COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Continental Appraisals Ltd. v. Air Touch Communications Ltd.,* 2024 BCCA 304

Date: 20240821
Docket: CA49487

Between:

Continental Appraisals Ltd.

Appellant
(Petitioner)

And

Scot Darville Stewart, Bronze Wines Ltd., Air Touch Communications Ltd. and Frances Jean Walbey Canfield

Respondents
(Respondents)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated November 9, 2023 (*Continental Appraisals Ltd. v. Stewart*, 2023 BCSC 1968, Nelson Registry Docket H20411).

Counsel for the Appellant:	R.R.W. Sookorukoff
Counsel for the Respondents, Air Touch Communications Ltd. and Frances Jean Walbey Canfield:	T.W. Pearkes
Place and Date of Hearing:	Vancouver, British Columbia April 24, 2024
Place and Date of Judgment:	Vancouver, British Columbia August 21, 2024

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett

Summary:

The appellant appeals an order dismissing its application to strike the respondents' amended responses in a foreclosure proceeding relating to the validity of a mortgage on property located in Grand Forks, British Columbia. Despite finding that the elements of cause of action estoppel were established, the chambers judge exercised her discretion not to apply the doctrine and did not strike the amended responses. Held: Appeal dismissed. The judge was entitled to find that the elements of cause of action estoppel were established. However, no reviewable error has been identified regarding her finding that special circumstances existed in this case such that the doctrine should not be invoked.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This case, which involves issues relating to the doctrine of *res judicata*, arises from an appeal of an order arising in a foreclosure proceeding (the "foreclosure proceeding") which dismissed the appellant/petitioner's application brought pursuant to Rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], to strike the amended responses filed by the respondents Frances Jean Walbey Canfield and Air Touch Communications Ltd. ("Air Touch"). The judge also directed the parties to arrange a hearing before her to determine the procedures to be employed to decide what is referred to in the reasons for judgment and the order as "the Form A transfer issue".

[2] For the reasons that follow I would dismiss the appeal.

Background and Procedural History

[3] The judge appropriately described this matter as "an unusual foreclosure proceeding". The appellant, Continental Appraisals Ltd. ("Continental"), is the first mortgagee of a parcel of land in Grand Forks, British Columbia which was originally owned by the respondent Mrs. Canfield (the "Property").

[4] In related proceedings, being *Canfield v. Bronze Wines Ltd.*, 2022 BCSC 546 (the "Action"), the trial judge, Horsman J., as she then was, summarized the pertinent facts:

[1] The plaintiff, Jean Canfield, is 84 years old. In January 2012, she signed an agreement of purchase and sale (the "Agreement"), agreeing to transfer ownership of her home in Grand Forks, British Columbia (the "Property") to the defendant Bronze Wines Ltd. ("Bronze Wines"). At the time, Mrs. Canfield was residing in an assisted living facility in the Lower Mainland, and recovering from hip surgery. She had no previous knowledge of Bronze Wines. She had never met the defendant Scot Stewart, who was the CEO and sole director of Bronze Wines, before the meeting at which the Agreement was signed. The deal was brokered by Mrs. Canfield's son-in-law Max Bottoni, a childhood friend of Mr. Stewart's. Mr. Bottoni drove Mrs. Canfield to the office of the notary, the defendant Howard Engman, who witnessed her signature on the Form A freehold transfer.

[2] The Agreement stated that the purchase price was $465,000. However, the terms of the Agreement did not provide for any immediate payment to Mrs. Canfield in return for the transfer of the Property. Instead, she was to receive a future stream of monthly income from a winery that Bronze Wine hoped to establish and operate on the Property. Pursuant to the Agreement, the monthly payments were deferred for two years. Depending on how one interprets the interest provision in the Agreement, the amortization period, which is not specified, was anywhere from 20 years to 40 years.

[3] It was a term of the Agreement that Mrs. Canfield had the right to foreclose and reclaim the Property if Bronze Wines missed three consecutive monthly payments. This security proved to be wholly ineffective. Bronze Wines had no assets. The company was incorporated by Mr. Stewart for the sole purpose of operating the winery. Mr. Stewart had limited income and assets. He had no experience in the wine-making business. Following the transfer of the Property to Bronze Wines, the company borrowed funds for the business from private lenders. The loans were secured by registered mortgages against the Property.

