

CANADA / JUDGMENT

Cummings v. Chen

2023 BCSC 266

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 266 Cummings v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cummings v. Chen,

2023 BCSC 266

Date: 20230209

Docket: S224646

Registry: Vancouver

Between:

James Cummings

Plaintiff

And

Annie Mei-Jy Chen

Defendant

Before: The Honourable Justice Blake

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A.W. Bayley

Counsel for the Defendant:

K. Smith

Place and Date of Hearing:

Vancouver, B.C.

January 31, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 9, 2023

[1] THE COURT: As these are oral reasons, I make the usual reservation that if a transcript of them is ordered, I may edit them where necessary and quote from the caselaw in more detail, but that the overall substance and result will not change.

I. introduction

[2] Annie Chen ("Ms. Chen") seeks to set aside a pre-judgment garnishing order made in this matter on July 20, 2022, for \$132,858.35 (the "Garnishing Order") and asks that all funds garnished pursuant to the Garnishing Order, currently held in Court be released to her.

[3] Ms. Chen no longer seeks an order striking the notice of civil claim pursuant to Rule 9-5 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. She continues to seek an order that this proceeding be either consolidated with *Cummings v. Chen*, Vancouver Registry No. E221234, or alternatively, be heard at the same time, pursuant to Rule 22-5 and s. 194.1 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. That separate application is scheduled to be heard February 28, 2023, for a day. I am not seized of this proceeding, nor of that application.

II. background

[4] Ms. Chen and the plaintiff, James Cummings ("Mr. Cummings") were common law spouses. They met in 2006, began a romantic relationship in March 2007, and began to cohabit in early 2009.

[5] In May 2010, Ms. Chen provided Mr. Cummings with funds to invest on her behalf. Mr. Cummings drafted a trust agreement to reflect the parties' agreement, which the parties executed with an effective date of May 10, 2010 (the "Trust Agreement"). His evidence is he drafted the Trust Agreement for Ms. Chen's protection. The Trust Agreement contains, among others, the two following clauses:

The Beneficiary covenants and agrees that she will indemnify and save harmless the Trustee against all claims, demands, actions, causes of action and damage (...) including without limitation (...) taxes payable in respect of profits realized upon the sale of securities.

The Trustee will give the Beneficiary prompt written notice of any and all notices of suits, claims, actions, causes of action, demands, assessments, tax levies or other information which it may from time to time receive relating to or affecting the Account subject thereto.

- [6] In late 2012, Mr. Cummings requested that Ms. Chen enter into a cohabitation agreement, and she signed the cohabitation agreement he drafted on January 3, 2012 (the "Cohabitation Agreement"). The parties later entered into an agreement amending the Cohabitation Agreement on April 23, 2014, as Mr. Cummings had purchased property located at 1138 Palmerston Ave, West Vancouver (the "House").
- [7] Both parties agree that Mr. Cummings declared the gains made on the funds given to him by Ms. Chen and subject to the Trust Agreement (the "Trust Funds"), in his own name personally, and not as a separate taxpayer as the Trustee of the Trust. They agree he was assessed tax personally on the gains realized on those Trust Funds.
- [8] From time to time Mr. Cummings provided Ms. Chen with a letter from his accountant setting out the taxes payable that he had paid in relation to gains realized on the Trust Funds. Mr. Cummings provided her with a letter from his accountant dated September 26, 2013, relating to the taxes paid on the gains made on the Trust Funds for the 2010, 2011 and 2012 tax years, and a letter from his accountant dated June 2, 2015, relating to the taxes paid on the gains made on the Trust Funds for the 2013 and 2014 tax years. The parties agree Ms. Chen reimbursed Mr. Cummings for those tax years.
- [9] Ms. Chen says that at some point in April 2016 Mr. Cummings informed her that he had paid taxes in the amount of \$23,325.54 on account of gains made on the Trust Funds for the tax year 2015, and she says she gave Mr. Cummings a cheque in that amount dated April 28, 2016.
- [10] As is not unusual, the parties have diametrically opposed versions of what happened next. Ms. Chen says that at some point in mid 2016, after she had reimbursed Mr. Cummings for the taxes he paid for the tax year 2015, the parties had discussions about the Trust Funds, and at the same time, discussed their plans for retirement, and they together decided they would use the Trust Funds one day to pursue their dream of travelling around the world by private jet. Ms. Chen says that Mr. Cummings proposed that he would continue to invest the Trust Funds and that any profits would be put towards that trip, and in exchange, he would no longer seek reimbursement for the taxes he paid on account of gains realized from those Trust Funds. Ms. Chen says she agreed to this proposal.
- [11] Mr. Cummings denies the parties reached such an agreement and describes Ms. Chen's account as a "fabrication".
- [12] However, notwithstanding this serious conflict in the evidence, it is not in dispute that between mid 2016 and mid 2022, Mr. Cummings did not provide Ms. Chen with any notifications of any of the taxes he had paid as a result of the gains realized on the Trust Funds.

