

CANADA / JUDGMENT

Bartch v. Bartch

2020 BCSC 2082

COURT

Supreme Court of British Columbia

DECIDED

29 December 2020

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2020 BCSC 2082 Bartch v. Bartch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bartch v. Bartch,

2020 BCSC 2082

Date: 20201229

Docket: E108417

Registry: Kelowna

Between:

Terry Lynn Marie Bartch also known as Terry Lynn Bartch

Claimant

And:

Bradley Dean Bartch also known as Brad Bartch

Respondent

Before: The Honourable Madam Justice Young

Supplemental Reasons for Judgment

re Directions and Orders

Counsel for the Claimant:

S. L. Specht

Counsel for the Respondent:

D. L. Polley

Place and Date of Hearing

via Conference Call:

Kelowna, B.C.

December 22, 2020

Place and Date of Judgment:

Kelowna, B.C.

December 29, 2020

Introduction

- [1] The respondent seeks directions from the court pursuant to paras. 15 to 19 of the final order dated September 27, 2019 and entered September 10, 2020 (the Final Order), on how the parties should proceed with steps recommended by Ms. Cheryl Schmidt in her letter of October 5, 2020 as it relates to income tax planning for the parties. The respondent submits that Option 3 which provides for the declaration of dividends over 2 years is the appropriate option to follow to minimize the impact of tax on distribution of corporate assets. He also seeks directions confirming the effective date of the Final Order directing the claimant to pay the respondent the sum of \$463,270.
- [2] In response, the claimant seeks direction that the parties follow Option 4 which provides for the creation of a holding company and deferring tax liability. The claimant further seeks direction that the "compensation payment" be held in the respondent counsel's trust account pending completion of the incorporation of a holding company by the respondent and the transfer of shares of BMC to the claimant. The claimant also seeks an order that the additional \$15,000 received by the respondent from the claimant in June, July and August 2019 be deducted from the monies owed to the respondent. She seeks an order that the respondent's proportionate share of Ms. Schmidt's costs to affect the rollover be held in trust. In oral submissions she also requested an order relating to the transfer of the parties' timeshare property.
- [3] The trial of this matter concluded in July 2019. There have been numerous reappearances before me seeking clarification of the order and some mathematical corrections. That Final Order was settled on July 9, 2020. The parties have settled costs. In the Final Order by consent the parties agreed to engage the accountant Cheryl Schmidt of KPMG to provide them advice as to whether the interim distribution of the value of the shares of 09723 BC Ltd. (097 Ltd.) to the respondent already paid prior to the trial could be retroactively rolled into a new company of the respondent on a tax-deferred basis or whether there were any other mechanisms to reduce the global tax liability of the parties for the past redistribution of the value of the shares to the respondent. If taxes are owed then the respondent is responsible

for 25% of that tax and it should be paid from a holdback of \$100,000. Upon seeking advice from Ms. Schmidt the parties were granted leave to seek further direction from the court in relation to the steps required to complete the transfer of funds pursuant to the Final Order in the event that the parties were unable to resolve the issues by agreement. The parties have not been able to resolve the issue.

Tax planning options

- [4] In the Final Order the claimant was ordered to pay to the respondent cash equivalent to a 25% interest in 097 Ltd. which was found to have a value of \$2,275,000. The 25% interest in favour of the respondent had a value of \$568,750. The respondent had already received interim advances in the sum of \$620,000 which exceeded the value of his 25% interest in 097 Ltd. In addition, the claimant was ordered to pay the respondent lump-sum spousal support of \$497,136. After making adjustments for a vehicle and a TFSA and adjusting for the interim advances made to the respondent, the claimant was ordered to pay \$463,270 to the respondent. This was intended to be the balance owing of lump-sum spousal support which was not taxable.
- [5] At trial submissions were made by counsel for the respondent that the parties could avoid tax implications of distributing the respondent's interest in 097 Ltd. by following the advice of Ms. Schmidt in a rebuttal report dated May 2, 2019. Ms. Schmidt set out options to avoid or minimize distributive income taxes in the case of separating assets of the company as part of the divorce settlement. She described a rollover transaction which would minimize the tax implications of the distribution.
- [6] Those submissions were made at the time when the respondent was claiming a 50% interest in 097 Ltd. and was anticipating that a further corporate distribution was payable to him. As a result of my findings at the trial, the respondent received 25% of the value of 097 Ltd. and had already received interim distributions exceeding the value of his 25% interest.
- [7] I ordered that \$100,000 be deducted from the balance owed to the respondent and be held in trust by counsel for the respondent pending a determination of the tax liability arising from the payment of interim advances to the respondent prior to trial because neither party had paid income tax on those advances.
- [8] At trial I relied on the worst-case scenario for tax implication in Mr. Tidball's March 18, 2019 opinion. He was of the view that the claimant could face tax implications of up to \$250,000 for the interim advances to the respondent. I ordered that the respondent pay for 25% of the tax owing as a result of the interim distributions. These taxes are to be paid from the \$100,000 being held in trust by his counsel.

