

CANADA / JUDGMENT

Chiu v. Yee

2014 BCSC 742

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Supreme Court of British Columbia

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2014 BCSC 742 Chiu v. Yee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chiu v. Yee,

2014 BCSC 742

Date: 20140430

Docket: E123269

Registry: Vancouver

Between:

Patty Shiu Ying Chiu also known as Patty Shiu Ying Yee

Claimant

And

Kong Lang Yee also known as Lannie King Yee also known as Lannie (Kong Lang) Yee and Lannie King Perrott Yee also known as Kelly (King Perrott) Yee

Respondents

Before: The Honourable Mr. Justice Cohen

On appeal from: An order of a Master of the Supreme Court of British Columbia, dated February 24, 2014 (Chiu v. Yee, E123269).

Reasons for Judgment

Counsel for the claimant:

H.B. Chiu

Counsel for the respondent, Kong Lang Yee also known as Lannie King Yee also known as Lannie (Kong Lang) Yee:

C.D. Starkey

Counsel for the respondent, Lannie King Perrott Yee also known as Kelly (King Perrott) Yee:

L.G. Atkinson

Place and Date of Hearing:

Vancouver, B.C.

March 31, 2014

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2014

Introduction

[1] This is an appeal by the claimant from a decision of a Master. The claimant alleges that the Master erred in law:

- by misapplying s. 256 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], with respect to the test for cancellation of certificates of pending litigation ("CPL");
- in determining that the respondent Lannie King Perrott Yee ("Kelly") posting security in the amount of \$20,000 is sufficient on the facts of this case; and
- by applying her own independent case law research without providing counsel for the claimant an opportunity to respond to or distinguish the cases relied upon.

Background

[2] The claimant is the wife of the respondent Kong Lang Yee ("Lannie"). The parties were married on September 25, 1990, and separated on October 27, 2012. Kelly is the adult biological son of Lannie and the stepson of the claimant.

[3] It is common ground that throughout the parties' marriage, Lannie gave money to Kelly of at least \$100,000, or perhaps a greater amount. The characterization of the funds received by Kelly, that is, whether the advances were loans or gifts, is very much in dispute.

[4] In Part 3 of her Financial Statement sworn March 22, 2013, the claimant lists several real estate assets:

- a property on Edgelow Street in Victoria, the former matrimonial home, registered in Lannie's name;

- a property on Island View Road in Saanichton, registered in the name of the two respondents (the "Island View" property);
- a property on Tyee Drive in Campbell River, registered in the name of Kelly (the "Campbell River" property); and
- a property on Pinnacle Road in Duncan, registered in the name of Kelly (the "Duncan" property).

The respondents assert that the Island View property is held in trust for Kelly's biological son, pursuant to a trust agreement dated April 26, 1993.

- [5] On October 27, 2005, Kelly and his now deceased wife purchased the Duncan property. The claimant says that prior to the purchase, the sum of \$76,000 was transferred into their savings account at Coast Capital Savings, which is the account from where the funds to purchase the property originated. The claimant asserts that Kelly used monies he received from Lannie to purchase the Duncan property.
- [6] On October 25, 2008, Kelly and his now deceased wife purchased the Campbell River property. The claimant says that prior to the purchase, deposits were made by Lannie into the same Coast Capital Savings account where the funds to purchase that property also originated.
- [7] The claimant submits that according to their income tax Notices of Assessment, the incomes of Kelly and his now deceased wife were limited at the material times. She also says that they were receiving social assistance for some time prior to the purchases of the Duncan and Campbell River properties. She asserts that they could not have accumulated the savings needed to purchase these two properties on their own.
- [8] In the claimant's Notice of Family Claim filed on October 29, 2012, she seeks, inter alia, an interest in the Duncan and Campbell River properties. She registered CPLs against both of these properties at that time.