- [13] On June 3, 2021, Mr. Cummings ended the relationship, and moved out of the House. For approximately the next nine months the parties unsuccessfully attempted to negotiate the breakdown of their marriage-like relationship.
- [14] Mr. Cummings says that following the end of their relationship in June 2021, Ms. Chen instructed him to liquidate the Trust Funds and pay her the net sales proceeds, and that he did pay her approximately \$1,273,000 in June 2021 in connection with those instructions. He says that the majority of the alleged taxes he says are due and owing--some \$90,306.08--relates to taxes paid on the gains realized in the 2021 tax year.
- [15] On July 13, 2021, Ms. Chen filed a charge on the House pursuant to the Land (Spouse Protection) Act, R.S.B.C. 1996, c. 246.
- [16] On May 6, 2022, Mr. Cummings' counsel filed a requisition in the Supreme Court of British Columbia, filing the Cohabitation Agreement for enforcement purposes. The effect of filing the Cohabitation Agreement with this Court was to commence a family law case.
- [17] On May 16, 2022, Mr. Cummings' counsel wrote to Ms. Chen's counsel demanding that she vacate the House. In that letter his counsel also advised that Mr. Cummings had caused the Cohabitation Agreement to be filed by way of requisition in the British Columbia Supreme Court. Ms. Chen has, to date, refused to vacate the House. That is an issue currently before another judge of this Court.
- [18] On May 19, 2022, Mr. Cummings then emailed Ms. Chen a number of letters from his accountant, seeking reimbursement for the taxes he had paid as a result of the gains on the Trust Funds for the 2015 through 2021 tax years. It is undisputed that Mr. Cummings liquidated the Trust Funds in 2021 at Ms. Chen's request. He wrote in his email:

However, selling the securities as instructed gave rise to significant tax liability for the 2021 tax year, which I have paid, and there are also significant taxes that I paid on your behalf in previous years going back to 2015 or 2016. You have not reimbursed me yet for any of those taxes. Please find attached letters from Andrew Liu calculating the additional taxes that were payable for the 2015 tax year, the 2016 through 2020 tax years, and for the 2021 tax year which total \$156,103.89. Although I do not have a specific recollection of you doing so, it is possible that you already paid me for the 2015 tax year, and if that is the case, please provide me with proof of that and deduct \$23,325.54 from the above total (being the amount of the 2015 tax liability).

As I am out of pocket as trustee for these moneys, please reimburse me by way of cheque payable to my lawyer, Alex Bayley, care of DuMoulin Boskovich LLP.

[Emphasis in original].