[4] By 2013, there were two mortgages registered against the Property in favour of Alpine Credits Limited ("Alpine Credits"). The first mortgage, in the principal amount of $335,000, was later assigned to the defendant Continental Appraisals Ltd. ("Continental"). The second mortgage, in the principal amount of $69,440, was assigned to the defendant Air Touch Communications Ltd. ("Air Touch"). These mortgages are in default. Bronze Wines has not made payments on the mortgages since 2015.

[5] Continental and Air Touch both initiated foreclosure proceedings. Air Touch reached a settlement with Mrs. Canfield, and did not participate in this trial. In 2019, the Property was sold. By consent, the net proceeds of sale—in the sum of $338,000—have been paid into court pending resolution of this proceeding.

[6] Bronze Wines did not make any monthly payments to Mrs. Canfield before defaulting on the mortgage loans. In effect, Mrs. Canfield transferred her Property to Bronze Wines without receiving anything in return. Mrs. Canfield has no other assets of significance. She now lives in subsidized housing in Nelson, BC.

The Canfield Action and the Foreclosure Proceeding

[5] Mrs. Canfield commenced the Action in May 2014, naming Bronze Wines Ltd. ("Bronze Wines"), Mr. Stewart, Air Touch and Howard Engman — the notary public who witnessed her signature on the Form A freehold transfer — as defendants.

[6] It is necessary to set out certain of the key events in both the Action and the foreclosure proceeding since they bear directly on the chambers judge's conclusions on the issue of *res judicata* and the submissions made on appeal that the respondents' position in the foreclosure proceeding amounts to a collateral attack on the trial decision in the Action.

[7] On April 30, 2018, Continental filed the petition in the foreclosure proceeding in order to avoid the expiry of the limitation period in which to enforce its mortgage. The petition named Mr. Stewart, Bronze Wines, Air Touch and Mrs. Canfield as respondents.

[8] On May 24, 2018, Mrs. Canfield filed her initial response in the foreclosure proceeding in which she took the position that the Action should proceed first, or at the same time as the foreclosure proceeding. Her position was stated in part in her response to petition:

> **Part 4: FACTUAL BASIS**
>
> […]
>
> 2. There is outstanding litigation between the respondent Canfield and the petitioner in relation to this piece of property. The Notice of Civil Claim is attached as schedule 1 to this response.
>
> 3. The petitioner did not disclose the extant proceedings in its petition.
>
> 4. The granting of a final *order nisi* would constitute an end run around the claim of the respondent Canfield.
>
> […]
>
> **Part 5: LEGAL BASIS**
>
> 1. It is inappropriate to apply for summary judgment under the foreclosure rules when the petitioner is a defendant in a civil claim which has as its subject matter the mortgagee's right to its security.
>
> [Emphasis added.]

[9] Continental and Air Touch also appeared to accept that the Action should proceed first, which it did.

[10] On May 15, 2019, Mrs. Canfield and Air Touch entered into the settlement agreement in which Air Touch agreed to cap its claim in the foreclosure proceeding at $106,555. As a result, Air Touch did not participate further in the Action but is entitled to payment on its mortgage from Mrs. Canfield if she is successful against Continental in relation to the funds held in trust following the sale of the Property.

[11] At some point in November 2019, at Mr. Engman's examination for discovery in the Action, Mrs. Canfield became aware that certain alterations had been made to the Form A transfer of the Property from Mrs. Canfield to Bronze Wines post-execution, without her knowledge or authorization. This is the genesis of the Form A transfer issue. She did not seek to amend the notice of civil claim in the Action to raise the issue.

[12] On October 28, 2020, following a trial management conference, Mrs. Canfield amended her notice of civil claim to add an allegation that the limitation period for Continental to enforce its security had expired. She did not seek to amend the notice of civil claim to raise the Form A transfer issue, nor did her trial brief reference the issue.

