

CANADA / JUDGMENT

Hodgins v. Hodgins

2024 BCSC 2511

COURT

Supreme Court of British Columbia

DECIDED

28 June 2024

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2024 BCSC 2511 Hodgins v. Hodgins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hodgins v. Hodgins,

2024 BCSC 2511

Date: 20240628

Docket: E211013

Registry: Vancouver

Between:

Timothy John Heathcote Hodgins

Claimant

And:

Sharon Jayne Hodgins also known as Sharon Jayne Oxley

also known as Sharon Jayne Wood

Respondent

Before: Associate Judge Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

I. Phillips

Counsel for the Respondent:

C. Lewis

Place and Date of Hearing:

Vancouver, B.C.

June 28, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 28, 2024

Introduction

[1] THE COURT: I have before me an application by the claimant seeking the following orders:

1. That the trial of the action, currently set for August 6, 2024, be adjourned;
 2. That parties proceed to mediation as set out in a consent order which was pronounced May 5, 2023;
 3. That the costs of mediation and preparation of expert reports be paid from the Scotiabank line of credit. The portion of that dealing with expert reports was resolved by consent, with the parties agreeing that costs for experts will be paid from Scotiabank line of credit. Payment of mediation costs are still in dispute; and
 4. That the parties' property at 1747 Balaclava Street in Vancouver (the "Balaclava Property"), which was formerly the family home, be listed for sale by no later than July 15, 2024, with the parties having joint conduct of sale and various terms that relate to the listing and sale process. Alternatively, an application that the parties' property located at 602 - 4910 Spearhead Place, Whistler (the "Whistler Property") be sold on the same terms as sought for the Balaclava Property.
- [2] There was also an issue raised as to costs and a penalty which the respondent seeks against the claimant relating to a second application for production of various categories of documents. The parties were able to resolve the latter issue by agreement. I was not asked to decide it, but counsel for the respondent is seeking costs of that application and a penalty, due to the claimant's non-compliance with his disclosure obligations.
- [3] I have made editorial changes to these reasons to improve readability. The reasoning and outcome have not changed.

Background

- [4] The parties started cohabiting October 1997, married March 16, 2003, and separated March 13, 2020. The respondent remained in the family home post-separation and the claimant moved out, initially renting in Vancouver. He currently resides at another property on Galiano Island (the "Galiano Property"), which is described as being mostly but not quite completed. It has a guest house, which is where the respondent is living. The main house does not yet have an occupancy permit.
- [5] The parties have three children. D. is age 23, and has completed a university degree program. C. is age 22, and has completed a bachelor of arts degree. Those two children are technically adults living at home and are still receiving some financial support from the respondent. The third child, M. is age 19, and is currently attending university in the UK.
- [6] This case has a fairly complicated financial underpinning. The claimant has been involved in securities and foreign exchange trading activities in the UK and Canada. He was pursuing this through a company, initially with his father. Their business involved something referred to in the materials as "straddle trading," which I am told is a way to basically manoeuvre the tax consequences of relevant transactions. This has recently come under challenge from CRA. There was litigation involving a client of the claimant and his father, who was initially successful in challenging the CRA reassessments at the Tax Court of Canada level, but that was overturned by the Federal Court of Appeal. Leave was sought from the Supreme Court of Canada, but was declined. So effectively, that puts a damper on the straddle trading that was a substantial part of the claimant and his father's business.
- [7] CRA has issued assessments against HFX in an amount exceeding \$8.8 million as a tax shelter promotion penalty and re-assessed the company for its tax years 2016-2021, in an amount exceeding \$1.8 million. It reassessed the claimant personally for the tax years 2016-2021, in an amount exceeding \$14 million, including re-assessments, interest and penalties. This is a development with which the parties have been struggling, in terms of figuring out how to address it in the context of their efforts to settle their property, debt and support issues.
- [8] The parties originally had a trial date in 2023. The claimant raised the idea of adjourning that, due to basically the expert evidence not being available or prepared and document production not being sufficiently advanced. That led to the parties consenting to an order adjourning the trial, pronounced on May 8, 2023. That order also imposed a regime of what were intended to be short-term financial arrangements dealing with interim without prejudice support, interim without prejudice arrangements for payment of expenses; primarily expenses relating to at least three lines of credit which are registered against the Balaclava Property and the Whistler Property, disclosure obligations and a plan for resolution via mediation, in the event the parties were not able to reach an informal negotiated settlement.

