bronze Wines Ltd.*, 2021 BCSC 1714 (the "Mid-Trial Ruling"), and pronounced July 26, 2021, Horsman J. denied Mrs. Canfield's application, insofar as it related to the Form A transfer issue. Justice Horsman granted the part of the application relating to Mr. Engman, but that aspect of the ruling is not important for present purposes.

[32] At paras. 8–12 of the Mid-Trial Ruling, Horsman J. set out some relevant procedural history. At para. 9, she noted that the action had been filed in 2014, and stated that the length of time it had taken to get to trial was due in part to two trial dates being lost due to the unavailability of a judge. There had been a number of case planning conferences and TMCs. At para. 10, she referred to the TMC which took place before Master Keim on October 22, 2020. She noted that, at that TMC, Mrs. Canfield sought an order that Continental's foreclosure petition be heard at the same time as the trial. She stated that an alternative was reached by consent, permitting Mrs. Canfield to amend her pleading to allege that Continental's limitation period for enforcing its security had expired, and that the mortgage was unenforceable on that basis. The notice of civil claim was amended accordingly.

[33] Counsel for the parties before me were also counsel at the October 22, 2020 TMC. They had different recollections of what had been said and, in particular, about whether counsel for Continental had opposed counsel for Mrs. Canfield's proposal that the foreclosure petition be heard at the same time as the trial. I granted leave, pursuant to Rule 12-2(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, for counsel to listen to the recording of the TMC in order to resolve this question. I also listened to the recording. It reflects that counsel for Continental did oppose having the two matters heard together, on the basis that Master Keim could not make the necessary order in the absence of Air Touch, which was no longer a party to the action by this time by virtue of its May 15, 2019 settlement with Mrs. Canfield.

[34] Returning to the Mid-Trial Ruling, Horsman J. stated at para. 11 that counsel for Mrs. Canfield only became aware of the alterations to the Form A at the examination for discovery of Mr. Engman in November 2019. She noted that that meant Mrs. Canfield had a year and a half to amend her notice of civil claim prior to trial, but did not do so. At para. 12, Horsman J. referred to Mrs. Canfield's submission that the defendants were put on notice by her trial brief that she would advance the Form A transfer issue at trial. She noted that the brief contained a "passing reference" to the Form A being void, but no particulars were given and the claim was not pled.

[35] The trial brief in question was a second one, filed May 4, 2021, in anticipation of a second TMC, held June 20, 2021. In part 1 of the brief, Mrs. Canfield stated that an issue in dispute was the "status of first mortgage (Continental)". She stated that her position was that it was unenforceable for two reasons, the first being the limitation period having tolled, and "in the alternative, the Form A transfer was void."

[36] Justice Horsman summarized the amendments which Mrs. Canfield sought to make with respect to the Form A transfer issue at para. 3 of the Mid-Trial Ruling as follows:

> [3] First, the plaintiff seeks to make amendments to plead that certain handwritten revisions made to the Form A Transfer Form which transferred the subject property to Bronze Wines after its execution render the Form A either voidable, as between the plaintiff and the defendant, Bronze Wines, or void. The proposed amendments include an allegation that the Form A is void pursuant to s. 25.1 of the *Land Title Act*. If the plaintiff was successful in establishing this, then the defendant, Continental, could not enforce its registered security against the Grand Forks property.

[37] At para. 13, Horsman J. summarized the bases upon which Continental, Bronze, and Mr. Stewart opposed the amendments. They submitted that they would be prejudiced, including because Continental "had no opportunity to undertake pretrial investigations into how the Form A came to be altered or why it was accepted for registration by the Land Title Office despite the alteration." Continental submitted it would be prejudiced by the passage of almost a decade since the Form A was registered. It had lost the opportunity to examine Mr. Engman for discovery as it might have done.

[38] At paras. 15–19 of the Mid-Trial Ruling, Horsman J. considered the factors relevant to the application to amend Mrs. Canfield's notice of civil claim to add the Form A transfer issue. At para. 15, she held that while the amendment was not obviously inconsistent with the existing pleadings, it "is a new and distinct issue that has a factual component that the defendants have been deprived of the opportunity to explore prior to trial." As a result, the evidentiary record was incomplete.

[39] At para. 16, Horsman J. accepted Continental's submission that the trial would have been conducted differently if the proposed plea had been advanced. She held that Continental "had fully lost the opportunity of pretrial discovery in relation to this issue including the possibility of adopting a more adversarial position vis-à-vis Mr. Engman."

[40] At para. 17, Horsman J. held that the proposed amendments would be prejudicial to the defendants at this stage. Neither costs nor an adjournment would remedy the prejudice. She held that the defendants should not be subjected to a prolonged process because Mrs. Canfield wished to advance a new claim in the middle of the trial.

[41] At paras. 18 and 19, Horsman J. held that the amendments were not necessary to address the issues presently raised, as they related to an entirely new claim that did not arise out of the evidence adduced at trial and would require a new factual investigation.

[42] In the result, Horsman J. dismissed Mrs. Canfield's application to amend her notice of civil claim to plead the Form A transfer issue.

[43] Immediately following Horsman J. delivering her Mid-Trial Ruling on July 26, 2021, counsel for Mrs. Canfield rose, indicating he wished to state something for the record. He stated:

> I would like to state for the record that the petition was not enjoined [*sic*] with this proceeding. There is no order nisi and the validity of the mortgage is an outstanding issue in that proceeding.

[44] Justice Horsman responded "That is what I assumed to be the case".

[45] At that time, the expectation was that the trial would continue, and that the defendants would open their cases. Instead, Mr. Stewart applied to adjourn the trial. His application was granted, and the trial did not resume until December 6, 2021. At that time the defendants called their evidence, including from Mr. Stewart and Mr. Engman, portions of the transcripts of which I referred to earlier.

[46] In the meantime, on September 7, 2021, Mrs. Canfield filed her amended response to petition in this foreclosure proceeding. The amendments set out in some factual and legal detail the Form A transfer issue.

[47] Justice Horsman rendered the Trial Judgment on April 5, 2022.

[48] Air Touch filed its amended response to petition on September 20, 2022, also pleading the Form A transfer issue. Air Touch pleaded that the court should declare that Mrs. Canfield, and those claiming through her, including Air Touch are entitled to the proceeds of sale held in trust.

[49] On January 11, 2023, Continental filed its amended petition. It added pleadings with respect to what occurred in the Action, and the *res judicata* issues now before the court. On March 6, 2023, both Mrs. Canfield and Air Touch filed their responses to the amended petition. I note that Continental seeks to have the entirety of Mrs. Canfield's and Air Touch's amended responses and responses to the amended petition struck. The result, if granted, would be to strike out all references in Mrs. Canfield's and Air Touch's pleadings with respect to the Form A transfer issue.

Should the amended responses be struck?

[50] Continental applies to strike the amended responses under Rule 9-5. In *Boyd v. Cook*, 2016 BCCA 424 at para. 16, the Court of Appeal found that an application to dismiss a claim as *res judicata* may be made under Rule 9-5(1)(d). Affidavit evidence is admissible to establish that a matter is *res judicata*.

[51] The doctrine of *res judicata* has two branches, both of which are relied upon by Continental: cause of action estoppel and issue estoppel. In *Ahmed v. Canna Clinic Medicinal Society,* 2018 BCCA 319 [*Ahmed*], Madam Justice Fenlon explained the purpose of the doctrine of *res judicata* at para. 9:

> [9] Cause of action estoppel and issue estoppel are two aspects of the doctrine of *res judicata*. The doctrine is one of the oldest techniques the law has developed to prevent abuse of the decision-making process, and is based on the principle that a dispute once judged with finality is not subject to

relitigation: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 20. Speaking for the Court, Justice Binnie said:

> [20] … The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): …

Issue estoppel

[52] The elements of issue estoppel are set out in the decision of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*] at para. 25:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[53] Where a party establishes those three elements, the court retains discretion to refuse to apply estoppel. That is because, as stated by Binnie J. at para. 1 of *Danyluk*, a "judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

[54] Continental's argument that issue estoppel applies in the present case falters at the first hurdle. The question of whether the Form A transfer form was void due to alterations made after Mrs. Canfield signed it was not decided in the Action. More broadly put, the validity of Continental's mortgage was not decided in the Action. That is apparent from the Mid-trial Ruling, in which Horsman J. held that the Form A transfer issue was a "new and distinct issue", and denied Mrs. Canfield's application to amend her notice of civil claim to plead the Form A transfer issue. It is, therefore, unnecessary to consider further the potential application of the doctrine of issue estoppel.

