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BRITISH COLUMBIA EDITION

March 2022

Featuring Counsel Comments from:

Robert J. Ellis and Jessie J. Skinnider, Christopher Hirst and Menka Sull, Duncan Magnus, Emily Clough and Polly Storey

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Baring v. Grewal, 2022 BCCA 42

Areas of Law: Specific Performance; Civil Conspiracy; Breach of Contract; Insufficient Evidence

~The trial judge erred in finding the respondents were entitled to a price abatement once a contract for the sale of land had already closed~

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The appellants, Harminder Singh Grewal and Zora Singh Grewal, were brothers who co-owned a blueberry farm in Langley. The appellants defaulted on a mortgage held by the respondent, Farm Credit Canada ("FCC"), who commenced foreclosing proceedings. In July 2017, the Supreme Court of British Columbia approved the sale of the farm to the respondents, Malkiat Singh Baring and Satwant Kaur Baring. The appellants' appealed the Supreme Court's order approving the sale and successfully obtained a stay until the hearing of the appeal on July 14, 2019.

Baring v. Grewal, (cont.)

On July 10, 2019, the appellants suggested that a large portion of the crop was ripe and should be harvested immediately. That same day two independent experts inspected the farm and agreed that harvesting could wait at least a week. During the afternoon of July 13, 2019, the appellants sprayed the blueberry fields with an insecticide. Then, in the overnight hours between July 13 and July 14–the same date as the appeal–a witness saw a tractor erratically spraying the blueberry fields with what was later determined to be two types of herbicides. The appeal of the sale order was dismissed that morning and the sale of the farm to the respondents was completed that afternoon. Immediately upon taking possession the respondents discovered significant damage to the blueberry plants.

The respondents commenced an action against the appellants seeking a price abatement or, in the alternative, damages for the tort of civil conspiracy. At trial, the appellants elected not to call evidence and made an insufficient evidence application pursuant to R. 12-5(6) of the *Supreme Court Civil Rules*. The trial judge found it was more likely than not that the appellants sprayed the herbicides beginning late on July 13, 2019 and that they acted in concert. The trial judge granted a price abatement in favour of the respondents for $2,796,000 and ordered punitive damages of $150,000 against the appellants.

Baring v. Grewal, (cont.)

APPELLATE DECISION

The appellants challenged the trial judge's conclusion that the respondents were entitled to a price abatement. The Court allowed this ground of appeal on the basis that a price abatement is an ancillary right to specific performance and is no longer available after a contract has been completed, unless the contract itself provides for compensation. Since the sale transaction had already completed prior to the respondents discovering the crop damage, the respondents were no longer seeking an abatement of the purchase price but rather should have sought damages for breach of contract.

The trial judge indicated in his reasons that if he was incorrect on the price abatement issue then he would have found the respondents were alternatively entitled to recover damages for the tort of civil conspiracy. The appellants argued that the trial judge erred by finding the tort claim had been made out on the evidence. The Court characterized this ground of appeal as an attempt to re-argue the evidence on appeal and found that there was a sufficient basis in the evidence, even though it was circumstantial, to support the trial judge's conclusions on civil conspiracy.

Zora Grewal also challenged several other aspects of the trial decision, including the quantification of the respondents' loss. He argued for the first time on appeal that aspects of the respondents' expert reports on damages contained errors and that, since he was self-represented at trial and had to rely on a translator, the trial judge had a duty to independently scrutinize those reports on his behalf. The Court found no principled foundation for the contention that Zora's obligation to advance his case should have been transferred to and assumed by the trial judge. Finally, Zora argued that he was entitled to lead evidence on quantification after the appellants' insufficient evidence application was denied. There is no general ability on the part of a defendant who brings an insufficient evidence application—as distinguished from a defendant who files a no evidence application—to preserve their right to lead further evidence on quantum if their application is denied.

COUNSEL COMMENTS

Baring v. Grewal, 2022 BCCA 42

Counsel Comments by
Robert J. Ellis and Jessie J. Skinnider,
Counsel for the Respondents

Robert J. Ellis

Jessie J. Skinnider

"The typical real estate contract of purchase and sale involves two parties: the purchaser and the vendor. The willing seller is motivated to maximize the purchase price. Should an event causing damage and loss occur before the closing date, such as fire, flood or similar perils, an abatement of the purchase price may be available and insurance issues are engaged.

A foreclosure sale, on the other hand, involves three parties in addition to the purchaser, which may be a less familiar cast of characters for many civil litigators. First, the foreclosing mortgagee, steps in as the vendor. Secondly, there is the defaulting (and often insolvent) owner/mortgagor, who may not be personally recovering much (or any) of the proceeds of sale. Thirdly, the sale must be approved, and overseen, by the court.

In a foreclosure sale, the property is usually in the hands of the defaulting owner/mortgagor until the closing date. Whereas in an ordinary real estate sale, purchasers expect to receive keys to a clean and tidy property, the defaulting mortgagor is not a voluntary vendor and so, may be less motivated to deliver the property to the purchasers in ideal condition. For this reason, a foreclosure sale is more likely to be on an "as is, where is" basis for the benefit of the mortgagee. Insurance for the purchaser in these circumstances is practically unavailable. However, should destruction result to the property prior to completion at the hands of the owner/mortgagor with possession, the purchaser should theoretically be entitled to the remedy of abatement of the purchase price, just like

COUNSEL COMMENTS

in a conventional sale, despite there being no privity between the owner/mortgagor and the purchaser.

This case involved a foreclosure sale of a blueberry farm by an immigrant husband and wife who were conscientious and experienced blueberry farmers. After the sale was approved, the owners/mortgagors initiated an appeal of the court order approving the sale, premised on a novel legal issue. This appeal delayed the original closing date ordered by the court, and the court granted a stay of the sale order pending the appeal. As a condition of the grant of a stay, the court ordered that the owners/mortgagors, who would remain in possession, maintain the blueberries in the best interests of the would-be purchasers.

