

CANADA / JUDGMENT

Barrand v. Limongelli

2022 BCSC 1858

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1858 Barrand v. Limongelli

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barrand v. Limongelli,

2022 BCSC 1858

Date: 20221024

Docket: E212344

Registry: Victoria

Between:

Margaret Irene Barrand

Claimant

And

Fulvio Mario Limongelli

Respondent

Before: The Honourable Mr. Justice M. Taylor

Reasons for Judgment

Counsel for the Claimant:

B.M. Pearce

Counsel for the Respondent:

C. Panadero

Place and Date of Hearing:

Victoria, B.C.

July 12, 2022

Place and Date of Judgment:

Victoria, B.C.

October 24, 2022

Introduction

- [1] Following a chambers application where the principal issues were resolved on consent in favour of Ms. Barrand, Ms. Barrand also seeks an order for special costs.
- [2] Ms. Barrand and Mr. Limongelli entered into a marriage-like relationship in or about 1997 and separated in 2009. They entered into a Separation Agreement dated February 3, 2010 (the "Agreement"), under which they agreed to a division of assets and spousal support.
- [3] Under clause 16 iv. of the Agreement, the parties agreed that Mr. Limongelli would have ownership of a registered retirement income fund with MD Management valued at approximately \$187,502 (the "RRIF"). It was further agreed that Mr. Limongelli would continue to withdraw annually from the RRIF the minimum amount stipulated by law (but not more than that), unless his private funds should run out. The Agreement also stated that Ms. Barrand would be named a beneficiary of the RRIF with respect to the residual funds not withdrawn by Mr. Limongelli and would remain a beneficiary.
- [4] Between 2010 and 2014, Ms. Barrand sought disclosure of annual account statements from Mr. Limongelli with respect to the RRIF, but Mr. Limongelli did not provide them. Accordingly, in 2014 Ms. Barrand brought an application and obtained an order of Justice Thomson (the "Thomson Order") requiring Mr. Limongelli to provide the most recent RRIF account statement. Following the Thomson Order, Mr. Limongelli provided Ms. Barrand in April 2015 with only a 1-page report but not the full account statement. Ms. Barrand was troubled by this report because it did not indicate that Ms. Barrand remained a beneficiary of the RRIF.
- [5] Accordingly, Ms. Barrand brought a further application before Justice Baird, raising again the issue of inadequate disclosure and also Ms. Barrand's status as a beneficiary. Mr. Limongelli admitted at the hearing of the application that he had indeed removed Ms. Barrand as a beneficiary. Justice Baird ordered that Mr. Limongelli provide Ms. Barrand with full statements of account by April 30 of each year and also that he restore Ms. Barrand as a beneficiary (the "Baird Order").

- [6] During the period between 2015 and April 2021, Ms. Barrand and her legal counsel made several requests for account statements. In breach of the Baird Order, Mr. Limongelli failed to comply with the requests. During that period, Ms. Barrand obtained a further order from Justice Giaschi in September 2021 requiring Mr. Limongelli to provide the full account statements (the "Giaschi Order").
- [7] Mr. Limongelli failed to comply with the Giaschi Order or to provide the full account statements to Ms. Barrand. Accordingly, Ms. Barrand brought another application before Justice Gaul, who ordered on Dec 17, 2021 that the full statements of account from 2015 to 2021 be provided (the "Gaul Order"). Following the Gaul Order, Ms. Barrand finally received full account statements for the years 2015 to 2020.
- [8] Upon receipt of the account statements, it became apparent to Ms. Barrand (and was admitted by Mr. Limongelli on this application) that Mr. Limongelli had commenced withdrawing funds above the minimum amount from the RRIF in 2019 and had continued to do so, leaving the RRIF with a balance of only \$46.48 as of the end of the 2021 year. In addition, Mr. Limongelli took steps to change the account number, in an apparent attempt circumvent Ms. Barrand's rights as beneficiary. Mr. Limongelli gave no explanation in the affidavit material for his decision to breach the Agreement by withdrawing the funds, other than that his investment advisor had recommended it and he had failed to obtain legal advice.
- [9] Unfortunately, by virtue of the statutory framework relating to RRIFs, the value depleted by Mr. Limongelli in the RRIF cannot be replenished. Ms. Barrand is understandably distressed that the financial security she had anticipated would be provided to her as the beneficiary of the RRIF has been taken away. It is also a relevant fact that Ms. Barrand, although of limited financial means, has invested substantial amounts of her own money on legal fees and other costs to bring the numerous applications required to require Mr. Limongelli to comply with his contractual obligations.
- [10] At the hearing, counsel for Mr. Limongelli conceded that Mr. Limongelli had breached the Agreement and failed to comply with a succession of court orders. An order on consent was agreed between counsel at the hearing, whereby a remedy can be crafted that creates a new investment account that will provide analogous financial security for Ms. Barrand and make her whole. I commend counsel for Mr. Limongelli for taking a reasonable approach on this matter by conceding the breaches of the Agreement and court orders and helping to craft a creative approach to attempt to remedy this unfortunate situation.
- [11] Nonetheless, counsel for Mr. Limongelli is not responsible for his client's prior actions, and these actions have potential cost consequences for Mr. Limongelli personally. I will now proceed to consider the issue of special costs.

