COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *SWS Marketing Inc. v. 1125003 B.C. Ltd.,* 2023 BCCA 225

Date: 20230605
Docket: CA48778

2023 BCCA 225 (CanLII)

Between:

SWS Marketing Inc. and Rene Gauthier

Appellants
(Plaintiffs)

And

1125003 BC Ltd. (dba Home Buyers Group), Marijana Harasemljuk Zavier, Andrew Rezmer, Christian Saxvik, and Odin Zavier

Respondents
(Defendants)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated December 12, 2022 (*SWS Marketing Inc., v. 1125003 B.C. Ltd.*, 2022 BCSC 2166, Vancouver Docket S213806).

Counsel for the Appellants: D.M. Palaschuk

Counsel for the Respondents: A. Grewal

Place and Date of Hearing: Vancouver, British Columbia
March 9, 2023

Place and Date of Judgment: Vancouver, British Columbia
June 5, 2023

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

2023 BCCA 225 (CanLII)

Summary:

The appellants challenge an order striking their notice of civil claim as an abuse of process. The action at issue was one of a series of legal proceedings arising from a dispute between investors in a real estate project. The chambers judge held the action was, in many respects, identical to a separate action the appellants were advancing concurrently. The pleadings, evidence and relief in the two actions overlapped significantly to the point of being almost indistinguishable. On appeal, the appellants raised various errors, including that the judge misapplied the doctrine of cause of action estoppel, wrongly held the action should be struck as "unnecessary, scandalous, frivolous or vexatious", failed to recite a relevant legal threshold, and otherwise erred in finding that the action was an abuse of process. HELD: Appeal dismissed. The decision to strike pleadings under Rule 9-5(1) is discretionary and the judge did not err in exercising that discretion. First, the judge did not misapply cause of action estoppel; rather, he never applied it at all. His reasons make clear the action was being struck as an abuse of process and not on the basis of estoppel. A similar logic is dispositive of the second alleged error: the judge never struck the action as frivolous or vexatious. Third, judges are presumed to know the law and it was not necessary for him to expressly recite the legal threshold he relied on. Finally, the judge's reasons disclose no error in striking the claim as an abuse of process, particularly given the various deficiencies of the pleadings before him.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] The appellants, SWS Marketing Inc. and Rene Gauthier, appeal from an order striking their notice of civil claim as an abuse of process. They raise numerous grounds of appeal. In my view, the appeal should be dismissed as none of those grounds has merit.

Background and the Judge's Reasons

[2] This appeal arises from the dismissal of Action No. S213806 (the "806 Action"). That action was one of a series of legal proceedings arising from a dispute between the investors in a condominium project located in Vernon, British Columbia.

[3] The history between the parties, and other third parties, is extended and tortured. The chronology in the appellants' factum is 13 pages long. That chronology is then followed by a further dozen pages of facts which are supported by some 75 footnotes. The judge's reasons referred to, and the respondents' factum further develops, the numerous actions, proceedings and interlocutory applications between

the parties or various combinations of them. The respondents' factum also describes the dozen or so judgments of the trial court and of this Court that have addressed different disputes between the parties, or at least some of them, and that provide an ever-evolving chronology of these disputes.

2023 BCCA 225 (CanLII)

[4] Though aspects of this history or background were relevant to the judge's decision, I do not consider that I need to develop that narrative fully. Instead, I have focused on the limited portion of the history between the parties that is particularly relevant to the issues the appellants have raised.

[5] The appellant/plaintiff, SWS, was incorporated in 2008 by its original principals to serve as a vehicle for real estate investments. Those principals were Mr. Gauthier, Mr. Zavier and Mr. Lanz. In 2010, Mr. Zavier became interested in two buildings, containing 14 residential strata lots (the "Project"), that were located in Vernon and that were the subject of the 806 Action. He planned to acquire the buildings, sell the strata lots to purchasers who would use his management company to manage the properties, rent them out and pay the mortgage. He also intended to use his share of rental revenue and management fees to improve the buildings with a view of ultimately selling them for profit. His wholly-owned company, Four Elements Marketing Inc., entered into a contract to purchase the land and buildings from the previous owners.