[13] On May 4, 2021, two and a half months before trial, Mrs. Canfield filed a second trial brief in which she stated that an issue in dispute was the status of the first (i.e., Continental) mortgage. The trial brief also alleged that the mortgage was unenforceable in that the limitation period had tolled; in the alternative, that the Form A transfer was void; and in the further alternative that the mortgagee was negligent or wilfully blind in its lending process. She did not, however, apply to amend the notice of civil claim to raise the Form A transfer issue.

[14] The trial of the Action commenced on July 19, 2021. On July 26, 2021, after closing her case and after the defendants made an unsuccessful no evidence motion, Mrs. Canfield applied to amend her notice of civil claim to plead the Form A

transfer issue. The trial judge dismissed the application in a mid-trial ruling which is indexed as 2021 BCSC 1714 (the "Mid-Trial Ruling"). The effect to be given to this ruling is central to this appeal.

[15] In her reasons for the Mid-Trial Ruling, Horsman J. observed that Mrs. Canfield had a year and a half to amend her pleadings to include the Form A transfer issue and that was not done: at para. 11.

[16] She went on to find that Continental had lost the opportunity for pretrial discovery in relation to the Form A transfer issue and that an adjournment would not remedy the potential prejudice to it arising from the passage of time and the factual investigation that would be required with respect to this issue. Justice Horsman concluded that there would be more prejudice to the defendants in allowing the amendment than to Mrs. Canfield in refusing it: at paras. 16–19.

[17] Following the Mid-Trial Ruling, Mr. Stewart applied to adjourn the trial. His application was granted and the trial did not resume until December 6, 2021.

[18] In the meantime, on September 7, 2021, Mrs. Canfield amended her response to petition in the foreclosure proceeding, those amendments being substantially the same to those in the draft amended notice of civil claim which was considered by the trial judge in the Mid-Trial Ruling.

[19] On April 5, 2022, Horsman J. rendered the trial reasons for judgment. She found the Agreement to be unconscionable and ordered it rescinded. Bronze Wines was found liable to Mrs. Canfield in the amount of $465,000, less any amounts she recovered from the proceeds of sale of the Property.

[20] The trial judge also found that the limitation period for Continental to enforce its security interest in the Property did not expire prior to the commencement of the foreclosure proceeding. She also decided that Continental's mortgage had priority over Mrs. Canfield's unregistered equitable interest in the Property. Accordingly, Mrs. Canfield was left with what amounted to a hollow judgment against Bronze Wines.

[21] On August 19, 2022, the trial judge issued reasons for judgment on interest and costs. Continental was granted double costs from the date of a formal offer to settle: *Canfield v. Bronze Wines Ltd.*, 2022 BCSC 1435. Mrs. Canfield sought leave to appeal the costs decision but did not appeal the dismissal of her claim against Continental.

[22] On September 20, 2022, Air Touch, now represented by the same counsel as Mrs. Canfield, amended its response to the foreclosure petition to plead the Form A transfer issue, seeking a declaration that Mrs. Canfield and those claiming through her, including Air Touch, were entitled to the proceeds of sale held in trust.

[23] Mrs. Canfield's application for leave to appeal the costs decision was heard by Fenlon J.A. on January 23, 2023. Mrs. Canfield's position was that the trial judge erred in awarding double costs by failing to recognize there was an "extant claim" in the form of the void Form A transfer. Continental submitted the proposed appeal had no merit in that the attempt to re-argue the Form A transfer issue in the foreclosure proceeding offended the principle of *res judicata*. The application for leave was dismissed with Fenlon J.A. deciding it was not necessary to rely on the doctrine of *res judicata* in considering the application: *Canfield v. Continental Appraisals Ltd.*, 2023 BCCA 61 at para. 31.

[24] On February 8, 2023, Mr. Engman succeeded in his appeal of the judgment against him: *Engman v. Canfield*, 2023 BCCA 56, leave to appeal to SCC ref'd, 40675 (12 October 2023).

[25] During this timeframe, the parties made further amendments in the foreclosure proceeding which addressed the Form A transfer issue. On January 11, 2023, Continental amended its petition to allege the Form A transfer issues were *res judicata*. On January 27, 2023, Mr. Stewart and Bronze Wines filed an amended response to petition consenting to an order paying the sale proceeds to Continental. On March 6, 2023, Mrs. Canfield and Air Touch filed further amended responses that expanded on their arguments with respect to the Form A transfer issue.