The Master's Decision

- [9] Shortly thereafter, Kelly applied to be removed as a party to the claimant's family law proceeding and to cancel the CPLs registered against the Duncan and Campbell River properties. The application was heard by the Master on February 13, 2014. At the time of the hearing, the trial was scheduled to commence on March 24, 2014. Acknowledging the abbreviated timeline, the Master reserved her decision until February 24, 2013.
- [10] In her decision, the Master dismissed the application that Kelly be removed as a respondent. However, she granted the application for removal of the CPLs and ordered that Kelly provide security of \$20,000. In her reasons, the Master said as follows, in relevant part:

- [14] However, Kelly also asks for an order cancelling the registration of the CPLs on the two properties which are registered solely in his name. The notice of application does not identify the legal basis on which the court can make the order sought.
- [15] In the course of submissions, I was provided with excerpts from the Land Title Act, R.S.B.C. 1996, c. 250 (the "LTA"). Section 256(1)(a) of the LTA allows for the registered owner of a property to make application for cancellation of the registration of a CPL on grounds of hardship and inconvenience to that owner. If the court is satisfied that the registration of the CPL or CPLs ought to be cancelled because of this inconvenience and hardship, the applicant must still provide security in an amount to be determined by the court: LTA, section 257. Kelly's material addresses the hardship grounds, although the claimant disputes the validity of some of those allegations.
- [16] In order to adequately address this aspect of the application, I have been required to conduct some independent legal research. It is appreciated that none of the parties have had an opportunity to make submissions on the authorities that will be cited in these reasons. In other circumstances the court might have requested such further submissions. However, the proximity of this application to trial makes that process difficult, at least practically speaking. The parties might not have an answer to the application until the eve of trial.
- [17] In order to avoid this situation in the future, I invite counsel to make use of the legal basis portion of the notice of application and response to not only include an overview of the oral argument, but also cite relevant common law authorities.
- [18] The most recent authority to have considered an application to cancel registration of CPLs in a family law context appears to be that of *Yin v. Liu*, 2011 BCSC 1301. That case did not involve a claim against a third party but does review the law with respect to relief under section 256 of the LTA. It also cites authorities which address the cancellation of a CPL's registration based on whether the claimant has an arguable case to support the CPL.
- [19] On that last point, all that needs to be demonstrated is that an interest in land is pled to support the CPL's registration. The claimant is not required to prove that she is entitled to an interest in the land at this stage of the litigation: *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379, para. 22.
- [20] Thus, the question to be asked here is whether Kelly has demonstrated hardship and inconvenience.
- [21] Kelly says that he needs to refinance one or both of the properties in order to be advanced about \$30,000. Those monies are said to be needed to pay for an insulin pump, legal fees relating to this litigation, accumulated debt and day-to-day living expenses. The affidavit material does not specifically address the amount of monies needed for legal fees.

- [22] Although the claimant suggests that Kelly's financial circumstances are not as dire as described, I am satisfied that the requisite hardship and inconvenience has been established on the evidence. The more difficult determination is the amount of monies that ought to be ordered as security.
- [23] The claimant says that the discovery process is incomplete so the amount of the claim against Kelly is not yet crystalized. However, the claimant suggests that the respondent Lannie advanced more than \$100,000 to Kelly using alleged family monies.
- [24] The security required does not need to be equal to the monetary claim or the likely amount of damages to be awarded: Enigma Investments at para. 30. Factors which the court ought to consider in determining the amount of security include the strength of the claim against Kelly and the availability of other assets to satisfy any judgment in favour of the claimant. While appreciating that the discovery process is ongoing, the claim against Kelly as made out in the pleadings is not the strongest claim. Kelly does not have a large cache of exigible assets. However, even if the claimant succeeds in her claim against Kelly, a dry judgment is unlikely. The court can, in my view, quite easily fashion a remedy under section 65 and 66 of the FRA to ensure that the claimant is paid or given an interest in various family assets in satisfaction of that judgment.
- [25] Considering all of these factors, I find that Kelly ought to provide security of \$20,000. Unless otherwise agreed between the parties, those monies shall be held in a trust account with Kelly's solicitors and shall not be released without court order or agreement in writing between all parties.
- [26] In summary, the orders I make are as follows:
- The application to have the respondent, Lannie King Perrott Yee, also known as Kelly Yee, be removed as a party to this action is dismissed;
 - The registrations of the certificates of pending litigation registered by the claimant on title to [the Campbell River and Duncan properties] are hereby cancelled;
 - The respondent Kelly shall provide security in the sum of \$20,000 with those funds to be deposited in the trust account of Kelly's solicitor, unless another place is agreed to by all parties, forthwith after Kelly obtains refinancing on one or both of the properties;
 - The funds held as security shall not be released unless by court order or written agreement between all of the parties to the proceeding.