- [12] The Court of Appeal in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 56, described when an award of special costs may be appropriate and the purpose that is served by such an award:
- [56] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young* [1993] 4 SCR 3 at 134-138. Special costs are not compensatory; they are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106. They are awarded when a court seeks to disassociate itself from some misconduct: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.) at para. 23. There are circumstances where special costs may be ordered where there has been no wrongdoing: *Gichuru v. Smith*, 2014 BCCA 414 at para. 90. These reasons are not concerned with such types of cases.
- [13] In *Chapman v. Chapman*, 2020 BCSC 1896 at paras. 6-11, Justice Jackson summarized recent developments in the law with regard to special costs and, in particular, discussed the approach to be followed when there have been prior costs orders in a proceeding:
- [6] The Court of Appeal recently reviewed the purpose underlying special costs in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69, leave to appeal ref'd 39145 (1 October 2020) [*Le Soleil*]. The Court affirmed the purpose of special costs is to punish and deter litigation misconduct, not to compensate the other party: at paras. 40-42.
- [7] However, special costs also enable a court to substantially indemnify a successful party: *Everywoman's Health Centre Soc. (1988) v. Bridges* (1991), 54 B.C.L.R. (2d) 294 at 297, [1991] B.C.W.L.D. 816 (C.A.); *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, leave to appeal ref'd 38924 (20 February 2020), at para. 49. The indemnification function is particularly relevant where one party has had to incur excessive costs due to misconduct on the part of the other party: *D'Atri v. Gonzalez*, 2017 BCSC 1244 at para. 55 [*D'Atri*].
- [8] It is not necessary for the party's conduct throughout the litigation to have been reprehensible to warrant an award of special costs for the entire action: *Bradshaw Stenner*, 2012 BCSC 237 at para. 9, leave to appeal ref'd 2012 BCCA 481. Nonetheless, while special costs are usually awarded for the whole proceeding, where such an award would be disproportionate, the court has the discretion to award special costs with respect to particular steps in the litigation: SCFR R. 16-1(1)(b)(ii); *Gichuru v. Smith*, 2014 BCCA 414 at para. 91, leave to appeal ref'd 36221 (16 April 2015).
- [9] Where previous orders are silent as to the scale of costs, the trial judge's cost order for special costs will govern: *Le Soleil* at para. 109. However, if a previous order for a particular step in the litigation has expressly addressed the scale of costs, or has summarily assessed costs, it cannot be varied by the trial judge: *Le Soleil* at paras. 101 and 108.
- [10] While not exhaustive, the types of conduct that may attract an award of special costs include delayed disclosure of or a failure to disclose documents, dissipating or not disclosing assets, depriving the other party of financial assets, disregarding the other party's interest in family assets, pursuing meritless claims and being reckless with regard to the truth, improper

allegations of fraud or conspiracy, or making the resolution of an issue far more difficult than it should have been: *Hu v. Dickson*, 2015 BCSC 218 at para. 49; *McIntyre v. McIntyre*, 2018 BCSC 472 at paras. 7-8; *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11; see also *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [Westsea] and *D.G.S. v. J.D.S.*, 2014 BCSC 2183.

- [11] Non-disclosure of assets and financial information, in particular, has been described as the cancer of family litigation and is viewed as being particularly egregious, potentially justifying an award of special costs: *Leskun v. Leskun*, 2006 SCC 25 at para. 34, citing with approval *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93, [1994] B.C.W.L.D. 2804 (S.C.); *Jin v. Cheng*, 2019 BCSC 148 at para. 59.
- [14] I will now consider the types of conduct, applicable in this case, that may attract an award of special costs, as referenced in *Chapman*.