- [19] By way of a letter dated May 25, 2022, Ms. Chen's counsel wrote to Mr. Cummings' counsel and advised Ms. Chen disputes that she owes Mr. Cummings anything on account of the 2016 through 2021 tax years, and "your client's claims are properly part of the claims the parties have against each other arising out of their relationship, and will ultimately be dealt with

altogether." On June 13, 2022, Ms. Chen's counsel wrote to Mr. Cummings' new counsel and advised that while Mr. Cummings had taken the step of commencing a proceeding by way of filing a requisition attaching the Cohabitation Agreement, Ms. Chen "asserts that the Cohab Agreement should be set aside or varied pursuant to s. 93 of the Family Law Act."

- [20] On June 9, 2022, Mr. Cummings filed the within notice of civil claim, but did not serve it. He then obtained the ex parte Garnishing Order on July 20, 2022, pursuant to which the \$132,858.35 was garnished from Ms. Chen's TD account. There was a second order issued against a second garnishee bank, which was not enforced.
- [21] Mr. Cummings filed an affidavit in support of the Garnishing Order in the within action sworn on July 18, 2022, in which he deposed he was the named plaintiff, the action was pending and was commenced on June 9, 2022, and:
3. The nature of the cause of action for which this action is brought is a claim for reimbursement of taxes paid by the plaintiff for the benefit of the defendant in connection with a trust agreement dated May 10, 2010. My claim is set out in the filed Notice of Civil Claim, a true copy of which is attached hereto and marked as Exhibit "A".
 4. In respect of the cause of action, the defendant is justly indebted to the plaintiff for \$132,778.35, after making all just discounts, and it is now justly due and owing.
 5. That to the best of my information and belief, Toronto-Dominion bank, 703 Park Royal North, West Vancouver, British Columbia, V7T 1H9, chartered bank, the garnishee, is indebted, under obligation or liable to the defendant, and that the garnishee is in the jurisdiction of this court, and the indebtedness, obligation or liability of the garnishee is not for salary or wages.
 6. The defendant and I were previously in a common-law relationship, but we were never married. We first moved in together in 2009. In January 2013, we signed a cohabitation agreement (the "Cohabitation Agreement").
 7. In 2014, I purchased a residence located at 1138 Palmerston Avenue, West Vancouver, British Columbia, V7S 2J6, and the defendant and I moved there as our principal residence. We lived there together until I ended our relationship in June 2021, at which time I moved out even though I am the sole owner of the residence. The defendant still resides there.
 8. As far as I am aware, in connection with the termination of our common-law relationship, no Notice of Family Claim has been filed by either party and no court proceeding has been commenced by either party, other than the Cohabitation Agreement filed by me in court for enforcement purposes.
- [22] Ms. Chen deposes that she was out of town from July 29 to August 1, 2022, and upon her return realized that Mr. Cummings had obtained the Garnishing Order. She deposes it has caused her hardship and inconvenience. She swears in her affidavit sworn August 19, 2022, in support of her notice of application to set aside the Garnishing Order:

35. The Garnishing Order has caused me hardship and inconvenience. Although I am financially comfortable, many of my assets are in relatively illiquid form, including securities, GICs, TFSAs, RRSPs and real property. The garnished funds were largely in US dollars. I require those funds for various purposes, including US investment or other expenditures in US currency. I also depend on having the funds in the TD account which was garnished available to me for my various other needs, including to pay legal fees in respect of my family law case with Jim, and other expenditures as they arise.
36. My personal financial circumstances have not changed in the time since Jim ended our relationship.
37. I have no intention of leaving British Columbia or removing any of my assets from the jurisdiction. In the event that Jim were eventually to prove his entitlement to the taxes he has claimed, there is no risk that he would be faced with a dry judgment.
- [23] Ms. Chen then filed the within notice of application to set aside the Garnishing Order on August 19, 2022. It was originally set down to be heard on August 31, 2022, and has been adjourned a number of times for a variety of reasons.
- [24] On October 13, 2022, Mr. Cummings served a summary trial application in the family law case, which came on for hearing before Justice Marzari on November 7, 2022, who directed the parties exchange pleadings. Mr. Cummings filed his notice of family claim on November 10, 2022, and Ms. Chen filed her response to family claim and her counterclaim on November 29, 2022. In her counterclaim she seeks orders to set aside or vary the Cohabitation Agreement, and the amendment entered into on April 23, 2014, pursuant to ss. 93 and 164 of the FLA, on the basis that both are procedurally and operationally unfair. Mr. Cummings filed his response to Ms. Chen's counterclaim on December 2, 2022.
- [25] Mr. Cummings wishes to bring a summary trial in the within proceeding, which Ms. Chen does not agree is suitable. On January 10, 2023, the parties participated in a case planning conference in this civil action, and Master Hughes ordered the plaintiff was not to file any summary trial application until there was a determination of Ms. Chen's application that the two actions either be consolidated or ordered to be heard at the same time.

