IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Han v. Cho,***
2008 BCSC 1192

Date: 20080902
Docket: L050150
Registry: Vancouver

Between:

Chul-Soo Han and Suk Hee Park and Jae Bok Yun

Plaintiffs

And:

Soonam Cho, also known as Jeong Eun Cho, also known as Jung Eun Cho, also known as Soon Yi Jung, also known as Cho Chong-Un, also known as Su-Nam Cho, also known as Bora Kang, Subi Park, also known as Subi Yu, Jioh Park also known as Jioh Yu, also known as Yang Hyun Park and Young Chan Shim

Defendants

Before: The Honourable Madam Justice Griffin

Reasons for Judgment: Ruling on Application to Set Aside Jury Notice

In Chambers

Counsel for Plaintiffs:	F.G. Potts T. Goepel
Counsel for Soonam Cho:	G.A. Phillips
Counsel for Subi Park and Jioh Park:	W.D. Holder
Date and Place of Hearing:	July 24-25, 2008 Vancouver, B.C.

[1] The plaintiffs claim in this proceeding that they were defrauded by the defendants. The plaintiffs have selected a trial by jury and the defendants[1] now apply to set aside the jury notice.

[2] The defendants advance two grounds for setting aside the jury notice: first, that this case is within the class of cases for which the Rules of Court mandate that the trial must be by judge alone; and second, that if the defendants are wrong on this point, in any event the court ought to exercise its discretion to set aside the jury notice because the issues are too complex for a jury.

[3] There are therefore two general issues:

1. Is the claim dealing with a matter that the Rules of Court mandate must be tried by judge alone,

without a jury, pursuant to Rule 39(25)?

2. Should the court exercise its discretion to dispose of a jury trial, because the issues require prolonged examination of documents or accounts or a scientific investigation, or are the issues of such an intricate or complex nature, such that the case cannot be tried conveniently by a jury, pursuant to Rule 39(27)(a)?

First Issue: Is the claim dealing with a matter that the Rules of Court mandate must be tried by judge alone, without a jury?

[4] There are certain classes of cases for which the Rules of Court require that the trial be heard by the court alone, without a jury, as set out in Rule 39(25).

[5] The defendants argue that the matters at issue in this case are matters for which a jury is excluded under Rule 39(25):

A. The trial relates to "the sale and distribution of the proceeds of property subject to any lien or charge," or "the partition or sale of real estate" within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(d) and (h);

B. The trial relates to "the execution of trusts," within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(e); and,

C. The trial relates to a matter in which "the relief sought relates to land and is for a declaration of a beneficial interest in or a charge on land and of the character and extent of the interests or charge" within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(j) and Rule 10(1)(g)(i).

[6] Before considering these categories of excluded claims, I will first review the nature of the plaintiffs' claim in this case. I will then review the general principles regarding the right to a jury trial, the judicial approach to interpretation of the Rule excluding the right to a jury trial, the historical origin of the exclusions to the right to a jury trial, and applicable principles of statutory interpretation.

The Nature of the Claim

[7] The essence of the claim is that the plaintiffs were defrauded of money by the defendant, Ms. Soonam Cho who, it is alleged, fraudulently misrepresented to them that she owned real estate in Korea and purported to sell these properties to the plaintiffs. The plaintiffs say they paid the defendant, Ms. Cho to purchase these properties and later discovered that she did not in fact own them. They say that the other defendants conspired with Ms. Cho in furtherance of the fraud and have acquired assets with the monies obtained from the plaintiffs through the fraud.

[8] The defendants do not dispute that the case alleges fraud, but they say central to the case are the plaintiffs' related claims in trust and to property held by the defendants, especially a condominium in Vancouver owned by Jioh Park.

[9] The defendants point to the plaintiffs' pleading that the monies they paid to the defendant Cho, and any assets obtained by reason of the fraud, now in the hands of the defendant Cho and the defendants Subi and Jioh Park, are impressed with a trust in favour of the plaintiffs, defined in the pleading as the "Trust" (paras. 23, 25 of the Amended Statement of Claim).

