

Date: 20230615  
Docket: CI 22-01-38516  
(Winnipeg Centre)  
Indexed as: Khandelwal et al. v. Kumar et al.  
Cited as: 2023 MBKB 101

## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

SUBHASH KHANDELWAL and	)	<u>PETER HALAMANDARIS</u>
SAVITRI KHANDELWAL,	)	<u>LAUREN L. GERGELY</u>
plaintiffs,	)	for the plaintiffs
	)	
- and -	)	
	)	
RAHUL KUMAR and ANJU BAJAJ,	)	<u>JOE D. CALIGIURI</u>
defendants.	)	for the defendants
	)	
	)	
	)	Judgment Delivered:
	)	June 15, 2023

### **PERLMUTTER A.C.J.**

#### **INTRODUCTION**

[1] The defendants move under King's Bench Rules 25.11(1)(c) and (d) to strike out the statement of claim filed in this proceeding in 2022 (the "2022 Claim") as an abuse of the process of the court and as not disclosing a reasonable cause of action. The defendants also move to discharge two related caveats registered against titles to land in the defendants' names. The grounds for the defendants'

motion are that, for an improper purpose, the plaintiffs are attempting to relitigate a nearly identical action filed in 2015 (the “2015 Claim”) that was dismissed for delay, and that the cause of action reflected in 2022 Claim is statute barred. It is the plaintiffs’ position that the 2015 Claim was not adjudicated on its merits, the 2022 Claim is not an abuse of process, and it is not plain and obvious that the 2022 Claim is statute barred. The plaintiffs oppose the defendants’ motion to discharge the caveats. As well, the plaintiffs move for a pending litigation order against titles to this same land.

### **BACKGROUND**

[2] In 2013, the defendants purchased two real properties in Winnipeg (collectively, the “properties”). The plaintiffs along with Ram Paul and Kamaljeet Saroa (who are parties to the 2015 Claim and are not parties to the 2022 Claim) loaned the defendants money for the down payments on these purchases. For each property, a caveat was registered against the title as security for the related loan.

[3] The plaintiffs claim these properties were purchased in connection with a joint venture agreement among the plaintiffs, the defendants, Mr. Paul and Ms Saroa that involved purchasing real property in Winnipeg which they would then develop to rent or re-sell. The plaintiffs allege that the terms of the joint venture agreement included that the plaintiffs, the defendants, Mr. Paul and Ms Saroa would hold equal beneficial interests in any property purchased for the purposes of the joint venture, and that they would be entitled to equal shares in

the receipts, gains and net profits of the joint venture and be responsible for equal shares of expenditures and net losses.

[4] The defendants deny they entered into a joint venture agreement pertaining to the properties and say their only agreement was that the plaintiffs, Mr. Paul and Ms Saroa would lend them funds to use towards the down-payment to purchase the properties.

[5] When the relationship among the parties broke down, the plaintiffs, Mr. Paul and Ms Saroa filed the 2015 Claim against the defendants, claiming amongst other relief, declarations that they have interests in the properties and that the properties are held in trust by the defendants for them. On April 26, 2021, the master dismissed the 2015 Claim for delay on the basis that more than three years passed without a significant advance in the action (Rule 24.02(1)). The appeal of the master's decision was dismissed by a judge on June 15, 2022. Neither the master's decision nor the judge's decision includes an order under Rule 24.06(1) that the dismissal of the 2015 Claim for delay is a defence to a subsequent action.

[6] The 2022 Claim (which the defendants move to strike out) was filed on November 22, 2022 and is essentially identical to the 2015 Claim (less Mr. Paul and Ms Saroa as parties). If successful on their motion to strike out the 2022 Claim, the defendants also move for an order to discharge the caveats on the properties. If the defendants are unsuccessful on their motion to strike, the plaintiffs seek a pending litigation order.

## **ISSUES**

1. Should the 2022 Claim be struck out as an abuse of process and/or as not disclosing a reasonable cause of action?
2. If the 2022 Claim is struck out, should the caveats be discharged from the titles to the properties?
3. If the 2022 Claim is not struck out, should a pending litigation order be granted in favour of the plaintiffs respecting the properties?

## **ANALYSIS**

### ***1. Should the 2022 Claim be struck out as an abuse of process and/or as not disclosing a reasonable cause of action?***

[7] It is the defendants' position that the plaintiffs are abusing the process of the court by attempting through the 2022 Claim to relitigate the 2015 Claim for an improper purpose, that the 2022 Claim is statute barred, and that it does not disclose a reasonable cause of action.

[8] The defendants submit that the plaintiff Mr. Khandelwal is a practicing lawyer who is simply trying to make their lives difficult. In support of this submission, the defendants identify several factors which they argue underscore the weakness of the 2022 Claim. The defendants point out that Mr. Paul and Ms Saroa are not named as parties to the 2022 Claim and have not participated in this matter since the motion to dismiss for delay was heard by the master in April 2021. The defendants also point out that the plaintiffs have retained five different law firms throughout this matter. In addition, they note the clear documentary evidence of the loan agreements for the purchase of the properties and argue that the evidence refutes the plaintiffs' claims of a joint venture

agreement and related beneficial interest in the properties. For example, the defendant Mr. Kumar deposed that all expenses relating to the properties were paid by the defendants and were operated at a loss to them.

[9] The defendants also submit that the 2022 Claim is statute barred because it is essentially identical to the 2015 Claim and was filed more than six years after the 2015 Claim.

[10] Overall, the defendants' counsel submits that principles of proportionality justify striking out the 2022 Claim given the time that has elapsed since the loan agreements, the relatively modest amounts of the loans, and the legal fees already incurred.

[11] I am not persuaded by the defendants' submissions for the following reasons.

***Reasonable Cause of Action***

[12] First, for the purpose of adjudicating whether the 2022 Claim discloses a reasonable cause of action, the defendants assert that the court has a discretion to consider evidence. However, such an approach would be contrary to well-established Manitoba case law. Recently, in ***Sarrasin v. Sokal***, 2022 MBCA 67, Simonsen J.A. reiterated the well-established test for striking out a statement of claim as disclosing no reasonable cause of action, as follows (paras. 25-26, with authority references omitted):

The well-established test to be applied in determining whether a statement of claim should be struck out for disclosing no reasonable cause of action is whether, assuming the facts pled are true, it is "plain and obvious" that the action cannot succeed...

Generally, the bar for striking out a pleading is very high and the remedy is to be used only sparingly; a pleading is to be read generously to accommodate drafting inadequacies...

[13] To the extent that it is the defendants' position that the 2022 Claim ought to be struck out because it is statute barred, the Manitoba Court of Appeal has held that the expiry of a limitation period is a matter of defence and cannot be dealt with on a motion to strike a statement of claim. In *Manning v. Nassar* (1990), 70 Man.R. (2d) 310, Twaddle J.A. provided at p. 311,

**A course which cannot be pursued is a motion by the defendant to strike out a claim on the ground that it was commenced after the expiry of a limitation period.** As I have already indicated, the claim need not allege the facts necessary to bring the plaintiff within the limitation period and the defendant's assertion of facts which suggest that the action is barred is, in the absence of a reply, deemed to be denied. And it is inappropriate, without an order or consent, for such an application to be dealt with on affidavit evidence.

[Emphasis added]

[14] In any event, in my view, it is far from "plain and obvious" that the 2022 Claim is statute barred. In light of the 2022 Claim being filed on November 22, 2022, the applicable limitation period is governed by the following provisions of *The Limitations Act*, C.C.S.M. c L150 (the "new *Act*"):

**31(3)** In the case of a claim discovered before the coming into force of this Act, a proceeding may be commenced under this Act if it is commenced before the earlier of

(a) two years after the coming into force of this Act; and

(b) the day the limitation period under the former Act expires or would expire.

...

**31(5)** If there was no limitation period respecting a claim under the former Act but this Act establishes a limitation period,

(a) in the case of a claim discovered before the coming into force of this Act, there is no limitation period;...