In this interim period, the owners/mortgagors sprayed herbicides on the blueberries with the intent of destroying the farm, an act found to constitute the tort of civil conspiracy. This act, described by the trial judge as "deliberate, malicious and wantonly destructive", resulted in the death of acres of otherwise healthy blueberry plants and substantially deprived the purchasers of the value of the farm. Unbeknownst to the purchasers, who rushed to close the sale mere hours after the owner/mortgagors' appeal was dismissed, they would later arrive to a distressing landscape of their besmirched farm.

The trial judge accepted that in this foreclosure sale, the owners/mortgagors breached their equitable duty to maintain the farm in a reasonable state. The spraying of herbicides was a breach of both equitable and court-ordered duties, as well as a contempt of court. Furthermore, there is a principle of public policy whereby the law does not permit a party to benefit directly from its own crime or other inherently wrongful conduct (e.g., *ex turpi causa non oritur actio*). The "as is, where is" clause in the written contract of purchase and sale only operated to protect the vendor/mortgagee, not the intentional wrongdoers and conspirators. The trial judge held that the plaintiffs' contractual claim to an abatement of the purchase price, an equitable remedy, was well-founded.

The Court of Appeal overturned the trial judge's decision on the abatement issue. The Court of Appeal found that since the sale had completed, the remedy of abatement was simply unavailable. In doing so, the Court did not address the difference

COUNSEL COMMENTS

between a typical two-party sale and a foreclosure sale involving four parties, nor the significance of the delay in completion caused by the owner/mortgagor.

The result is curious in that it is unclear why the breach of an equitable and/or court-ordered duty (a finding which was not directly found to be in error) should not invite the availability of equitable intervention. Further judicial commentary on the mechanics of how court-ordered and common law duties in a foreclosure sale merge with the principles of contract would have been of practical significance to foreclosure lawyers in particular.

Leave to appeal to the Supreme Court of Canada is being sought."

Pirani v. Pirani, 2022 BCCA 65

Areas of Law: Trusts; Breach of Trust; Breach of Fiduciary Duties; Conflict of Interest

~The trial judge erred by failing to determine whether the trust instrument modified the scope of the trustees' fiduciary duties towards all beneficiaries by displacing the "no conflict" and "no profit" rules~

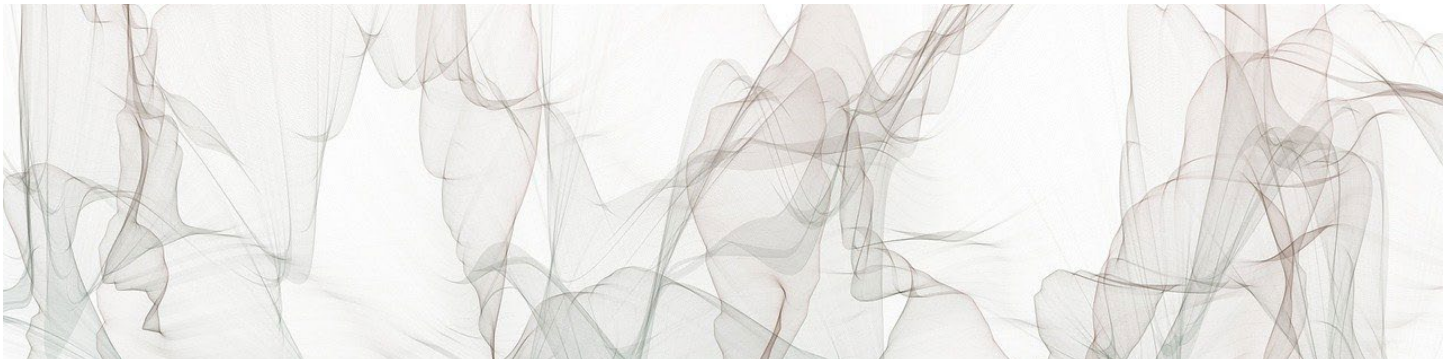
CLICK HERE TO ACCESS THE JUDGMENT

The four Pirani brothers (the "First Generation") established a number of successful businesses through two main entities called Pirani Enterprises Ltd. ("PEL") and Piramco Investments Ltd. ("PIL"). In 1993, the First Generation implemented an estate freeze so that future increases in the value of PEL and PIL would accrue to their intended heirs. The First Generation also created four family trusts and incorporated four numbered holding companies. The trusts at issue in this case were the MAP and Madatali Trusts. The MAP Trust was implemented by Mohamed Aly Pirani; its beneficiaries were his three children, Mehboob, Fareed, and Arshad and its trustees at the relevant times were Haider Pirani (one of the four First Generation brothers) and Mustaq Pirani, who was Mohamed Aly's nephew. The Madatali Trust was implemented by Madatali Pirani; its beneficiaries were his three children, Mustaq, Bashir, and Najma and its trustees at the relevant times were Haider and Mehboob. Mehboob and Mustaq Pirani were named as successor directors on the boards of their father's respective numbered companies, were directors of PEL and PIL, and were involved in running the family businesses.

Pirani v. Pirani, *(cont.)*

In or around 2012 the numbered companies were restructured and the family trusts were wound-up in order to avoid tax liabilities arising from the 21-year rule. The transactions "froze" the current value of the numbered companies' shares in PEL and PIL, distributed new classes of shares to the beneficiaries of each trust, and created new classes of shares, including voting shares, to capture the future growth or decline in the value of PEL and PIL. These new classes of shares were distributed to beneficiaries who were actively involved in running the family businesses to the exclusion of those beneficiaries who were not actively involved.