III. legal principles

- [26] Section 3 of the Court Order Enforcement Act, R.S.B.C 1996, c. 78 [COEA] provides for the ex parte process by which a plaintiff, judgment creditor, or a person entitled to enforce a judgment or order for the payment of money may apply for a pre-judgment garnishing order. Section 3(2) sets out the requirements of the statutorily required supporting affidavit, which requires, if a judgment has not been recovered that someone aware of the facts must depose to the following:
- (i) that an action is pending,

- (ii) the time of its commencement,
- (iii) the nature of the cause of action,
- (iv) the actual amount of the debt, claim or demand, and
- (v) that it is justly due and owing, after making all just discounts,

- [27] The attachment of debts before judgment, in the form of a pre-judgment garnishing order, is an extraordinary process which requires meticulous observance of the requirements. In a situation of uncertainty about whether a debt is either partially or fully owing, it is inappropriate to let a garnishing order stand: see *Knowles v. Peter*, 12 W.W.R. (N.S.) 560, 1954 CanLII 533 (B.C.S.C.); see also *Flintstone Concrete v. Peace River*, 2003 BCSC 1137 at para. 18 [*Flintstone Concrete*]. However, a plaintiff may make note of a set off or just discount, and still garnish for the difference: *Flintstone Concrete* at para. 92(b)(ii).
- [28] A plaintiff may not cure defects in the initial material filed at the time they apply for a pre-judgment garnishing order at the time a defendant applies to set aside the impugned order: *Flintstone Concrete* at para. 44.
- [29] One of the principal objects of the remedy is to provide a plaintiff with security for the claim being advanced: see *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857 at para. 17 [*Key Insurance Services*].
- [30] An applicant may apply to set aside a garnishing order pursuant to Rule 8-5(8) on the basis that the requirements set out in s. 3(2)(d) of the COEA were not satisfied, or may apply pursuant to s. 5 of the COEA on the basis that all or part of the garnished funds be released if the court "considers it just in all of the circumstances": see *Politeknik Metal San ve Tic A.Ş. v. AAE Holdings Ltd.*, 2015 BCCA 318 at para. 26 [*Politeknik*]. On an application under s. 5 of the COEA, it is appropriate to consider the merits of the action in assessing what is just in the circumstances: see *Politeknik* at para. 27, citing *Min-En Laboratories Ltd. v. Westley Mines Ltd.* (1983), 57 B.C.L.R. 259 at 260, 1983 CanLII 177(C.A.) [*Min-En Laboratories*].
- [31] The principle of full and frank disclosure applicable to ex parte applications generally is not ousted by the COEA and applies equally to the issuance of garnishing orders: see *Politeknik* at paras. 30-33.
- [32] The disclosure required when applying for a garnishing order must be that which is relevant and material to the statutorily prescribed contents of the supporting affidavit. A material fact is a fact that may have affected the outcome of the application: see *Environmental Packaging Technologies Ltd. v. Rudjuk*, 2012 BCCA 342 at para. 51 [*Environmental Packaging*]; *Politeknik* at paras. 30-34; *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at para. 33.

