

CANADA / JUDGMENT

Block v. Block

2020 BCSC 702

COURT

Supreme Court of British Columbia

DECIDED

6 May 2020

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2020 BCSC 702 Block v. Block IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Block v. Block, 2020 BCSC 702 Date: 20200506 Docket: E-104246 Registry: Victoria Between: Deborah Ann Block Claimant And: Cyrus Paul Block Respondent Before: The Honourable Mr. Justice Punnett Reasons for Judgment (In Chambers) Counsel for the Claimant: N.J.W. Reid Counsel for the Respondent: T.L. Brown, Q.C. Place and Date of Hearing: Victoria, B.C. October 31, 2019 Place and Date of Written Submissions of Claimant Victoria, B.C. December 20, 2019 Place and Date of Written Submissions of Respondent: Victoria, B.C. January 16, 2020 Place and Date of Written Reply of Claimant: Victoria, B.C. February 7, 2020 Place and Date of Judgment: Victoria, B.C. May 6, 2020

Introduction

- [1] The claimant applies for, inter alia, a declaration the parties' Separation Agreement dated December 27, 2011 (the "Agreement") and the resulting consent order of June 8, 2012 (the "Order") be declared "void or voidable, in whole or in part" and that the Agreement or part of it be rescinded and that the Order or part of the Order be set aside.
- [2] Following a hearing on March 29, 2018, the claimant was held entitled to retroactive child support regarding the parties' twin girls from January 1, 2016 with reasons for judgment dated May 3, 2018 at 2018 BCSC 716. On September 18, 2018 the claimant, through her former counsel, applied under s. 152 of the Family Law Act, S.B.C. 2011, c. 25 (FLA), to vary the earlier order, inter alia, for retroactive child support from 2012 to 2017. That application was heard on December 5, 2018 and judgment reserved. It subsequently came to the court's attention that the order made in 2018 had not been entered. The court by memorandum to counsel requested that occur. The order has been neither entered nor settled.
- [3] In April 2019 the claimant changed counsel. On October 18, 2019 the claimant filed the present application. It was heard on October 31, 2019. The court requested written submissions from counsel on several issues. Those submissions have now been received.

Background

- [4] The detailed background is found in my earlier reasons at 2018 BCSC 716. Briefly, the parties had a 20-year marriage and are the parents of twin girls, now aged 21, born on November 30, 1998. After mediation, they entered into a separation agreement on December 27, 2011 and were divorced in July 2012. That Agreement addressed child support, spousal support and property division.
- [5] A consent order based on the Agreement was entered on June 8, 2012.
- [6] Both parties acted in reliance on the Agreement for over seven years until the claimant obtained a second legal opinion when she retained present counsel in April, 2019.
- [7] The claimant in the amended October 18, 2019 application seeks the following relief:
1. For directions with respect to the hearing of this application, including that it be set for hearing on the trial list.
 2. That a hearing date be set and for such ancillary orders as may be required.
 3. For a declaration that the Separation Agreement dated for reference December 27th, 2011, and the Consent Order dated 08/Jun/2012 be declared void or voidable, in whole or in part.
 4. That the said Agreement or part thereof be rescinded.
 5. That the said Order or part thereof be set aside.
 6. In the alternative or in addition, that the said Separation Agreement and Order be varied pursuant to the provisions of section 65 and/or 68 of the Family Relations Act with respect to the Claimant's interest in the Respondent's shares of Block Communications Inc. ("BCI").
 7. In addition, that the spousal and child support provisions in the said Order be varied pursuant to section 17 of the Divorce Act (Canada) and/or sections 152 and/or sections 167 of the Family Law Act.
 8. For an Order that the Respondent shall transfer to the Claimant shares of BCI presently registered to the Respondent and/or held in trust for the Respondent, as directed by the Court, but not less than 7,100 shares, with such security as the Court deems appropriate.
 9. In the alternative for an Order for damages against the Respondent in lieu of rescission.
 10. In the alternative, that the Respondent holds 7,100 shares in BCI in trust for the Claimant and that the Court shall set such security as it deems appropriate to ensure that the Claimant receives her interest in the shares.
 11. In the alternative, damages for breach of trust.
 12. In the alternative, rectification of the Agreement.

