TAB 8

2016 ABCA 49
Alberta Court of Appeal

Hill v. Hill

2016 CarswellAlta 229, 2016 ABCA 49, [2016] 5 W.W.R. 61, [2016] A.W.L.D. 866, [2016] A.W.L.D. 867, [2016] A.W.L.D. 868, [2016] A.J. No. 180, 262 A.C.W.S. (3d) 1040, 34 Alta. L.R. (6th) 234, 395 D.L.R. (4th) 1, 612 A.R. 213, 662 W.A.C. 213, 82 C.P.C. (7th) 49

Daniel Walter Hill, Respondent (Plaintiff) and Paul James Hill, Richard P. Rendek and Rand Flynn, Appellants (Defendants)

Daniel Walter Hill, Respondent (Plaintiff) and Famhill Investments Limited and Harvard Developments Inc., Appellants (Defendants)

Marina Paperny, Brian O'Ferrall, Barbara Lea Veldhuis JJ.A.

Heard: January 12, 2016
Judgment: February 25, 2016
Docket: Calgary Appeal 1501-0174-AC, 1501-0175-AC

Proceedings: reversing *Hill v. Hill* (2015), [2015] A.J. No. 760, 2015 ABQB 436, 2015 CarswellAlta 1245, R.J. Hall J. (Alta. Q.B.)

Counsel: C.J. Popowich, R. Jadusingh, for Respondent
M.O. Laprairie, Q.C., J.R. Wildeman, for Appellants, Paul James Hill, Richard P. Rendek and Rand Flynn
F.R. Foran, Q.C., J.G. Hopkins, for Appellants, Famhill Investments Limited and Harvard Developments Inc.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.ii Fraud, perjury or collusion
Civil practice and procedure
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Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.viii Raising defence of res judicata
XXII.23.a.viii.C Miscellaneous

Headnote
Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — New evidence
Plaintiff brought action claiming 25 per cent of shares held by family trust — Action was dismissed, as was appeal — Plaintiff applied to set aside judgment on basis new evidence discovered after conclusion of the first action — Defendants applied to

strike statement of claim as frivolous and vexatious, an abuse of process and res judicata — Application was dismissed and defendants appealed — Appeal allowed and plaintiff's action dismissed — Evidence failed to meet materiality requirement of new evidence exception to res judicata — New evidence only to be admitted after judgment where evidence "practically conclusive" — New evidence must conclusively establish plaintiff's case — New evidence here not practically conclusive, did not conclusively impeach result of first trial, and could not be said to change aspect of case — New evidence contained document stating that four siblings were shareholders, but it did not incontrovertibly establish that they were shareholders in fact and in law — Evidence would not have affected key findings of trial judge regarding intentions of trustees which findings formed basis of decision.

Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — Fraud, perjury or collusion

Plaintiff brought action claiming 25 per cent of shares held by family trust — Action was dismissed, as was appeal — Plaintiff applied to set aside judgment on basis new evidence discovered after conclusion of the first action — Defendants applied to strike statement of claim as frivolous and vexatious, an abuse of process and res judicata — Application was dismissed and defendants appealed — Appeal allowed and plaintiff's action dismissed — Chambers judge found that plaintiff had not established fraud with respect to defendant PH's testimony and would not have admitted fresh evidence on ground of fraud — Nothing raised on appeal to indicate fraudulent behaviour, aside from some potentially inconsistent or incorrect testimony.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Raising defence of res judicata — Miscellaneous

Plaintiff brought action claiming 25 per cent of shares held by family trust — Action was dismissed, as was appeal — Plaintiff applied to set aside judgment on basis new evidence discovered after conclusion of the first action — Defendants applied to strike statement of claim as frivolous and vexatious, an abuse of process and res judicata — Application was dismissed and defendants appealed — Appeal allowed and plaintiff's action dismissed — Evidence failed to meet materiality requirement of new evidence exception to res judicata — New evidence only to be admitted after judgment where evidence "practically conclusive" — New evidence must conclusively establish plaintiff's case — New evidence here not practically conclusive, did not conclusively impeach result of first trial, and could not be said to change aspect of case — New evidence contained document stating that four siblings were shareholders, but it did not incontrovertibly establish that they were shareholders in fact and in law — Evidence would not have affected key findings of trial judge regarding intentions of trustees which findings formed basis of decision — Res judicata applied.

