
CANADA / JUDGMENT

Bruce v. Vaughan

2016 BCSC 2258

COURT

Supreme Court of British Columbia

DECIDED

28 October 2016

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2016 BCSC 2258 Bruce v. Vaughan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bruce v. Vaughan,

2016 BCSC 2258

Date: 20161028

Docket: E103957

Registry: Vancouver

Between:

Janet Kathleen Bruce

Claimant

And

Mark Eldred Vaughan

Respondent

Before: The Honourable Mr. Justice Voith

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

E. Ian B. Hayward

Counsel for the Respondent:

Catrina M. Chisholm

Place and Date of Hearing:

Vancouver, B.C.

October 26, 2016

Place and Date of Judgment:

Vancouver, B.C.

October 28, 2016

- [1] THE COURT: The respondent has applied to retroactively reduce the spousal support obligations he was ordered to pay at trial. He does so based, he argues, on a material change of circumstances on the part of the claimant, Ms. Bruce. The trial of this family law action took place before Mr. Justice Saunders on April 2 to 5, 8 to 12, and October 16, 2013. Saunders J. delivered oral and unreported reasons for judgment that were delivered on October 24, 2013 (the "Trial Reasons").
- [2] In the Trial Reasons, Mr. Justice Saunders said:
- [43] Ms. Vaughan claims spousal support. I find she is entitled to support on the basis of need in order to equalize the economic impact of the dissolution of the marriage and to equalize as far as is reasonably possible the parties' living standards post separation. In this respect I am in substantial agreement with the submissions set out in the written argument of the claimant at paras. 114 to 157.
- [44] Using the Spousal Support Advisory Guidelines, support would be based upon an income imputed to Mr. Vaughan of \$105,000, an amount he could have earned and could reasonably be expected to earn in his employment with the federal government were he not to exercise his entitlement to unpaid leave. To the extent his income has fallen below that level since 2010, I find he has been wilfully underemployed and an income of \$105,000 is to be imputed to him. I would also impute and/or project to Ms. Vaughan a net income through her real estate business of \$12,000.
- [45] Utilizing the without-children formula in the Spousal Support Advisory Guidelines, Ms. Bruce is entitled to support between the midpoint and high end of the range. I find that amount to be the sum of \$3,700 per month.
- [46] I order that Mr. Vaughan will pay retroactively increased interim spousal support in that amount to Ms. Bruce for the period October 1, 2011, to October 1, 2013, less what has already been paid.

- [47] Mr. Vaughan will pay spousal support in the amount of \$3,700 each month commencing November 1, 2013, and continuing on the 1st of every month thereafter to and including November 1, 2016, or the date the parties commence receiving monthly payments from the employment pension.
- [3] It is relevant that the parties began living together in 1981. They were married on May 21, 1988, and they separated on September 15, 2010. The respondent is an architect who is employed by the federal government. He is 64 years old. The claimant, who is 65 years old, works as a real estate agent.
- [4] The respondent's submissions are based entirely on the proposition that Ms. Bruce's gross income in 2014 and 2015 was \$89,193 and \$50,503.97 respectively. It is argued that those incomes are substantially higher than the incomes that were imputed to her by Saunders J., and that those increases, or that difference in her imputed and actual incomes, constitute a material change of circumstance.
- [5] Counsel for the claimant makes several answers in response. Two are particularly salient. The first frames the issues and expresses it more accurately. The second is determinative.
- [6] The claimant's first submission places her 2014 and 2015 gross incomes in context. This is achieved in two ways. First, it is clear that the 2014/2015 years were aberrant. In 2013 and 2016, the claimant actually lost money and made less than the amounts that were imputed to her by Mr. Justice Saunders. Indeed, it appears clear from the material that was before Mr. Justice Saunders that Ms. Bruce's income had fluctuated relatively significantly in the years prior to trial. Thus, Ms. Bruce had lost money in 2011; she made money in each of 2009, 2010, and 2012, though those incomes varied. It is also relevant that the time-limited support ordered by Mr. Justice Saunders was not subject to annual review and that there was no obligation on the parties to exchange their financial information on a yearly basis.
- [7] The claimant argues, correctly in my view, that aspects of these years should be averaged. I say aspects of the years, because parts of 2013 predated the Trial Reasons, and, at least in concept, were captured by the Trial Reasons. There is, however, no reason that parts of 2013, 2014, 2015, and 2016 should not be averaged; see *Ouellette v. Ouellette*, 2012 BCCA 145 at para. 66.
- [8] The second point is that the gross figures that Ms. Bruce earned, once adjusted for expenses which can properly be deducted for both tax and spousal support guideline purposes, yield a more modest sum. Both counsel generated various scenarios based on various averages of various duration and the exclusion or inclusion of different expenses. The result of those calculations on a conservative basis yields a net income of perhaps \$25,000 or \$30,000 per year. By conservative, I mean using an average of only Ms. Bruce's 2014, 2015, and 2016 incomes or losses and only a subset, consisting of office administration, car, and capital cost allowances, of the expenses associated with her income.