In March 2016, the appellants–Fareed and Arshad, along with Fareed's two daughters–sued Mehboob, Mustaq, Haider and Imran Pirani (Mehboob's son) and the late Mohamed Aly's numbered company, 438702 BC Ltd. ("702"). The action alleged the defendants breached their duties as trustees and fiduciaries because the structure of the reorganization violated the "no conflict" and "no profit" rules. The trial judge concluded that: (1) Haider and Mustaq were in a disabling conflict as the MAP Trustees and breached their fiduciary duties to the respondents by failing to act in good faith; (2) that Mehboob knowingly assisted Mustaq and Haider in their breach of their fiduciary duties; and (3) the appellants acted collectively. The trial judge found that the trustees' decision to implement a reorganization that conferred benefits on themselves and their families necessarily involved a breach of fiduciary duty. She also found that the appellants' valuation of the family businesses, which was used to set the frozen value of the estate, was flawed and underestimated. The trial judge ordered a remedy of disgorgement.



Pirani v. Pirani, *(cont.)*

APPELLATE DECISION

The appellants argued that the trial judge committed an extricable legal error by applying only general principles of fiduciary duty to their exercise of discretion as the trustees of the MAP Trust rather than by looking specifically at the scope of the discretion to depart from those principles conferred on them by the MAP Trust itself. The appellants state that the trial judge ignored the First Generation's intentions in creating the trusts by concluding that Haider and Mustaq were in a disabling conflict of interest.

The Court held that the trial judge committed extricable legal errors in her analysis of the scope and content of the duties owed to the respondents by the appellants. The trial judge failed to start her analysis by asking what the appellant trustees' duties were in light of the trust instrument and its contextual interpretation before assuming that general fiduciary duties governed the

Pirani v. Pirani, *(cont.)*

reorganization and had been breached unless the trustees could justify their decisions. The Court concluded that the trial judge took too narrow a view of the context in which the MAP Trust was established and of the broad discretion conferred by an "Accelerated Distribution Clause" found at Clause 4.12 of the trust instrument, which spoke to distributing the capital of the MAP Trust disproportionately. Had the trial judge undertaken a more contextual analysis she would have had to examine whether the trustees were authorized to exercise that discretion notwithstanding that they were acting in the face of what otherwise might be considered a disabling conflict. The trial judge erred by failing to address whether this clause displaced or modified the scope of the trustees' fiduciary duty to act solely in the best interests of all the beneficiaries.

The trial judge also erred by finding that the settlors of the MAP and Madatali Trusts did not authorize the conflict of interest in which Mehboob and Mustaq found themselves. The settlors were nominal and it was the First Generation brothers who in reality implemented the trusts and sanctioned the conflicts. Furthermore, where a family trust owns a family business, it is commonplace to have the same individual acting both as director and trustee and the Court found no conflict inherent in that arrangement. The MAP and Matadali Trusts did not prohibit a trustee from being a director of PEL or PIL or maintaining a financial interest in the family businesses, which points away from the existence of a disabling conflict of interest. Additionally, and although the point was not considered by the trial judge, the Court acknowledged it was possible that the trust instrument vitiated or modified the "no profit" rule.

In light of its conclusions, the Court noted the trial judge's assessment about Mehboob and Mustaq dishonestly undervaluing PEL and PIL would need to be revisited. The Court allowed the appeal and ordered a new trial.

0694841 B.C. Ltd. v. Alara Environmental Health and Safety Limited, 2022 BCCA 67

Areas of Law: Purchase and Sale Agreements; Limitation of Liability Clauses; Reasonable Reliance

~The chambers judge did not err in granting summary dismissal where the appellant ITC relied as a third party on a Phase II environmental assessment conducted by the respondent in the face of a disclaimer limiting liability~

CLICK HERE TO ACCESS THE JUDGMENT

In April 2011, the appellant, 06994841 BC Ltd. ("069") entered into an agreement to purchase a commercial property located on Bridgeport Road in Richmond for $5,488,000. As part of its due diligence under the purchase agreement, 069 retained the respondent, Alara Environmental Health and Safety Limited ("Alara") to conduct a Phase I and later Phase II environmental assessment of the property. While the Phase I report flagged a number of areas of potential contamination, the Phase II report (the "Report") did not discover any environmental contamination or recommend further investigation. The Report contained a disclaimer that "ALARA will not accept liability for the loss, injury claim, or damage arising directly or indirectly from any use or reliance on this report by any person or entity other than the Client" (the "Disclaimer").

In July 2011, after the Report was complete, 069 assigned the purchase agreement for the property to the appellant, International Trade Center Properties Ltd. ("ITC") (the "Assignment Agreement"). Both 069 and ITC had the same director and sole acting mind, Mr. Ching. The assignment agreement stipulated that ITC would conduct its own due diligence and investigation, but in reality ITC relied on the Report, which had only been prepared for 069, in moving forward to close the property transaction.

In February 2016, ITC discovered environmental contamination on the property that required remediation. 069 assigned to ITC its cause of action against Alara. ITC alleged it had relied on the Report to its detriment, and that the Report was negligent. Alara successfully applied for summary dismissal on the basis of the Disclaimer and ITC's status as a third party. The chambers judge found that ITC did not establish reasonable reliance because the Assignment Agreement

0694841 B.C. Ltd. v. Alara Environmental Health and Safety Limited, (cont.)

emphasized that 069 and ITC were separate entities acting independently of each other with respect to the purchase transaction. Alara was entitled to rely on that separation such that the Disclaimer prevailed.

APPELLATE DECISION

The appellants argued that the chambers judge erred by finding that ITC had other sources of information to protect itself and by disregarding certain critical factors, including that Alara had prepared the report to assist with the purchase of the property (the very purpose for which it was used), that ITC had paid for the report, and that Alara would have consented to ITC's use of the Phase II report.