[15] It is undisputed that the 2022 Claim was discovered before the coming into force of the new **Act** (given that it is essentially the same as the 2015 Claim).

[16] The gist of the 2022 Claim is that the defendants hold one-third of the properties acquired pursuant to the joint venture in trust for the plaintiffs and that the plaintiffs have an interest in the properties. The 2022 Claim alleges a constructive trust, a breach of trust, a misappropriation of funds and seeks an order that the defendants deliver up or transfer to the plaintiffs their interests in the properties, along with an accounting of amounts received by the defendants on account of the joint venture agreement. Under s. 49(2)(b) of **The Limitation of Actions Act**, R.S.M. 1987, c. L150 (the "former **Act**"), there is no limitation period for an action by a beneficiary under a trust "to recover from the trustee trust property or the proceeds thereof" or "converted to his use". The phrase "to recover" encompasses claims for declarations of ownership rights, including resulting and constructive trusts (**Shirritt-Beaumont v. Frontier School Division**, 2020 MBCA 31, paras. 34-36). Accordingly, for the purpose of s. 31(5) of the new **Act**, there is no limitation period for this aspect of the 2022 Claim and it is not plain and obvious that the action cannot succeed.

[17] To the extent that the 2022 Claim claims to recover land (the plaintiffs' interests in the properties), s. 25 of the former **Act** prescribes a 10-year limitation period. The agreements to purchase the properties allegedly on behalf of the joint venture were entered into in 2013. Accordingly, for this aspect of the 2022 Claim,

under s. 31(3) of the new **Act**, the limitation period is 10 years (the day the limitation period under the former **Act** expires or would expire as the earlier of that date and two years after the coming into force of the new **Act**). With the 2022 Claim filed in 2022 (less than 10 years after the property purchases in 2013), it is not plain and obvious that the action cannot succeed.

***Abuse of Process***

[18] Turning to the question of whether the 2022 Claim should otherwise be struck out as an abuse of process, the fact that the 2015 Claim (that is essentially the same as the 2022 Claim) was previously dismissed for delay is not in itself a basis to strike. The defendants fairly and, in my view, correctly concede that without an order under Rule 24.06(1) (that the dismissal of the 2015 Claim for delay is a defence to a subsequent action), the dismissal did not preclude the plaintiffs from filing the 2022 Claim (see ***Ruchotzke v. Ruchotzke***, 2022 MBQB 153 (paras. 46-52)). As noted in ***Lenko v. Hydro Electric Board (Man.)***, 2007 MBCA 157, at para. 7 (as quoted in ***Ruchotzke***, para. 55), there may be reasons why an action is dismissed without barring subsequent proceedings.

[19] In ***Vitacea Company Ltd. et al. v. The Winning Combination Inc. et al.***, 2016 MBQB 180, Joyal C.J. discussed the circumstances when proceedings constitute an abuse of process as follows (para. 87, with authority references omitted):

...An abuse of process may arise when a legal process is used for an ulterior motive, other than that for which it was intended. When properly invoked, an allegation of abuse of process is meant to provide protection against harassment or the perversion of the legal process for the purposes of accomplishing an



improper result... An abuse of process may be established where the proceedings are oppressive and vexatious and/or they violate the fundamental principles of justice underlying the community's sense of fair play and decency... A claim found to be frivolous and vexatious and/or embarrassing may nonetheless also constitute an abuse of process. A particular or unique emphasis and focus of an abuse of process claim is on the court's integrity and its interest in maintaining confidence in the administration of justice.

[20] The thrust of the defendants' argument is that the 2022 Claim is unmeritorious and the plaintiffs are using the legal process to harass the defendants. As substantiation for this argument, they invite the court to infer weakness in the plaintiffs' case. They argue this weakness is revealed by the absence of Mr. Paul and Ms Saroa as parties to the 2022 Claim and that the plaintiffs have had four other counsel prior to their present counsel. However, there is no persuasive evidence that these circumstances arise from a weakness in the plaintiffs' case or that the plaintiffs are using the legal process for an ulterior motive other than that for which it was intended.