- [33] In *Politeknik*, Justice Tysoe, writing for a unanimous court, addressed two recent decisions in the context of setting aside a pre-judgment garnishing order: *Environmental Packaging* and *Key Insurance Services*. As counsel disagreed on the proper interpretation of this judgment, I will repeat the relevant paragraphs in full:
- [30] One of the alternate arguments made by the defendants is that the garnishing order was properly set aside because the plaintiff did not make full and frank disclosure of all material facts when it obtained the order. I agree with the defendants that, in addition to defects in the supporting affidavit as to the matters set out in s. 3(2)(d) of the COEA, a garnishing order obtained without notice to the defendants should not be sustained if the facts set out in the supporting affidavit as to the cause of action against a defendant (or in a notice of civil claim attached to the affidavit) are misleading or otherwise fail to disclose all material facts with respect to the cause of action.
- [31] In *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 342, this Court held that the principle of full and frank disclosure applicable to ex parte applications generally is not ousted by the COEA and applies equally to the issuance of garnishing orders. The Court accepted the analysis of this issue by Voith J. in *Key Insurance Services*, including his reliance on the decision of Mr. Justice Groberman in *Clark v. Third Storey Holdings Ltd.*, 2003 BCSC 1358, where he wrote:
- [17] As is usual, the garnishing order in this case was issued by the registrar on an ex parte basis and without a hearing. The issuance of a garnishing order is a judicial or quasi-judicial function of the registrar, and where the registrar is asked to make such an order on an ex parte basis, it is my view that the duty of disclosure imposed on the plaintiff is a very high one, notwithstanding that the form of affidavit is statutorily prescribed.
- [32] In *Environmental Packaging*, Mr. Justice Chiasson, on behalf of the Court, reasoned as follows:
- [51] For the most part, I accept the very comprehensive analysis of Voith J., but with this caveat: the required disclosure must be that which is relevant and material to the prescribed contents of the affidavit. An application for a garnishing order is not free-standing; it is authorized by statute and the statute prescribes the criteria for obtaining the relief. A registrar or judge is entitled to have for consideration all material that is relevant and material to these criteria. The tendered material may be narrower in scope than would be required to obtain an ex parte injunction. The standard I have identified respects the legislative intent as expressed in ss.7 and 8, that is, that satisfaction of the prescribed criteria is sufficient, with the gloss that the full context of the criteria must be presented to the registrar or judge.

- [33] Thus, the plaintiff in this case was required to make full and frank disclosure of all material facts related to the cause of action asserted against the defendants. A material fact is one that may have affected the outcome of the application: see *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at para. 33.
- [34] Justice Tysoe went on to conclude that the affidavit filed in support of the pre-judgment garnishing order failed to disclose a material fact, and concluded that if all the material facts had been properly disclosed, "the registrar may well not have issued the garnishing order on the basis that the facts did not support a claim against the Subsidiary": at para. 34.
- [35] The COEA does not oblige an applicant to disclose all possible defences on an ex parte application for a pre-judgment garnishing order: *Li v. Westside Preparatory Society*, 2021 BCCA 153 at para. 37.
- [36] Section 5(1) of the COEA provides that where a garnishing order is made against a defendant or judgment debtor, such person may apply to the registrar or to the court in which the order is made for a release of the garnishment. Subsection (2) provides that if a judge considers "it just in all the circumstances, he or she may make an order releasing all or part of the garnishment".
- [37] Master Groves, as he then was, noted as follows in *Flintstone Concrete*:
- [89] Pre-judgment garnishing orders are an extraordinary remedy granted by the court. A pre-judgment garnishing order allows a plaintiff in an action to force the defendant to pay into court all or a portion of the debt being sought in an action prior to any determination in the action being made. The rationale behind these orders is to prevent the defendant from disposing of, absconding with, or in any other manner disavowing themselves of funds available to satisfy the debt. It is a remedy granted only where particular circumstances are alleged to exist and where it is relatively clear that there is a definitive debt owing to the plaintiff.
- [92] Recognizing perhaps that the remedy of pre-judgment garnishing orders is an extraordinary one, there has been much litigation around them. Having reviewed the many authorities noted in this decision, it is clear that there are three main areas of attack; those being general considerations, deficiencies in affidavits, and the requirements of justice.
- [38] Justice Bouck interpreting the precursor provision to s. 5(2) of the COEA held "One can only presume [the section] was intended to provide a remedy where there is undue hardship, abuse, or the order is unnecessary. I do not mean these examples to be exhaustive; rather they are tests which may help in deciding what is 'just in all the circumstances'": see *Webster v. Webster*, 1979 CanLII 744 at para. 15, 1979 CarswellBC 129 (S.C.) [*Webster*], aff'd 101 D.L.R. (3d) 248, 1979 CanLII 631 (B.C.C.A.), as cited in *Flintstone Concrete* at paras. 21-22.
- [39] When considering whether it is "just in all the circumstances" to set aside a garnishing order, it is a relevant consideration if there is a concern that the plaintiff's judgment would otherwise go unsatisfied if successful at trial: see *Key Insurance Services* at para. 17(h)-(j);