[26] On March 15, 2023, Continental filed the notice of application that is the subject of this appeal. It applied pursuant to Rule 9-5 of the *Rules* to strike the amended response pleadings of Mrs. Canfield and Air Touch on the basis that they failed to disclose a reasonable defence, were a collateral attack on the trial decision in particular the Mid-Trial Ruling, and that the respondents were barred from raising the Form A transfer issue as a result of issue estoppel or cause of action estoppel.

[27] The application came on for hearing on October 5–6, 2023 at the same time as the hearing of Continental's petition.

Reasons of the Chambers Judge

[28] The issue before the chambers judge was whether Mrs. Canfield and/or Air Touch were estopped or otherwise barred from litigating the Form A transfer issue in the foreclosure proceeding.

[29] The judge observed that Mr. Stewart was listed as the applicant on the original Form A transfer introduced as an exhibit at trial, and which Mrs. Canfield had signed. The second version of the Form A transfer was altered such that Mr. Stewart's name and contact information was blacked out and Mrs. Canfield's was written in. She claimed that the altered version added her contact information and other details without her knowledge or authorization. Mr. Stewart acknowledged approving corrections for "non-critical mistakes". Mr. Engman denied making or authorizing any changes to the Form A transfer, or filing it with the Land Title Office. Mr. Engman had stated that any alterations may render the document non-registrable: at paras. 22–25.

[30] The judge then reviewed the Mid-Trial Ruling to provide context to the procedural steps taken by the parties before then outlining the applicable framework:

> [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): …

[31] The judge found the doctrine of issue estoppel to be inapplicable to this case since the Form A transfer issue had not been decided in the Action in that it had been a "new and distinct issue" as at the Mid-Trial Ruling: at para. 54.

[32] She went on to consider the doctrine of cause of action estoppel and despite finding that the factors in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 were established, she concluded that "equity dictates that Mrs. Canfield has the opportunity to have her claim about the Form A transfer decided on the merits" and exercised her discretion not to apply the doctrine: at paras. 71, 75.

[33] I shall return below to the judge's reasons when I consider the specific grounds of appeal.

[34] Finally, the judge addressed the issue of whether the petition should be referred to the trial list, as suggested by the appellant, or be decided on the current pleadings and evidence, as proposed by the respondents. The judge noted that the court has discretion to decide the procedure to be followed in determining triable issues. Since the respondents had raised a triable issue respecting the validity of the Form A transfer, it was unnecessary to refer the petition to the trial list. Instead, further procedures such as cross-examinations on affidavits or trial evidence should be sufficient. The judge ordered a future hearing to discuss appropriate procedures for resolving the Form A transfer issue, with the judge remaining seized of the proceeding: at paras. 77–83.

Issues on Appeal

[35] As framed by the appellant, the issues raised on appeal are whether the chambers judge erred by:

- failing to find that issue estoppel applied;
- applying the wrong test for exercising her discretion to refuse to apply the principles relating to cause of action estoppel;
- considering an invalid factor in exercising her discretion, being the "interests of justice" in the absence of special circumstances;
- giving no or insufficient weight to any of the factors that favoured exercising her discretion in favour of the appellant; and
- failing to consider and apply the doctrine of collateral attack to strike the amended responses.

Standard of Review

[36] The question of whether the doctrine of issue estoppel or cause of action estoppel is met is a question of law reviewable on a standard of correctness: *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 24.

[37] The discretionary decision not to apply the doctrine even though the elements have been established is entitled to deference unless the court below misdirected itself or proceeded on a wrong principle, gave no or insufficient weight to relevant considerations, or came to a decision that is so clearly wrong that it amounts to an injustice: *Klassen v. British Columbia (Minister of Public Safety and Solicitor General)*, 2021 BCCA 294 at para. 24.

Analysis

Issue Estoppel

[38] The judge set out the applicable framework:

> [51] 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.

[39] She found the appellant's argument failed at the first element, as 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. This was evident in the Mid-Trial Ruling, where Horsman J. characterized the Form A transfer issue as a "new and distinct issue". It was thus "unnecessary to consider further the potential application of the doctrine of issue estoppel": at para: 54.