13. In the alternative, specific performance as it relates to the transfer of 7,100 shares of BCI to the Claimant.
 14. That the Respondent shall pay to the Claimant such ongoing, lump sum and retroactive spousal and child support as the Court deems appropriate.
 15. That the Respondent shall provide to the Claimant copies of any and all communications from BCI or any of its representatives within 14 days of receipt.
 16. That the Respondent shall forthwith, within 14 days of an Order of this Court provide the outstanding disclosure previously sought and shall provide such further information as may be reasonably requested within 14 days of the request.
 17. That the Order of this Court made May 3rd, 2018, be set aside.
 18. For an Order for costs.
 19. Such further and other relief as the Court deems appropriate.
 20. If necessary, that the application of the Claimant filed September 18th, 2018 be amended to include the relief sought in this application, pursuant to section 22(5) of the Limitation Act.
- Position of the Claimant
- [8] The claimant alleges the marriage was abusive, as was the divorce process, and that the respondent failed to provide truthful and complete disclosure respecting his assets and prospects and in particular his interest in the family corporation Block Communications Inc. ("BCI"). She alleges she was overwhelmed by the respondent and his family during the divorce process and that she incurred approximately \$293,000 in legal fees in 2011. She alleges that her counsel at the time pressured her into signing the Agreement because of her counsel's own personal financial problems. She says that she did not pursue the 2013 review of child maintenance because the process had exhausted her in 2011 and 2012 and she was focused on her obligations to their children. In 2016 she was experiencing financial difficulties because of the children's extraordinary expenses. She advised the respondent of the need for greater child support and then in 2017 her first application was brought.
- [9] She submits that on April 10, 2018, after the March 29, 2018 hearing, the respondent disclosed for the first time trust documents that revealed, inter alia, that:
- a) The respondent redeemed shares from BCI for \$798,238.00 on December 31, 2012;
 - b) The respondent received dividend income of \$1,056,508 from the Block Family Mandatory Trust in 2012;
 - c) The respondent's overall wealth was and is far in excess of what he represented and disclosed it to be both before and after the Agreement was signed and the Order entered.
- [10] She also submits that shares previously held in the respondent's family trust were transferred to the respondent in 2014.

- [11] The claimant alleges the respondent understated his true wealth by over \$9,000,000 in the divorce proceedings. She submits that had she known this in 2012, she would have applied then to set aside the Agreement and Order.
- [12] The claimant says that the first time she learned she may have a claim to set aside and/or vary the Agreement and Order regarding BCI and spousal support was after she obtained a second legal opinion in April 2019. She seeks to set them aside based on a lack of disclosure, unconscionability, inequality of bargaining power and inadequate counsel. Position of the Respondent
- [13] The respondent submits the Agreement was the product of a lengthy mediation where both parties had counsel and that he provided disclosure that was complete including a valuation of BCI and his prospects. He denies the allegations of abuse. He submits the claimant was well aware throughout the marriage that BCI was a family company he had inherited shares in and that it was an exceedingly valuable company. He further submits that the claimant learned of his greater income when she received copies of his 2015 income tax return on June 17, 2016 and his 2016 income tax return on June 27, 2017. He argues there is no basis to set aside the Agreement or the Order.
- [14] In addition, he submits the claimant is out of time to apply to vary the Agreement. That is, the claimant's application is statute barred by the operation of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), and the Limitation Act R.S.B.C. 1996, c. 266 (the "former Act"). The respondent submits that if he is correct, the proposed trial will not be required. He argues the six-year general limitation period under s. 3(5) of the former Act applies, the alleged "act or omission" having occurred when the Agreement was entered on December 27, 2011. Hence over six years have passed and that ends the matter.
- [15] He also submits that under s. 6 of the former Act, which sets out the circumstances whereby the running of a time limit can be postponed, that a party obtaining a "second legal opinion" that discloses a potential cause of action is not a basis for such postponement. He suggests that if the claimant believes she received negligent legal advice, her remedy is against her former counsel, not the respondent. Law and Discussion
- [16] The respondent submits that the former Act applies and any action founded on unconscionability or any other common law cause of action is statute barred.
- [17] Section 3(5) of the former Act states:
- (5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.
- [18] The claimant submits that the Limitation Act, S.B.C. 2012, c. 13 (the "new Act"), applies and that her claims are not statute barred.

- [19] Section 30 of the new Act provides: Transition 30.(1) In this section: "effective date" means the day on which this section comes into force; "former Act" means the Limitation Act, R.S.B.C. 1996, c. 266, as that Act read immediately before the effective date; "former limitation period" means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date; "pre-existing claim" means a claim
- (a) that is based on an act or omission that took place before the effective date, and
 - (b) with respect to which no court proceeding has been commenced before the effective date.
- (2) A court proceeding must not be commenced with respect to a pre-existing claim if
- (a) a former limitation period applied to that claim before the effective date, and
 - (b) that former limitation period expired before the effective date.
- (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
- (4) Subject to subsection (2), if a pre-existing claim was not discovered before the effective date,
- (a) in the case of a pre-existing claim referred to in section 3 of this Act, that section applies to the pre-existing claim,
 - (b) subject to paragraph (a) of this subsection, in the case of a pre-existing claim referred to in section 8 (1) (a) or (b) of the former Act, Part 2 of this Act and section 8 of the former Act apply to the pre-existing claim, or
 - (c) in the case of any other pre-existing claim,
 - (i) subject to subparagraph (ii) of this paragraph, this Act applies to the pre-existing claim, and
 - (ii) Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of (A) the effective date, and (B) the day the act or omission takes place under section 21 (2) of this Act.
- (5) Nothing in this section restricts the right of a person to bring a court proceeding at any time in relation to a claim referred to in section 3 (1)(i) (j) or (k) of this Act, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period.
- [20] The "effective date" is the date the new Act came into force, June 1, 2013.
- [21] The claimant did not commence a claim for the relief sought in this application before the effective date.