[6] In 2010, he invited SWS to assist in marketing the strata lots. Purchasers were required to enter into a purchase and sales agreement with Four Elements and a joint venture agreement with SWS. The joint venture agreement provided that SWS would manage the strata lot and rent it out, with profits and losses being shared equally between SWS and the purchasers of the units.

[7] The transactions closed in March 2011. SWS took over management of the Project in April 2011. It then appointed a strata council controlled by Mr. Gauthier. In 2012 or 2013 there was a falling out between Mr. Gauthier on the one hand, and Messrs. Zavier and Lanz on the other. Mr. Zavier ultimately induced a majority of owners to join him in setting up an alternate strata council. Neither council

recognized the legitimacy of the other. Both claimed the right to manage the Project and to collect strata fees. The chambers judge correctly observed that the "situation deteriorated into chaos" and that by November 2013 "the Project was already embroiled in litigation on several fronts".

2023 BCCA 225 (CanLII)

[8] In the spring of 2017, Mr. Zavier sought assistance from the defendant Mr. Rezmer. Mr. Rezmer apparently had expertise in managing difficult properties. He incorporated a new company, the corporate defendant 1125003 B.C. Ltd. ("112"). The defendant, Mr. Saxvik, was hired to manage 112.

[9] The judge noted that 112 offered individual owners of the Project "the prospect of greater stability and an exit strategy in the form of a "lease-option agreement" which purported to authorize 112 to carry out the management functions that had initially been assigned to SWS under the original joint venture agreements. Most owners entered into such lease-option agreements with 112.

[10] The appellants started the 806 Action in April 2021. The judge described the claim, as amended, as "alleg[ing], in summary, that the defendants wrongly induced the owners who signed lease-option agreements to breach the joint venture agreements, and that Mr. Zavier and Mr. Saxvik also defamed the plaintiffs in doing so".

[11] The parties brought competing applications before the judge. The appellants/plaintiffs brought a summary trial application seeking various declarations to establish liability. They intended to leave the quantification of any damages that might be owing to a later date. The defendants argued the matter was not suitable for summary disposition or, alternatively, that judgment should be granted in their favour.

[12] In the competing application the respondents/defendants sought to have the 806 Action struck on various grounds but "primarily because it improperly duplicate[d] claims that the plaintiffs have already advanced, or should have advanced, in other proceedings".

[13] The judge identified several earlier actions or proceedings that were relevant to his determination. Of particular note is an action that was commenced in November 2013 under Action No. S138229 (the “229 Action”). The pleadings in the 229 Action were amended multiple times. In the Fourth Amended Notice of Civil Claim, filed December 7, 2021, the plaintiff was SWS and the named defendants were Mr. Zavier, Mr. Lanz, the strata corporation, the owners who had signed lease-option agreements and their unnamed tenants (who were identified as John/Jane Doe #1–9).

[14] The judge observed that in the Fourth Amended Notice of Civil Claim, SWS “added a number of new allegations mirroring those that were already being advanced in [the 806 Action], although no steps were taken to add Ms. Zavier, Mr. Saxvik, Mr. Rezmer and 112 (all of whom are named as defendants in this action), as defendants in that one”. He identified numerous paragraphs in the amended pleadings in the 229 Action that advanced claims mirroring the claims in the 806 Action.

[15] The judge identified that the 229 Action, which had been consolidated with a separate petition commenced by Mr. Zavier, Mr. Lanz and the owners (who were defendants in the 229 Action), was tried before Justice Adair over 18 days in February and March 2022. The reasons of Justice Adair, indexed at 2022 BCSC 743 (the “229 Reasons”) were thorough and comprehensive. No appeal was brought from the orders made in the 229 Reasons.

[16] The judge described Justice Adair’s conclusions in the 229 Action:

> (a) SWS was not entitled to a declaration that the joint venture agreements had been breached, because a declaration that past conduct was wrongful is not a remedy that can properly be granted (para. 211);
>
> (b) SWS’s claim for an accounting was refused because there was no air of reality to SWS’s allegation that the defendants had in fact earned hidden profits in any significant amount (paras. 212-213);
>
> (c) Mr. Zavier had signed and was a party to a joint venture agreement (paras. 214-220);
>
> (d) the joint venture agreements had not been terminated by an accepted repudiation, as the defendants alleged, nor were the defendants entitled to

2023 BCCA 225 (CanLII)

2023 BCCA 225 (CanLII)

rescind, thus entitling SWS to a remedy for breach of contract (paras. 221-246);

(e) SWS's claim asserting a beneficial interest in the owners' units, on the basis that it had contributed to the down-payments, was refused (paras. 247-278);

(f) SWS's claim for damages alleged to be payable under the joint venture agreements was refused (paras. 280-285);

(g) further submissions would have to be made before the appropriate remedy could be granted for the breach of contract that was found to have occurred (paras. 286-298);

(h) SWS's claim for an assignment of certain rights under the *Strata Property Act* and associated injunctive relief was refused (paras. 299-307); and

(i) the counterclaim was dismissed (paras. 324-356).