Positions of the Parties

- [11] It is the claimant's position that the Master was clearly wrong in deciding that Kelly had established the requisite hardship and inconvenience to cancel the CPLs. The claimant says that the Master did not state what evidence she specifically relied upon in rendering her decision.

[12] The claimant notes that Kelly sought to have the CPLs removed on the basis that he needed \$30,000 to pay for a new insulin pump, daily living expenses, legal fees for the upcoming trial and his outstanding MasterCard bill.

[13] In his Affidavit #4 sworn January 27, 2014, Kelly deposed, in part, as follows:

Current Financial Position

11. Last year I earned approximately \$15,411.39 from work at Beacon Community Services and an additional approximately \$10,000.00 from working as a Gardner and doing odd jobs for people.
12. Since my wife died in 2012 I have been struggling to pay my living expenses as I no longer have contributions from her. In August 2013, I re-married, but my current wife is retired and I am covering her living expenses as well. Now shown to me and attached herein as Exhibit "A" is a copy of my last paystub from 2013 which shows my year to date earnings.
13. Even my most basic expenses not including my income taxes, CPP or EI, amount to between \$34,056 and \$42,600 annually. Now shown to me and attached herein as Exhibit "B" is a copy of what I estimate my monthly expenses are.
14. In addition over this past year, I have also incurred expenses relating to repairing the Island View Property of approximately \$10,000.00. Together my living expenses and repair costs for Island View have depleted my savings as well as my available credit.
15. I have no intention to sell either of my properties if the CPL's are removed. As advised I need to refinance to help cover my living expenses. I have been living off my savings and credit cards recently, specifically,
 - (a) In July 2013, I had \$9,253.67 in a non-registered account and \$26,958.16 in my TFSA, all but \$6,428.48 has been spent.
 - (b) My Mastercard bill has increased to 19,544.56 as of January 25, 2014 when I called the provider to obtain my balance. I am struggling to make the minimum payments. There is only \$177.97 available credit remaining on the account.
 - (c) While my bank account fluctuates, I have less than \$2,500.00 available to me and I have income taxes and property taxes coming due in the next few months.

Now shown to me and attached as Exhibit "C" is a copy of my account summary from Coast Capital. In addition, I do have an RRSP at TD Bank but prefer not to withdraw money from my RRSPs because of the tax consequences.

Insulin Pump

16. Since my current insulin pump is old and no longer works properly, I have been many issues [sic] with my glucose levels. My Doctor has recommended I purchase an Omnipump which costs approximate \$7,000 - \$8,000 plus supplies between \$800 - \$1000 a month. I am contacting my Doctor to confirm how much of the amount will be covered, however, even at 70% coverage; I would be out of pocket between \$2100 - \$2400.
17. However, I do not believe that I will be eligible for coverage. I do not qualify for Plan C for the insulin pump as plan C is for people on income assistance nor am I under the age of 18, now shown to me and attached herein as Exhibit "D" is a copy of the Medical Supplies Coverage information from the BC Government.

Interim Need

18. I would like to remove \$30,000 from my properties to assist in covering my living expenses. I have not heard from the bank yet if I can obtain that money from one property or if I need to refinance both properties.
 19. Although there is more equity than that available in each house, those are the amounts I can remove without requiring an updated appraisal on the houses by the bank and the money can be made available more quickly.
 20. In addition, if I am not removed as a party from the action, I will need funds for the litigation which is currently set for a 10 day trial.
- [14] The claimant responded to this evidence in her Affidavit #4 sworn February 6, 2014. She deposed, in part, as follows:
10. In response to paragraph 12 of the Respondent Kelly's Affidavit #4 where he deposes that "since [his] wife died in 2012, [he has] been struggling to pay [his] living expenses as [he] no longer has contributions from his her", [sic] the Respondent Kelly previously deposed that he and his now deceased wife were able to amass savings (which they allegedly used to purchase real property) because he paid all the household expenses and her earnings were saved.
 11. In response to paragraph 13 of the Respondent Kelly's Affidavit #4 where he deposes to his "most basic expenses", the Respondent Kelly does not depose for which of real properties the expenses were incurred. The Respondent Kelly also has not disclosed the monthly rental income that he receives for his two rental properties, being the Duncan Property and the Campbell River Property. In addition to the Respondent Kelly not providing any evidence regarding the monthly rental income that he earns for each of the rental properties, he also has not provided any accounting of the expenses that are paid from the rental income. Accordingly, the expenses listed as exhibit "B" of the Respondent Kelly's Affidavit #4 are likely double counted because such expenses have already been paid from the rental income.