Eaglecrest Explorations Limited v. Consolidated Madison Holdings Ltd. (1995), 14 B.C.L.R. (3d) 336 at para. 21, 1995 CanLII 1363 (S.C.). Likewise, also whether the defendant has a potential meritorious defence is a consideration: see Eaglecrest at para. 21, Politeknik at para. 27 citing Min-En Laboratories at 260.

- [40] In Webster, a case in which a husband claimed against his wife by reason of four alleged promissory notes, and the wife had a separate maintenance application, Justice Bouck noted at 175:

As in most disputes of this nature, conflicting affidavits were filed. They disagreed with one another on the true meaning of the promissory notes. Nonetheless, the demands in this action seem inextricably woven into the whole complaint as to who owns what assets and what are his or her debts and income. Until it is resolved, there is no possibility of finally determining the rights of the parties with respect to permanent maintenance or relief [under the Family Relations Act].

He proceeded to set aside the garnishing orders, noting that there was no suggestion that if the plaintiff succeeded he would "get a dry judgment because his wife will have either become insolvent or will have hidden her assets and placed them out of the reach of execution": para. 16(a). The Court of Appeal upheld this decision: see Webster v. Webster (1979), 101 D.L.R. (3d) 248 at 250, 1979 CanLII 744 (B.C.C.A.).

- [41] Mr. Cummings relies on the decision of Rogge v. Strohmer, 1994 CanLII 1867, 1994 CarswellBC 2687 (S.C.), in which this Court considered an application to set aside a pre-judgment garnishing order in a family proceeding context. In that decision, the Master concluded that the parties were bound by a marriage agreement, that they would maintain separate property, and accordingly held it was clear their relationship was not governed by the family law or by equitable principles of advancement, but rather by the laws of debtor and creditor. In that case, Master Horn refused to set aside the garnishing order. Ms. Chen argues that in that case the critical distinction is that the validity of the marriage agreement was not in dispute and, accordingly, it is not useful to the analysis I must undertake. I agree.

IV. analysis

- [42] This application does not turn on an analysis of whether Mr. Cummings properly set out the amount he says is due and owing from Ms. Chen "after making all just discounts" as required by s. 3(2) of the COEA. It is clear that in calculating the amount he alleges to be due and owing he did endeavour to make just discounts for funds Ms. Chen says she paid to Mr. Cummings on account of the taxes for the 2015 tax year.