[17] The 229 Action and the 806 Action were being advanced concurrently. The judge identified this reality and said:

> [30] Just over a year after commencing this action, on April 28, 2022, and while the trial decision of Adair J. was still under reserve, the plaintiffs filed an amended NOCC in this action. They say they did so in order to incorporate the new information that became available to them during the trial. In fact, however, the amendments largely rehashed allegations that SWS had already pleaded in the Fourth Amended NOCC in S138229, filed on December 7, 2021 and summarised earlier. Indeed, parts of the amended NOCC in this action were copied verbatim from the plaintiffs' previous pleadings in that action. No effort to improve them was ever made, despite Adair J.'s subsequent criticism of the similar pleadings that were before her in S138229.
>
> [31] The main change of substance that was made with the amendments of April 28, 2022 was to identify Mr. Zavier as a protagonist responsible for the alleged misconduct that is the subject of the claim, a role he had played from the outset in the parallel allegations advanced in S138229. On the same day that the plaintiff filed the amended NOCC in this action, they also filed an application to add Mr. Zavier as a defendant.

[18] Though I have said there is no need to trace each of the various actions, proceedings or applications the parties have advanced in the past decade, a snap shot in time illustrates the undisciplined morass of litigation the judge described.

[19] In 2021, the overlapping 806 and 229 Actions were both being pursued by the appellants. In January 2021, the parties brought cross applications to address, among other things, issues of governance between the two strata councils. That

matter made its way to this Court that same year. In the Spring of 2021, the parties brought competing applications seeking judgment, by way of summary trial, on a number of isolated issues. Those applications were dismissed. The judge identified the parties also appeared on several occasions “seeking, among other things, to have the other declared in contempt” of earlier court orders. In September 2021, Mr. Zavier, Mr. Lantz and the owners who were defendants in the 229 Action commenced a petition seeking relief under the *Strata Property Act*, S.B.C. 1998, c. 43. That petition was then consolidated with the 229 Action before it went to trial. In October 2021, 112 filed its own petition seeking “almost identical relief” to the petition that had been filed by Messrs. Zavier, Lantz and others.

[20] The judge also observed:

> [38] In addition to the proceedings that I have already described, one or both of the plaintiffs have also commenced separate actions arising from the Project against a former bookkeeper, a former caretaker and some of the lawyers who have represented Mr. Zavier or his allies in this and related litigation. Those actions have since been discontinued, except for the action against the lawyers…which has been discontinued against some but not all of the defendants were originally named.

[21] Central to the judge’s reasoning was the conclusion that the 806 Action and the 229 Action were in many respects identical. I have said that the judge identified the extent to which the pleadings in the two actions overlapped. He also considered the extent to which the claims, evidence, and relief in the two actions overlapped, and observed:

> [46] What are before the court here, rather, are two claims arising from precisely the same set of facts, the current one framed in tort and the earlier one in contract. Although the two claims name different defendants (apart from Mr. Zavier himself, who is common to both), the tort defendants are alleged to have induced the same breach of contract, including by defaming the plaintiffs, that are the subject of [the 229 Action]. More importantly, the tortious conduct alleged against the defendants in this action was an essential component of the contract claim that was advanced in [the 229 Action].

[22] The judge then quoted extensively from the earlier detailed findings of Justice Adair in the 229 Action. Having done so, he said:

2023 BCCA 225 (CanLII)

> [50] This is the same conduct, the same evidence, that forms the factual basis for the claim being advanced in this action. Indeed, the plaintiff's have based their summary trial application almost entirely on these findings of Adair J. and little else.