[10] The defendants also rely on the fact that the plaintiffs further plead, in the alternative, that to the extent the defendants Cho, Subi Park and Jioh Park have acquired real property by converting the Trust monies, they hold that property in trust for the plaintiffs. The plaintiffs say this includes a condominium in Vancouver registered in the name of Jioh Park, and so Jioh Park holds the condominium property in trust for the plaintiffs (para. 27 of the Amended Statement of Claim).

[11] Finally, the defendants emphasize that the plaintiffs seek various remedies in the prayer for relief, including

a declaration as to what assets in the hands of the defendants are held in trust for the plaintiffs, a declaration that any monies or assets into which the plaintiffs monies can be traced are the property of the plaintiffs, and an order for payment or transfer of the same to the plaintiffs.

General Principles Regarding the Right to a Jury

[12] There is a common law right to a jury. A party ought not to be deprived of this important right except for cogent reasons: ***King v. Colonial Homes Ltd.***, [1956] S.C.R. 528 at 533.

[13] In ***Nichols v. Gray*** (1978), 9 B.C.L.R. 5 (C.A.), Craig J.A. explained the plaintiff's entitlement to a jury in civil cases (at 10):

> A plaintiff is entitled to trial by jury, except in certain types of cases specified in the Rules, and he can be deprived of this right only if a party opposing a trial by jury establishes "clearly" that one of more of the exceptions in R. 39(20) [the predecessor to Rule 39(27)] is applicable. *McDonald v. Inland Natural Gas Co*. (1966), 57 W.W.R. 87 at 95.

[14] In ***McDonald v. Inland Natural Gas Co.*** (1966), 57 W.W.R. 87 (B.C.C.A.), Branca J.A. commented at 95 that "while the right of a trial by jury goes back far and is imbedded deeply in the history of our law, and while a litigant is not to be deprived of that right unless he is clearly within an exception created by law, where such an exception applies, that right should be refused."

[15] The onus is on the applicant seeking to set aside a jury notice to show that the party who selected trial by jury is not entitled to that mode of trial: ***Creasy v. Sweny*** (1942), 57 B.C.R. 457, [1942] 3 W.W.R. 457 (C.A.).

Judicial Interpretation of the Phrase "relates to" in Rule 39(25)

[16] All of the trials listed in Rule 39(25), as trials that must be heard without a jury, are trials that "relate to" certain subject matter. Sub-Rule 39(25)(j) involves trials that "relate to" a matter referred to in Rule 10(1), which is the rule that lists applications that may be made by originating application. Rule 10(1), in turn, incorporates the phrase "relates to" in several of its subsections, including the third provision relied on by the defendants in this case, namely, Rule 10(1)(g).

[17] The defendants' application raises the question: how should the court interpret the phrase "relates to" in the context of Rule 39(25)?

[18] It could be argued that the phrase "relates to" in Rule 39(25) connotes that any trial that in part touches on the matters listed must be heard by the court without a jury, since the trial will relate to those matters. In its broadest sense, "relates to" can mean in any way connected with a matter. The verb "relates" has a very wide dictionary definition. The *Concise Oxford English Dictionary*, 11th ed., Soanes and Stevenson eds. (Oxford: Oxford University Press, 2004) defines "relate" in part as "make or show a connection between > (relate to) concern".