- [43] Rather, this application turns on whether Mr. Cummings fulfilled his obligation to meticulously observe the requirements set out in the COEA, and whether there is a basis to set aside the Garnishing Order as a result of what Ms. Chen says was his failure to make full and frank disclosure or, alternatively, on the basis it is just to do so in all of the circumstances.
- [44] I note that the relief sought in the notice of application was on the basis of s. 5(2) of the COEA, but that the legal basis of the notice of application clearly sets out Ms. Chen's legal arguments that Mr. Cummings had failed to provide full and frank disclosure in his application to obtain the Garnishing Order, and that it was also appropriate to set aside the Garnishing Order on the basis it is just to do so in all of the circumstances. Accordingly, I will consider both arguments advanced by Ms. Chen.
- [45] I will turn first to the issue of whether Mr. Cummings failed to provide the necessary full and frank disclosure on his ex parte application. He says that the parties were clinical in their separation of their assets and debts. He argues that the issue of the alleged tax reimbursement due and owing from Ms. Chen to him as Trustee is a completely separate matter from the issues arising from the breakdown of their relationship.
- [46] I note that Mr. Cummings characterizes the Trust Agreement they entered into as a "binding and enforceable written contract." A trust is not legally characterized as a written contract, but rather is a legal relationship pursuant to which the trustee receives legal title to the trust property, in the capacity of a fiduciary, to be held solely for the benefit of the beneficiaries of the trust. A commonly accepted definition of a trust, as noted in Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thompson Reuters Canada, 2021) at 4, quoting from David Hayton, Paul Matthews & Charles Mitchell, eds, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 19th ed (London: LexisNexis, 2016) at 3:

A trust is an equitable fiduciary obligation, binding a person (called a trustee) to deal with property (called trust property) owned and controlled by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation

- [47] Whether the Trust Agreement was a valid and subsisting trust deed, or rather a "binding and enforceable written contract", will be a matter to be resolved by the trial judge.
- [48] Mr. Cummings maintains that he fulfilled the statutory requirements for the affidavit necessary to be filed in support of the Garnishing Order. He says that he is seeking to recover a debt from Ms. Chen pursuant to the Trust Agreement, in his capacity as trustee. He characterizes this as a separate, distinct, and narrow issue that can conveniently and efficiently be dealt with in isolation from the family proceeding, and so in accordance with the object of the Rules. His position is that his notice of civil claim does not involve any alleged family claims. He argues that a family law proceeding between two parties does not automatically subsume all claims that happen to exist between them, particularly claims

where the parties are conducting themselves in different and distinct capacities outside their family relationship.

- [49] Mr. Cummings' position is that the Cohabitation Agreement was filed in court for enforcement purposes only, and he argues that the claims in this action are not inextricably woven into any family law proceeding.
- [50] I disagree for the following reasons.
- [51] While I agree with Mr. Cummings that he was not obliged to disclose all potential defences Ms. Chen may have alleged in response to his notice of civil claim, I disagree that it was not a material fact relevant to the application seeking a garnishing order that Ms. Chen had already advised him she took the legal position that the Cohabitation Agreement should be set aside or varied pursuant to the FLA. By way of a letter dated May 25, 2022, Mr. Cummings was advised that Ms. Chen disputed she owed him anything on account of the 2015 through 2021 tax years, and that she took the position that those issues ought properly to be raised in the context of "claims the parties have against each other arising out of their relationship". He was further advised by way of a letter dated June 13, 2022, that Ms. Chen took the position the Cohabitation Agreement ought to be set aside or varied pursuant to s. 93 of the FLA.
- [52] It is within this context that Mr. Cummings' obligation to provide the required disclosure of what is relevant and material to the prescribed contents of the affidavit must be considered. I cannot agree with Mr. Cummings' argument that the claims he advances in the notice of civil claim form no part of any claims the parties may bring against each other arising from the breakdown of their relationship and are rather "claims arising out of a contractual trustee-beneficiary relationship." If the Cohabitation Agreement is ultimately set aside or varied, then Ms. Chen's interest as a beneficiary pursuant to the Trust Agreement may be subject to a claim that her beneficial interest in the Trust is a family asset for the purpose of part 5 of the FLA. Likewise, the proper characterization of any taxes found to be due and owing from Ms. Chen to Mr. Cummings may be argued to be family debt. While I make no determination of any ultimate decision that will be made by the trial judge on these issues, I find that Mr. Cummings failed to provide the full material context necessary in his supporting affidavit sworn on July 18, 2022. Rather, he merely deposed that no notice of family claim had been filed by either party and no court proceeding had been commenced by either party "other than the Cohabitation Agreement filed by me in court for enforcement purposes". He failed to disclose the relevant and material context that Ms. Chen disputed the enforceability of the Cohabitation Agreement, and had advised him that all the outstanding issues as between the parties ought properly to be resolved within the context of a family law proceeding. I do not accept the argument that this was sufficient. In failing to detail this relevant correspondence between the parties, I find his affidavit failed to disclose the relevant context and material facts, and so failed to properly set out the relevant context of the dispute between the parties. His sworn statement that Ms. Chen was justly indebted to him for \$132,778.35, after making all just discounts, and that he knew of no other family