12. In further response to paragraph 13 of the Respondent Kelly's Affidavit #4, the Respondent Kelly has previously deposed that he resides in the Island View Property and has also, previously implied in a previous affidavit, that he and his now deceased wife were also able to amass savings because they "resided in the Island View Property". Accordingly, the Respondent Kelly implied that his expenses while living on the Island View Property were fairly limited.
13. In response to paragraph 14 of the Respondent Kelly's Affidavit #4 where he deposes that he incurred expenses of approximately \$10,000 to repairing [sic] the Island View Property, the Respondent Kelly has not provided any documentary evidence that he incurred such expenses. Throughout my marriage to the Respondent Lannie, he would pay for the repairs and most, if not all, the expenses of the Island View Property.
14. In response to paragraph 15 of the Respondent Kelly's Affidavit #4 where he deposes that he has depleted his savings, the evidence in his affidavit is inconsistent with the evidence about his financial assets as set out in his Form 8 Financial Statement filed March 22, 2013 ("Form 8"). The Respondent Kelly deposes that he had financial assets having a value of \$50,400 and also, RRSPs of \$15,330.
15. In further response to paragraph 15 of the Respondent Kelly's Affidavit #4 where he deposes that his MasterCard bill has increased to \$19,544.56, the Respondent Kelly has not produced his MasterCard bill. Further, we do not know what expenses that the Respondent Kelly has incurred. If the Respondent Kelly has incurred a large MasterCard bill because he chose to marry in Mexico and have an extended honeymoon in Mexico, I should not be prejudiced because of his excessive spending habits.
16. In response to paragraph 16 and 17 of the Respondent Kelly's Affidavit #4 regarding the insulin pump, the Respondent Kelly has not provided any documentary evidence that he applied for financial assistance from PharmaCare and was rejected. Further, as deposed in my previous affidavit, the Respondent Kelly could pay for the insulin pump in monthly instalments.
17. In further response to paragraphs 16 and 17 of the Respondent Kelly's Affidavit #4 where he deposes to purchasing "an Omnipump", the website for the Omnipod, which I understand is the same as the "Omnipump", states that "an installment payment plan is available for patients with limited or no insurance coverage". Attached as exhibit "A" to this my affidavit is a true copy of a print out from the website of Omnipod confirming the above.
18. In response to paragraphs 18 and 19 of the Respondent Kelly's Affidavit #4 where he deposes to needing \$30,000 to cover his living expenses", the Respondent Kelly has not fully disclosed all his financial assets. Based on his Form 8, the Respondent Kelly should still have funds available to him without refinancing the Duncan Property and the Campbell River Property.

19. In further response to paragraphs 18 and 19 of the Respondent Kelly's Affidavit #4 where he deposes that he has not "heard from the bank yet", the Respondent Kelly has not provided any documentary evidence from the "bank" that he has applied for the refinancing and that such refinancing has been approved. Specifically, the Respondent Kelly has not provided a copy of his application form for the refinancing, which application form should set out his assets, debts, income and expenses.
- [15] The claimant argues the Master failed to recognize that Kelly did not provide full disclosure of his income, specifically that he did not disclose any of the rental income he received from the Duncan and Campbell River properties. The claimant asserts that Kelly's failure to disclose rental income is a "key factor" in this appeal and upon which she places great reliance in her submission that the Master was clearly wrong. Counsel for the claimant insists that the Master should have drawn an adverse inference from the fact that Kelly did not deny the claimant's evidence of his receiving rental income from the Duncan and Campbell River properties, which he had not accounted for in his application materials.
- [16] The claimant also points to Kelly's evidence that his expenses are between \$34,000 and \$42,000 per year. The claimant states that Kelly did not identify for which properties these expenses were incurred. She also notes that he did not provide any documentary evidence that he actually incurred the amounts he claimed for utilities. The claimant says these shortcomings are significant, especially in light of the fact that he previously deposed that living in the Island View property was allowing him to save a considerable amount of money.
- [17] The claimant asserts that if Kelly earned rental income of \$1,000 per month from the tenants of the Duncan and Campbell River properties and this income was added to his employment income of \$25,000, the total income available to him would be in excess of \$49,000. This would mean that Kelly would have income over expenses in an amount in excess of \$6,000 per year.
- [18] Further, the claimant submits the Master did not give consideration to the fact that Kelly did not deny that he previously purchased an insulin pump by making instalment payments not exceeding \$30 per month. Therefore, it is plain from the evidence that Kelly did not require a lump sum to purchase a new insulin pump.
- [19] In addition, the claimant notes that the trial has been adjourned generally since the date of the hearing before the Master. Kelly's evidence is that he had spent some \$6,000 for legal fees to date, leaving him with a surplus of \$4,000 from the \$10,000 he received from Lannie to use for legal fees.
- [20] As for the MasterCard bill, the claimant submits that the Master did not consider the fact that the bill was high because Kelly chose to get married and have his honeymoon in Mexico in August and September 2013.