[40] The appellant challenges this conclusion, arguing that the chambers judge construed the issue too narrowly. Relying on *Cliffs* at paras. 32–36, it contends that an issue may be determined implicitly where a factual or legal issue is "necessarily bound up" with or "fundamental" to the determination of the court.

[41] It says that Horsman J. dismissed Mrs. Canfield's claim against Continental, concluding that the latter's registered mortgage had priority over the former's unregistered interest in relation to the proceeds of sale. It follows, submits Continental, that Mrs. Canfield engaged the court in a priority dispute on the basis that Continental was aware of her interest when it acquired the mortgage, and later that the limitation period to enforce the mortgage had expired. In its factum it argues that Mrs. Canfield's position was "founded on the shared position that Continental held a valid mortgage interest arising from a valid Form A transfer of title".

[42] I disagree. The judge correctly noted that the trial judge had found 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 mid-trial, given the potential prejudice to the other parties.

[43] It would be illogical, in my view, that the Form A transfer issue could be "new and distinct" for the trial judge on the one hand, and yet, on a subsequent application, be sufficient for the chambers judge to conclude that issue estoppel applied on the basis that it was "necessarily bound up" or "fundamental" to the trial judge's conclusions in the Action.

[44] I would not accede to this ground of appeal.

Cause of Action Estoppel

The Reasons

[45] The judge set out the applicable framework:

> [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 *Cliffs*.]

[46] The judge found the four elements of cause of action estoppel to be satisfied.

[47] First, the judge observed that the Action resulted in a final decision and all appeals had been exhausted: at para. 56.

[48] Continental, Mrs. Canfield, Bronze Wines and Mr. Stewart were also all parties to the Action and the foreclosure proceeding. The judge noted that the parties disagreed as to whether Air Touch was a party to the Action or was Mrs. Canfield's privy in the Action: at para. 57.

[49] The judge concluded that Air Touch was Mrs. Canfield's privy in the Action due to a number of factors including:

- Air Touch had the right to participate in the Action as a defendant;
- Air Touch ceased to be a party and did not participate at trial due to the settlement agreement;
- Air Touch had an interest in the merits of the Action that went beyond a financial interest due to its agreement with Mrs. Canfield for the disposition of the proceeds of sale; and
- Air Touch and Mrs. Canfield were represented by the same counsel in the foreclosure proceeding and took identical positions: at para. 61.

[50] The judge found the cause of action in the Action and the foreclosure proceeding to be the same, that is, requiring the court to determine the validity and enforceability of Continental's mortgage. The fact that the challenge to the mortgage's validity in the Action was based on the limitation period and in the foreclosure proceeding was the Form A transfer issue did not render the two proceedings separate and distinct: at para. 64.

[51] The judge found that the Form A transfer issue was not argued in the Action, but the question was whether it could have been argued had Mrs. Canfield exercised reasonable diligence: at para. 65.

[52] The judge found that Mrs. Canfield, with reasonable diligence, could have amended her notice of civil claim in a more timely way than applying to do so mid-trial, noting that no rationale for choosing not to do so had been put forward: at para. 70.

[53] She observed, however, "that does not conclude the analysis". The judge observed that the court retained jurisdiction not to apply the doctrine where it would

lead to injustice, as explained in *Ahmed v. Canna Clinic Medicinal Society*, 2018 BCCA 319:

> [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.

[54] Referring to the outcome in *Danyluk*, where the elements of issue estoppel were established, the judge noted the Court's comments that it "should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice": at para. 72.

The Parties' Positions

[55] The appellant's position is that the judge, having found that the four elements governing cause of action had been established, erred in exercising her discretion not to apply the doctrine in the circumstances of this case.

[56] Specifically, Continental argues that the judge:

- only referred to the potential for injustice in exercising her discretion and failed to take into account that Mrs. Canfield had not exercised reasonable diligence in proceeding to amend the notice of civil claim to raise the Form A transfer issue;

- did not identify any special circumstances or "overriding question of fairness" that necessitated a re-hearing;

- did not take into account the narrow circumstances in which her discretion could be exercised, that is, a tribunal-to-courts context as opposed to a court-to-court context as explained in *Cliffs*; and

- failed to account for the circumstances referred to by Horsman J. in the Mid-Trial Ruling which included: 1) the loss of pre-trial discovery; 2) the loss of opportunity to adopt a more adversarial position against Mr. Engman at the trial; 3) the prolonged litigation process; and 4) the prejudice arising from the passage of time to investigate the factual circumstances which had occurred 10 years beforehand.