[19] However, the courts of this province have construed the phrase "relates to" in Rule 39(25) narrowly. In ***Whiteway v. Nyack***, [1980] B.C.J. No. 993 (QL) (C.A.), Taggart J.A. referring to Rule 39(18), the predecessor of Rule 39(25), said at para. 14 that "the meaning of the rule is that the matters referred to in the subparagraphs must form the main or central issue or issues in the action." The "main or central issue" formulation has been applied in several subsequent decisions (***Collette v. Cartier Partners Securities Inc.***, 2005 BCSC 501, 43 B.C.L.R. (4th) 140, ***CIBC v. Wedeene*** (1992), 7 C.P.C. (3d) 402, [1992] B.C.J. No. 872 (QL) (S.C. Master), and ***Leffler v. Flanagan***, [1993] B.C.J. No. 1568 (S.C. Master)). In ***Modonese v. H.A. Simons (International) Ltd.*** (1987), 19 B.C.L.R. (2d) 164 (C.A.) the court, in dealing with the question of whether the case was one that could not as a matter of law be tried before a jury, declined to strike a jury notice where an excluded matter was an issue, but not the principal issue.

[20] This construction of Rule 39(25) is consistent with how the courts in the past construed predecessor rules restricting the common law right to a jury trial. In ***Hopper v. Dunsmuir (No. 1)*** (1903), 10 B.C.R. 17 (Full Ct.), Drake J., in construing M.R. 330 and M.R. 81 of the ***Supreme Court Rules, 1890***, stated at 19 that the court must

"look at what is in reality the action that is to be tried". See also ***Canadian Pacific Railway Co. v. Parke et al.*** (1896), 5 B.C.R. 507, [1896] B.C.J. No. 47 (Full Ct.). English courts dealing with similar rules have also historically taken the same approach: ***Jenkins v. Busby*** (1891), 38 Ch. D. 484 (C.A.).

History of the Exclusions to the Right to a Jury Trial

[21] The judicial approach to interpretation of the exclusions to the right to a jury trial, which has involved looking at the substance of the action to be tried, can be understood by looking at the origin of the exclusions.

[22] The exceptions to the right to a jury trial listed in Rule 39(25) have their origin in those matters heard in the Court of Chancery. Historically, the Court of Chancery did not have jury trials, using instead paper trials on evidence taken by examiners before the matter came before the judge. The nineteenth century English court reforms initially gave the Court of Chancery the power to direct issues to be decided by juries at assizes, and later permitted the Court of Chancery to decide common law issues by jury. Chancery judges embraced the former practice, but were uncomfortable trying common law issues before juries in their own courts, and generally avoided doing so. See Michael Lobban, "The Strange Life of the English Civil Jury, 1837-1914" in John W. Cairns and Grant McLeod, eds., *Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (Oxford: Hart Publishing, 2002).

[23] When the courts of England were fused, so that a single court could grant relief in both common law and equity, a Chancery Division was created and the rules of procedure dictated that certain matters should continue to be heard by chancery judges. The English ***Supreme Court Judicature Act, 1873***, 36 & 37 Vict. c. 66 (U.K.). listed in section 34(3) the specific matters assigned to the Chancery Division:

> 34. There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court:
>
> (1.) All causes and matters pending in the Court of Chancery at the commencement or this Act:
>
> (2.) All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any Judges or Judge thereof respectively, except Appeals from County Courts :
>
> (3.) All causes and matters for any of the following purposes:
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> The administration of the estates of deceased persons;
>
> The dissolution of partnerships or the taking of partnership or other accounts;
>
> The redemption or foreclosure of mortgages;
>
> The raising of portions, or other charges on land;
>
> The sale and distribution of the proceeds of property subject to any lien or charge;
>
> The execution of trusts, charitable or private;
>
> The rectification, or setting aside, or cancellation of deeds or other written instruments;
>
> The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;
>
> The partition or sale of real estates;
>
> The wardships of infants, and the care of infants' estates.

[24] The matters historically assigned to the Chancery Division of the merged English court can be compared to our present-day British Columbia Rule 39(25) which provides:

(25) A trial shall be heard by the court without a jury where it relates to

(a) the administration of the estate of a deceased person,

(b) the dissolution of a partnership or the taking of partnership or other accounts,

(c) the redemption or foreclosure of a mortgage,

(d) the sale and distribution of the proceeds of property subject to any lien or charge,

(e) the execution of trusts,

(f) the rectification, setting aside or cancellation of a deed or other written instrument,

(g) the specific performance of a contract,

(h) the partition or sale of real estate,

(i) the custody or guardianship of an infant or the care of an infant's estate,

(j) a matter referred to in Rule 10 (1), or

(k) a family law proceeding.

