

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wilson v. Koch*,
2023 BCSC 659

Date: 20230411
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 Justice Mayer

Oral Reasons for Judgment

Counsel for the Plaintiff:

N.A. Rayan

Counsel for the Defendant, Doreen Koch:

J.D. Keeley
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Counsel for the Defendants, Woody
Kuroaka and Century 21 Executives Realty
Ltd and the Third Party, Steven Tate:

S. Gladders

Place and Date of Hearing:

Vancouver, B.C.
April 4, 2023

Place and Date of Judgment:

Vancouver, B.C.
April 11, 2023

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Introduction

[1] The defendant, Doreen Koch, brings an application that certain issues of fact or law arising in this claim, which concerns a claim for specific performance of a contract of purchase and sale (the “Contract”) of a piece of land she owned in Lumby, British Columbia (the “Property”), be tried before the remaining issues.

[2] In particular, Ms. Koch seeks an order that the issues of whether the Property is unique and the quantum of the plaintiff, Matthew Wilson’s damages, if damages are found to be an adequate remedy, be tried first, with the remaining issues tried later. That is, she seeks an order bifurcating the trial.

Background

[3] In this proceeding, Mr. Wilson seeks an order for specific performance of the Contract in relation to the Property. He commenced this action on March 23, 2021 and amended his pleadings on June 10, 2022.

[4] The Property is a 10-acre farm which has been in Ms. Koch’s family for over 80 years.

[5] Ms. Koch is 92 years old and returned to reside at the Property some time after July 2020 after spending a period of time at a seniors’ residence. Ms. Koch has no assets other than the Property and her income is limited to government pensions.

[6] The Contract was executed by Ms. Koch’s son, Colin Jenkins aka Collin Jenkins, on July 15, 2020, pursuant to an enduring power of attorney executed by Ms. Koch in favour of Mr. Jenkins in April 2018.

[7] Mr. Jenkins died shortly after the Contract was executed.

[8] An earlier contract to purchase the Property was executed in February 2020 but did not complete for unrelated reasons. Mr. Wilson says that Ms. Koch was aware of this contract.

[9] Ms. Koch says that she did not consent to the sale of the Property and had no knowledge of the Contract prior to its execution by Mr. Jenkins. Ms. Koch says that despite coming regularly to the Property to socialize, the realtor retained by Mr. Jenkins to sell the Property, Woody Kuroaka, never discussed the sale of the Property with her.

[10] Mr. Wilson says he visited the Property on July 22, 2020 and spoke to Ms. Koch's niece, Ms. Treen. Mr. Wilson also says that his father-in-law spoke with Ms. Koch at that time and she did not advise that she had not consented to the Contract.

[11] Mr. Kuroaka and Century 21 Executives Realty Ltd. ("Century 21") have been named as defendants in this action. Mr. Kuroaka worked with Century 21 and was the realtor engaged by Mr. Jenkins.

[12] Along with Mr. Kuroaka, Steve Tate, Mr. Wilson's realtor, and Century 21 have been named as third parties by Ms. Koch (the "third-party realtors"). The essence of the claim of Ms. Koch against the third-party realtors is that they breached fiduciary duties owing to her or were negligent in the performance of their duties.

[13] Mr. Wilson says that the Contract is valid and enforceable. He seeks specific performance on the basis that the Property is unique for reasons including its suitability for commercial development and its proximity to a nearby property that he owns—which would facilitate the installation of services for both properties at a significantly lower cost. Alternatively, Mr. Wilson seeks damages for breach of the Contract which he believes are in excess of \$2 million.

[14] Ms. Koch says that the Contract is not enforceable for reasons including the alleged breach of fiduciary duty by Mr. Jenkins or, alternatively, because Mr. Jenkins was not authorized to enter into the Contract. In the further alternative, Ms. Koch says that any interest Mr. Wilson may have in the Property is extinguished through application of the principle of equitable set-off, including equitable fraud. Finally,

Ms. Koch says that if the Contract is enforceable, specific performance is not available in this case.

[15] Ms. Koch brought a summary trial application on March 9, 2023, seeking dismissal of the claims against her. This application was dismissed by Justice Hardwick.