[23] With respect to the issue of the relief the judge said:

> [51] The overlap between the two claims is also apparent on the face of the pleadings, as I have already observed. Moreover, in their summary trial application, the plaintiffs seek the following declarations:
>
> > (a) the defendants have "interfered with the Joint Venture Agreement contractual relations between SWS and the owners of Units 101, 102, 104, 105, 106, 107, 108, 201, 204, 205 and 206 … with damages to be determined at trial";
> >
> > (b) "… any securities, loans, debts or notes payable [*sic*] granted by the owners of Units 101, 102, 104, 105, 106, 107, 108, 201, 204, 205 and 206 in the Vernon Property … to the Defendants are void ab initio";
> >
> > (c) "the 1125003 B.C. Ltd.'s Lease and Options to Purchase Real Estate on Units 101, 102, 104, 105, 106, 108, 205 and 206 in the Vernon Property … were invalid and void ab initio";
> >
> > (d) "any Power of Attorney, proxy or other instrument held by the Defendants on the Units 101, 102, 104, 105, 106, 107, 108, 204, 205 and 206 in the Vernon Property … are void ab initio and invalid"; and
> >
> > (e) Mr. Saxvik and Mr. Zavier have defamed SWS and Mr. Gauthier, with damages to be determined at trial.
>
> [52] Items (b), (c) and (d) on that list are indistinguishable from the following relief that SWS sought at para. 16 in Part 2 of its Fourth Amended NOCC in S138229 (despite not having applied to add 112 as a defendant in that action when it should have):
>
> > An order that all of the Lease and Option to Purchase Real Estate agreements, mortgages, equitable mortgages, or charges entered into after November 13, 2013 between any party including but not limited to [112] and any of the Defendant Owners be declared null and void ab initio.
>
> [53] With respect to items (a) and (e), the plaintiffs are here repeating a discredited tactic they pursued at trial in S138229 (that is, seeking declarations that the defendants' conduct was wrongful), despite the express ruling of Adair J., at para. 211 of her decision, that no such remedy could properly be granted. Insofar as the plaintiffs intend to seek damages at a later date founded on those declarations, it is worth noting that no damages were awarded to SWS to compensate it for the owners' breaches of the joint venture agreements. That being so, it is difficult to see how SWS, let alone Mr. Gauthier personally, could properly recover damages against the defendants in this action for having induced those same breaches.

2023 BCCA 225 (CanLII)

[24] The judge was satisfied the 806 Action “should be dismissed as an abuse of process, particularly when it is viewed in the broader context of all of the other litigation that has arisen from this same dispute”.

[25] I noted earlier that, at one point, 112 filed a petition. The judge observed that following the release of the 229 Reasons, 112’s petition was struck by Justice Brongers on the basis of both cause of action estoppel and abuse of process: see *1125003 B.C. Ltd. v. The Owners, Strata Plan KAS 1886*, 2022 BCSC 1142.

[26] In conclusion, the judge adopted the following comments of Brongers J. when he dismissed 112’s petition:

> [43] In my view, this is a case with the doctrine of abuse of process warrants being applied in order to prevent 112 from effectively reopening the underlying dispute just to consider whether an administrator should be appointed contrary to the apparent wishes of the Strata Corporation. I find that this would not be in the interest of justice as 112’s privies had a chance to pursue this relief but failed to do so before Justice Adair.
>
> [44] Furthermore, it bears emphasizing that litigation in respect of the Vernon Project and its strata Council has subsisted for over eight years now. It has generated no less than eight published court decisions, and no doubt others that are unpublished. After an 18-day trial, the dispute has finally been largely adjudicated by means of the thorough 358-paragraph judgment penned by Justice Adair. During that trial the parties made it clear that they are eager to move on. In particular, Justice Adair noted at para. 13 of the judgment:
>
> > At the end of the trial, it was observed that everyone wants the units to be sold, and that appeared to be the one area of consensus. I agree with that observation. Sale of the units would at least bring an end to the prolonged fighting over matters relating to the Strata Corporation and its governance, and reduce the scope of the war two one over money and the division of profits from the Vernon Project.
>
> [45] Given all of the circumstances, I am of the view that it would bring the administration of justice into disrepute if 112’s duplicative petition is permitted to proceed now that the Adair Judgment has been rendered. Accordingly, the doctrine of abuse of process would be applicable to this matter even if cause of action estoppel was not.