[57] Continental acknowledges that while the judge did refer to these factors she "did not engage with them in any way".

[58] Mrs. Canfield submits that no reviewable error has been established in relation to the judge's exercise of discretion. Specifically, she argues that references in the authorities, including *Danyluk*, to the tribunal-to-court as opposed to the court-to-court context serve as "guidance" as opposed to a "bright line" distinction.

[59] In the alternative, Mrs. Canfield argues that if this Court were to accede to the argument that the judge erred in the exercise of her discretion, she nonetheless reached the correct result in that she and Air Touch were not privies. Accordingly, the second element of cause of action estoppel identified in *Cliffs* had not been established. She also submits that the judge erred in finding that the fourth *Cliffs* due diligence factor had not been established.

Discussion

[60] Central to this appeal is whether the judge committed a reviewable error by exercising her discretion to avoid an injustice in circumstances which she found to be "special" per *Ahmed* at para. 28, quoting *Fournogerakis v. Barlow*, 2008 BCCA 223 at para. 16.

[61] The residual exercise of discretion referred to in *Danyluk* applies to both issue estoppel and cause of action estoppel: *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.,* 2008 BCSC 756 at para. 56.

[62] I start by observing that, based on the procedural history to which I have referred, it was entirely open to the judge to conclude that the Form A transfer issue had never been litigated in the sense that it had been determined as between the parties.

[63] I also do not accept the appellant's submission that the judge failed to engage "in any meaningful way" in the factors she needed to consider in order to engage in a proper exercise of her discretion. The reasons, when read contextually and as a whole, indicate that she did consider the various factors and engaged in the requisite analysis. That said, I shall return later in these reasons to the judge's analysis concerning the second *Cliffs* factor, mutuality, and the fourth *Cliffs* factor, being the exercise of reasonable diligence.

[64] The appellant submits that the judge erred in failing to recognize that her residual discretion was limited. It says in its factum that "[t]he discretion to refuse to apply cause of action estoppel is much narrower in the court-to-court context than in the tribunal-to-court context".

[65] Specifically, the appellant relies on the following passage from *Cliffs:*

> [42] This brings us to the exercise of the chambers judge's discretion not to apply issue estoppel, a question that is also dependant on case law that is not completely consistent and in which subtleties abound. In *Danyluk*, the Court ruled that it was an error of principle not to address the factors for and against the exercise of the discretion not to apply issue estoppel and that "The list of factors is open ... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." (Para. 67.) The most important of these, the Court said, was the potential for injustice since, as noted by Jackson J.A. in dissent in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* [1993] 6 W.W.R. 1 (Sask. C.A.):
>
> > 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. [At 21.]

> [43] Binnie J. was referring, however, to the tribunal-to-court context rather than the court-to-court context. He noted the Court's earlier decision in *G.M. (Canada) v. Naken* [1983] 1 S.C.R. 72, where it was said that the discretion not to apply issue estoppel is "very limited in its application'". A broader discretion, Binnie J. stated, was warranted in relation to the decisions of administrative tribunals. This distinction was made in *Furlong v. Avalon Bookkeeping Services Ltd*., 2004 NLCA 46, where the Court emphasized that *Danyluk* had not modified *Naken, supra,* and that potential injustice becomes relevant only where, having exercised due diligence, a party has not received a "full and fair hearing". (At paras. 41–2; my emphasis.)
>
> [44] In *Proctor & Gamble Pharmaceuticals Canada, Inc. v. Canada (Minister of Health)* [2004] 2 F.C.R. 85, Rothstein J., then of the Federal Court of Appeal, suggested for the majority that the discretion is limited to "special circumstances" (citing *Henderson v. Henderson, supra*, at 115), which would include fraud, misconduct or the discovery of decisive fresh evidence that could not have been adduced at the earlier proceeding by the exercise of reasonable diligence, although "fairness considerations could cancel the exercise of discretion." (Para. 29.) In *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd*. (1988) 47 D.L.R. (4th) 431 (B.C.S.C.), Chief Justice McEachern described the exception as requiring "some overriding question of fairness" necessitating a rehearing. (At 438.)
>
> [Emphasis in original.]