[16] A five-day trial is currently set to commence on May 15, 2023, although all parties appear to agree that a 15-day trial will likely be required to address all of the issues in dispute. Ms. Koch seeks this order severing the trial, with the issues of uniqueness and damages dealt with during the first phase of trial in May 2023 and the remaining issues, including the enforceability of the Contract and the claims against the third-party realtors, dealt with in the second phase of the trial in the fall.

Legal Basis for the Application

[17] Ms. Koch’s application is brought pursuant to R. 12-5(67) of the *Supreme Court Civil Rules* which permits the trial of one question before others.

[18] Whether or not to sever part of a trial is within the discretion of this Court and the scope of the Court’s discretion must be interpreted in light of the overall object embodied in Rule 1(3) to “secure the just, speedy and inexpensive determination of every proceeding on its merits”: *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2009 BCSC 1592, at paras. 12 and 13.

[19] The principles relevant to the exercise of discretion under R. 12-5(67) were summarized in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2007 BCSC 1014 [*Okanagan Indian Band*], aff’d 2008 BCCA 107, at para. 69 (citing *Nguyen v. Bains*, 2001 BCSC 1130):

[69] [...]

a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.

- b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
- c. Severance is most appropriate when the trial is by judge alone.
- d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
- e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
- f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

Position of the Parties

[20] Ms. Koch submits that granting the severance order she seeks will very likely end this litigation in that once the issues at the first phase of the trial are decided, there is a likelihood of settlement. That is, if she is successful at the first phase of trial on the issue of uniqueness and Mr. Wilson's damages are found to be nominal, the parties will be motivated to settle. In addition, Ms. Koch submits that she is a 92-year-old pensioner and as a result of her age and financial circumstances, it will either be difficult or impossible (if she is no longer alive) for her to participate in a 15-day trial.

[21] In addition, Ms. Koch submits that the uniqueness of the Property and the quantum of Mr. Wilson's damages are distinct issues, separate from the background and circumstances leading to the formation of the Contract and its enforceability. That is, in Ms. Koch's submission, the issues are not interwoven to the extent that the trial can not be bifurcated.

[22] The third-party realtors support Ms. Koch's application. They submit that the issues proposed to be tried first by Ms. Koch are distinct from the question of the enforceability of the Contract and whether there was negligence on their part. The third-party realtors concede that a trial of the issues sought by Ms. Koch may not end the litigation but submit that the resolution of those issues will put the parties in a position where reaching settlement is easier.

[23] Mr. Wilson submits that for various reasons, it is not appropriate to bifurcate the trial. He submits that the credibility of Ms. Koch and Mr. Jenkins is critical to the issues in dispute, including their subjective intentions, which Mr. Wilson contends goes to the legal and equitable defences to the specific performance claim. He submits that the facts relating to the uniqueness of the Property cannot be neatly severed off from the remaining factual matrix surrounding the formation and breach of the Contract, which he submits are intrinsically intertwined.

[24] Further, Mr. Wilson submits that severing the issue of uniqueness would not resolve the issue of specific performance, as the legal and equitable defences to specific performance would have to be dealt with during the second phase of trial. He submits that uniqueness is one element in an assessment of a claim for specific performance, which involves determining whether an award of damages would be an inadequate remedy in all of the circumstances.

[25] Finally, Mr. Wilson submits that if bifurcation is ordered, it is likely that there would be an increase in the total costs of trial as many of the same witnesses will be required to testify in both phases on related issues.

Analysis

[26] In my view, it is not appropriate to grant the order for bifurcation sought by Ms. Koch. I will apply the relevant principles set out in *Okanagan Indian Band* to the facts of this case.

Will time and expense be saved?

[27] There must be more than a bare, or mere, assertion that there will be a real likelihood of saving time and expense. There must be case-specific information before the court about expected efficiencies and the court should be “told what specific issues, evidence or legal arguments would be avoided and why as well as how much time and money would likely be saved as a result”: *Nguyen*, at para. 12.

[28] Ms. Koch has not provided any submissions with respect to how much time or money will be saved if this trial is bifurcated, other than submitting it is “likely” that if

she is successful at the first phase of a bifurcated trial, the parties will negotiate a settlement, resulting in savings from not having to proceed with the second phase of trial.