- [22] If the act or omission date is December 27, 2011 when the Agreement was entered - that is, the date of the respondent's alleged failure to disclose or fraudulent disclosure - then the claimant's claim is a "pre-existing claim" under s. 30(1) as it will have occurred before June 1, 2013.
- [23] As the claimant submits, s. 30(2) of the new Act does not apply as the limitation period under the former Act would not have expired before the effective date.
- [24] The question of which Act applies then turns on when the claim was discovered. If the claim was discovered before June 1, 2013, then the former Act applies under s. 30(3) of the new Act. If the discovery was after June 1, 2013, then the new Act applies under s. 30(4)(c)(i): see *Sohal v. Lezama*, 2019 BCSC 1709 at para. 94.
- [25] As noted, the claimant argues the claim was only discovered in April 2019 when she received a second legal opinion. If she is correct, then the claim would be subject to the new Act and the claim may still be alive as being within the basic two-year limitation period under s. 6 of the new Act.
- [26] Both the former and new Acts require that the court apply an objective test for discoverability, that is, whether a person in the claimant's position "knew or reasonably ought to have known" that the alleged cause of action existed: new Act s. 8; former Act s. 6(4). See as well Division 3 of the new Act which sets out Special Discovery Rules for specific circumstances including claims based on fraud: s. 12.
- [27] Counsel were not able to provide authority directly addressing the issue of legal advice and the discovery of a cause of action.
- [28] In *Blunt v. Lee*, 2019 BCSC 351, the parties had separated in March of 2011 and entered into a separation agreement on or about December 24, 2012, although the claimant did not execute it until January 9, 2013. Then, on December 8, 2017 the claimant filed a Notice of Application seeking to have several sections of the agreement set aside or that the entire agreement be set aside and replaced with an order. The respondent applied for summary dismissal of the claim on the basis the application was made under the FLA when the FRA applied and that the claimant was out of time to bring an application under the FRA.
- [29] Justice Young held that, given the agreement was entered into before the FLA came into force, the application to set aside the agreement's property division provisions could not be brought under the FLA, nor since it was a common law relationship did the FRA apply.
- [30] On the issue of limitation periods, Young J. discussed whether the new or former Act applied:
- [39] Under the former Limitation Act, an application to set aside an agreement as unconscionable is subject to a six-year limitation period: Former Limitation Act, s. 3(5); *Clarke v. Haayer*, 2010 BCSC 735 at para. 15. The limitation period for claims in unjust enrichment is also six years under the former Limitation Act: Former Limitation Act, s. 3(5);

Can-Auto Inspections Inc. v. Vascor, Ltd., 2011 BCSC 1644 at para. 133. The claimant filed his notice of application less than six years after the agreement was entered into. Thus, if the grounds were discovered before June 1, 2013, his application would not be barred under the former Limitation Act.

- [40] The claimant takes the position, however, that he did not discover his cause of action until he had legal advice in 2016. If the claim was discovered then, the current Limitation Act applies and the claimant's cause of action would be subject to a two-year limitation period. He commenced his application to set aside portions of the agreement on December 8, 2017 and would not be statute barred.
- [31] Therefore, the claim was not out of time regardless of which Act applied. There was sufficient information before the court to make the findings necessary to address the facts and issues. As a result, the issue of discoverability applying upon receiving a second legal opinion was not in issue.
- [32] In *Farrer v. Farrer*, 2013 BCSC 1088, a divorced spouse sought rescission of a separation agreement on the grounds of unconscionability. The defendant submitted the action was commenced out of time relying on the former Act and the equitable defence of laches. The issue was before the court at trial, not in chambers. Justice Saunders noted at para. 174 that "consideration of the limitation defence will require specific findings as to what transpired during the negotiation process".
- [33] Given the parties' contradictory evidence respecting the negotiation of the Agreement and the extent of disclosure upon which it was based, as well as the various other allegations made, the limitation issue cannot be resolved on this application nor the other relief sought. In my view, resolution of the limitation issue and the claims advanced by the claimant require a trial.
- [34] The application of the claimant shall be set for trial. The issue of any amendments to the pleadings was not addressed. I make no order regarding that issue nor the disclosure sought. Costs shall be in the cause. "The Honourable Mr. Justice Punnett"

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