The Court rejected these arguments and dismissed the appeal. First, it was not clear on the evidence that Alara would have consented to ITC using the Report, and even if Alara's practice was typically to grant consent, the appellant did not know that at the time it relied upon the Report and therefore could not use that to establish reasonable reliance. The chambers judge also made no reviewable error in his conclusion that ITC had agreed to conduct its own due diligence under the Assignment Agreement and that it had the option to commission its own environmental assessment; the fact that it chose not to despite knowing the terms of the Disclaimer worked to its detriment. The appellants failed to establish palpable and overriding errors with respect to any alleged errors on the part of the chambers judge.

COUNSEL COMMENTS

0694841 B.C. Ltd. v. Alara Environmental Health and Safety Limited, 2022 BCCA 67

Counsel Comments by
Christopher Hirst and Menka Sull, Counsel for the Respondent


Christopher Hirst


Menka Sull

"The central issue on this appeal was whether one corporate entity could rely on a report prepared by a consultant for its closely-related corporate entity in the face of a disclaimer clause limiting its use to its client. In previous cases, the Court of Appeal had held that the general rule is that a clear disclaimer clause extinguishes liability to a third party user of a report absent special circumstances to justify a departure from the general rule.

Our client, the respondent Alara, had prepared a Phase II environmental assessment report for the appellant numbered company in a property transaction. The Phase II report concluded there was no environmental contamination. The numbered company then assigned its interest in the purchase contract to a related company, the appellant ITC, for approximately $200,000. The assignment contract noted that ITC would perform its own diligence of the property; however, ITC did not conduct any independent investigations and decided to complete the transaction. ITC alleged many years later that it had discovered environmental contamination on the property, and the appellants sued Alara in negligent misrepresentation. One of Alara's defences to the claim was that the Phase II report contained a clear disclaimer clause disclaiming any liability to third party users of the report.

The appellants argued that because both the numbered company and ITC were controlled by the same operating mind, the general rule should not apply, and it was reasonable for ITC to have relied on the Phase II report when it decided to complete the purchase. They argued that

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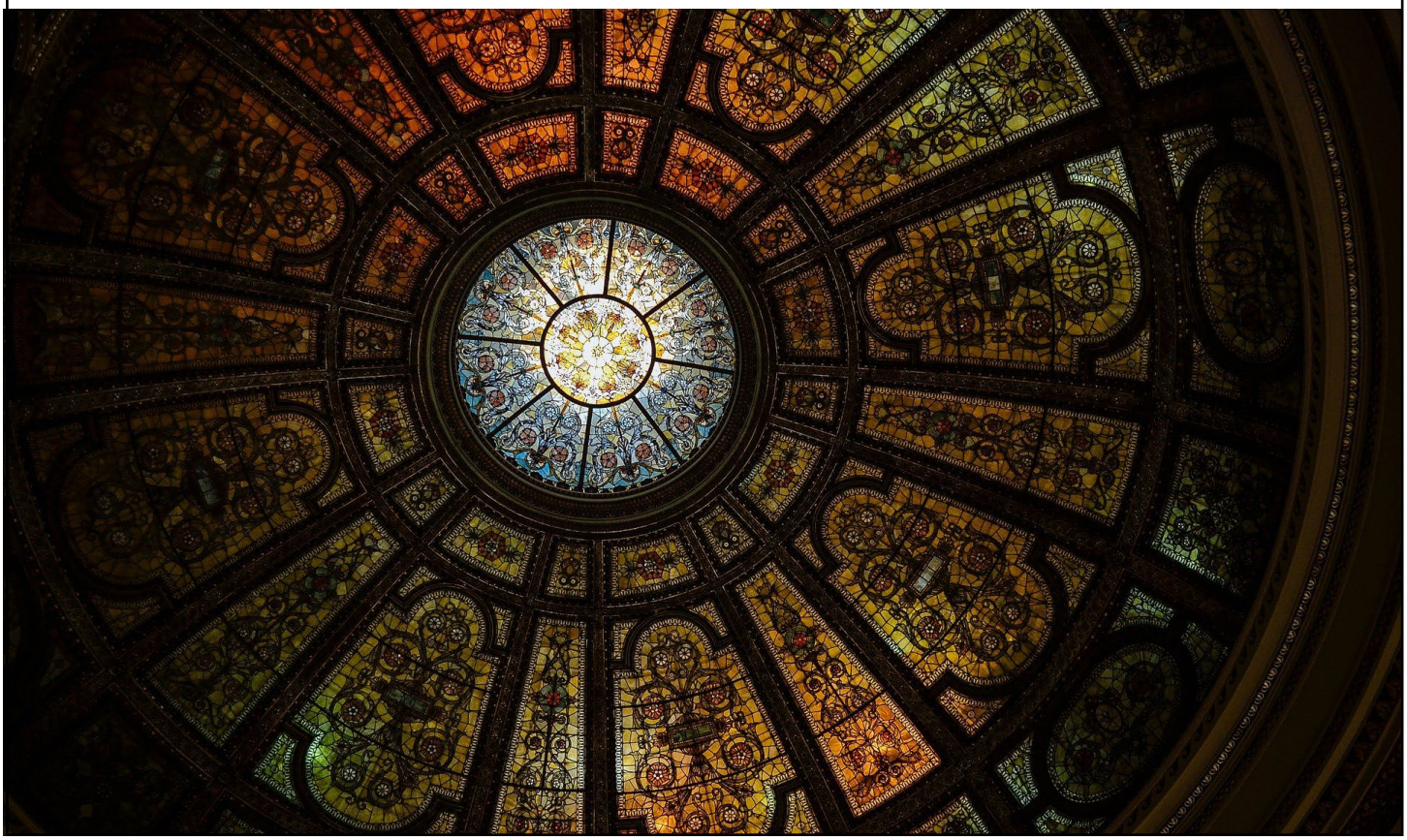
it would be commercially absurd for ITC to have commissioned its own report when the report was being used for the very transaction that the report had been prepared for.