[66] The appellant argues that the judge erred in finding that special circumstances existed in this case in that:

- she found that Mrs. Canfield did not exercise reasonable diligence in amending the notice of civil claim prior to the mid-trial application; and
- there was no fraud or misconduct or the discovery of fresh evidence that could not have been adduced at the trial of the Action.

[67] What this submission fails to take into account, in my view, is that the overriding factor in the exercise of discretion in both the tribunal-to-court and court-to-court context is "some overriding question of fairness".

[68] Two authorities, both from the Supreme Court of British Columbia, assist in making this point.

[69] The first is *Grant McLeod*, where Josephson J., in what I consider to be a fulsome and persuasive analysis, considered similar issues as exist here.

[70] *Grant McLeod* involved an application to dismiss a claim for breach of contract on the basis of cause of action estoppel as the claim arose out of the same set of circumstances that was the subject matter of a lien action, that is a court-to-court context. The question was whether the pleadings could and should have been amended in the lien action to include the breach of contract claim.

[71] The judge referred to the decision of Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co.* (1997), 162 N.S.R. (2d) 321 (C.A.), leave to appeal refused, [1997] S.C.C.A. No. 656 that articulated a list of five factors to consider as to whether a party "should" have raised an issue:

> 1. whether the proceeding constitutes a collateral attack on the earlier findings;
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> 2. whether it simply asserts a new legal conception of facts previously litigated;
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> 3. whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence;
>
> 4. whether the two proceedings relate to separate and distinct causes of action; and
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> 5. whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[72] After reviewing the factors in *Hoque*, Josephson J. concluded that cause of action estoppel did not apply, but in the event that he was wrong, he considered whether there was a residual discretion not to apply the doctrine in accordance with the principles referred to in *Danyluk*. He exercised his discretion not to do so on "considerations of fairness and justice": *Grant McLeod* at paras. 46–48, 60.

[73] The second is *Thandi v. Burnaby (City)*, 2005 BCSC 1479, where Bennett J., as she then was, also followed the principles articulated in *Hoque* and considered the issue of a collateral attack.

[74] In *Thandi*, an enormous pile of garbage accumulated on a piece of property. In the first action, the City sued the owners for damages caused by the

encroachment of the waste material onto City lands as well as the nuisance it created, and for the cost of removal. The owners counterclaimed, alleging the City's resolution to recover its costs was made without jurisdiction. The counterclaim and subsequent appeal were dismissed.

[75] In a second action, the owners sought a declaration that the amount assessed by the City for the clean-up was wrongly calculated. The defendant City argued that the plaintiffs ought to have raised the issue regarding the accuracy of the calculations in their counterclaim in the first action, and since they did not do so, their claim was barred by the application of the doctrine of *res judicata*.

[76] Despite finding that the second action "could" have been brought as part of the counterclaim, Bennett J. found that the second action did not involve a collateral attack on the first:

> [122] In this case, the new cause of action could have been brought as part of the counterclaim. However, it does not present as a collateral attack on the final judgment by Smith J. and nothing claimed is inconsistent with the earlier ruling. The defence raised by the Thandis in their statement of defence puts the issue of the costs of removal of the waste squarely in issue in this trial, so the issue has been litigated as part of this trial with respect to the waste on the City lands.
>
> [123] The facts upon which the Thandis rely for this claim, and in substantial part, for their defence to the City's claim, are not those that were relied upon before Smith J. The claim before Smith J. was limited to the City's legal ability to pass such a binding resolution. Therefore, it is not an abuse of process of the proceedings by seeking this declaration as this issue was not previously litigated before Smith J. This action is not an attempt to impose "a new legal conception on the same facts".

[77] To return to the circumstances of this proceeding, a key factor, in my view, in the judge's exercise of discretion was what occurred in the Action and its interplay with the foreclosure proceeding, in particular, that the Form A transfer issue remained to be resolved as between the parties.