[21] To the extent that the defendants rely on the loan agreements for the purchase of the properties as conclusive evidence that there was no joint venture agreement between them and the plaintiffs, in the circumstances, there is nothing in the evidence that would necessarily preclude a finding that there are both loan agreements and a joint venture agreement. Indeed, much of the defendants' argument is to the effect that their evidence ought to be preferred over the plaintiffs' evidence without any compelling argument why.

[22] While ultimately the defendants may succeed on the merits (at trial or by summary judgment), at this juncture, their arguments about the strength of their

case and the corollary weakness in the plaintiffs' case are incapable of establishing that the 2022 Claim is an abuse of the process of the court.

[23] Accordingly, the evidence fails to meet the threshold of establishing that the 2022 Claim is an abuse of process.

***Proportionality***

[24] Finally, while the principle of proportionality (which is relied upon by the defendants as both a basis to strike the statement of claim as disclosing no cause of action and as an abuse of process) is a cornerstone of all aspects of the Rules, it is not a basis to supplant the governing legal principles discussed above surrounding the striking of a statement of claim.

[25] As such, for the reasons discussed, I am not striking the 2022 Claim.

***2. If the 2022 Claim is struck out, should the caveats be discharged from the titles to the properties?***

[26] In light of my conclusion that the 2022 Claim is not to be struck out, I am not ordering the discharge of the caveats.

***3. If the 2022 Claim is not struck out, should a pending litigation order be granted in favour of the plaintiffs respecting the properties?***

[27] In *Forsythe et al. v. Labossiere et al.*, 2022 MBCA 28, Spivak J.A. set out the test to obtain a pending litigation order as follows (para. 43, with authority references omitted):

Additionally, the decision to dismiss the plaintiffs' motion for a PLO [pending litigation order] was on the basis of the motion judge's determination of the matter on the merits, instead of the application of **the proper legal test to obtain** or discharge **a PLO**, which has a lower threshold. That test **is whether there is a triable issue that the plaintiffs have a reasonable claim to the interest in land...** It is not

for the court at this stage to determine a plaintiff's claim, but rather only to decide whether there exists a triable issue in that regard...

[Emphasis added]

[28] In opposing the plaintiffs' motion for a pending litigation order, the defendants' counsel advances many of the same arguments regarding weakness in the plaintiffs' claim as advanced as part of their motion to strike out the statement of claim. However, as noted, there remains competing affidavit evidence between the plaintiffs who assert a joint venture agreement and related interest in the properties and the defendants who assert there was no such agreement or interest in the properties. There have been no cross-examinations on these affidavits.

[29] There is also evidence involving the defendant Mr. Kumar that is consistent with the plaintiffs' position that the properties were being developed as part of the alleged joint venture. For example, on April 16, 2013, Vogt Building Construction Inc. sent an email to Mr. Kumar and Mr. Paul providing a quote to complete surveying certificates of both properties and stating "they will be marking the site for future condominium development...". As well, the defendant Mr. Kumar deposed that he, Mr. Paul, and the plaintiff Ms Khandelwal were shareholders and directors of a company that owned a different property (other than the two properties previously discussed) and wanted to develop it into a condominium complex. While denied by the defendants, the plaintiff Mr. Khandelwal deposed that this company was incorporated on behalf of the joint venture for the purpose of also holding title to the two properties.

[30] Of course, none of this evidence is conclusive, but, in the context of all of the evidence, in my view, demonstrates at least a triable issue that the plaintiffs have a reasonable claim to the interest they claim in the properties.

[31] Accordingly, I am granting the pending litigation order sought by the plaintiffs.

**CONCLUSION**

[32] In conclusion, the defendants' motion to strike out the statement of claim and to discharge the caveats from titles to the properties is dismissed while the plaintiffs' motion for a pending litigation order respecting these properties is granted.

[33] If costs cannot be agreed upon, I will receive written submissions.

\_\_\_\_\_ A.C.J.