[25] It is apparent that all of the exclusions to trial by jury listed in Rule 39(25)(a) through (i) can be directly traced back to those matters considered chancery matters.

[26] All that has been added to the present-day Rule 39(25), as additional exclusions to the right to a trial by jury, from the list of those matters assigned to the Chancery Division of the merged English court by s. 34(3) of the English ***Judicature Act, 1873***, are matters referred to in Rule 10(1) and family proceedings: Rule 39(25)(j) and (k).

[27] Rule 10(1) provides:

(1) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where

(a) an application is authorized to be made to the court,

(b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document,

(c) the applicant is the only person who is interested in the relief claimed, or there is no person against whom relief is sought,

(d) the relief, advice or direction sought relates to a question arising in the administration of an estate of a deceased person or the execution of a trust, or the performance of an act by a person in the person's capacity as executor, administrator or trustee, or the determination of the persons entitled as creditors or otherwise to the estate or trust property,

(e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability,

(f) the relief sought is for payment of funds into or out of court,

(g) the relief sought relates to land and is for

(i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,

(ii) a declaration settling the priority between interests or charges,

(iii) an order cancelling a certificate of title or making a title subject to an interest or charge, or

(iv) an order of partition or sale, or

> (h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.

[28] Like all of the other matters listed in Rule 39(25) (other than family proceedings), the list of matters in Rule 10(1) also has roots in chancery practice. Present-day Rule 10 is titled "Originating Application", as it was in the 1976 Rules. Before the 1976 Rules, what is now known as an "originating application" was called an "originating notice", and before that an "originating summons". In ***Re Holloway (A Solicitor), ex parte Pallister***, [1894] 2 Q.B. 163 (C.A.) at 167-68, Lindley L.J. explained that the "originating summons" was conceived as a method of commencing certain chancery proceedings in chambers, as opposed to the conventional method of lodging an equitable bill.

[29] Rule 10(1)(g) was introduced in the 1976 British Columbia Supreme Court Rules. It appears to have been imported from Rule 410 of the Alberta Rules of Court, Alta. Reg. 390/68, which at the time the 1976 Rules were drafted provided:

> Proceedings may be commenced by originating notice in the following cases:
>
> …
>
> (c) proceedings relating to land
>
> (i) for the declaration of a beneficial interest in or a charge upon land and of the character and extent thereof, or
>
> (ii) for a declaration settling the priority as between interests or charges, notwithstanding any entry in the register or the registration or filing of any instrument, or
>
> (iii) for an order cancelling any certificate of title or making any title subject to an interest or charge;
>
> …
>
> (i) proceedings to compel partition of land;

[30] This Alberta rule had no connection with whether or not a jury trial was available.

[31] Given that the object of the committee that drafted the 1976 British Columbia Rules was to "streamline the rules …, to eliminate unnecessary procedures, to accommodate the realities or present practice and to write it all in clean prose," (see Peter Fraser, "The New Rules of Court: The Background" (1976) 34 The Advocate 117 at 119) it is sensible to conclude that the drafters did not intend to change the general availability of civil jury trials when they imported Rule 10(1)(g) from Alberta. Rather, it can be concluded that the drafters considered that the matters in Rule 10(1)(g) might be suitable for hearing in Chambers by petition, as these might be relatively simple cases which could be decided by application on affidavit evidence.

[32] Garry D. Watson, ed., *Holmested and Watson, Ontario Civil Procedure* looseleaf (Scarborough: Carswell, March 2008) described the way legal systems in England, Canada and the United States accommodated the different common law and chancery approaches to trying cases (at 47-10):

> While trial by jury was the norm at common law, it was not used in equity. This continued to be of significance when, after the 19th century *Judicature Act* reforms, the two systems became jointly administered. What emerged, not only in England and Canada, but also in the United States, was the principle that jury trial was not available in equity cases.