[78] This should be considered within the context of what Horsman J. found to be an unconscionable transaction, to which I would add one that left Mrs. Canfield (who

received nothing for the Property) without an effective remedy against Bronze Wines.

[79] When considering the judge's exercise of discretion, it bears noting what the judge said about the third factor identified in *Cliffs*, being "that the current proceeding and the prior action not be separate and distinct":

> [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.
>
> [Emphasis added.]

[80] This conclusion was open to the judge to make on the record before her.

[81] I now wish to turn to the judge's finding that the second *Cliffs* factor, that is mutuality, had been established.

[82] The judge referred to *J.P. v. British Columbia (Director of Child, Family and Community Services)*, 2013 BCSC 1403, in particular, para. 72:

> [60] … [where] 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.]

[83] The judge then stated:

> [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.

[84] As an alternative submission, Mrs. Canfield challenges this finding that the privy or mutuality factor had been established.

[85] I would not accede to this argument. The second *Cliffs* requirement of mutuality encompasses situations where the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action.

[86] The parties in the foreclosure proceeding were also parties in the Action. It was thus open to the judge to conclude that this factor had been established.

[87] Mrs. Canfield also challenges the judge's conclusion that she did not act with reasonable diligence in raising the Form A transfer issue in the Action. She says she raised the issue at two case management conferences, attempted to have the Action and the foreclosure proceeding proceed at the same time, and after the Mid-Trial Ruling had been made, amended her response in the foreclosure proceeding to raise the issue.

[88] The judge approached the issue this way:

> [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.

[89] It was open to the judge on the evidence to reach this conclusion, and I would not accede to Mrs. Canfield's argument on this point.

[90] It follows that the judge made no reviewable error in finding that cause of action estoppel had been established in this case.

[91] This then leads to the judge's conclusion that special circumstances existed in this case such that, in order to avoid an injustice, the doctrine should not be applied.

[92] I first consider Continental's argument that raising the Form A transfer issue in the foreclosure proceeding amounted to a collateral attack on the judgment in the Action. When the *Hoque* factors are considered, I would not accede to this submission.

[93] A collateral attack is a challenge to the validity of an order that amounts in essence to "an appeal of the order": *British Columbia (Workers' Compensation Board) v. D & G Hazmat Services Ltd.*, 2024 BCCA 127 at para. 42. As I noted above with respect to issue estoppel, it is difficult to understand, as the appellant argues, how raising the Form A transfer issue in the foreclosure proceeding could amount to an impermissible collateral attack on the Action when Horsman J., in the Mid-Trial Ruling, found it to be a "new and distinct issue" as at that time.

[94] In my view, based on the record before her, it was also clearly open to the judge to conclude that in the special circumstances of this case, she should decline to apply the doctrine of cause of action estoppel in order to avoid an injustice. This would mean that Mrs. Canfield would have her day in court in order to challenge the validity of the Form A transfer.

[95] In reaching this conclusion the judge was entitled to take into account:

- The reason Mrs. Canfield did not receive a “full and fair hearing” regarding the Form A transfer issue is that the trial judge decided that it was separate and apart from what was required to adjudicate the issues she had to decide at the trial, which included whether the Agreement was unconscionable;

- This case does not involve a litigant being twice vexed by the same cause. Rather, what occurred here were concurrent proceedings with overlapping issues. The overarching principles of fairness and justice are not met when a litigant, in this case, Continental, resists in one proceeding, that is the Action, efforts by Mrs. Canfield to have all matters heard to achieve finality and then, at later date in another proceeding, seek to have responses struck on the basis of cause of action estoppel;

- There was no wasted effort by Continental in the Action proceeding as it did before Justice Horsman as the only issue raised against it was the limitation issue which was resolved in its favour; and

- There was no abuse of process in this case which warranted the intervention of an estoppel.

[96] The chambers judge was very much alive to the applicable legal principles and the special circumstances that existed in these proceedings. No reviewable error has been identified with respect to the exercise of her discretion that the doctrine should not be invoked in this case.

Disposition

[97] I would dismiss the appeal and wish to thank counsel for their helpful submissions.

“The Honourable Mr. Justice Abrioux”

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Bennett"