Cause of action estoppel

[55] The traditional requirements for cause of action estoppel were set out by the Court of Appeal in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 [*Cliffs*], at para. 28:

> 1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
> 3. The cause of action and the prior action must not be separate and distinct; and
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.
>
> [emphasis in original]

[56] The first element of cause of action is clearly made out. The Action resulted in a final decision. All appeals have been exhausted.

[57] The second element requires that the parties to the two proceedings be the same or their privies. Continental, Mrs. Canfield, Bronze and Mr. Stewart were all parties to the Action and are parties to this proceeding. The parties disagree whether Air Touch, who did not participate in the trial of the Action due to its settlement with Mrs. Canfield, and which is a party to this proceeding, was a party to the Action or was Mrs. Canfield's privy in the Action.

[58] Continental submits that Air Touch was both a party to the Action and Mrs. Canfield's privy. It notes that Air Touch was a defendant but settled with Mrs. Canfield before trial. Under the terms of the settlement between Air Touch and Mrs. Canfield, Air Touch only shares in the sale proceeds subject to the interests of Continental. Continental submits that the Form A transfer argument raised jointly by Air Touch and Mrs. Canfield would defeat Air Touch's own interest in the property, as Air Touch is in the same legal position as Continental. Continental submits that Air Touch can only avoid its own interest being void if the Form A transfer is void by the terms of its settlement with Mrs. Canfield.

[59] Air Touch denies that by settling with Mrs. Canfield it became her privy. It submits that the settlement agreement determined how the proceeds of sale would be allocated as between them if Continental's mortgage was not found not to be enforceable. It submits that it has not had the opportunity to advance arguments about why Continental's security is not valid and enforceable.

[60] In *J.P. v. British Columbia (Director of Child, Family and Community Services)*, 2013 BCSC 1403, Mr. Justice Walker reviewed the authorities related to privies in the context of *res judicata* at paras. 70–75. At para. 70, he wrote that "privies have been described as persons having a community or unity of interest, whether by blood, title or interest." Further, "the concept is elastic and the categories of privies are not fixed." As described at para. 71, the court must determine whether there is a "sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other was party". At para. 72, Walker J. quoted *The Doctrine of Res Judicata in Canada*, 2d. ed., for the proposition that:

> …A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. A person who has no right to participate as a party in a proceeding lacks a due process requirement to make a finding of privity of interest. To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privy requires parallel interest in the merits of the proceeding, not simply a financial interest in the result. However, a non-party who enters into a formal agreement with the party in a proceeding for disposing of the proceeds is a privy of that party and bound by the first proceeding. [Emphasis in original.]

[61] I conclude that Air Touch was Mrs. Canfield's privy in the Action. A number of factors lead me to that conclusion. Air Touch did have the right to participate in the Action: it was a defendant. Due to the settlement agreement, Air Touch ceased to be a party and did not participate at trial. The consent dismissal order as against Air Touch was issued July 17, 2019. At trial, due to the terms of the settlement agreement, Air Touch had a parallel interest in the merits of the proceeding. Air

Touch's interest went beyond a financial interest in the result due to its agreement with Mrs. Canfield for the disposition of the proceeds of sale. Further, Air Touch and Mrs. Canfield are now represented by the same counsel in the foreclosure proceeding, and take identical positions.

[62] I conclude that there is a sufficient degree of identification between Air Touch and Mrs. Canfield to make it just to hold that Air Touch is bound by the Action.

[63] The third element requires that the current proceeding and the prior action not be separate and distinct. In *Cliffs*, the Court explained at para. 28 that the doctrine requires two causes, with the first having ended in a final judgment that bars a "second claim for the same cause". The Court went on to state that "In this context, 'cause of action' does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy."

[64] This element is also made out. The Action and the present foreclosure proceeding both arise out of the same factual situation and require the court to determine the validity and enforceability of Continental's mortgage. The specific legal bases for challenging the enforceability of the mortgage raised by Mrs. Canfield are different: in the Action she challenged the enforceability of the mortgage on the basis that the limitation period for Continental enforcing its security interest had expired; in the present proceeding she seeks to challenge the validity of the mortgage on the basis that the Form A transfer was void. The fact that there are multiple ways in which it is alleged that the mortgage is unenforceable in the two proceedings does not render the two proceedings separate and distinct: *Ahmed*, at para. 22.

[65] The fourth element requires that the basis of the cause of action in the subsequent proceeding was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. I have already explained that the basis of the present challenge to the validity of the Form A transfer was not argued in the Action. The question then is whether it could have been if Mrs. Canfield had exercised reasonable diligence.

[66] Mrs. Canfield made some efforts to have the Form A transfer issue decided in the Action. To briefly restate the relevant events, Mrs. Canfield filed her notice of civil claim in 2014. She did not plead the Form A transfer issue. That is not surprising, as it was in November 2019 at Mr. Engman's examination for discovery that Mrs. Canfield learned, through her counsel, about the alterations to the Form A upon which she now relies. She did not amend her notice of civil claim to include the Form A transfer allegations. In a trial brief filed September 22, 2020, she sought an order that this petition be tried together with the Action so that all matters in issue could be resolved in one proceeding, or alternatively that the limitation issue be tried at the same time. At the October 22, 2020 TMC, Continental opposed having the two matters heard together. By consent, Mrs. Canfield was permitted to amend her notice of civil claim to add the limitation issue.

[67] In a trial brief filed May 4, 2021, Mrs. Canfield stated that an issue in dispute was the "status of first mortgage (Continental)", and stated that her position was that it was unenforceable for two reasons, the first being the limitation period having tolled, and in the alternative, the Form A transfer was void.

[68] At trial, after she had closed her case and the defendants had made an unsuccessful no evidence motion, Mrs. Canfield applied to amend her notice of civil claim to add the Form A transfer allegations. For reasons I have already summarized at some length, Horsman J. dismissed that motion in the Mid-Trial Ruling.

[69] Do Mrs. Canfield's efforts to have the Form A transfer issue decided within the context of the Action constitute reasonable diligence? Continental submits not, pointing to the fact that she could have sought to amend her notice of civil claim earlier than the middle of trial, and that she did not appeal the Mid-Trial Ruling. For her part, Mrs. Canfield submits that the Action was complicated enough, she was a vulnerable litigant who was having difficulty with the trial process, and that it would not have been rational for her to appeal the Mid-Trial Ruling or the earlier TMC

orders, given that leave to appeal would have had to have been sought and was unlikely to have been granted.

[70] I do not fault Mrs. Canfield for not appealing the Mid-Trial Ruling or the earlier TMC orders. However, I find that with reasonable diligence she could and should have amended her notice of civil claim before the trial of the Action to include the Form A transfer issues. No rationale for choosing not to do so has been put forward. This was undoubtedly a complex piece of litigation, and Mrs. Canfield was an elderly and vulnerable litigant. But that does not mean that she could not, with reasonable diligence, have amended her notice of civil claim in a more timely way than applying to do so mid-trial.

[71] I, therefore, conclude that the four elements of cause of action estoppel have been made out. That does not conclude the analysis. Where the elements of cause of action estoppel are established, the court retains discretion not to apply the doctrine where it would lead to injustice, as explained at para. 28 of *Ahmed*:

> [28] The doctrine of *res judicata* is not an inflexible one. The court retains a discretion not to apply cause of action estoppel in special circumstances where it would lead to injustice. In *Fournogerakis v. Barlow*, 2008 BCCA 223, Lowry J.A. said:
>
> > [16] Where it applies, *res judicata* serves as an equitable estoppel. Its purpose is to ensure justice is done, prevent abuse of process, and fulfill the societal interest of finalizing litigation. The court retains a discretion to refuse to apply the principle where in special circumstances a rigid application would frustrate its purpose: *Arnold v. National Westminster Bank Plc*., [1991] 2 A.C. 93 (H.L.) at 109–111.

[72] In *Danyluk*, the Court held that the elements of issue estoppel were established. The Court went on to consider whether it should exercise its discretion to refuse to apply estoppel. Many of the factors it considered in this connection are inapplicable in the present case, as the Court was considering a decision of an administrative tribunal, not a superior court. The final factor it considered, and one it termed at para. 80 to be the most important, was the potential for injustice. The Court stated that it “should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case

it would work an injustice". It cited the dissenting decision of Jackson J.A. in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.) at p. 21 for the following dictum:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

[73] The Court concluded that "whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated."

[74] In *Cliffs*, the court noted at para. 26 that appellate courts have emphasized that the principle of finality must be balanced against the fundamental principle that courts are reluctant to deprive litigants of the right to have their cases decided on the merits.

[75] In my opinion, equity dictates that Mrs. Canfield has the opportunity to have her claim about the Form A transfer decided on the merits. Mrs. Canfield can be faulted for making the mistake of failing to amend her notice of civil claim in a timely manner. The stubborn fact remains that her claim that the Form A transfer was void due to the alterations made after she signed it has simply never been properly considered and adjudicated. It would cause an injustice for cause of action estoppel to be applied in the unique circumstances of this case. I, therefore, refuse to apply cause of action estoppel.

[76] I dismiss Continental's application to strike the amended responses of both Mrs. Canfield and Air Touch.

Next steps

[77] In the event I dismissed its application to strike the amended responses, Continental submitted that the petition should be referred to the trial list. Mrs. Canfield and Air Touch submitted that the petition should be decided on the pleadings and evidence now before the court.

[78] In *Pillar Capital Corp. v. Horseshoe Valley Ranch Ltd.*, 2023 BCSC 82 [*Pillar Capital*], Justice Loo helpfully summarized the principles to be applied in considering whether to refer a petition to the trial list, or to order hybrid procedures, as follows:

> **The Legal Context**
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> [10] Rule 22-1(7)(d) provides that on a hearing in chambers, the Court may "order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding." Rule 21-7(5)(k) provides for such an order in foreclosure proceedings.
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> [11] In the recent case of *Cepuran v. Carlton*, 2022 BCCA 76, the Court of Appeal of British Columbia clarified that where a triable issue is raised by a respondent to a petition, a judge is not obliged to refer the matter to the trial list under R. 22-1(7), but has a discretion to do so or to employ other pretrial procedures for the resolution of the issues:
>
> > [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.
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> [12] In *Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706, the Court explained the application of *Cepuran* to the issue of whether a petition should be referred to the trial list, stating:
>
> > [46] A determination that there is a triable issue is no longer the end of the analysis: *Cepuran* at para. 158. Instead, where a judge hearing a petition proceeding concludes it raises a triable issue, they have the discretion to refer it to the trial list or to use hybrid procedures pursuant to R. 16-1(18) and R. 22-1(4) within the petition proceeding itself to assist in determining the issues: *Cepuran* at para. 160. Some of the factors that may be relevant in deciding whether to convert a petition proceeding to an action include the undesirability of multiple proceedings, the desirability of avoiding unnecessary costs and delay, whether the particular issues involved require an assessment of the credibility of witnesses, the need for the Court to have a full grasp of all the evidence, whether there is some urgency or the matter is highly time sensitive, and whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute: *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson)*

> *Plaza Inc*., 2009 BCSC 1701 at paras. 49, 51 [*Boffo*] citing *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627 at para. 39, both cited with approval in *Cepuran* at para. 165. In considering whether to order the use of hybrid procedures within the petition proceeding itself, or to refer the matter to trial, at minimum a chambers judge "will need to be mindful of the object of the *Rules* set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding": *Cepuran* at para. 166.

(See also *The Owners, Strata Plan NW 499 v. Louis*, 2022 BCCA 231 at paras. 40–42).