[33] The focus on the substance of the action in ascertaining the availability of a jury trial is confirmed by the experience of Ontario, which inadvertently limited the availability of trial by jury when it revised its rules such that the availability of a jury was based on the relief claimed. When the effect of the change was appreciated, Ontario was moved to amend its rules to restore the former practice under which juries tried common law issues and judges tried equitable issues at the same time. This experience is described in *Holmested and Watson, Ontario Civil*

Procedure, *supra*, at 47-14 – 47-17:

> The *Judicature Act* contained two provisions as to cases in which jury trial was unavailable. ...
>
> The second provision in the *Judicature Act* was extremely general. Section 60(4) provided that jury trial was unavailable in "causes, matters or issues over the subject of which the Court of Chancery had exclusive jurisdiction before the commencement of the *Administration of Justice Act* of 1873." As already explained, this provision continued the state of affairs after the merger of law and equity that had existed prior to that reform: jury trial was the norm at common law, but it was not used in equity. However, s. 60(4) was very general in nature. By contrast the *Courts of Justice Act* s. 108(2) lists more specifically the actions that cannot be tried with a jury. ...
>
> Several of the specific paragraphs of s. 108(2) refer to forms of equitable relief (*e.g.*, injunctions, execution of a trust, specific performance) and paragraph 11 provides the general provision that trial by jury is unavailable in respect of a claim "for other equitable relief."
>
> ...
>
> As originally enacted in 1984, s. 121(2) (now 108(2)) provided that "actions in which a claim is made for <u>any of the following kinds of relief</u> shall be heard without a jury." A literal reading of this provision meant that if any equitable relief was claimed in an action, even though other non-equitable relief was also claimed, jury trial was unavailable. ...
>
> This had not been the situation under the former practice. Former Rule 257 provided that where both legal and equitable issues were raised and jury notice was served, the case was to be tried at the same time unless the trial judge otherwise directed. The resulting situation, under the former practice, was that when both legal and equitable issues were raised, the jury tried the former and the trial judge the latter. Hence, the existence of an equitable issue (*e.g.*, a claim for equitable relief) did not <u>automatically</u> deprive the party of the right to a jury trial: see Holmested & Gale, *Ontario Judicature Act and Rules of Practice*, R. 257. ...
>
> In 1989, by S.O. 1989, c. 55, s. 20, s. 121(2) (now 108(2)) was amended in recognition of the fact that the original section had inadvertently changed the law by requiring a trial without a jury whenever equitable relief was claimed, even though other relief of a non-equitable nature was also claimed. ... The intent of the amendment was to restore the law to the situation that a jury is only prohibited in respect to the claim for one of the enumerated kinds of relief (*e.g.*, equitable relief), so that a jury may still determine the issues of fact with respect to other claims in the action.
>
> [Emphasis in original]

<u>Principles of Statutory Interpretation</u>

[34] A principle of statutory interpretation that is of assistance in interpreting the phrase "relates to" in Rule 39(25) is that the legislature is presumed not to intend to abolish, limit or otherwise interfere with the rights of subjects. Legislation designed to curtail the rights that may be enjoyed by citizens or residents is strictly construed. The presumption against interfering with rights applies to both common law and statutory rights. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths Canada, 2002) at 399.

[35] Sullivan also presents another relevant principle at 341:

> Although legislation is paramount, it is presumed that legislatures respect the common law. More precisely, it is presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of the common law courts, or generally to change the common law.

[36] The historical origin of the rule regulating the availability of trial by jury in civil matters shows that the rule was not conceived as a restriction on the common law right to trial by jury. Thus, to the extent that the exclusions under the rule might be read as expanding beyond their original subject matter, they would be a restriction of a common law right. As such, the exclusions must be construed narrowly.