Analysis

[21] In my opinion, the appeal must be dismissed.

[22] The oft cited standard of review for the decision of a Master was articulated in *Abermin Corp. v. Granges Explorations Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.). In that case, Macdonald J. discussed the scope of review and held at p. 193:

An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the master.

[Emphasis added.]

[23] Here, the order appealed from is a purely interlocutory matter and the appeal ought not to be entertained unless the Master's decision was clearly wrong. The "clearly wrong" test limits appellate intervention to instances where the Master was wrong in principle or wrong in her findings of fact: *Stephen v. McGillivray*, 2008 BCCA 472 at para. 17.

[24] Sections 256 and 257 of the Land Title Act provide, in part:

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

257 (1) On the hearing of the application for an order referred to in section 256 (1), the Court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and

(ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or

- (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
- (2) The form of the undertaking must be settled by the registrar of the court.
- (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

[25] In *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379 at para. 24 [Enigma], Goepel J. (as he then was) said:

[24] Pursuant to s. 256(1)(b) of the [LTA], an applicant must demonstrate hardship and inconvenience as a prerequisite to an order cancelling a CPL. The provision does not require the hardship and inconvenience to be significant. The defendants' inability to dispose of the Lots has caused them at least some inconvenience and hardship. While this action remains outstanding, the defendants are deprived of the investment income they could earn on the proceeds of sale and must pay the Lots' ongoing expenses. The hardship and inconvenience set out in the defendants' affidavit is similar to that accepted by the court in *Haider Investment Corp. v. Rattan*, [1991] B.C.J. No. 3826 (S.C.). I am satisfied that the defendants have met the s. 256(1)(b) prerequisites for their application.

[Emphasis added.]

[26] The claimant referred me to the following authorities: *Braich v. Mission Development Corporation*, 2008 BCSC 1698; *Yuan v. Yuan*, 2012 BCSC 172; *Usher v. Larabee*, 2010 BCSC 1608; *T.S. v. M.S.*, 2011 BCSC 1715; and *Kerr v. Baranow*, 2011 SCC 10. Many of these cases are not relevant to the central issue before me on this appeal, that is, whether the Master was clearly wrong in her decision to cancel the CPLs and order Kelly to provide security of \$20,000.

[27] The most relevant of the cases submitted by the claimant is *Braich*. At paras. 56-66, L. Smith J. (as she then was) considered the evidence before her and concluded that hardship and convenience had been met on the facts of that case. In relation to the amount of security ordered, she held at para. 68:

[68] It is appropriate for the court to take into account the probability of the plaintiff succeeding in the action in determining the amount of security, if any, to be posted: s. 257(3) of the Land Title Act.

The weakness of the plaintiff's case justified an order cancelling registration of the CPL. In addition, it was appropriate to order the defendants to post security as well as undertake to pay the plaintiff's damages if he was successful in the action.