- [9] If all of Ms. Bruce's expenses are factored in using a three-year average for 2014, 2015, and 2016, this sum is perhaps \$20,000 or \$25,000 annually.
- [10] These figures, as I have said earlier, place the respondent's application in context and give rise to the question of whether these incomes, when compared to the income that Saunders J. imputed to Ms. Bruce, constitute a material change as that concept is understood in the authorities. The spousal support order cannot be changed unless the court is satisfied that there has been a change in the condition, means, needs, or other circumstances of either former spouse since the previous order. Thus s. 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), provides:

Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

- [11] The test for variation is a strict one. The change in circumstances must be substantial, unforeseen, and of a continuing nature; see *Tyler v. Tyler* (1996), 26 B.C.L.R. (3d) 319 (C.A.) at para. 34. Otherwise, the parties cannot properly organize their financial affairs and plan for their future.
- [12] Importantly, a material change must have some degree of continuity and must not be merely a temporary set of circumstances; see *L.M.P. v. L.S.*, 2011 SCC 64 at para. 35.
- [13] Some fluctuations, positive and negative, in Ms. Bruce's income were foreseeable. The increases in income she enjoyed in 2014 and 2015 were not of a continuing nature and were, based on her historical pattern of earnings, in the nature of a temporary set of circumstances. These conclusions, without more, would militate against the respondent's application, but there is more. There is an egregious set of behaviours, post-trial, on the part of the respondent that have caused Ms. Bruce serious financial harm, that have impacted her in her economic self-sufficiency, and that are relevant.
- [14] I recount the respondent's post-trial conduct mindful that conduct is irrelevant for the purposes of fixing or varying spousal support; see *Leskun v. Leskun*, 2006 SCC 25, at para. 20. In *Leskun*, however, Binnie J. at para. 21 drew a distinction between the emotional and economic consequences of misconduct - the latter, but not the former, may be considered in determining the right to support, its duration and amount. To disregard the economic consequences that flow from the respondent's misconduct would do violence to the needs-based object that motivated the spousal support award made by Saunders J.
- [15] I start with certain findings that were made by Mr. Justice Saunders and that set the stage for what was to follow. In the Trial Reasons, Saunders J. concluded that the respondent was dishonest and that his evidence was contrived to mislead the court; see paras. 3, 4, and 5 of the Trial Reasons.

- [16] Thereafter in separate reasons indexed at 2014 BCSC 2249, Saunders J. awarded Ms. Bruce special costs of the trial on account of the fact that the respondent's conduct at trial was "reprehensible in the fullest sense of the word"; at para. 37.
- [17] Further events that followed trial are relevant. On October 16, 2013, Saunders J. ordered that the claimant have exclusive occupancy of the former family residence and made a protection order restraining the respondent from attending the former family residence. The respondent had cut through the wall of the claimant's suite to gain entry, screwed her door closed so that she could not access the bottom half of her suite, while he went through and removed her belongings. The circumstances leading to these various orders are detailed in the claimant's affidavit dated June 6, 2016.
- [18] On May 8, 2014, the respondent requested a hearing date to apply for reconsideration of the Trial Reasons. Saunders J. denied that request, describing it as an "abuse of process".
- [19] The respondent refused to cooperate when finalizing the special cost award made by Saunders J. and the order had to be settled before the Registrar. The respondent thereafter refused to comply with the various other orders that had been made by Mr. Justice Saunders. Those orders included, inter alia, a failure to: (a) effect the equalization of the parties' RSPs; (b) make a compensation payment to the claimant to effect equal division of investment accounts and other financial affairs; (c) pay interest on a line of credit for his share of debts incurred post-trial; and (d) make spousal support payments.
- [20] The claimant eventually brought an application for contempt. On January 9, 2015, Butler J. adjourned the claimant's application to find the respondent in contempt, but made a number of orders relative to the enforcement of the earlier orders made by Mr. Justice Saunders. The respondent was ordered to pay costs of \$2,000.
- [21] On January 28, 2015, Harris J. found the respondent to be in contempt of the trial orders that had been made earlier and she made a number of orders, including a requirement that the respondent pay the claimant support arrears and the interest that she was paying on the respondent's share of a loan. The respondent was ordered to pay special costs of the application, which were agreed to be \$5,000.
- [22] On February 27, 2015, Affleck J. extended the protection order made by Saunders J. indefinitely. The circumstances that led to this and necessitated this order are again described in the claimant's affidavit dated June 6, 2016. Those circumstances included multiple breaches of the initial protection order and an episode of violence.
- [23] On July 22, 2015, Choi J. made an order adjourning the respondent's application for various orders relative to chattels until he complied with existing orders of the court. The determination of the costs for this hearing was left to the judge hearing the application.

