
CANADA / JUDGMENT

Dias v. Dias

2020 BCSC 1756

COURT

Supreme Court of British Columbia

DECIDED

18 September 2020

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2020 BCSC 1756 Dias v. Dias

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dias v. Dias,

2020 BCSC 1756

Date: 20200918

Docket: E050501

Registry: Vancouver

Between:

Maxcyne Maria Goretti Dias

Claimant

And

Anthony Alfred Dias

Respondent

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

Counsel for the Claimant (Respondent):

K. Bowman

Counsel for the Respondent (Applicant):

B.D. Hastings

Place and Dates of Hearing:

Vancouver, B.C.

August 25-26, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 18, 2020

Introduction

- [1] These reasons were delivered orally and have been edited for distribution.
- [2] This case raises issues regarding the interpretation and application of certain provisions of a separation agreement entered into between the parties and their interaction with a prior order pronounced by the court.
- [3] The respondent brings two applications. The first application is regarding the separation agreement terms and their application with regard to real property in India owned by the claimant. The respondent also applies for security to ensure compliance of the claimant with regard to the division of the India property, if the respondent is successful on his first application.

Background

- [4] The parties were married in India in 1973. They separated on April 7, 2018. The claimant is now almost 69 years old and the respondent is 73. The claimant, in 2018, was employed as a licensed property manager and the respondent began his retirement.
- [5] The claimant originally filed her family claim in 2005. There was a period of reconciliation. Her amended family claim was filed on March 15, 2019. She claimed spousal support. The respondent filed a counterclaim claiming spousal support for himself. The claimant has been represented by legal counsel throughout the proceedings. The respondent has been represented but for a short time acted on his own behalf.
- [6] Pursuant to an order made August 6, 2019, the matrimonial home was sold and net sale proceeds placed in trust pending further order of the court, or agreement of the parties. Another order was made with respect to the property in India as follows:

The family property in Coimbatore District, of Singanlux Survey #230/1 & 2, Tamil Nadu, India shall be forthwith listed for sale and thence sold, with the Parties having joint conduct of sale unless otherwise ordered. The net proceeds of sale shall be divided equally between the Parties, or as the Parties may otherwise agree.

(the "India Property Order").

- [7] The India property is vacant land.
- [8] On March 2, 2020, initially at the request of the respondent, the parties met over lunch. The claimant brought with her a draft agreement which she, through her counsel, had originally proposed in 2018. The terms of the agreement were based on an original proposal provided to the respondent and reviewed by him and his legal counsel in 2018. At that time he rejected it as he was of the opinion it was unfair to him.
- [9] Unbeknownst to the respondent, the claimant recorded their meeting. While the respondent questions the reasons for some of the gaps in the recording, he does not deny it is otherwise an accurate recording of their meeting. The India Property is never mentioned in the recording and both parties agree it was not specifically discussed.
- [10] During the meeting the respondent agrees he told the claimant that he wanted to finalize matters and he would sign whatever she proposed. He says this is because he thought there was a chance of reconciliation. They went through the draft and he marked some changes he thought were required, including updating the provisions regarding how to divide the proceeds of sale from the matrimonial home since it had sold. He initialled most clauses including the property division clause 12.
- [11] Both parties repeatedly mention they want to resolve their issues without going to trial or incurring further legal expenses. The respondent clearly did not want his lawyer involved anymore. A trial management conference was set for the next day and he stated he wanted to sign off on an agreement before the conference and settle the matter without further appearances.
- [12] The claimant mentions she is not receiving any of the respondent's pension or other assets, they confirm how a mortgage owed is divided, they discuss furniture division, and the respondent says to the claimant "both sides there was a give and take". The respondent, under the agreement, retains his employment pension with the Municipal Pension Plan, his RRSPs, CPP benefits and savings.
- [13] Both discussed not wanting to pay their lawyers any more money. The respondent repeatedly stated the agreement needed to be signed before the court conference the next afternoon.
- [14] Despite the respondent's suggestion that she not go back to her lawyer to draft the agreement in accordance with their discussion, the claimant arranged for her lawyer to draft it.

- [15] The next day, March 3, 2020, the parties signed a separation agreement which purported to settle all issues arising out of their marriage (the "Separation Agreement"). It was filed with the court the same day. The respondent signed the Separation Agreement without obtaining legal advice. At the March 3, 2020 conference, the court was informed that a settlement had been reached between the parties and the April 2020 trial dates were released. A notice of intention to act on his own behalf was filed by the respondent on March 5, 2020.
- [16] With respect to property division, the Separation Agreement contains a number of provisions specifically dealing with division of the proceeds from the sale of the matrimonial home, and the parties agreed before me as to the final calculation of that division.
- [17] The Separation Agreement also contained the following provision:
12. Except as otherwise stated in this Agreement, each Party shall retain all property in his or her possession or registered in his or her sole name wherever located and in particular without limiting the foregoing:
 - a) Jude shall keep his personal items, real property, pensions, bank accounts, savings, cash, stock portfolio, RRSP's, pensions and all other assets free and clear of any claim by Maxcyne;
 - b) Maxcyne shall keep her personal items, real property, pensions, bank accounts, savings, cash, stock portfolio, RRSP's, pensions and all other assets free and clear of any claim by Jude.
- [18] The last provision in the Separation Agreement is a form of merger provision:
36. This Agreement shall not merge in any order of the Court, except to the extent that order is inconsistent with this Agreement.
- [19] It is the India Property Order and its interaction with the Separation Agreement, if any, which is the focus of the respondent's application.
- [20] On March 10, 2020, Mr. Hastings, on behalf of the respondent but not yet on the record, wrote to counsel for the claimant indicating the respondent was of the view that there was a "slip" in the Settlement Agreement since it does not contain a provision matching the terms of the India Property Order. Mr. Hastings also proposed that the Separation Agreement does in fact contemplate that the court order would survive the terms of the agreement.
- [21] To date, the respondent has not consented to the release of the matrimonial home sale proceeds to the parties, and so they remain in trust pending the outcome of this application.
- [22] There is no valuation of the respondent's defined benefit pension plan although his monthly benefit calculation has been provided. There is no valuation of the claimant's property in India. On examination for discovery, the respondent claimed the property was worth \$75,000 but then admitted he just pulled that figure out of a hat. In this hearing, the

respondent provided current printouts from sale by owner internet listings of properties in India which he submits is evidence of the value of the land. Those figures range from the equivalent of \$161,300 to \$435,032.

Interpretation of the Separation Agreement

- [23] The principles of contractual interpretation are discussed in *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107:
- [42] The contractual intent of the parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of the contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation) the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one of more of the contract's provisions ineffective will be rejected.
- [24] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada recently held that extrinsic evidence where the terms of a contract are unambiguous would be limited to objective evidence of facts that the parties knew or reasonably ought to have known at the time they formed the contract.
- [25] The Separation Agreement is written in very plain language. It is not replete with legaleze. It sets out that the agreement is being made in order to provide a final settlement of the issues between the parties arising from their marriage. A term is included in the recitals confirming the parties are fully aware of the assets, liabilities and income of themselves and each other and are satisfied that full, fair and proper disclosure of all financial matters has been made to one another.
- [26] Clause 12(b) of the Separation Agreement is clear in its effect: any of the claimant's real property registered in her own name, is to remain her own property. That includes the India land. The parties were well aware of the existence of that property at the time the Separation Agreement was signed and its registered ownership status as the claimant's property.
- [27] Clause 36 provides that the Separation Agreement will not merge in any court order except to the extent the order is inconsistent with the agreement. That provision does not restrict the timing of the order. It does not, as many agreements do provide, refer to subsequent orders. The claimant submits that the clause only refers to subsequent orders because that is just how these things work. But that is too simplistic an answer to make me disregard the wording used in the agreement. On its face, the term does not limit merger to orders issued subsequently.
- [28] If the India Property Order is to be considered in force, and not overridden by clause 12(b), does it conflict with clause 12(b)? I find that it does not. The India Property Order clearly provides for the parties to reach their own agreement on the division of proceeds of the

India property. If the parties agreed to the claimant retaining a 100% interest, then it would have the effect of rendering the forced sale provision unnecessary. As the claimant submits, to force the parties to obtain an amendment to the court order regarding sale process itself, even by consent, would be an overly technical requirement and an intrusion on the parties' right to compromise and settle their property claims. I do not see this as a case of placing the claimant in a possible contempt situation if she did not sell the property given the agreement on her retaining a 100% interest.

[29] Therefore, if the agreement is valid, there is no requirement that the claimant sell the India property, and she retains a 100% interest in it.

Validity of the Separation Agreement under the Family Law Act

[30] The respondent argues that if the terms of the Separation Agreement are such that the claimant retains a 100% interest in the India property, then the agreement should be replaced under the Family Law Act, S.B.C. 2011, c. 25 [FLA] by way of modification under s. 93 of the FLA. The respondent submits the process of entering into the agreement was procedurally unfair, the agreement terms are substantively unfair, the agreement is a nullity due to the principle of non est factum as the respondent did not understand the agreement, and that the terms of the agreement are unconscionable.

[31] Section 93 of the FLA provides in part as follows:

93(1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.

Procedural or substantial unfairness

[32] As set out in *Asselin v. Roy*, 2013 BCSC 1681:

125 Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.

130 Certainly is no doubt a desirable objective and parties should be encouraged, where mutually desired, to establish regimes of property entitlement which deviate from the statutory scheme.

131 However, certainty should not trump either procedural or operational fairness as defined in s. 93 [of the FLA].

[33] Our courts have long recognized that domestic agreements are different from commercial ones, and that different considerations apply in testing the procedural and substantive fairness of these agreements: *Stark v. Stark* (1990), 26 R.F.L. (3d) 425 at p. 434.

[34] Section 93 of the FLA is essentially a codification of the common law set out in *Miglin v. Miglin*, 2003 SCC 24 and *Rick v. Brandsema*, 2009 SCC 10 as it applies to marriage agreements. The first stage includes two parts: reviewing the agreement to analyze whether it is procedurally and/or substantively unconscionable. Has there been a fundamental flaw in the negotiation process? Does the substance of the agreement represent a significant departure from the statutory objectives?

[35] As to the statutory objectives, s. 92 of the FLA specifically permits parties to make separation agreements that depart from what a court would otherwise order. A policy of the FLA as set out in s. 4(b) is to encourage resolution of family law disputes through agreement.

[36] The second stage of the analysis requires consideration of whether the circumstances of the parties at the time of the application to set aside the agreement no longer reflect the parties' intentions at the time of the execution and the objectives of the statutory scheme.

[37] The respondent submits that the procedure leading up to the signing of the agreement was procedurally unfair because the respondent signed it without legal advice, he only saw a copy on the day of signing, and he was in physical and psychological distress, all of which was known to the claimant. He submits he signed the agreement, in part, because he thought the claimant was suggesting it would allow rehabilitation of the respondent's

relationship with the claimant. He further submits he did not understand the impact of the agreement with regard to the court order. The claimant says she thought it was abundantly clear that the India property was covered under Separation Agreement clause 12(b) as her property.

- [38] Absence of legal advice is relevant, but not determinative: *Y.L. v. G.L.*, 2020 BCSC 808 at para. 285. The respondent clearly chose not to seek legal advice in this instance. He was, however, prepared for the parties to jointly retain a new lawyer to draft up the agreement with the terms they discussed. Despite his claim that he does not recall having received legal advice on the draft when received in 2018, he clearly did receive advice, as his legal counsel at the time communicated to claimant's counsel the position of the respondent on the draft, and throughout the proceedings to date.
- [39] The respondent saw a revised and final copy on the day of signing, but as I note above he was familiar with the initial draft. The changes were made in accordance with his notations about the family home proceeds, and the updated circumstances of the parties. It is a nine-page agreement. It is not an extensive tome written in technical language.

[40] As set out in Miglin:

82 Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement.

83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

- [41] The respondent was not in a vulnerable position. In fact, in his submissions he agreed that he had a history of verbally abusing the claimant. His evidence of physical and psychological distress was based on his statement to the claimant in the midst of the March 2, 2020 meeting that he was feeling very stressed. He said he did not sleep the night before and wanted them to close this chapter in their life because he did not feel well. It was apparently causing him headaches and heartaches. No medical evidence was provided. These are what would be the normal stresses and strains of resolving the termination of a very long relationship, which would come up on the day before a court conference confirming the upcoming trial dates.
- [42] He insisted the agreement be signed and filed before the court conference. It was not the claimant pressing for the agreement to be finalized right away. She did not take advantage of his stress. The claimant did not express a similar need for haste. The claimant called a new

lawyer during the meeting to see if they could retain them to draft up the agreement. The parties discussed that possibility. Ultimately, it was the respondent's insistence on signing an agreement the next day which likely led to the claimant simply asking her existing lawyer to draft up the revised version. The next day the respondent ensured the agreement was signed and took care of filing it with the court.