Delayed disclosure of or a failure to disclose documents

- [15] In this case, Mr. Limongelli failed for years to disclose documents, and in particular the RRIF account statements, despite a succession of court orders requiring him to do so.
- [16] In *Sebok v. Babits*, 2022 BCCA 2 at para. 61, Justice Marchand found that "deliberate" and/or "material" non-disclosure is a factor that can give rise to an award of special costs, although observing that material non-disclosure, on its own, would have to be particularly egregious to justify such an award. If this were the only factor in this case, it might not be sufficient on its own to justify an award of special costs. However, it was not the only factor.

Dissipating or not disclosing assets

- [17] In addition to non-disclosure of key documents, Mr. Limongelli also deliberately dissipated the assets in the RRIF from \$187,000 down to little more than zero, all without providing Ms. Barrand any notice of what he was doing. It is clear in my view that Mr. Limongelli's decision not to disclose the account statements, and his changing of the account number, was directly connected to the dissipation of the assets, as the dissipation would have been obvious to Ms. Barrand if she had been given access to the account statements. The irresistible inference is that he was actively trying to hide the dissipation of assets from Ms. Barrand.

Depriving the other party of financial assets and disregarding the other party's interest in family assets

- [18] Ms. Barrand was the beneficiary of the RRIF under the Agreement and the evidence was that she was relying on the residue in the RRIF account to provide her security in her retirement. By dissipating the RRIF, Mr. Limongelli took that security away from Ms. Barrand.

Pursuing meritless claims and being reckless with regard to the truth

- [19] Mr. Limongelli alleged on the application that Ms. Barrand had failed to make disclosure of her own financial information but these allegations were fully refuted by Ms. Barrand in her affidavit material and revealed to be meritless.
- [20] One example was a meeting where Ms. Barrand brought him her income tax materials (in an effort to be proactive on disclosure) and Mr. Limongelli got angry and told her to take the materials away. The evidence that this interaction occurred was found in an email sent by Mr. Limongelli the following day where he apologized for his behaviour and for getting angry. Thus it is clear that, contrary to Mr. Limongelli's allegation, Ms. Barrand was in fact making efforts to provide financial disclosure and Mr. Limongelli had refused the disclosure.

Making the resolution of an issue far more difficult than it should have been

- [21] There was evidence that Mr. Limongelli took pleasure in using his financial advantage to leverage Ms. Barrand's position and to impact her behaviour during the litigation. For example:
- On Oct 27, 2021 Mr. Limongelli sent Ms. Barrand an email stating: "No talk no money". This was a reference to his position that he would not pay her the spousal support she was entitled to unless she agreed to have a conversation with him.
 - On March 10, 2022, Mr. Limongelli sent Ms. Barrand an email stating: "There will be no court case and you missed an opportunity for a better future". This email was sent after it was apparent that this application was going ahead, and appears to have been a blatant attempt to intimidate Ms. Barrand and discourage her from asserting her rights.
- [22] Taking into account all the foregoing, I am satisfied that an award of special costs is appropriate on this application. Mr. Limongelli's conduct throughout the course of this litigation has been reprehensible and the court must dissociate itself from his actions.
- [23] Counsel for Ms. Barrand has asserted that special costs should be awarded relating to not only this application but all the prior applications dating back to 2014.
- [24] I am sympathetic to Ms. Barrand's position, given the expenses she has incurred to repeatedly return to court to oblige Mr. Limongelli to comply with prior court orders. However, I am also bound by the Court of Appeal's direction in *Le Soleil* that if a previous order for a particular step in the litigation has expressly addressed the scale of costs, or has summarily assessed costs, it cannot be varied by the trial judge: *Le Soleil* at paras. 101 and 108.
- [25] In this case, it is clear that, with the exception of the Baird Order, the other earlier orders did indeed summarily assess costs and/or address the scale. The prior cost orders were as follows:

- Thomson Order - each party to bear their own costs.
- Baird Order - no order as to costs.
- Giaschi Order - costs against Mr. Limongelli and a \$2000 fine.
- Gaul Order - costs of this application and the Giaschi application payable forthwith. Ms. Barrand entitled to ordinary costs at scale B in any event of the cause and payable forthwith.

[26] Accordingly, I order special costs in favour of Ms. Barrand with respect to this application and the application before Justice Baird, but not with respect to the other earlier applications, payable forthwith upon assessment.

"M. Taylor J."

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