- [9] I am now advised by counsel for the claimant that a corporate rollover is not available for previously paid distributions. The manner and timing of a corporate rollover should be determined before payments were made. That means that rollover provisions to avoid corporate distributive tax are no longer available to the parties unless the lump-sum spousal support is re-characterized as a distribution of corporate assets. I am not prepared to order that. Re-characterizing these funds runs contrary to the intention behind the Final Order.
- [10] I have reviewed the October 5, 2020 letter of Cheryl Schmidt and subsequent correspondence between Ms. Schmidt and counsel for the 2 parties. I find that Option 3 declaring dividends over 2 years is the best approach. That option requires declarations of dividends to the respondent over 2 years which results in tax liability of approximately \$215,000. No actual cash is payable with these dividends since the respondent has already received the money.
- [11] To clarify a question raised in correspondence from Ms. Schmidt dated November 23, 2020, I did order that the respondent pay 25% of taxes owed on the advances of \$620,000.
- [12] I reject Option 4 which would require the respondent to pay into a holding company the remaining amount outstanding of the lump-sum spousal support because I do not agree that it should be re-characterized. This option would have made sense if the respondent were to receive further corporate distribution after the trial. That is what was anticipated by him when he made this submission that tax could be avoided by using a corporate rollover. Option 4 is complicated and would require ongoing cooperation between the parties over 3 years to share tax liability which would be only assessed against the respondent. This option would reduce the tax liability to approximately \$176,000 but would add additional legal and accounting costs. It would also postpone the payment to the respondent of the lump-sum spousal support for 3 years.
- [13] I direct that the parties instruct Cheryl Schmidt to implement Option 3 and that the parties cooperate fully with her to affect this tax planning.

\$15,000 payment

- [14] On December 31, 2019, I addressed submissions made by Ms. Specht that the claimant continued to pay \$5,000 per month pursuant to the September 14, 2018 order of Madam Justice MacDonald until the release of the decision on September 27, 2019. These payments have not been factored into my decision as I calculated arrears as at June 2019. I did apply the \$5,000 payment for June 2019 as an advance on property. In my memorandum to counsel I advised them that my calculation of arrears of \$497,136 was only accurate to June 30, 2019. I invited the parties to address the arrears which accumulated in July, August and September 2019 and the credit of \$5,000 per month. The parties have not been able to resolve this issue.
- [15] The claimant asks that \$15,000 be deducted from the balance owed to the respondent. Although she submitted that this amount is for June, July and August, I believe it should be for July, August and September 2019.

- [16] Since the parties have not been able to reach an agreement in over a year, I am prepared to order that the claimant receive a credit against the amount owed to the respondent for lump-sum spousal support. The credit is for \$15,000 unless no spousal support was paid between July and September 2019. If no spousal support was paid to the respondent for those three months, then I order that the credit be reduced to \$8,000.

Timeshare transfer

- [17] A further issue has arisen over the completion of the timeshare transfer. Upon my direction the claimant has prepared the documents and her bookkeeper has made arrangements with the virtual notary for the respondent to sign the documents. She submits that the respondent has refused to acknowledge or respond to her, however, I see evidence that there has been a response from Mr. Polley. Ms. Specht explained what a virtual notary is. I direct the respondent to sign the online documents as forwarded to him by Tanis Taylor.

Effective date of final order

- [18] The respondent takes the position that the claimant has intentionally delayed the payment of the lump-sum spousal support and seeks the direction that the court set a date on which that payment should have been made to assist in the calculation of post-judgment interest.
- [19] There have been many reappearances after the original reasons were released and adjustments were made on the amount payable. A certain sum was not fixed until the order was settled and mathematical errors were corrected. Therefore, I find some justification for the delay of payment of this amount. I fix July 9, 2020 as the date the order was settled to be the effective date that payment should be made. Given that I have now settled the issue of the \$15,000 payment, I do so retroactively and I direct that the new balance of \$448,270 be paid to the respondent forthwith. If no spousal support was paid for July, August and September 2019 then that amount will be increased to \$455,270.

Orders

- [20] I make the following orders:

1. The parties are to proceed with the steps outlined in Option 3 as recommended by Cheryl Schmidt in her letter to the parties dated October 5, 2020.
2. The claimant is to pay to counsel for respondent in trust the sum of \$448,270 or alternatively \$455,270 forthwith.
3. From those funds, counsel for the respondent will retain the previously ordered \$100,000 in trust pending a determination of the tax liabilities arising from the payment of the respondent's interest in 097 Ltd.
4. In addition I order that counsel for the respondent retain sufficient funds in trust to pay the respondent's proportionate share of Cheryl Schmidt's fees.

5. The parties shall each bear their own costs of this reappearance.
6. Justice Young is no longer seized of this matter or of any enforcement proceedings.

"B. M. Young, J."

The Honourable Madam Justice Young

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Prepared on 25 October 2026 · Esheria