Table of Authorities

Cases considered by *Marina Paperny J.A.*:

Ambrozic v. Burcevski (2008), 2008 ABCA 194, 2008 CarswellAlta 652, 90 Alta. L.R. (4th) 247, 41 E.T.R. (3d) 1, 53 R.F.L. (6th) 242, 433 A.R. 25, 429 W.A.C. 25 (Alta. C.A.) — referred to

Arnold v. National Westminster Bank plc (1991), [1991] 3 All E.R. 41, [1991] 2 A.C. 93, 142 N.R. 31 (U.K. H.L.) — considered

Burcevski v. Ambrozic (2010), 2010 ABQB 570, 2010 CarswellAlta 1781, 34 Alta. L.R. (5th) 273, [2011] 3 W.W.R. 370, 491 A.R. 245 (Alta. Q.B.) — considered

Burcevski v. Ambrozic (2011), 2011 ABCA 178, 2011 CarswellAlta 973, [2011] 9 W.W.R. 120, 46 Alta. L.R. (5th) 145, (sub nom. *Ambrozic v. Burcevski)* 505 A.R. 359, (sub nom. *Ambrozic v. Burcevski)* 522 W.A.C. 359 (Alta. C.A.) — referred to

D.K. Investments Ltd. v. S.W.S. Investments Ltd. (1990), 44 B.C.L.R. (2d) 1, 1990 CarswellBC 45 (B.C. C.A.) — referred to

Doering v. Grandview (Town) (1975), [1976] 2 S.C.R. 621, (sub nom. *Grandview (Town) v. Doering)* [1976] 1 W.W.R. 388, (sub nom. *Grandview (Town) v. Doering)* 61 D.L.R. (3d) 455, 7 N.R. 299, 1975 CarswellMan 64, 1975 CarswellMan 87 (S.C.C.) — considered

Glatt v. Glatt (1935), [1935] O.R. 410, [1935] 4 D.L.R. 99, 17 C.B.R. 1, 1935 CarswellOnt 94 (Ont. H.C.) — referred to

Glatt v. Glatt (1935), [1936] O.R. 75, 17 C.B.R. 219, [1936] 1 D.L.R. 387, 1935 CarswellOnt 106 (Ont. C.A.) — referred to

Henderson v. Henderson (1843), 67 E.R. 313, 3 Hare 100, [1843-60] All E.R. Rep. 378 (Eng. V.-C.) — followed

Hill v. Hill (2012), 2012 ABQB 256, 2012 CarswellAlta 873, (sub nom. *Hill v. Hill Family Trust)* 540 A.R. 158 (Alta. Q.B.) — referred to

Hill v. Hill (2013), 2013 ABCA 137, 2013 CarswellAlta 436, (sub nom. *Hill v. Hill Family Trust)* 553 A.R. 16, (sub nom. *Hill v. Hill Family Trust)* 583 W.A.C. 16 (Alta. C.A.) — considered

with very high degrees of proof required to ensure that relitigation will be permitted only in rare circumstances. As noted by LeBel J, relitigation is available only where necessary to enhance the credibility, effectiveness and integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (S.C.C.) at para 52, [2003] 3 S.C.R. 77 (S.C.C.) [*CUPE*].

30 This appeal deals primarily with the "new evidence" exception to *res judicata*. That exception has been expressed in a number of ways in the case law, but a test has emerged which can be generalized as follows: First, the new evidence must not have been discoverable with reasonable diligence prior to trial; and second, the new evidence must be so material that it would have changed the result had it been adduced at trial.

31 The first part of the test, the requirement for reasonable diligence, is not the main issue on this appeal. It is the articulation and interpretation of the second branch of the test, the materiality requirement, that requires further discussion.

Materiality of the new evidence

32 The case law in this area reveals that the new evidence exception to *res judicata* demands a high threshold in terms of relevance and materiality. The test has been formulated variously in the Canadian jurisprudence, but the challenge in establishing the requisite level of materiality is apparent throughout.

33 The Supreme Court of Canada set out the general test for relitigation on the basis of new evidence in *Varette v. Sainsbury* (1927), [1928] S.C.R. 72 (S.C.C.) at paras 23-25, (1927), [1928] 1 D.L.R. 273 (S.C.C.). That case involved an appeal from a trial decision seeking to set a judgment aside or order a new trial on the basis of new evidence discovered after trial. The court stated the test as follows:

> On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive: para 23.

The court noted that the new evidence in that case was not practically conclusive, as it would not "conclusively establish the plaintiffs' case" and could not affect the judgment (paras 25-26).

34 The Supreme Court of Canada returned to the new evidence exception in *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.) at para 11, (1975), 61 D.L.R. (3d) 455 (S.C.C.) [*Doering*], where an action was struck on the basis of *res judicata*. There, the court adopted Lord Cairns' formulation of the new evidence exception from *Phosphate Sewage Co. v. Molleson* (1879), (1878-79) L.R. 4 App. Cas. 801 (Scotland H.L.) at pp 814-5:

> My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here ... would have been been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to
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> [emphasis added].

35 In *CUPE*, the Supreme Court of Canada restated, in general terms, the test for relitigation on the basis of new evidence. The court held that relitigation will enhance the integrity of the judicial system when, among other circumstances, "fresh, new evidence, previously unavailable, *conclusively impeaches the original results*" (*CUPE* at para 52) [emphasis added].

36 This Court delineated the test to be met for a judgment to be set aside on the basis of new evidence in *Kaliel v. Aherne*, [1946] 1 W.W.R. 461, [1946] 2 D.L.R. 388 (Alta. C.A.) [*Kaliel*]. As in the within appeal, that case dealt with an application to strike a setting aside action on the basis of *res judicata*. Although the result ultimately turned on the fraud exception, Ford JA for the majority set out the test for the new evidence exception to *res judicata* at 469:

