

CANADA / JUDGMENT

Castelli v. Paton

2023 BCSC 1987

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 1987 Castelli v. Paton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Castelli v. Paton,

2023 BCSC 1987

Date: 20230705

Docket: E64854

Registry: New Westminster

Between:

Vittorio Mark Castelli

Claimant

And

Alison Jane Paton

Respondent

Before: The Honourable Justice Schultes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant (by video):

D.H. Goodwin

Counsel for the Respondent (by video):

M. Brandon

Place and Date of Hearing:

New Westminster, B.C.

April 26, 2023

Place and Date of Judgment:

New Westminster, B.C.

July 5, 2023

Introduction

- [1] In this summary trial application, the respondent is seeking to have the claim dismissed, on the basis that her marriage-like relationship with the claimant ended in September 2018 and his claim was not filed within the limitation period imposed by the Family Law Act. In the alternative, she seeks security for costs on the basis that the claimant is no longer residing in Canada and no longer has meaningful assets here.
- [2] The claimant maintains that their relationship continued until April 2022, when he began this action, and that as a result his claim is properly brought. He takes the position that it would be unjust to decide this matter as a summary trial, because of the relatively early stage of the proceedings, and the limited steps towards discovery that have been taken. He resists providing security for costs on the basis that his substantial income, which he earns from a Canadian employer, will be quite sufficient to address any costs award that might be made against him.

The Respondent's Position

- [3] She was born in Scotland and currently lives there. Her business is buying, renovating, and then renting out properties. She owns 12 such properties in Scotland and one in Canada.
- [4] She deposes that she began her relationship with the claimant in August 2012, while she was living in Canada. They separated in January 2013 when she moved back to Scotland, but she returned to Canada in August of that year, and they began dating again.
- [5] In November 2013, they bought a property jointly in Surrey and lived there together. They jointly shared household expenses and tasks, and the claimant's children from his previous relationship lived with them during his parenting time. She became a permanent resident of Canada, sponsored by the claimant, in July 2015.

- [6] She says that they separated in October 2016 and have not shared a residence since. They had previously purchased a condominium in Vancouver as an investment, one of three properties that they purchased together during their relationship in addition to their family home. After they separated, the respondent purchased the claimant's interest in that condo and moved into it.
- [7] In February of 2017, they began what she describes as a "dating relationship". They separated for the final time in September 2018, although they remained friends until May 2022, when she became aware of this action and a certificate of pending litigation that accompanied it. They had occasional sexual encounters during the intervening years. For example, they met up in London for a day in 2019 while the claimant was on a work layover, and for three days in Paris in November 2021.
- [8] In July 2019, she returned to Scotland, where I gather she intends to remain. She has only spent about five months in Canada since that time. The claimant has not visited her in Scotland since 2017, including not attending a celebration of her 50th birthday.
- [9] In July 2020, she returned to Vancouver for four months to sell her condominium here and to renew her Canadian permanent residency status. In October 2021, she returned for two weeks to collect her permanent residency card, which had apparently gone missing in the mail. In addition to staying with friends during her visit, she stayed with the claimant for part of it.
- [10] Their last meeting was in Los Angeles on May 7 and 8, 2022. She travelled there with the friend with whom she co-owns her condo. She and the claimant had a sexual encounter on that trip. Unknown to her at that time, he had filed his notice of family claim and had placed a certificate of pending litigation on the condo. She and her friend had already accepted an offer from a third party to purchase it.
- [11] He notified her of the CPL by text on May 12. In what may be a revelation of his underlying motives, he explained in the text that he had taken this action because she did not pay him her share of the mortgage penalty on the former family residence, or contribute to the suite that he worked on at that residence, and because he had funded their "two main purchases" without her sharing any of the risks. In a subsequent email, he referred to the fact that "you made over a half million dollars by using my borrowing", and threatened to report her to the Canada Revenue Agency.
- [12] The respondent refers to various sources of support for her position about the date of the end of the relationship.