[27] The judge then said:

> [56] The situation has only grown worse since those words were written. It is now the plaintiffs who are seeking to relitigate the same dispute in a

2023 BCCA 225 (CanLII)

> different guise. Like 112, they have already had their day (indeed, too many days) in court.

[28] The judge ordered the 806 Action be struck under Rule 9-5(1)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 as an abuse of process.

2023 BCCA 225 (CanLII)

Issues on Appeal

[29] The narrow ground of appeal identified in the appellants' factum is that the "chambers judge erred in striking the amended Notice of Civil Claim… by failing to properly apply the doctrines of cause of action estoppel and abuse of process". This narrow ground is then advanced in numerous ways that I will describe.

Standard of Review

[30] The decision to strike pleadings under Rules 9-5(1)(b)(c) and (d) is generally a discretionary decision, attracting a deferential standard of review: *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 18. Further, the abuse of process doctrine is a discretionary remedy available to the court to control its own process: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 39; *Krist v. British Columbia*, 2017 BCCA 78 at paras. 52–53.

[31] The standard of review for the appeal of discretionary orders was described in *Penner v. Niagara (Regional Police Services Board*), 2013 SCC 19:

> [27] A discretionary decision of the lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 at pp. 76-77.

See also *Simpson v. Zaste*, 2022 BCCA 208 at para. 20; *Pan Afric Holdings Ltd v. Athabasca Holdings Ltd.*, 2018 BCCA 113 at para. 28.

Grounds of Appeal

[32] The appellants raise a number of discrete issues.

2023 BCCA 225 (CanLII)

i) The judge misapplied the doctrine of cause of action estoppel

[33] This issue, which is addressed at considerable length in the appellants' factum, has no merit. The judge was quite clear that he struck the appellants' claim and pleading in the 806 Action as an abuse of process and not on the basis of cause of action estoppel. At different points in his judgment he said:

> [15] For the reasons that follow, I have concluded that the defendants' application should be allowed and the claim struck as an abuse of process.
>
> …
>
> [54] In any event, regardless of whether the formal test for cause of action estoppel has been made out, I am satisfied that this action should be dismissed as an abuse of process, particularly when it is viewed in the broader context of all of the other litigation that is arisen from the same dispute.
>
> …
>
> [57] For those reasons, I have concluded that the claim should be struck under Rule 9-5(1)(d) as an abuse of process.

ii) The judge erred in concluding the 806 Action was "unnecessary, scandalous, frivolous or vexatious"

[34] This ground of appeal similarly raises an issue that is not faithful to the judge's reasons. Rule 9-5(1) provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[35] Rule 9-5(1) (a) to (d) allow a court to strike a pleading on a number of disparate bases. The respondents' notice of application relied on different legal

theories to strike the appellants' claim. One such basis was R. 9-5(1)(b) under which they argued the pleadings in the 806 Action were "unnecessary, scandalous, frivolous, or vexatious" and should be struck.

[36] The judge, relying on *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at para. 97, described "the considerations that may bear on whether a claim should be characterized as "vexatious" for the purposes of [Rule 9-5(1)]".

[37] However, in the paragraph that immediately follows his reference to *Simon*, the judge said:

> [41] The concept of an abuse of process is more general. It has been held that the categories of abuse of process are open and that the doctrine of abuse of process can capture any circumstances in which the court's process is used for an improper purpose….

[38] Thus, as earlier noted, the judge struck the appellants' claim on the basis that it was an abuse of process. Though he expressed concern over the appellants' amended pleadings in the 806 Action, he did not rely on R. 9-5(1)(b) to strike that pleading.

iii) The judge did not identify that Rule 9-5(1) establishes a "plain and obvious" threshold

[39] This ground of appeal relies on the contention that "the chambers judge did not set out the "plain and obvious" threshold that must be met to strike a pleading under Rule 9-5".

[40] In my view, there was no need for the judge to expressly state or "set out" the legal standard that is applicable to R. 9-5(1) generally or to R. 9-5(1)(d) specifically. Judges are presumed to know the law and are not required to "expound on features of [the] … law that are not controversial in the case before them": *R. v. G.F.*, 2021 SCC 20 at para. 74. See also: *F.H. v. McDougall,* 2008 SCC 53 at para. 54; *Hague v. Hague*, 2022 BCCA 325 at para. 22.