- [9] The parties engaged in negotiations over a protracted period, October 2023 to May 2024. Unfortunately, these were not successful. The parties arrived in May 2024 with a looming August 6, 2024 trial date, and there was a scramble to try and get a bunch of expert evidence in place and with document production being pursued. The document production was necessary for at least some of the experts to do their job, specifically Patti Daum, who was retained to provide a valuation of HFX Markets Ltd. ("HFX"), the company through which the claimant and his father were pursuing their business. She was also preparing a Guideline Income Report to help determine the claimant's level of income for support purposes.
- [10] The consent order which the parties entered into on May 5, 2023 did provide interim without prejudice arrangements for support, including child support of \$7,661 per month starting from January 1, 2023, and spousal support of \$16,817 per month, from the same date. After those arrangements were put in place, relatively quickly thereafter they fell into arrears, after the arrival of the CRA assessments. The claimant and his father were looking at purchasing another company called "Blackheath". That was eventually purchased in the father's name only. The claimant says he is now working for it as a salaried employee, earning about \$72,000 per annum. I have also been taken to evidence indicating that the claimant received a \$700,000 tax-free loan from Blackheath, which may be forgiven if the claimant remains employed with the company for 5 years. If forgiven, this loan would become taxable as income to the claimant, for tax purposes. He has also been receiving loans directly from his father of about \$246,000 and from HFX.
- [11] There is considerable complexity in the financial arrangements that the parties are going to have to present to the court at trial. One of the things applying financial pressure at the moment is there are three lines of credit which total about \$1.7 million and change in debt, which are being serviced by the parties. About \$1.3 million and change of that has been registered against the Balaclava Property, and about \$375,000 against the Whistler Property.
- [12] The Whistler Property is being used for short-term rentals by the respondent. The property is registered in her name. She says she has been generating about \$150,000 per year in rental income, and netting between \$70,000-\$80,000. This is an important source of income for her. She is not employed outside of the home, or was not during the relationship, and her financial means are limited. She is receiving, I think it was \$1,174 per month that the claimant is voluntarily paying. He has not taken steps to formally apply to vary the amounts of support he is obliged to pay under the consent order.
- [13] There are uncertain financial circumstances with which the parties are dealing while the litigation is pending. The respondent complains she does not have sufficient funds to meet all of the obligations she has. She has the two older children living with her and still requiring some financial support. They are not technically "children of the marriage", having graduated. It sounds like neither of them has yet achieved full-time employment, though.

- [14] The youngest child is not living with the respondent in the former family home, but she is still attending university and incurring expenses for that. She studies in the UK, and occasionally flies back and forth. This distinction is not material for purposes of today's decision. The respondent says that she does not have enough money to pay all the obligations she has. She is not receiving the level of support that is required under the terms of the consent order. She objects to the application to sell the Whistler Property, as it is one of her key sources of income. She is also not agreeable to selling the Balaclava Property. At this point, it serves as a residence for her and the children.
- [15] On the respondent's side, he says his income has materially changed due to the developments with CRA and some bad publicity relating to those developments which has negatively impacted his former business with his father. He essentially says he will not be in a position to make an application to vary the child and spousal support orders until he gets the Guideline Income Report from Ms. Daum. Until then, he has unilaterally selected the lower support amount which he is paying.
- [16] On the other hand, the respondent complains that the claimant has received considerable amounts of money from Blackheath, as an interest free and forgivable loan. Blackheath is owned by his father. He has also received about \$246,000 in loans from his father for various things. The claimant's lifestyle has not changed materially, despite the alleged substantial reduction in his income.
- [17] In terms of assets, the main assets drawn to my attention are basically Balaclava, Whistler and Galiano Properties, and a boat which has been valued at around \$400,000 - \$500,000. There is a big question mark that is hanging over everyone's head about what the implications of the CRA assessments are as against HFX and the claimant personally are for purposes of family debt and allocation of responsibility for those.