- [24] The respondent filed a notice of appeal on November 21, 2013, to appeal the judgment of Saunders J. The hearing of the appeal was delayed on two separate occasions. On the first occasion, respondent's counsel had settled the appeal, but the respondent alleged he had not understood the nature of the settlement. The second adjournment was at the respondent's request due to scheduling issues. The appeal was ultimately settled on February 18, 2016, giving rise to an appeal order.
- [25] In the settlement of the appeal, the claimant agreed to reduce the reapportionment of the former family residence in her favour by 5% and to settle the special costs order for \$100,000.
- [26] The appeal order also provided that the former family residence was to be listed for sale no later than April 27, 2016, in accordance with certain terms. The respondent would not cooperate with the selection of a realtor and the claimant was forced to file a notice of application to appoint a listing agent so that the residence could be listed. Ultimately, an agreement was reached for a particular realtor.
- [27] On August 10, 2016, the respondent reset the application that had been adjourned by Madam Justice Choi. The parties appeared before Butler J. and the respondent was not permitted to proceed, as he has not complied with the orders made by Justice Choi. He was ordered to pay costs of \$1,500.
- [28] The respondent thereafter refused to cooperate with the distribution of the sale proceeds of the family residence. He initially insisted that \$30,000 of the claimant's share of the sale proceeds be held back, but there was no allegation of any debts owing from the claimant to the respondent. These monies were finally paid out after a consent order was entered into on October 12, 2016.
- [29] The respondent continues to refuse to accept his 50% share of certain rental shortfalls that were ordered at trial and the application to release certain holdbacks from the sale of the family residence is still outstanding.
- [30] My purpose in outlining the history of the respondent's behaviour is to make clear that that behaviour has served to frustrate the needs-based support order that Justice Saunders made. At the time of trial, Ms. Bruce was struggling with cancer. She continues to struggle with various serious health issues.
- [31] The manifest object of the support order made by Mr. Justice Saunders was to enable Ms. Bruce to achieve economic self-sufficiency, to attempt to re-establish her pre-separation standard of living, and to enable her to meet her day-to-day expenses.
- [32] The respondent's behaviours, individually and collectively, have caused Ms. Bruce to have to return to the court on an ongoing basis. She has been required to address the respondent's trespass into her home, his assaulting her, his ignoring court orders, and his advancing specious applications. Those matters, post-trial, have cost her in excess of \$160,000 in legal fees or more than \$4,860 each month since the trial. After deducting the amounts she has

received on account of various costs orders that were made, she has still spent more than \$4,400 per month in dealing with the respondent's behaviours and his war of attrition. This exceeds by a considerable amount the total spousal support she has received. It is worth emphasizing that the respondent has not been successful on a single application that he has brought or that he has contested. Whether by design or otherwise, the respondent has effectively stripped Ms. Bruce of any of the benefits she ought to have received from the spousal support payments that were made to her.

- [33] In the Family Law Source Book for British Columbia, authored by the Continuing Legal Education Society of British Columbia, the authors, at page 6-12, after observing that spousal misconduct is not relevant to an award of spousal support, nevertheless conclude that such misconduct is relevant in terms of its "effect on a spouse's ability to achieve self-sufficiency".
- [34] It is this consideration that is relevant in this case and it is this consideration that dominates this application.
- [35] Three further matters arise. First, it was argued that the costs orders that were made should address the respondent's conduct and his lack of success on or in the applications I have described. This is patently not so. Some of those orders were made on a party-and-party basis and only serve to indemnify Ms. Bruce to a modest degree. Furthermore, it is the calculations that I have referred to and the true economic consequence of this litigation post-trial that underlie my central concern with the respondent's present application.
- [36] Second, special costs orders are meant to signal the court's condemnation and rebuke in relation to particular behaviours. They are also meant to deter those same behaviours; see *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17; and *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 37.
- [37] In some cases, however, special costs awards do not serve to deter behaviour. This is such a case. Two special costs awards and a finding of contempt have seemingly failed to make clear to the respondent that his ongoing behaviours were unacceptable.
- [38] The third point is that the court, quite properly, generally uses measured and temperate language when addressing the improper or wrongful behaviour of a litigant. That measured use of language can, however, mute the court's true concerns. Thus the words "condemnation" and/or "rebuke", though generally accurate, may in some cases understate the egregious nature of a party's behaviour and the court's true views of that conduct. This is again such a case.
- [39] The affidavit of Ms. Bruce describes aspects of the respondent's conduct, post-trial, that gave rise to certain applications or to certain orders. That conduct, simply put, has been brutish, relentless, and completely unacceptable. If Ms. Bruce had sought to address each aspect of these behaviours, she would be a pauper.

[40] The present application, for the reasons I have described, is misconceived and it is, accordingly, dismissed.

[41] Does anything arise from those reasons?

[42] MR. HAYWARD: Nothing, My Lord, other than the issue of costs, unless my friend has something.

[43] MS. CHISHOLM: No, My Lord.

[44] THE COURT: Yes.

[SUBMISSIONS ON COSTS]

[45] THE COURT: I am going to fix costs at \$3,000. I think it is necessary to do that and I am pleased that you are both content to do so.

[46] MR. HAYWARD: Yes. Can those costs be payable forthwith, My Lord?

[47] THE COURT: I am going to make that order. In saying that, I am mindful of the policy considerations that normally militate against that order. In these circumstances, I consider that that order is appropriate.

[48] THE COURT: All right then, thank you.

"Voith J."

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