Conclusion: The Meaning of "relates to" Under Rule 39(25)

[37] A review of the case law interpreting Rule 39(25), the historical origins of the Rule, and principles of statutory interpretation leads to the conclusion that whether a trial "relates to" a matter pursuant to the Rule means something more than "touches on or is in any way concerned with" one of the excluded matters. The Rule must be read as meaning that one of the excluded matters is the main or central focus of the trial.

[38] I will now address the exclusions on which the defendants rely in their application.

A. Does the trial relate to "the sale and distribution of the proceeds of property subject to any lien or charge", or "the partition or sale of real estate" within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(d) and (h)?

[39] The first question is, does the trial relate to "the sale and distribution of the proceeds of property subject to any lien or charge", or "the partition or sale of real estate" within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(d) and (h)?

[40] Nowhere in the plaintiffs' Amended Statement of Claim do they seek the sale or partition of real estate or proceeds of property subject to any lien or charge. I find that this is not a case in which the central focus in "the trial will relate to the sale and distribution of the proceeds of property subject to any lien or charge", or "the partition or sale of real estate" within the meaning of Rule 39(25)(d) and (h) and so this is not a ground for excluding a jury.

B. Does the trial relate to "the execution of trusts", within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(e)?

[41] The next question is, does the trial relate to "the execution of trusts", within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(e)? The defendants say that it does. The defendants rely on the case of ***Coodin v. Hodgkinson*** (1983), 49 B.C.L.R. 359 (S.C.).

[42] In ***Coodin v. Hodgkinson****, supra*, the plaintiff sued defendant stockbrokers, alleging that he had a discretionary account with them that was dissipated by the brokers' misconduct. The plaintiff alleged that the defendants were to invest the funds wisely, and owed him a fiduciary duty. The plaintiff sued for damages, but also claimed equitable relief of restitution and exemplary damages for breach of trust. The defendants applied to strike the plaintiff's jury notice on two grounds: first, that the matters were too complex, as the trial would require a detailed review of the stock market transactions at issue, and expert evidence on the stock market; and second, that the matters concerned "the execution of trusts" and could not be heard by a jury based on the predecessor to our current Rule 39(25)(e). The court accepted both arguments, and held that the trial should proceed without a jury.

[43] The plaintiffs argue that ***Coodin v. Hodgkinson*** is distinguishable because the court in that case found that "the chief issue" in the case "relates to management of a trust fund". Here, the plaintiffs argue, there is no issue relating to management of a trust fund. The main focus of the trial is whether fraud and conspiracy occurred, and if so, where did the plaintiffs' money go.

[44] The plaintiffs note that ***Coodin***, *supra* was distinguished in ***CIBC v. Wedeene River Contracting Co.***, *supra*. In that case, the plaintiff was advancing a fraudulent conveyance claim, alleging that the defendant company had fraudulently conveyed ownership of life insurance policies, placed on the life of a director, to the director's wife. The defendants pleaded in defence that the policies were subject to a trust in favour of the wife, including a constructive trust based on services she had provided to the company, which the directors were simply honouring when they made the transfer. The defendants filed a jury notice and the plaintiff applied to strike it on the grounds that first, the case involved a matter relating to the "execution of a trust", and second, that because it was dealing with an express, resulting or constructive trust, that these issues were too complex for a jury. The court rejected both arguments and allowed the jury notice to stand.

[45] The court in ***CIBC v. Wedeene,*** *supra*, held that the central issue in that case concerning a trust was whether or not the trust existed; it was not the execution of or management of a trust. This distinguished the case from ***Coodin v. Hodgkinson***, *supra*. The court in ***CIBC v. Wedeene*** also held that the question of whether or not the trust existed was not too complex for a jury.