- [28] In the case at bar, the Master explained that the proximity of Kelly's application to the trial date made it impractical for her to invite the parties to make submissions on her independent legal research.
- [29] Counsel also addressed in their arguments before me the timing issue at the hearing before the Master. Counsel for the claimant indicated that she did not seek an adjournment to cross-examine Kelly on his affidavit evidence because she simply did not have time. Counsel for Kelly submitted that since the materials were exchanged on the day of the hearing, there was no time to respond to the claimant's affidavit respecting her assertions about rental income. She said that counsel for the claimant did not take the position at the hearing before the Master that she is taking on this appeal about the absence of a denial from Kelly regarding rental income. She says that claimant's counsel should not be allowed to raise the point now.
- [30] Ideally, the Master would have invited counsel to make submissions on the authorities she cited as a result of her independent legal research before rendering her decision. However, in my view, the fact that the Master did not first contact counsel for their submissions is not, in all of the circumstances surrounding the timing of Kelly's application and the impending trial date, a sustainable ground for appeal.
- [31] On the merits of the appeal, the Master correctly identified the test for cancellation of the CPLs: whether Kelly had demonstrated hardship and inconvenience. She set out the explanation provided by Kelly in support of his need to refinance one or both of the properties in order to generate \$30,000. She also noted the claimant's position that Kelly's financial circumstances were not as dire as he described them to be. Notwithstanding the claimant's position, the Master found that the requisite threshold of hardship and inconvenience had been established on the evidence before her.
- [32] Based on Enigma, the onus on Kelly to succeed in having the CPLs removed is not one of a high threshold. On my reading of the Master's Reasons, I find that she properly directed herself on the legal issue bearing upon s. 256 of the LTA. She grasped the point and outlined the relevant evidence in arriving at her conclusions. In my view, the fact that the Master did not specifically mention the claimant's evidence about rental income from the Duncan and Campbell River properties does not demonstrate that she failed to consider it. The Master is to consider all aspects of the evidence before her on the application; however, it is not the law that she has to give a detailed recitation of all the evidence in her Reasons when setting out her findings.
- [33] Turning to the matter of security, once again the Master cited the decision in Enigma wherein Goepel J. said at paras. 28 and 30:

28. Pursuant to s. 257 of the [LTA], the court may cancel a CPL and order the posting of security if it is satisfied that damages will provide adequate relief. In this case, I find that damages will provide adequate relief to the plaintiffs and therefore it is appropriate to cancel the CPLs.
30. While the authorities suggest that a defendant does not, in every case, have to post security equal to the estimated damages, the potential for substantial damages is a factor to be taken into account in fixing the amount of security. Another factor is the financial worth of the party to be called upon to post security: *Park & Tilford Canada Inc. v. Festival Markets Inc.* (1986), 6 B.C.L.R. (2d) 160 (S.C.).
- [34] The position of the claimant is that even if none of the current equity in Kelly's name was released to him, the funds available would still be insufficient to compensate her for her share of the unaccounted-for funds that have been dispersed by Lannie, the total of which is alleged to be \$1,504,121.25 on the basis of her own affidavit evidence. The claimant estimates that an equal division of the current family assets would provide herself and Lannie with approximately \$620,000 each. Whereas, if the court takes into consideration the alleged unaccounted-for funds as part of the claimant's compensation payment, then she would be entitled to approximately \$752,060, and there would be a shortfall of roughly \$130,000. Therefore, the Master's conclusion that there would not be a dry judgment, as the court could fashion a remedy under the reapportionment provisions of the Family Relations Act, R.S.B.C. 1996, c. 128, to ensure that the claimant is paid or given an interest in various family assets in satisfaction of a judgment, is in error.
- [35] With respect, I disagree. In arriving at her conclusion, the Master considered the strength of the claimant's case against Kelly as well as the availability of other exigible assets to satisfy judgment in favour of the claimant. She held that the case against Kelly was not strong and that, even if the claimant succeeded against him, a dry judgment was unlikely. She held that Kelly ought to provide security of \$20,000, which is approximately one third of his equity in both the Duncan and Campbell River properties.
- [36] In weighing all of the material placed before the Master and considering the strength of the parties' respective cases against each other, I cannot find that it was unreasonable for the Master to set the security at \$20,000. Likewise, I find no error with her conclusion that, in the event of a successful outcome for the claimant, the court could use the reapportionment provisions of the Family Relations Act to ensure that the claimant's judgment would be satisfied.

Conclusion

- [37] I find that in arriving at her decision on Kelly's application, the Master was not clearly wrong. In the result, the claimant's appeal of the Master's decision is dismissed with costs to the respondents.

"B.I. Cohen J."

The Honourable Mr. Justice Cohen

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