This case was novel as British Columbia courts had not yet considered whether the fact that two corporate entities were closely related was a sufficiently unique circumstance to justify departure from the general rule that a clear disclaimer clause extinguishes liability to a third party. In this case, the fact that both the numbered company and ITC were controlled by the same individual, the fact that ITC paid Alara's invoices, and the fact that the report was used for the same transaction were not sufficient to justify a departure. ITC could have obtained its own report or sought consent from Alara to use the report, and it did neither.

In dismissing the appeal, the Court reaffirmed that a clear disclaimer clause will extinguish liability to a third party user of a report and that the cases which depart from the general rule due to the existence of special circumstances will be rare."



Banh v. Chrysler, 2022 BCCA 74

Areas of Law: Family Law; Property Division; Date of Valuation

~The trial judge erred by placing undue weight on factors not contemplated in s. 95(2) of the Family Law Act *in his decision to value the growth of excluded properties only to the date of separation rather than to the date of trial~*

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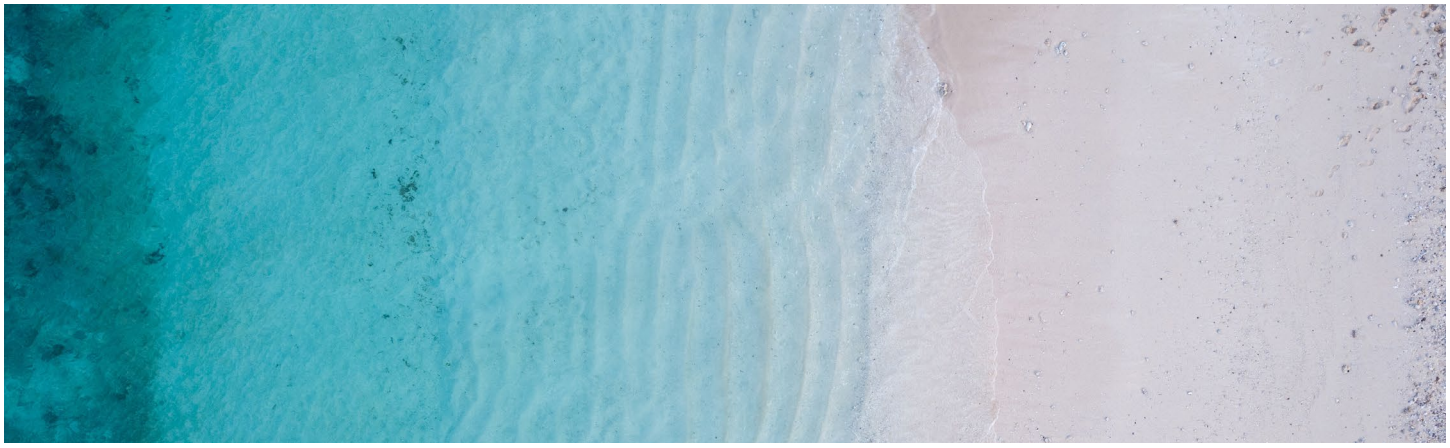
The parties married in August 2014 and separated in August 2016. The respondent husband owned two rental properties in Victoria and one in Port Alice, and the appellant wife owned a property in Surrey. While these were considered excluded properties pursuant to the *Family Law Act*, SBC 2011, c 25 ("FLA"), the growth in their value from the date of marriage to the date of trial was considered family property and therefore subject to a presumptive equal division. The parties went to trial in November 2019 and agreed upon the following valuations: (1) the Victoria Property A grew in equity by $95,000 at the time of separation and by $290,000 at the time of trial; (2) the Victoria Property B grew in equity by $115,000 at the time of separation and by $315,000 at the time of trial; (3) the Port Alice Property decreased in equity by $35,000 at the time of separation and only by $10,000 at the time of trial; and (4) the Surrey Property grew in equity by $65,000 at the time of separation and by $170,000 at the time of trial.

The trial judge found it would be significantly unfair to the husband to divide the growth in the value of the properties from the date of marriage to the date of trial. He considered the short duration of the marriage, the considerable growth in the value of the properties post-separation, and the work required by the husband to manage and maintain the rental properties (and the wife's insignificant contributions to same). The trial judge determined that it was more appropriate in the circumstances to use the date of separation rather than the date of trial; he awarded the wife one-half of the increase in the equity of the Victoria properties less one-half of the increase in the equity in the Surrey property for a total award of $72,500.

Banh v. Chrysler, *(cont.)*

APPELLATE DECISION

The Court held that the trial judge erred in principle by relying on factors outside the scope of s. 95 of the *FLA* when considering whether it would be significantly unfair to equally divide the family property at the date of trial. The trial judge gave too much weight to the husband's contributions to the development, management, and maintenance of the rental properties. On the evidence, the husband's contributions did not fit within the scope of either s. 95(2)(c), which looks at contributions to the career or career potential of the other spouse, or s. 95(2)(f), which looks at contributions that caused a significant post-separation increase in the value of family property beyond market trends. The Court also declined to consider the husband's contributions under the catch-all provision of s. 95(2)(i) since to do so would ignore the fact that the husband was the only party post-separation who collected and used the rents generated from the three rental properties. Other factors relied on by the trial judge were also irrelevant to the s. 95(2) analysis. It did not matter that the wife did not actually own any of the three rental properties, and it was unclear why the growth in the value of the properties post-separation should be viewed as a windfall to only one spouse. The Court was also not convinced that the wife's counsel's unilateral setting of a trial date three and a half years after the separation related to the economic characteristics of their spousal relationship; it moreso related to litigation conduct and could have been addressed through costs.