[46] ***CIBC v. Wedeene,*** *supra,* is consistent with ***Leffler v. Flanagan***, *supra*. In ***Leffler***, the court held that a claim founded upon a resulting or constructive trust "does not fall squarely within one of the enumerated classes which cannot be heard by a jury". In ***Dorus v. Teck Corporation***, 2008 BCSC 1112, the claims of unjust enrichment, restitution and constructive trust were recognized as remedies. It does not appear to have been argued that a constructive trust claim falls within the exception to a trial by jury for matters relating to "execution of trusts" (Rule 39(25)(e)). The court found that these matters were not too complex and could be explained to a jury.

[47] I agree with the plaintiffs in this case that the facts are more akin to ***CIBC v. Wedeene*** than to ***Coodin v. Hodgkinson***. The only issue in this case regarding a trust is whether or not it exists, and this is in the context of the constructive trust remedy only. The management or "execution" of trusts is not the main focus of the trial and, as such, the bar to a jury in Rule 39(25)(e) does not apply.

C. Does the trial relate to a matter in which "the relief sought relates to land and is for a declaration of a beneficial interest in or a charge on land and of the character and extent of the interests or charge", within the meaning of the Rules prohibiting a trial by jury, pursuant to Rule 39(25)(j) and Rule 10(1)(g)(i)?

[48] The defendants seek to have the court strike the respondent's jury notice on the basis that the trial relates to "a matter referred to in Rule 10(1)(g)".

[49] Given the narrow interpretation of "relates to" in Rule 39(25), a trial that includes an aspect fitting within Rule 10(1)(g) may nonetheless be heard before a jury if that aspect is not the main or central focus of the trial.

[50] Like Rule 39(25), Rule 10(1)(g) includes the phrase "relates to".

> Rule 10 (1) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where
>
> (g) the relief sought relates to land and is for
>
> (i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge….

[51] In my view, Master Horn was correct in his interpretation of this exclusion to the right to a jury trial in ***McQuade v. British Columbia Teachers' Federation***, [1995] B.C.J. No. 1578. He held that the question of whether a matter properly fits within Rule 10(1) and is thereby excluded from trial by jury pursuant to Rule 39(25) requires looking at the substance of the claim being advanced. If the claim is not in substance a claim that could sensibly be brought and determined in chambers by petition, then the right to a jury trial is not excluded. This approach reflects the historical origin of the restrictions on the right to a jury trial. Where an action is primarily a common law action, there has always been a right to trial by jury, and simply because the claim also touches on a matter which is listed in Rule 39(25) does not mean the right to a trial by jury has been lost.

[52] The essence of the plaintiffs' claim is a civil fraud claim. The main focus of the trial will not "relate to relief sought relate[d] to land and for a beneficial interest in or charge on land and of the character and extent of the interest or charge", as in Rule 10(1)(g)(i). While the plaintiffs do seek a declaration as to a property interest in land, as an asset purchased with the proceeds of fraud, this relief will not be the central focus of the trial. The main focus of the factual determinations at trial will be: did a fraud or conspiracy occur, and if so, where did the money go. This is not the type of claim that could properly be determined by petition. This claim is not excluded from trial by jury pursuant to the application of sub-Rules 39(25) and 10(1)(g).

Second Issue: Should the court exercise its discretion to dispose of a jury trial because the issues require prolonged examination of documents or accounts, or because the issues are of such an intricate or complex nature that the case cannot be tried conveniently by a jury, pursuant to Rule 39(27)(a)?

[53] The defendants say that the issues will require prolonged examination of documents and accounts, such as bank accounts. However, there was no evidence before the court that was persuasive on this point.

[54] As well, the defendants say the constructive trust claim is too intricate and complex to be understood by a jury.

[55] The plaintiffs take the position that the question of whether or not a constructive trust exists in this case is a legal conclusion within the exclusive purview of the judge alone, and will not be a question for the jury. The jury will be asked questions of fact such as: Was there a fraud or conspiracy? Who participated in it? Where did the plaintiffs' money go? After the jury returns its findings on the facts, the plaintiffs say the court will be asked to determine the question of whether trust or tracing remedies apply. Once the court determines this, the jury will then be instructed to assess damages or make findings determining the quantum of the trust property. When the jury returns its findings on these issues, the plaintiffs will then elect common law damages or equitable remedies, such as a constructive trust remedy.