- [13] The claimant is a pilot for an airline in Canada and as a result, he is able to take companions on flights with him at a heavily discounted rate. To be eligible to use the pass as a spouse, one has to have been in a relationship with the airline employee for at least two years. The respondent lists her flights with the claimant using that pass, which run from December 2015 to September 2018, and says that except "maybe on one occasion" in March 2019, she did not use the pass after September 2018.
- [14] She also attaches documents relating to five trips that she took to meet with the claimant at various locations in the world since April 2019, all of which she organized and paid for herself, rather than as a spouse travelling under a companion pass.
- [15] She notes further that the parties did not share in the proceeds of investment properties that were held in each of their sole names, a property that he bought in June 2016 before they separated (although she went on the title for mortgage purposes), or the condo that she moved into after the separation.
- [16] In addition, she points out that all of their joint assets had been divided by November 2016, and they have not been involved in any joint financial endeavours since then.
- [17] She deposes that after the end of their relationship, the claimant was in a marriage-like relationship with a woman from Winnipeg, who subsequently moved out to BC and lived with him at his home in White Rock from June 2019 to August 2020. She attaches an email from the woman confirming the nature of that relationship, copies of the woman's identification showing the claimant's White Rock address, a lease agreement that the woman and the claimant entered into for a property in Mexico, and a photo of the woman with the claimant. In her email, this woman also describes the claimant's children living with them in White Rock, and the group of them behaving as a family.
- [18] In May 2021, the claimant told the respondent that he had signed up with a matchmaking service that caters to an elite clientele, which cost him \$10,000. She attaches text messages in which he described that service to her, included a photo of himself that he had taken for it, and said he was going to be meeting a woman in Florida who was referred to him by it.
- [19] The respondent herself has been in romantic relationships with two other men since the end of the one with the claimant, from January to July 2020 and February to May 2021 respectively. She attaches a photo of herself during the first of these relationships and text messages during the second, as well as a message from the claimant asking her about one of her dates with the second companion. That companion has also provided an affidavit confirming the chronology of their relationship.
- [20] Finally, the respondent cites a text message to a friend in September 2018, in which she contemporaneously narrated the recent end of her relationship with the claimant, and another message the following month in which she described how upset she was with the demise of the relationship, and with the claimant joining dating apps.

- [21] Perhaps more persuasively, the respondent includes a text from the claimant in April 2021, in which he described having confirmed to a third party that he and the respondent were no longer in a relationship, and another from him later that month in which he responded to her assertion that their relationship had "not worked out" by expressing his wish that it will work out in the future. He also said he wanted to give her advice, to assist her in changing her personality to benefit her future relationships.
- [22] With respect to the claimant's ability to pay costs, the main concern raised by the respondent is that he is now a resident of Mexico, and has disclosed to her that as of the end of 2021 he would no longer be paying Canadian taxes. He owns no real property in Canada and lists only minimal assets in his financial statements - an older vehicle, just over \$6,000 in bank accounts, and just under \$10,000 in an RRSP. He does not list any Mexican property or bank accounts.
- [23] Of further concern to the respondent in terms of the reliability of his disclosure, there are assets and investments that are not included in the statement even though she is aware of them - his employment pension from the airline, a \$250,000 investment in a boat building company, and a profit in that amount from flipping a Mexican property, which is described by a realtor. He has also not yet complied with an order made at a judicial case conference in this matter that he disclose the records associated with his companion pass, and his tax returns back to 2017.
- [24] Raising further concerns about his compliance with court orders, the respondent attaches an affidavit from the claimant's former spouse explaining that he has not complied with orders requiring him to pay her child and spousal support.
- [25] The upshot of those various factors, according to the respondent, is a real likelihood that if she is successful in this action, she will be unable to recover costs that are ordered in her favour. A particular financial burden she is facing in that regard are disbursements for the appraisals that the claimant is requesting of her various properties in the United Kingdom. She expects them to cost \$8-\$11,000. Her counsel estimates the total costs and disbursements for a three-day trial will be \$28,187, which she argues should be the amount of security provided by the claimant.

The Claimant's Position

- [26] Although the claimant concedes that he and the respondent did not share a residence after October 2016, he deposes that their marriage-like relationship nevertheless continued, with them staying at each other's residences from time to time. Their final separation was also not September 2018, as she has claimed. Rather, he maintains that their "romantic and sexual relationship" continued until April 2022. Once she moved back to Scotland, it was a long-distance relationship with almost daily phone contact and trips to various destinations at which they "rekindled" their "ongoing relationship."

[27] He lists trips throughout the world, ranging from a few days to several weeks in duration, which match times that the respondent was out of Canada. These include the four-month and two-week stints in Vancouver and the London meetings that she refers to in her affidavits, as well as the trip to LA, which is agreed on any version of events to be the end of their relationship.

[28] His position with respect to his subsequent relationship with the woman from Winnipeg is that despite it, his regular phone contact and ongoing sexual encounters with the respondent continued. He elaborates that:

Our ongoing relationship, that is with the respondent, was somewhat open, allowing for seeing other persons while continuing to be of sexual and long term nature.

[29] He refers to other indications of an ongoing marriage-like relationship:

- the respondent listing herself as a spouse in relation to his transfer of the vehicle to her in October 2018. (She says this was done only to avoid transfer taxes. She had actually purchased it herself in 2013, but it was registered in the claimant's name because at that time she could not qualify for a loan in Canada);
- engaging in five to ten sessions of marriage counselling together in September 2020. (The respondent explains that this was not marriage counselling, but rather personal counselling for her to assist in breaking old patterns and behaviours. The claimant attended three of these sessions and only to assist her in learning from previous relationships. She attaches an email from the counsellor referring to those three dates, although the counsellor does not describe or confirm the content of the sessions);
- The respondent taking the claimant's passport with her to assist in the renewal of her permanent resident card in Vancouver in 2021. (She says she did so only pursuant to instructions in a letter that she received from the relevant government agency when she was seeking to track down the card that had not been mailed to her. She maintains that the nature of her relationship with the claimant was not discussed, and she made no representations in that regard when she attended the government office); and
- her continuing interactions with his children, such as on a trip to Mexico in January 2018.

[30] Addressing the need for security for costs, the claimant notes that he earns about \$200,000 per year as a pilot, so his wages could be garnished to cover any costs order against him. (The respondent responds that given their respective current residences, such garnishing would be very expensive for her to have to do to pursue her costs.)

[31] As to his current level of financial disclosure, he explains that the investment in the boat company is of no value, and his Mexican bank account does not contain any funds. Contrary to the affidavit sworn by his former spouse, he maintains that he is up to date on any required payments to her.

Discussion

[32] The threshold question on the limitation issue is whether this is suitable for determination by a summary trial. The claimant submits that such a determination will require assessments of the parties' respective degrees of credibility in order to resolve the key factual dispute, and that it would be unjust to make such assessments until he has had a chance to develop his case through examinations for discovery of the respondent, examinations of other witnesses, or potentially cross-examination on her affidavits. The respondent's counsel submits that there is already the necessary objective evidence in the record to resolve that issue in her favour.

[33] Purely for the sake of convenience, I will repeat the summary of relevant principles on this issue from *Lu v. Li*, 2023 BCSC 271.

[102] As is well known, Rule 9-7(15) of the [Supreme Court Civil Rules, which is identical to Rule 11-3(15) of the Supreme Court Family Rules] provides that:

(15) On the hearing of a summary trial application, the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

I. the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

II. the court is of the opinion that it would be unjust to decide the issues on the application.

[103] Relevant factors in deciding whether it would be "unjust" to decide the issues summarily have been found to include: "The amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices": *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, (1989), 1989 CanLII 229 (BC CA), 36 B.C.L.R. (2d) 202 (C.A.) at p. 215, and *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369.

[104] With respect to the determination of credibility, "[i]n appropriate circumstances, it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone": *ARC Digital Canada Corp. v. Amacon Alaska Development Partnership*, 2023 BCCA 34 at para. 40, citing *Orangeville Raceway Ltd. v. Wood Gundy Inc.*, 1995 CanLII 2663 (BC CA), [1995] 6 B.C.L.R. (3d) 391 (C.A.).

[105] Similarly, in *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, the Court stated:

- [22] It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A [the predecessor of Rule 9-7]. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.
- [106] There is no rule that examinations for discovery must always take place before a matter can be dealt with by way of summary trial, and the suggestion that something "might turn up" in the course of discovery is not sufficient to defeat a summary trial application: *Tassone v. Cardinal*, 2014 BCCA 149 at para. 38.
- [107] More generally, when a summary trial is set down, the parties are obliged "to take every reasonable step to put themselves in the best position possible...[and] cannot, by failing to take such steps, frustrate the benefits of the summary trial process." As in the case of discovery "the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275, at para. 34.
- [34] The applicable limitation period here results from the combined operation of certain sections of the Family Law Act. It is common ground that at one point the parties were engaged in a marriage-like relationship. To meet the definition of "spouse" under s. 3(1)(b) (i), they had to have been in such a relationship for a continuous period of at least two years, which is satisfied even on the respondent's chronology. The applicable limitation period arises from s. 198(2) of the FLA, which requires a spouse to start an action for property division, pension division, or child and spousal support within two years of the date they separated. The notice of family claim was filed on April 28, 2022, so a separation date before April 28, 2020, will render his claim statute-barred.
- [35] Once again, purely for the sake of convenience, I will repeat the summary of principles on what constitutes a marriage-like relationship from *Dey v. Blackett*, 2018 BCSC 244:
- [192] The determination of whether a relationship was marriage-like requires a "holistic approach", in which all of the relevant factors are considered and weighed, but none of them are treated as being determinative of the question: *Austin v. Goerz*, 2007 BCCA 586 at paras. 58 and 62.
- [193] While a "checklist" approach to this question is not appropriate, it can still be helpful during the analysis to consider the presence or absence of commonly-accepted "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship": *Weber v. Leclerc*, 2015 BCCA 492 at para. 25. A frequently-cited authority has identified these indicators as including "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple": *M. v. H.*, 1999 CanLII 686 (SCC), [1999] 2 S.C.R. 3 at para. 59, citing *Molodowich v. Penttinen* (1980), 1980 CanLII 1537 (ON SC), 17 R.F.L. (2d) 376 at para. 16

(Ont. Dist. Ct.).

- [194] While financial dependence was at one time considered an essential aspect of a marriage-like relationship, this is no longer so: Austin at paras. 55-56.
- [195] The intentions of the parties, particularly whether they saw the relationship as being "of a lengthy, indeterminate duration", will be important to the determination of whether the relationship was marriage-like. However, evidence of their intentions must be tested against objective evidence of their lifestyle and interactions, which will provide direct guidance on the nature of the relationship: Weber, at paras. 23, 24. In other words, "subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such": Takacs v. Gallo (1998), 1998 CanLII 6429 (BC CA), 48 B.C.L.R. (3d) 265 (C.A.) leave to appeal to SCC ref'd, [1998] S.C.C.A. No. 238, at para. 53.
- [36] Dealing with the point at which separation occurred, s. 3(4) of the FLA provides:
- For the purposes of this act, spouses may be separated despite continuing to live in the same residence, and the court may consider as evidence of separation communication by one spouse to the other spouse of an intention to separate permanently, and an action taken by a spouse that demonstrates the spouse's intention to separate permanently.
- [37] These requirements were helpfully explained in M.L. v. R.H., 2022 BCSC 1580:
- [36] The parties agree that law on what constitutes separation is quite settled. Their submissions are neatly summed up in H.S.S. v. S.H.D., 2016 BCSC 1300 at paras. 40, 42 rev'd on other grounds 2018 BCCA 199, that to determine the date of separation it is sufficient to prove "an intention of one spouse to repudiate or end the marital relationship" and, "action consistent with that intention":
- [40] It is clear that the law does not require a meeting of the minds with respect to the intention to separate. A physical separation, coupled with one party's intention to live separate and apart, is sufficient: Nearing v. Sauer, 2015 BCSC 58 (B.C. S.C.) at para. 54. The legal framework for determining that spouses have lived separate and apart requires that the Court find, first, an intention of one spouse to repudiate or end the marital relationship and, second, action consistent with that intention. The parties disagree on whether that action must include an unambiguous verbal expression of his or her settled intention.
- [42] I have concluded, for the reasons that follow, that the weight of the jurisprudence supports Mr. S.'s articulation of the governing legal principles. The Court's task is to assess objectively, on the totality of the evidence, whether one spouse held a settled intention to separate and communicated that intention through his or her conduct to the other spouse. An express statement is only one of the factors for consideration in what is necessarily a contextual analysis.

[37] The action communicating a "settled intention" to terminate a spousal relationship must have the required content and character to communicate that level of intention. Ephemeral threats or discussions that are not followed through are insufficient. For this reason the conduct in issue must communicate that intention in a "convincing manner": J.J.G. v. K.M.A. 2009 BCSC 1056. Thus, although the jurisprudence emphasizes the need for a holistic assessment of the evidence (having regard to the diversity of marital relationships), it remains necessary to prove:

1. A "settled intention to separate"; and
2. "Conduct [demonstrating] in a convincing manner that this particular state of mind is a settled one."

[38] In addition, dealing specifically with property division, s. 83(1) of the FLA provides that:

For the purposes of this part, spouses are not considered to have separated if within one year after separation they begin to live together again, and the primary purpose for doing so is to reconcile and they continue to live together for one or more periods total at least 90 days.

[39] The evidence raises two key factual disputes to which the question of the suitability of a summary trial must be applied:

1. When did the parties separate?
2. Did any of their subsequent contact meet the requirements of a marriage-like relationship?

[40] On the claimant's version of events, there is no need to address the second issue because he says that the end of the relationship in 2022 also ended contact of any kind between the parties.

[41] I will begin by observing that because this is an application for a final order - the dismissal of the claim - hearsay is not admissible (see Rule 10-4(13) of the SCFRs). This prevents me from relying on the narrative provided by the claimant's alleged subsequent spouse (although he does not deny having had a relationship with her), the email from the counsellor, and, strictly speaking, any of the documents the respondent relies on that emanate from third parties and are relied on by her as proof of the truth of their contents.

[42] Similarly, her prior consistent statements to others describing the end of the relationship are inadmissible in the absence of an allegation of recent fabrication, or something particularly cogent arising from their timing which would make them admissible as narrative as circumstantial evidence - neither of which are present on the current material.

[43] Despite these necessary deletions from the respondent's evidence, I would still describe the claimant's case as presented on this application as quite a tenuous one. His affidavit is of a bare bones nature and contains very limited details of how the marriage-like relationship is supposed to have continued after the separation of residences, other than to assert baldly that it did, or to refer to it as continuing as a "romantic and sexual one", with "almost daily

communication and sexual encounters". One particularly wonders why a supposedly ongoing relationship would need to be "rekindled" by these periodic meetings, as he describes.

- [44] He does not address his text messages to the respondent about being involved with a matchmaking service, or his statement to her in 2021 about confirming to a mutual acquaintance that they were no longer together. However, I would not weigh his texts discussing their relationship in a manner that implies it had concluded by then against his position, since they came in a reply affidavit from the respondent that he could not have replied to further without leave.
- [45] The claimant also does not address the nature of his subsequent relationship, other than to assert that he and the respondent had an open one that permitted him to pursue others. He does not address her subsequent relationships of that nature at all.
- [46] Further, he does not address the apparent disentanglement of their finances as of the respondent's alleged separation date, other than to point out that they continued to take holidays together.
- [47] To give his position its due, he is able to refer to some actions by the respondent after her separation date in which she engaged in behaviour that either represented herself as a spouse (the vehicle registration), or are consistent with an ongoing marriage-like relationship (having him attend several of her counselling sessions, and using his passport to retrieve her permanent resident card).
- [48] They also attended a rather striking number of international trips together and stayed together in Vancouver long enough in two periods to at least arguably elevate the relationship beyond the "friends with benefits" characterization that she provides. In this respect, he benefits from the required holistic analysis of what a marriage-like relationship consists of, and the corresponding absence of presumptions based on more orthodox kinds of social behaviour.
- [49] On this point, the respondent's vagueness in her material about why the post-separation dating relationship that resumed in February 2017 meant that the parties' final separation was not until September 2018 does lend some support to his position, in that it confirms that the marriage-like relationship continued in a situation in which a joint residence was not maintained. In other words, it tends to show that a marriage-like relationship could continue to exist between them for at least some period of time without having the traditional attributes that it had while they were living together.