[41] The legal standard that is applicable to applications brought under R. 9-5(1) is clear and well established. Rule 9-5(1) is commonly relied on by litigants and thus

2023 BCCA 225 (CanLII)

well known to judges. Further, the same "plain and obvious" standard applies to each of sub-rules (a) to (d). There is no room for confusion. Thus, the appellants apparently did not consider it necessary to make any reference to that legal standard in the responsive materials they filed. Conversely, the respondents' application materials expressly alerted the judge to the "clear and obvious" standard, albeit in reference to R. 9-5(1)(b) and (c). The legal standard applicable to Rule 9-5(1)(d) was simply never in question.

2023 BCCA 225 (CanLII)

iv) The 806 Action was not an abuse of process

[42] The appellants advance numerous issues under this ground of appeal. Before turning to those issues, it is useful to understand the content and ambit of the abuse of process doctrine. The leading decisions are *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 and *Behn v. Moulton Contracting Ltd.,* 2013 SCC 26. The judge quoted extensively from *Behn* which, in turn, refers to *Toronto (City).* The latter decision contains the following succinct summary:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
>> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. <u>It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.</u> See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>>
>> <u>One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined</u>.
>>
>> [Emphasis added.]
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v.*

> *White* (2001), 2001 CanLII 24020 (ON CA), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, 1986 CanLII 3573 (SK CA), [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 1987 CanLII 993 (MB KB), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 1987 CanLII 5396 (MB CA), 21 C.P.C. (2d) 302 (Man. C.A.).) …

[43] In *Behn*, the court also referred to *R. v. Power*, [1994] 1 S.C.R. 601 where the abuse of process doctrine was described as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice": at para. 39. The court in *Behn* emphasized the doctrine is "characterized by its flexibility", that "it is not limited to preventing relitigation" and that "the administration of justice and fairness are at the heart of the doctrine…": at paras. 40 and 41.

[44] With this framework in hand, I turn to the appellants' various submissions.

[45] The appellants contend the judge erred in referring to or relying on the earlier reasons of Justice Brongers where he dismissed the petition brought by 112 on the basis of abuse of process. They emphasize the portion of Justice Brongers' reasons where he said "… it would bring the administration of justice into disrepute if 112's duplicative petition is permitted to proceed now that the Adair Judgment has been rendered". They argue that in this case, the 806 Action is not "duplicative" of the 229 Action and they emphasize that the 806 Action "seeks relief against four different parties and under different causes of action".

[46] In my view, the appellants misapprehend what both the chambers judge and Justice Brongers said. As it relates to Justice Brongers' judgment, they focus too narrowly on a few words rather than on the substance of what he said. Justice Brongers (at para. 43 of his judgment that I quoted earlier) said that 112 sought relief that its privies "had a chance to pursue… but failed to do so before Justice Adair". Thus, it is clear that the relief being sought in 112's petition was not, in fact, exactly "duplicative" of the relief being sought in the petition that was consolidated with the 229 Action.

[47] As it relates to the chambers judge, it is clear he relied on the whole of the passage he quoted from Justice Brongers' reasons. This included the fact that the

2023 BCCA 225 (CanLII)

litigation between the parties had been ongoing for eight years, giving rise to numerous judgments, and that it was time to move on. Further, the judge had earlier expressly noted that both the causes of action and the parties in the 229 and 806 Actions were different. He fully understood that the two actions did not, strictly speaking, "duplicate" each other.

2023 BCCA 225 (CanLII)

[48] This leads to a further and principled difficulty with this aspect of the appellants' submission. The abuse of process doctrine does not *require* "duplication" between two actions. Unlike *res judicata* or cause of action estoppel, it is a flexible doctrine that is "unencumbered by specific requirements": *Behn* at para. 40.

[49] The next issue raised by the appellants focuses on the fact that the 806 Action had four defendants (112, Ms. Zavier, Mr. Rezmer and Mr. Saxvik) who were not party to the 229 Action. The appellants assert that the judge erred when he suggested that these defendants could or should have been added to the 229 Action. They argue the judge arrived at this conclusion with "hindsight" and "without any evidence" that SWS could have amended the 229 pleadings before the trial of that action commenced.