Banh v. Chrysler, *(cont.)*

The only consideration the trial judge correctly took into account was the short duration of the marriage under s. 95(2)(a). The Court acknowledged that a variation in the date of division of property can hinge on a single factor under s. 95(2), but in this case found the two-year marriage was not so compellingly short that it justified an unequal division of family property. The Court allowed the appeal and ordered that the equity in all four properties from the date of the marriage to the date of trial be divided equally.

Cepuran v. Carlton, 2022 BCCA 76

Areas of Law: *Patients Property Act*; Medical Assessments; *Parens patriae*; Converting Petitions to Actions

~The chambers judge erred in referring the issue of the appellant's capacity to trial and ordering her to undergo a medical assessment in the absence of two medical affidavits attesting to her lack of capacity. A judge hearing a petition is no longer required to refer the matter to trial~

CLICK HERE TO ACCESS THE JUDGMENT

The respondent, Sheri Cepuran, is the daughter of the appellant, Anna Cepuran. After the appellant's husband died, Sheri became concerned about the appellant's health. As the appellant's enduring power of attorney, Sheri took steps to transfer the appellant's beneficial interest in several British Columbia properties to the Ana Cepuran Alter Ego Trust (the "AET"). The appellant took issue with Sheri's involvement in managing her assets. She signed a revocation of Sheri's power of attorney and applied to the Supreme Court to obtain a declaration that the revocation was valid and to nullify the AET. Sheri, in turn, applied under the *Patients Property Act*, RSBC 1996, c 349 ("*PPA*") for an order declaring the appellant incapable of managing her affairs and appointing Sheri as committee of the appellant's estate. The respondent trustee of the AET also applied for directions.

Section 3(1)(a) and (b) of the *PPA* require that an application be supported by affidavits from two qualified medical practitioners attesting to the person's incapacity (see *McNeal v Few* (1975), 63 BCLR 281). If a judge is satisfied by the two medical affidavits, then the judge must grant an order declaring the person incapable; if the judge is not satisfied, then the judge has discretion to refer the capacity issue to trial under s. 3(2), or to order the person submit to a medical examination under s. 5(1), or to dismiss the petition. Sheri tendered affidavits from two physicians, including Dr. Passmore, a geriatic psychiatrist, neither of whom had actually met the appellant. The appellant also filed two medical affidavits from a specialist and from her family doctor, both of whom met with and assessed the appellant. The chambers judge admitted each affidavit but found that the affidavit of Dr. Passmore did not meet the requirements of s.

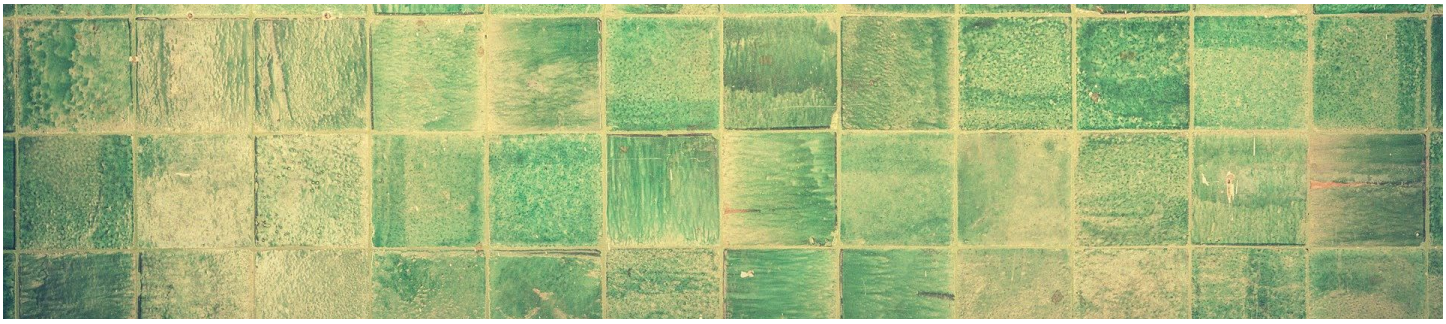
Cepuran v. Carlton, *(cont.)*

3(1)(b) of the *PPA* for the purpose of declaring the appellant incapable. Relying on the Court of Appeal decision in *Kartsonas v Kartsonas*, 2009 BCCA 218, the chambers judge nevertheless concluded that he had jurisdiction under the *PPA* to refer the matter for trial and to order the appellant to obtain a medical assessment. He consolidated the other applications and ordered they be converted into an action.

APPELLATE DECISION

The appellant appealed on the basis that the judge erred in referring the issue of her capacity to trial under s. 3(2) of the *PPA* and in ordering her to submit to further medical examinations. She also challenged whether a judge hearing a petition must convert it into an action where there is a bona fide triable issue, as per *British Columbia (Milk Marketing Board) v Saputo Products Canada G.P.*, 2017 BCCA 247. A five-judge panel heard the appeal.

The Court held that the chambers judge erred in his interpretation of the *Kartsonas* decision. *Kartsonas* does not stand for the proposition that a trial court can order a person to submit to a medical examination under the *PPA* absent the required two medical affidavits even if a judge is satisfied there is a "serious issue" of capacity. In this case, one of Sheri's medical affidavits had not met the threshold under the *PPA* and therefore the chambers judge lacked authority to order a trial or further medical examination. The Court set aside the *PPA* orders. It noted that the *PPA* does not require that physician affiants personally meet with and assess the person whose capacity is at issue, but that an opinion not based on personal



Cepuran v. Carlton, *(cont.)*

knowledge of the person may not meet the substantive requirements of s. 3(1)(b), to be determined on a case-by-case basis. Further, Sheri could not establish that this was a case where the *parens patriae* jurisdiction should be used to order a medical examination of the appellant since the evidence did not support that the appellant was a vulnerable adult incapable of managing her own financial affairs or that she had refused to be medically assessed (in which case, other statutory mechanisms, like the *Adult Guardianship Act*, RSBC 1996, c 6 and the *Public Guardian and Trustee Act*, RSBC 1996, c 383, could be relied upon).