- [50] At the end of the day, despite the weakness of the claim, I cannot be satisfied that the objective supporting evidence relied on by the respondent is sufficient to allow me to make definitive findings of credibility with respect to it, without hearing the live testimony of the parties and their supporting witnesses, and having it tested in cross-examination. Therefore, I find myself unable to find the necessary facts to render judgment on a summary trial.
- [51] In those circumstances, I think that examinations for discovery are likely to enhance the existing body of evidence and the claimant's ability to challenge the respondent's account of their relationship after the initial separation (rather than the claimant simply being hopeful that something will turn up), so that proceeding to a decision without examinations for discovery would also be unjust.
- [52] Therefore the application to dismiss the claim as a summary trial is itself dismissed, with one exception.
- [53] The claimant's amended claim for child support must be dismissed, due to an entire absence of any evidence that would establish compliance with the applicable limitation period. The claimant does not depose to support having been provided by the respondent for the children as a stepparent on any particular date, and the respondent expressly deposes that she did not do so, but rather that he paid for the groceries when the children stayed with them. Section 147(4)(b) requires the stepparent to have contributed to the support of the children in question for at least one year and that an action to receive support from such a stepparent be brought within a year of their last contribution. There is no need for a credibility assessment on this issue - the claimant has simply failed to prove his case.
- [54] The conclusion with respect to the suitability of a summary trial on the main issue makes it necessary to consider the respondent's alternative application that the claimant provide security for costs. The applicable principles were reviewed in the context of a family case in *L.S. v. G.S.*, 2016 BCSC 1130:
- [31] The purpose of an order for security for costs is to protect a litigant from the possibility that it will be unable to recover costs from its opponent if the litigant is ultimately successful in the litigation. Rule 22-1(6) of the Supreme Court Family Rules provide that the court may make an order for security for costs of a party. Courts also have inherent jurisdiction to order security for costs: *Shiell v. Coach House Hotel Ltd.* (1982), 1982 CanLII 454 (BC CA), 37 B.C.L.R. 254 (C.A.).
- [32] The test for ordering security for costs against an individual is generally more stringent as compared to a corporate plaintiff. Madam Justice Dillon in *Han v. Cho*, 2008 BCSC 1229, referred to the exercise of the court's discretion to award security for costs against an individual:

- [27] ... The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.
- [33] This test was affirmed by the Court of Appeal in *Meade v. Armstrong (City)*, 2011 BCCA 63.
- [34] Courts have applied the factors established in *Ruko of Canada Ltd. v. Canadian Imperial Bank of Commerce* (1991), 49 C.P.C. (2d) 105 (B.C. S.C.) in family law proceedings (See: *Siddoo v. Siddoo*, 2006 BCSC 445; *L.(J.D.) v. L.(C.L.)*, [1999] B.C.J. No. 803 (S.C.)). Those factors, as summarized in *Siddoo* at para. 28, include:
- a. The ability of the defendant to pay costs, if ordered;
 - b. The merits of the case;
 - c. The level of costs;
 - d. Any prejudice to the plaintiff as a result of a delay in the application; and
 - e. Prejudice to the plaintiff in the sense of preventing it from proceeding with a meritorious claim if an order is made.
- [35] An important consideration in making an order for security for costs against an individual is access to justice, *Bronson v. Hewitt*, 2007 BCSC 1751:
- [42] With individuals, the fundamental concern has always been access to the courts. Access to justice is as important today as it was in 1885 when Lord Bowen declared in *Cowell* that "the general rule is that poverty is no bar to a litigant". Individuals, no matter how poor, have always been granted access to our courts regardless of their ability to pay a successful defendant's costs. Only in egregious circumstances have individuals been ordered to post security for costs.
- [36] This reflects the general principle that facilitates access to justice notwithstanding impecuniosity. The exercise of discretion to award security for costs, therefore, involves a balancing of injustices: "The possibility of stifling a legitimate claim versus the use of impecuniosity as a means of pressure on a defendant": *Han*, at para. 26.
- [55] In my estimation, an application of these factors weighs strongly in favour of ordering security for costs. This is not an impecunious litigant whose access to justice is threatened. The claimant is a high-salaried employee who has deliberately chosen to relocate to another country, and in the course of doing so has effectively made himself judgment-proof.

- [56] His claim made it past dismissal on a summary basis by the narrowest of margins. If it had been possible to make credibility findings on the present material, it likely would have been dismissed. There is no indication that having to post the security being sought, which to my mind is quite modest in light of the type of trial that is likely to result, would prejudice his ability to move the case forward in any way.
- [57] Therefore, I order that the claimant post security for costs in the requested amount within 60 days, failing which the action will be stayed.
- [58] Since the success in this matter has been evenly divided, I order that the parties each bear their own costs. Thank you very much.

"Schultes J."

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