[50] The 806 Action was filed on April 15, 2021. The trial of the 229 Action commenced on February 15, 2022 or some 10 months after the 806 Action was initiated. In my view, it was open to the judge to be critical of the appellants' decision to commence and run two parallel actions. Rather than applying to add 112, Ms. Zavier, Mr. Rezmer and Mr. Saxvik to the 229 Action, the appellants chose, as the judge noted, to amend the claim in the 229 Action (in December 7, 2021) to add "a number of new allegations mirroring those that were already being advanced in the 806 Action".

[51] Though there is no certainty a judge would have added the four named defendants to the 229 Action, it is hard to imagine this would not have occurred. That application could have been brought at least 10 months before the intended trial date in the 229 Action. That was ample time to avoid prejudice to the existing defendants in that action. Further, the hearing judge would have appreciated that if

the four defendants were not added to the 229 Action, the appellants intended to pursue the 806 Action and bring another near "duplicative" action. Finally, if the appellants were not successful on their application, this would have provided them with some answer to a future abuse of process application in the 806 Action. It would have been open to them to say they had endeavoured to add the four defendants to the 229 Action but had been unable to do so.

2023 BCCA 225 (CanLII)

[52] Instead, the judge correctly concluded the appellants chose to advance two claims "arising from precisely the same facts" and seeking near "indistinguishable" relief.

[53] The next issue raised by the appellants is that Mr. Gauthier was not a plaintiff in the 229 Action but was an intended plaintiff in the 806 Action. They say it is "unfair" that Mr. Gauthier will now be unable to seek relief.

[54] Some context for this submission is necessary. Some 10 pages and 30 paragraphs of the 229 Reasons addressed the pleadings in the 229 Action. Though respectful, Justice Adair was highly critical of the pleadings filed by the parties. She described SWS's pleadings as "filled with evidence" and "unhelpfully prolix". She said the pleadings "impeded rather than facilitated, the identification of the factual and legal issues the court was being asked to decide". She was of the view that the deficiencies in the pleading "added to the length of the trial". She considered that aspects of the pleading were redundant and that SWS had failed to plead "material facts necessary to state a complete cause of action".

[55] Importantly for present purposes, Justice Adair identified that Mr. Gauthier was one of the originally-named plaintiffs in the 229 Action. However, soon after the trial began it became apparent that no cause of action had been pleaded, and no relief was sought on his behalf. He was therefore removed as a plaintiff in the action.

[56] As noted earlier, the 229 Action was commenced in 2013 and the original claim was thereafter amended four times. Without wishing to be harsh, it is remarkable that a party, represented by counsel, would go to trial on the basis of a

pleading that had been repeatedly amended and that failed to either advance a cause of action or seek relief on its behalf.

[57] These circumstances militate strongly against the appellants' contention that it would now be "unfair" to Mr. Gauthier not to be permitted to advance a new claim arising from the circumstances that existed in the 229 Action.

[58] The deficiencies in the SWS pleadings in the 229 Action are otherwise relevant. The chambers judge noted the appellants failed to make any effort to amend the pleadings in the 806 Action "despite Adair J.'s subsequent criticism of the similar pleadings that were before her in [the 229 Action]". Elsewhere the judge observed that aspects of the relief being sought by the appellants in the 806 Action "repeat[ed] a discredited tactic they had pursued at trial in the [229 Action]".

[59] Though the judge emphasized the extended history of litigation between the parties and the significant similarities in the 229 and 806 Actions, the ongoing failure of the appellants to advance a proper pleading in the 806 Action is also relevant to the judge's reliance on the abuse of process doctrine: *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2012 BCCA 196 at paras. 66–67; *Air Palace Co., Ltd v. Rotor Maxx Support Limited*, 2023 BCCA 197 at para. 36.

[60] Finally, the appellants say the dismissal of the 806 Action gives rise to other forms of "unfairness". I do not consider that I need to develop these issues further. In my view, none of them provides a proper basis to interfere with the judge's discretion.

[61] Ultimately, the abuse of process doctrine is engaged when allowing litigation to proceed would "violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice": *Toronto (City)* at para. 37. Each of these principles was engaged in the present case.

2023 BCCA 225 (CanLII)

2023 BCCA 225 (CanLII)

Disposition

[62] In my view, there is no basis for appellate intervention with the judge's decision and I would dismiss the appeal.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Skolrood"