Finally, the Court reviewed the arguments based on *Saputo* and concluded that a judge hearing a petition that raises triable issues is no longer required to refer the matter to trial; rather, a judge has the discretion to do so, or to use hybrid measures within the petition proceeding itself under R. 16-1(18) and R 22-1(4) of the *Supreme Court Civil Rules*.

COUNSEL COMMENTS

Cepuran v. Carlton, 2022 BCCA 76

Counsel Comments by
Duncan Magnus, Counsel for the Appellant

"This appeal arose from a chambers decision referring three petitions to the trial list. The appeal provided guidance on when a court can investigate an adult's competency and overturned the longstanding test of when to refer a petition to the trial list.

Duncan Magnus

***Patient Property Act* considerations**

With respect to the *Patient's Property Act* ("*PPA*"), the Court agreed with the Appellant's position that two affidavits of medical practitioners setting out their opinion that the adult is incapable is a prerequisite before the *PPA* can be engaged. The Court clarified that the *PPA* should be interpreted strictly and there must be two medical opinions that give clear and conclusive opinions of incapacity. Examinations under the *PPA* are a serious intrusion into the privacy and dignity of a person and unless the necessary affidavits from two medical practitioners are present, the investigation should not proceed. The Court recognised the balance between the need to protect individuals at risk on the one hand and Charter values and the presumption that an adult is to be presumed capable on the other hand.

An interesting argument on whether the medical opinion required an in-person assessment arose in this matter. The Court did not find that an in-person assessment must be done, but did find that diagnosis is necessary. In other words, more than just an opinion of incapability is necessary, the opinion must state the reason for the diagnosis.

With respect to the discretion of the Court to exercise the *parens patria* jurisdiction of the court, the Court confirmed that there must be 1) the evidence must establish serious questions to be tried as to both the person's incapacity 2) the person's need for protection; and 3) there must be a legislative gap that can only be filled by the court exercising its jurisdiction. This decision questioned whether the

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legislative gap previously open under *Temoin v Martin* to order the examination of an unwilling adult has been narrowed. In my view, the Court has pointed to the Public Guardian and Trustee and designated agencies as a primary resource to investigate the incapacity of an unwilling adult.

A fresh take on referring petitions to the trial list.

The Court of Appeal was requested to form a five Judge panel for the express purpose of revisiting the test to refer a petition to the trial list. The long standing test has been whether there was a bona fide triable issue. The Court overturned the test, stating that "a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to hear the matter, refer it to the trial list or to use hybrid procedures within the petition proceeding itself to assist in determining the issues". While the Court declined to prescribe a test for when a petition should be referred to the trial list and indicated that it should be determined on a case by case basis, the court did indicate that the statutory context was important to determine whether a hybrid procedure was appropriate in addition to the object of the Rules of Court, the amount involved, the importance of the issues and complexity of the proceeding.

As a result of this decision, there are some important to note regarding petitions generally (not just for *PPA* petitions):

1. Petitions should not be referred to the trial list automatically when a triable issue is raised. The decision affects not just *PPA* maters, but is wide ranging; affecting commercial disputes, trusts, judicial review and foreclosures to name a few.
2. While petitions are summary in nature, historically the ease in referring petitions to the trial list lead to unnecessary complexity, cost and delay. Significant effort is involved in preparing a petition, a response to petition and supporting affidavits, which often seems wasted when starting over after the matter has been referred to the trial list. With the door open to the court to decide a petition even when there is a triable issue, it seems to me that litigants will be better able to access the courts in an efficient, effective and timely manner.