[56] The defendants did not raise any objections to this way of proceeding, other than their general objection that the matter is not suitable for a jury.

[57] In ***Dorus***, *supra*, the court held that the constructive trust remedy was not so complicated as to deny the plaintiffs their choice of trial by jury.

[58] In ***Mustaji v. Tjin***, [1995] B.C.J. No. 39 (S.C.), the trial judge exercised his discretion to not leave questions regarding the existence and breach of an alleged fiduciary duty to the jury, but did leave the jury to answer questions of fact relating to the alleged fiduciary duty. The judge then based his ruling on the fiduciary duty claim upon the facts found by the jury. The Court of Appeal found that the judge did not err by dividing the questions as he did ((1996), 25 B.C.L.R. (3d) 220 (C.A.)).

[59] The ultimate decision of whether to grant the equitable relief sought by the plaintiff appears to properly reside in the trial judge. In ***Dopf v. Royal Bank of Canada*** (1998), 46 B.C.L.R. (3d) 66 (C.A.), Goldie J.A., referring to remedies based on equitable principles, cautioned at para. 22 that "[t]here are strong policy reasons for maintaining that the responsibility for administering such remedies should be left to the judge alone." This practice is consistent with the practice in Ontario, as noted in *Holmested and Watson*, *supra*, at 47-14 – 47-17 (see para. 33 of these reasons).

[60] I conclude that the fact equitable remedies are claimed in this case is not sufficient reason to remove the case from trial by jury. The facts for determination by the jury will not be too complex. The responsibility of awarding equitable remedies will remain that of the trial judge alone.

[61] The defendants also argue that complicated expert evidence will be required, which is akin to a "scientific investigation" and will make the case too intricate and complex for a jury. A key defence is that the underlying transaction, for which the plaintiffs paid money to the defendant Ms. Cho, was illegal in Korea. Another defence may be that the plaintiffs have brought proceedings in Korea which make the issues in this case *res judicata*. The defendants say they will require experts to testify as to Korean law and then findings of fact will have to be made as to Korean law. Finding facts on what is the effect of the law of a foreign jurisdiction will be too complex for a jury, the defendants argue.

[62] The plaintiffs say that the issues are not complex. The plaintiffs also say that the jury is capable of hearing and weighing expert evidence.

[63] At this stage of the case, expert evidence has not been exchanged.

[64] If expert evidence is going to be called at trial, it can be a reason to delay the determination of the whether or not trial by jury is suitable: see ***Forliti (Guardian ad litem) v. Woolley***, 2003 BCSC 79. Once the expert reports are before the court it will be easier to determine whether or not the issues are as complex and as difficult for a jury as one party suggests. While the defendants are contemplating calling expert evidence, they are not bound to do so and surely, their decisions in this regard will await their receipt of draft expert reports. In addition, it is unknown what issues, if any, the plaintiffs will take with any expert evidence filed by the defendants.

[65] One issue which complicates the use of a jury is the plaintiffs' stated intention to call similar fact evidence

and evidence of the defendant Ms. Cho's criminal record. This evidence may be highly prejudicial to a jury. However, the plaintiffs say that they understand that a risk to them of having a jury trial is that this evidence may be ruled inadmissible. The plaintiffs say that they are willing to take this risk.

[66] At this stage of the case, I am unable to conclude that the matter is so complex that it is unsuitable for a jury.

Conclusion

[67] The defendants' application for an order that the trial be heard by the court without a jury is dismissed. I will give the defendants liberty to re-apply on new evidence no later than 30 days before trial, if the parties have exchanged expert reports or there are other circumstances that have changed. Costs of this application will be costs in the cause.

Madam Justice Susan A. Griffin

[1] That is, all defendants other than Mr. Shim who did not appear on the application.