Adjournment of Trial

- [18] The basis for the application to adjourn the trial is, firstly, the claimant argues that the consent order contemplated that the parties attend mediation. It sets out a settlement formula. There was to be an offer made or counteroffer, and if that was not successful in resolving matters, within 60 days from that date, there would be a mandatory mediation. It provides a fairly detailed formula for how all of that was supposed to unfold. Rather than following that process, the parties continued negotiating informally for a period of more than six months, until they had basically exhausted the possibilities by about May 2024.
- [19] The claimant argues that mediation is a mandatory thing which has not happened yet and the trial ought to be adjourned so it can happen, in accordance with the terms to which the parties agreed. The consent order also contemplates the possibility that the mediation could morph into an arbitration, as opposed to the parties using the court's trial process to resolve their dispute. I do not see that as a persuasive argument for adjournment. Frankly, the parties have chosen not to strictly follow the terms of the consent order. They were doing a

very near alternative, which was to negotiate intensively for the 6-plus months, and either side could have invoked the mediation process at any point during that period. They decided they did not want to incur the cost to mediate, presumably, and were content to continue negotiating informally. In substance, it is the much same thing. Mediation is a form of negotiation. In substance, the intent was being followed, if not the strict letter of what the consent order contemplates. In any event, that is not a basis on which I would adjourn the trial, standing alone.

- [20] The more concerning issue is that the parties have left the development of their expert evidence very late into the day. I am told there are appraisals for the three real estate properties that are in progress, and that they should be available in advance of the August 6 trial date. There is some uncertainty with respect to the Galiano Property appraisal possibly being an issue, based on a suggestion the claimant might not allow the appraiser to access it.
- [21] An appraisal has been done of the boat. Ms. Daum sent an email on June 24, 2024, identifying 12 categories of documents which she requires in order to finalize a report which she previously prepared and issued in draft form, back in 2023. The parties have left quite late the process of having her finalize her report. She says she needs a variety of documents, which are for the most part the claimant's documents or ones in his control, to be able to finalize this report.
- [22] The respondent says the fault for all of this being left so late is the claimant's failure to produce documents. The claimant says everything was "on hold" while they were negotiating, that this was a consensual thing while the parties were focusing on trying to settle, rather than spending money on experts and whatnot. Whomever you choose to assign blame to, my concern is that we are slightly over a month away from the August 6 start of trial. Ms. Daum has indicated that if she gets the information she has requested in these 12 categories, that she would try to have her report completed by the week of July 22. There is uncertainty in terms of how much of the information that she needs is going to actually get to her within that time-frame, and is it going to get to her in sufficient time for her to actually meet the deadline she has suggested, the week of July 22.
- [23] On the appraisal for Galiano Property, I have been told this has been promised by the last day of July, or close to the last day of July, when the parties have an August 6th trial date. This means it becomes available mere days before the start of trial. The claimant says that the case is not ready for trial and that the parties' counsel will not have the expert evidence with sufficient time to properly prepare. Respondent's counsel says that the court can be urged to make inferences by the claimant's failure to disclose information and that adverse inferences can be drawn against him on that basis.
- [24] My concern is I do not have sufficient information, from Ms. Daum's perspective, about whether she is actually going to have an intelligible report possible without these 12 categories of documents being produced. I am also frankly concerned about the lack of reasonable time for all of this last-minute rush of expert evidence arriving mere days before

the start of trial, and the impact this will have on the parties' ability to actually be ready for trial. If some of it does not happen, there may be important gaps. Ms. Daum is preparing both the Guideline Income Report and the HFX valuation. Those appear to be important pieces of the puzzle. It also has not really been adequately explained to me how the parties intend to persuade the trial judge that he or she ought to largely ignore the CRA debt and treat it as a future possibility, as opposed to an established issue that has to be addressed at trial, in terms of division of responsibility for paying it. I am told the claimant is in the process of going through a court challenge in Ontario for that issue, and has retained a law firm at very substantial cost to challenge the CRA valuations. This is a process that may take years to unfold.