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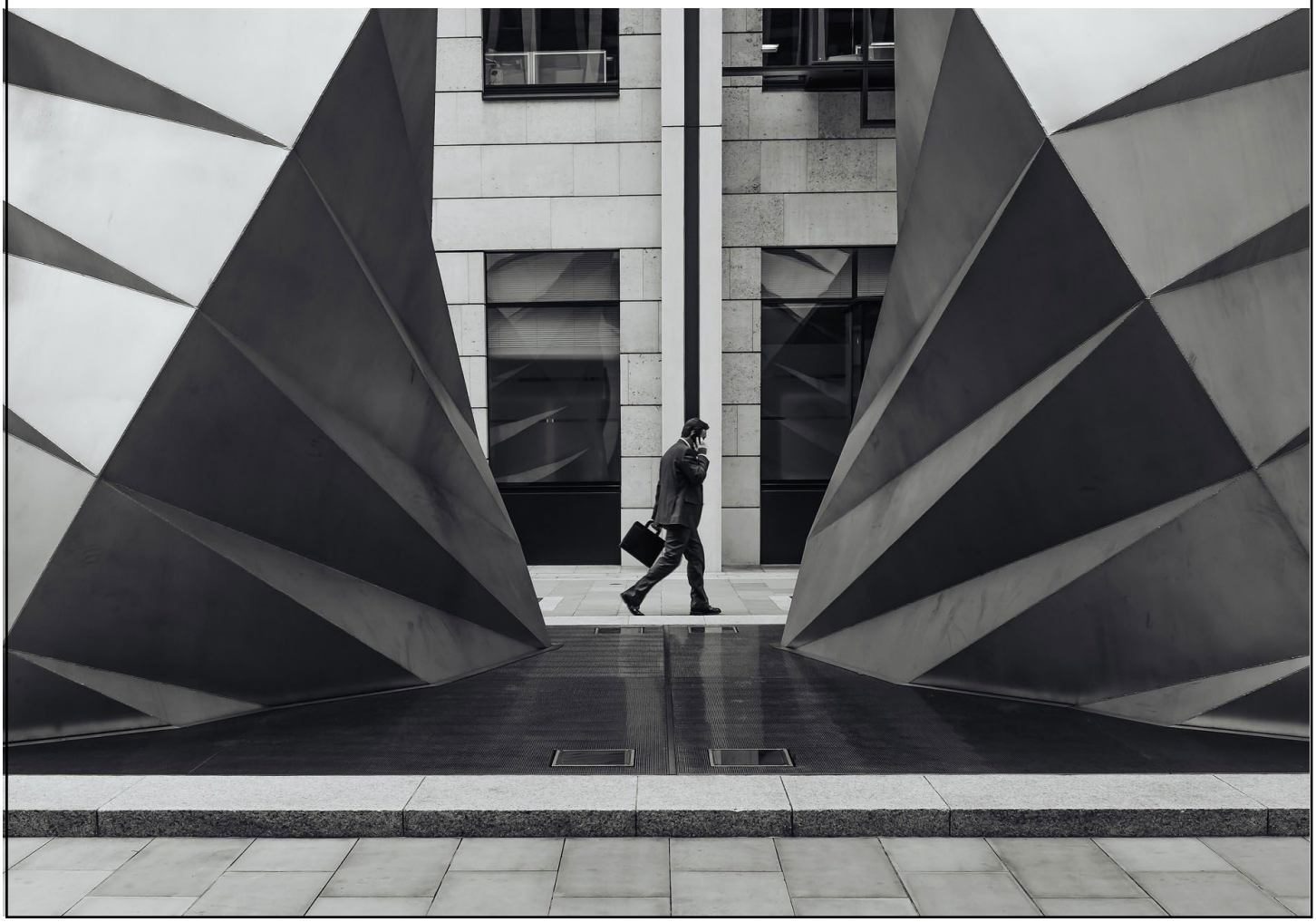
3) The Court highlighted that modern approach to litigation is to allow parties and the courts to tailor trial and pretrial procedures to a given case. Hybrid procedures are available within the petition proceeding (such as cross examination and document disclosure). While this creates flexibility for the Court to fashion procedure to reflect the necessity of a certain case, in my view, it puts an obligation on counsel to consider what types of adjustments to procedure should be contemplated at the petition hearing early on. For example, if certain documents are necessary, should they be obtained prior to the hearing; if a certain witness should give *viva voce* evidence, what arrangements need to take place. I would also think that where counsel are seeking to tailor procedures that timely discussions between counsel would be of assistance."



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Cepuran v. Carlton, 2022 BCCA 76

Counsel Comments by
Emily Clough and Polly Storey,
Counsel for the Respondent Sheri Cepuran

Emily Clough

Polly Storey

"These appeals provided a five-justice division of the Court with an opportunity to comment upon evidentiary issues and interlocutory relief in committeeship matters under the *Patients Property Act* [*PPA*], and to revisit the test for referring a petition to trial.

A key issue on appeal concerned the medical evidence needed to engage the *PPA*, and how that medical evidence may be obtained. Justice Griffin, for the Court, clarified the following points:

1. Medical examinations cannot be ordered under the *PPA* unless an application is already before the Court, supported by the two medical affidavits required by s. 3(1). If those opinions are not present, then the Court has no jurisdiction under the *PPA* to order that the proposed patient submit to a capacity assessment or to order a trial of the proposed patient's capacity.
2. The *PPA* does not contain a requirement that medical opinions be based on an in-person assessment of the adult. Rather than prescribing a particular process, "the *PPA* leaves the basis for reaching the necessary opinion to the professional standards and ethics of the medical

> practitioners" (para. 116). That said, as the *PPA* requires a diagnosis of the reason for incapacity, where a doctor has not personally assessed the proposed patient, their opinion may not be certain enough to meet the requirements of s. 3(1)(b).

In deciding the appeal, however, Justice Griffin also invited further development of capacity law:

1. The appeal court has a discretion to order medical assessments under the *PPA* which is "rarely exercised" (para. 105), and the factors relevant to making such orders on appeal may develop over time.
2. Although past decisions have identified a "legislative gap" allowing the Court to invoke its parens patriae jurisdiction to order that an adult attend mental capacity assessments, "the legislative context is different today as compared to the situation in *Temoin* [*v. Martin*, 2012 BCCA 250]" (para. 136) with the coming into force of Parts of the *Adult Guardianship Act*:

> > [137] … [T]he analysis in *Temoin* should not be automatically applied without taking into consideration the current legislative context and the facts and circumstances of the adult in question. I would expect any case relying on the *parens patriae* jurisdiction, as the basis for obtaining a medical assessment of an adult who is suspected of being incapable of managing their affairs, to address whether there exists a gap in the available statutory mechanisms.

The appeals also provided the Court with an opportunity to consider the test for referring a petition to trial, both generally and with respect to committeeship petitions:

1. Justice Griffin noted that in *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247, a three-judge division affirmed that a petition must be referred to trial where a *bona fide* trial issue exists. Sitting as a division of five in the instant case, however, the Court observed that, "There should be good reason for dispensing with a petition's summary

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procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason" (para. 158):

> [160] … a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc., 2009 BCSC 1701, and *Terasen Gas Inc. v. Surrey (City*), 2009 BCSC 627, set out some factors that may be relevant in deciding whether to refer a petition to trial or order that hybrid procedures be used within a petition. At minimum, the Court must be mindful of the object of the Rules set out in Supreme Court Civil Rule 1-3.

2. The test is the same for committeeship petitions. While the statutory context authorizing a petition will often be an important factor, it will be for the Courts to determine whether a petition proceeding is suitable for adopting a hybrid procedure or referring the matter to trial."

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