[13] Pillar relied on decisions pronounced prior to *Cepuran* in which this Court has suggested that the threshold for converting a foreclosure petition into a trial ought to be a low one. For example, in *Do v. Nichols*, 2014 BCSC 1082, the Court held:

> [39] In my view, the courts have established a low threshold for converting a foreclosure petition into an action for trial because of a well-placed concern that people should not be deprived of their interest in property by way of a foreclosure without a full canvassing of all the relevant evidence and arguments and that a property owner should have a fair and full opportunity to present their case.

[14] On the other hand, the Court in *Cepuran* remarked that in those matters that are properly advanced by petition, the starting point is that a summary procedure ought to be appropriate:

> [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the *Rules* contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29-30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

[15] In *Phaneuf* at para. 47, the Court set out the issues to be determined when a petition respondent seeks to have the proceeding referred to the trial list:

1. Is the proceeding one that was properly initiated by petition?
2. If so, does the proceeding raise triable issues?
3. If so, should the triable issues be determined by referring the petition to the trial list or by hybrid procedures within the petition proceeding?

> On the facts of this case, there is no issue as to whether this proceeding was properly initiated by petition, the first issue identified in *Phaneuf*.
>
> [16] For the purposes of R. 22-1(7), a triable issue is an issue of fact or law that is not bound to fail: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 80.
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> [17] In order to raise a triable issue, the Respondents must do more than make bare assertions in response to the claims advanced by Pillar. In Forjay Management Ltd v. 0981478 B.C. Ltd., 2018 BCSC 1494 [Forjay], this Court held:
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> > [30] A party will not succeed in responding to such an application by simply relying on bald assertions. He must "put [his] best foot forward" with respect to the existence of material issues to be tried: *McLean* at paras. 36–38. See also *Trowbridge v. Connelly*, 2017 BCSC 2336 at para. 5; *Richter v. Stoeckli Stucco Ltd.*, 2016 BCSC 1294 at para. 11.

[79] In *Pillar Capital*, the court held that the respondent had raised three triable issues. At para. 72, Loo J. referred to the importance of balancing the interests of proportionality and access to justice with the court's ability to fairly determine a case on the merits. At para. 73, Loo J. held that the triable issues could be determined by the use of a more limited process than a full trial, and at para. 77 ordered that the parties be granted leave to exchange expert evidence and conduct cross-examinations on that evidence, and to exchange further affidavits and conduct cross-examination on those issues.

[80] In the present case, I find that Mrs. Canfield and Air Touch have raised a triable issue with respect to whether the Form A transfer is void due to the alterations made to it after Mrs. Canfield signed it. It is arguable that those alterations are sufficient to make it a false document and, therefore, a fraud or forgery: *Gaysek v. The Queen*, [1971] S.C.R. 888 at pp. 890-91. It is further arguable that, as a result, the Form A transfer was a void instrument, and that Bronze did not acquire an interest in the land by registration of the Form A transfer and, therefore, Continental did not acquire an interest in the land through the mortgage granted to it: *Gill v. Bucholtz*, 2009 BCCA 137 at para. 26.

[81] The issue of whether the Form A transfer was void cannot fairly be determined on the pleadings and evidence now before the court. However, it is not necessary for the petition to be referred to the trial list to determine that issue. The parties have already filed some affidavit evidence bearing on this issue. Mrs. Canfield filed transcripts of evidence from the trial of the Action. It may be that the parties will agree or the court may order that evidence from the trial is admissible in the hearing of this petition. Continental and Mr. Stewart may wish to further investigate the evidentiary issues related to the changes made to the Form A transfer subsequent to Mrs. Canfield's signature and file further affidavits to address those issues. Cross-examination, either on affidavits or the transcripts, may be appropriate.

[82] Counsel were not in a position to fully argue what hybrid procedures would be appropriate at this hearing. Now that the parties have the court's decision, I direct that a hearing be held at which the question of what further procedures are appropriate can be discussed, and the court can make whatever further orders or directions are necessary to ensure that the Form A transfer issue can be fully and finally resolved in an efficient and proportionate manner. I will remain seized of this petition.

[83] The parties are to contact Supreme Court Scheduling to arrange a hearing before me to determine the procedures to be employed to decide the Form A transfer issue.

"L.M. Lyster J."

LYSTER J.