proceeding other than his requisition filing the Cohabitation Agreement, was insufficient in these circumstances.

- [53] I find that if this information had been properly disclosed, it may have affected the outcome of the application. Those material facts may have changed the characterization of the cause of action advanced in the notice of civil claim from one of simple creditor and debtor, to one of the proper distribution of family property and family debt, if the Cohabitation Agreement were to be set aside or alternatively varied. I find Mr. Cummings failed to provide the full and frank disclosure necessary on his ex parte application and on that basis, I find the Garnishing Order should not be sustained.
- [54] For the sake of completeness, I would also set aside the Garnishing Order on the basis that it is not just in the circumstances to allow it to stand. Notwithstanding Ms. Chen's emphatic arguments, I do not find it necessary to make a determination of whether Mr. Cummings is attempting to circumvent, or gain leverage, in the family proceeding. Rather, I find the demands made by Mr. Cummings in relation to the alleged taxes due and owing to him, in his capacity as Trustee, are inextricably woven into the relief Ms. Chen said she would seek in the family law proceeding, and that she has now set out in her counterclaim. Notwithstanding the conflicting affidavits of the parties, and notwithstanding Mr. Cummings now argues that Ms. Chen has a Taiwanese passport, family in Taiwan, and has retired and sold some of her properties, I see no evidence of a substantiated concern that Ms. Chen may either become insolvent or hide her assets. Rather, I find Mr. Cummings is now, after the fact, attempting to supplement his sworn evidence as was set out in his original application. As set out above, that is inappropriate. Ms. Chen has deposed that she has assets, but the Garnishing Order has caused her hardship and inconvenience, as many of her assets are in a relatively illiquid form, and she requires those funds for various purposes, including paying her legal fees. I do not find Mr. Cummings provided any evidence in his garnishing application that Ms. Chen is having cash-flow problems, other than as may reasonably have arisen as a result of the breakdown of their relationship. Throughout 2022 the parties engaged in negotiations, and exchanged sworn F8 financial statements. At the time he obtained the Garnishing Order, Mr. Cummings adduced no evidence to support any alleged concerns he may have that when this matter is finally determined he may have a dry judgment. In these circumstances I find the pre-judgment Garnishing Order is unnecessary: see *Webster*; see also *First Ave. Research Corp. v. Donar Chem. Ltd.* (1987), 11 B.C.L.R. (2d) 136 at 143, 1987 CanLII 2687 (S.C.). Accordingly, I determine it is just in all the circumstances to set aside both of the garnishing orders, and to release the garnished funds to Ms. Chen.

V. conclusion

- [55] The two garnishing orders are set aside, and the funds garnished pursuant to the Garnishing Order are to be released to Ms. Chen. Ms. Chen is to have her costs of this application.

[SUBMISSIONS RE COSTS]

THE COURT: All right. I am satisfied that in these circumstances I agree with counsel for Ms. Chen and the order that she is entitled to her costs of this application stands.

"Blake, J"

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