[29] In my view, this is simply bald speculation which is not supported when the nature of Mr. Wilson's claims is considered. Mr. Wilson is seeking specific performance or, alternatively, considerable damages. Even if a decision on the issue of uniqueness was entirely dispositive of Mr. Wilson's claim for specific performance (which is not the case as is made clear in *Deol v. Sinnathamby*, 2021 BCSC 722 at paras. 28–30), it is entirely unclear if the parties would likely settle after the first phase of trial.

[30] In this case, Mr. Wilson seeks specific performance for purposes including proceeding with a development of the Property and his adjacent property. It is understandable that he wishes to have all issues in dispute determined expeditiously.

[31] Ms. Koch and the third-party realtors submit that there will be no additional time required to the existing time estimate of 15 days if the trial is bifurcated. I do not consider that this submission has merit.

[32] In my view, it is likely that a bifurcated trial will, in total, result in a longer trial than a single trial of all of the issues. There are possible delays that will result from a bifurcated trial, including a potential appeal of a decision in the first phase of trial and delays in scheduling the second phase. Further, it can also be presumed that there will be additional costs resulting from having to get up to speed twice on the issues for the second trial as a result of the passage of time: *Nguyen* at paras. 14 and 17.

Are the issues in the proposed bifurcated trial inextricably interwoven?

[33] In this case, Ms. Koch proposes that the issue of Mr. Wilson's damages for breach of the Contract can be decided first at the first phase of trial, on the assumption that damages are owing, with the issue of liability under the Contract determined later. This is a novel submission and not surprisingly, Ms. Koch was not

able to point to any authority in which the issue of damages was dealt with first with liability deferred to a second trial.

[34] In my view, it is not appropriate to split issues of liability and damages. In general, courts should lean against splitting issues of liability and damages where general issues of credibility may arise: *Element v. Del Mar*, 2012 BCSC 868.

[35] In this case, issues of credibility concerning Mr. Wilson’s evidence on the reason he wished to purchase the Property or his father-in-law’s engagement with Ms. Koch, Mr. Jenkins, and Ms. Treen will almost certainly arise. Both parties agree that a number of the same witnesses will have to testify at both the first and second phase of trial and, as a result, the possibility of inconsistent findings of credibility arises. Imagine a situation where a court makes findings of credibility after the first phase of trial, which are then revised after the second phase of trial? At that point, it is simply too late to “unwind” the credibility findings made during the first phase.

[36] I do not find that the issue of uniqueness can be effectively dealt separately from the general question whether specific performance is justified in this case. As I have already stated, uniqueness is one factor to be considered in determining entitlement to specific performance—the overarching question being whether damages would be an inadequate remedy: *Deol*, at para. 30.

Do other issues, including Ms. Koch’s age and financial circumstances, justify bifurcation?

[37] I do not find that Ms. Koch’s personal circumstances justify an order for bifurcation of this trial.

[38] As Mr. Wilson states, there is no prejudice to Ms. Koch in that she will be able to continue to reside on the Property until the trial of this matter is complete.

[39] Although Ms. Koch is 92, there is insufficient evidence that she will be unable to participate in a trial of this matter if it occurs in the fall of 2023 as is proposed.

[40] Finally, as a pensioner, Ms. Koch may have limited income but there is insufficient evidence before me on which I can conclude that she will be unable to pay legal fees arising from a 15-day trial.

Conclusion

[41] In general, litigation in slices is to be avoided. I do not find that there are compelling reasons, such as a real likelihood of a significant saving in time and expense, to bifurcate the trial of this matter in the manner sought by Ms. Koch. Further, I am not satisfied that the issues sought to be dealt with by Ms. Koch at a first phase of trial are sufficiently distinct from those which would be dealt with in the second phase of trial. In fact, I find that issues of credibility and evidence with respect to entitlement to specific performance and the assessment of damages in lieu of specific performance inextricably link the issues sought to be bifurcated.

[42] As a result, Ms. Koch's application is dismissed.

[Submissions on Costs]

[43] Costs are awarded to the plaintiff in any event of the cause.

“Mayer J.”