- [43] The evidence shows that the claimant did not offer up hope of a reconciliation. She made it clear she wanted matters to be resolved so they could stop the drawn out proceedings between them. The respondent, in his submissions, acknowledges that ultimately it was not a reconciliation on offer but rehabilitation of the relations between them. That is a different thing, and in any event I find no inducement or undue pressure at play.
- [44] The division of any sale proceeds of the India property was subject to a default provision of 50/50 or as the parties otherwise agree. The claimant was read the terms of the draft and pointed to the provisions regarding finality and settling all claims. The respondent submits he thought the India Property Order was not affected by the agreement and would continue to force the sale of the property and division under the terms of the order separate and apart from what was being divided under the Separation Agreement. Yet he did not confirm that understanding in his negotiation of the agreement with the claimant. He asked other questions about the meaning of provisions, including whether the mention of spousal support meant there would be none. The claimant confirmed there would be no spousal support payable.
- [45] It is not plausible that the respondent would have been under the belief that the India property division was not being settled within this agreement. He was adamant that the matters between them be finalized. I do note, however, that the respondent was quick to question the effect of the agreement with respect to the India property. He says he approached the claimant on March 5 about handling the India property, and he retained new counsel to inquire about correcting the slip as he saw it.
- [46] Even if the respondent was genuinely under the misapprehension that the India property was not to be retained by the claimant and he was in a vulnerable position which the claimant took advantage of, I would not find that the end result is substantively unfair.
- [47] The respondent is not claiming that the claimant failed to disclose assets or debts. He was in possession of documents relating to the India property and in fact went to India to view it and start the sale process. The respondent's evidence as to the value of the property is unhelpful. Hearsay evidence of a seller's listing price is not evidence of the value of property. A property's value is best determined by what the market will bear, not what a seller asks a market to pay. No appraisal was provided. No taxing authority assessment was provided. As the claimant points out, the respondent is not an expert in Indian real estate values, and his searches are not what I can rely upon as comparable listings or values.

- [48] We do have information on the claimant and respondent's assets which they retain under the Separation Agreement. As well, we have information on the family debts. The respondent had approximately \$42,000 in financial assets mostly in a TFSA, and valued his RIF and employment pension at \$105,037. The valuation of the employment pension, at \$57,927, is based on contributions to the plan. Given the fact that it is a defined benefit plan, this value is likely significantly lower than the commuted value of the respondent's interest in the defined benefit plan.
- [49] Based on the figures provided for the initial and final division of the house sale proceeds which includes allocations for family debt responsibilities, and the financial assets of the parties, excluding any value for the India property, I find that the respondent would receive approximately \$297,000 as his portion of family property and the claimant would receive approximately \$243,800. That is an amount of approximately \$53,000 in the respondent's favour. The low value placed on the pension means that the respondent would receive significantly more than that difference.
- [50] There is no spousal support payable by either party under the agreement. The relationship lasted approximately 45 years, and the respondent had commenced his retirement at age 71. Given the ages of the parties and the employment status of each, and their assets, I find this is a neutral factor.
- [51] Without reliable evidence of the value of the India property, I cannot say that the claimant would receive a substantively unfair amount. For that to occur, the India property would have to be valued at an amount significantly in excess of \$53,000. This does not include a costing of the sale of the property in order for the claimant to realize on the asset, which might be substantial given the procedural roadblocks the parties attested to in being able to sell the property to date.
- [52] The respondent urges me to make a finding on the fairness of the agreement. As before, he seeks finality to the proceedings.
- [53] In light of the evidence before me in this application, I do not find that the agreement is substantively unfair in the circumstances of the parties.
- [54] Even if I found that there were procedural unfairness involved or substantive unfairness in the terms of the agreement, I would decline to exercise my discretion under s. 93(4) of the FLA. On consideration of all of the evidence, I would not order the replacement of the Separation Agreement with an order that is substantially different from the terms set out in the agreement.
- [55] I do not find that s. 93(5) comes into play here as the respondent made his challenge known within days of the signing the agreement and the parties have not taken action in reliance of the terms pending resolution through the courts.

Division of matrimonial home proceeds

- [56] The parties agreed that the final calculation of the division of proceeds pursuant to the Separation Agreement terms is \$241,440.83 for the claimant and \$167,608.33 for the respondent. I confirm those amounts.
- [57] As the respondent has not been successful in his claim to an interest in the India property, I need not make a decision on his application for security against the house proceeds for his interest in the India property.

Costs

- [58] If the parties wish to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. If they do not do that, then I award the claimant costs of the application at Scale B.

"Wilkinson J."

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