- [25] In any event, the factors that are considered on an application to adjourn trial are set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173, at paras. 18-21:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 1992 CanLII 1815 (BC CA), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).
- [20] Other factors or considerations include (in no particular order of priority):
- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); *Sidoroff* at para. 10);
 - the reasonableness of the request (*Dhillon* at para. 16);

- the grounds or explanation for the adjournment (Dhillon at para. 16; Toronto-Dominion Bank at para. 38);
- the timeliness of the request (Dhillon at para. 16);
- the potential prejudice to each party (Dhillon at paras. 16-17);
- the right to a fair trial (Dhillon at para. 16);
- the proper administration of justice (Dhillon at paras. 16 and 39; Toronto-Dominion Bank at para. 36);
- the history of the matter, including deliberate delay or misuse of the court process (Toronto-Dominion Bank at para. 38); and
- the fact of a self-represented litigant (Toronto-Dominion Bank at para. 39).

[21] Securing a fair trial on the merits of the action is the ultimate goal. This requires consideration of the nature of the claim.

[26] I am concerned that the parties have not yet developed all of the key evidence which is needed to effectively deal with this matter at an August 6th trial. None of the appraisals are currently available, other than the boat. The Guideline Income Report and the valuation for HFX are key pieces of the puzzle, and neither of those is yet available. I do not have a high degree of confidence that these 12 categories of documents are going to be provided to Ms. Daum in time for her to be able to finalize a report, and if she does, it will be a last-minute thing that will not allow the parties or their counsel time to actually digest and react to it.

[27] In the circumstances, I think that the case is not ready for trial, and it is necessary to adjourn it. It would be appropriate to hand this case to a trial judge, when there appears to be a very high likelihood that there will be major gaps that will ultimately result in an adjournment, or possibly a continuation of the trial while further key evidence is developed. I order that the trial be adjourned to the earliest mutually convenient date available. I would also make the next trial date peremptory on the claimant.

Application To Sell Balaclava or Whistler Properties

[28] On the application to sell either the Balaclava or Whistler properties, the applicable test is based on Rule 15-8(1) of the Supreme Court Family Rules, BC Reg 169/2009, which read as follows:

Court may order sale

- (1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

- [29] In *Halan-Harris v. Blain*, 2023 BCSC 681, Justice Giaschi summarized the principles at paras. 13-15:
- [13] The principles to be applied upon an application for a sale of family property are set out by Master MacNaughton, as she then was, in *K.J.M. v. P.D.A.*, 2011 BCSC 1729 at paras 13-14:
- [13] Rule 15-8 permits the Court to order that matrimonial property be sold where it appears that it is necessary or expedient to do so. As the Court of Appeal said in *Reilly v. Reilly*, 1992 CanLII 742 (BC CA), [1992] B.C.J. No. 2561, an order for sale can be made on an interim basis.
- [14] The parties agreed about the principles to be considered and applied by the court when dealing with such an application. They have been set out in a number of cases and include, in summary:
- a) If a sale is not necessary then, viewed objectively, it should be advantageous to both parties: *Reilly* at para. 35;
 - b) Any doubt about the justice of an order for sale should be resolved in favour of the status quo recognizing that the status quo for one spouse may perpetuate an injustice for the other: *Bodo v. Bodo*, [1990] B.C.J. No. 346 (S.C.) and *Reilly* at para. 35;
 - c) Where children are involved, the court should consider their need for stability and easy access to their school and friends, especially in the period immediately following separation. However, stability for the children may be balanced by other factors which affect their best interests including maintaining a relationship with an access parent: *Bodo*, at p. 12, *Dean v. Dean*, 2008 BCSC 1176 at para. 14, and *L. v. L.*, 2002 BCSC 871 at para. 33;
 - d) The availability and affordability of alternative accommodation for each party and their dependents: *Bodo* at p. 12;
 - e) The emotional condition of each party especially the party who has primary parenting responsibility: *Bodo* at p. 12;
 - f) External economic factors such as a declining market or the wasting of the asset: *Bodo* at p. 12;
 - g) The capacity of the parties to maintain the asset: *Bodo* at p. 12; and
 - h) The inability of one party to buy out the others interest and the inevitability of the ultimate sale of the property: *Lede v. Lede*, [1994] B.C.J. No. 1655 (S.C.) at paras. 15-16, *Dean v. Dean*, 20008 BCSC 1176 at para. 12.
- [14] More recently, in *Morrison v. Greenwood*, 2020 BCSC 1356, Justice MacNaughton wrote:
- [26] Rule 15-8(1) confers discretion on the court to order the interim sale of property where it is necessary or expedient to do so. In the event that there is no necessity, expediency becomes the sole basis for determining whether or not such an order should be made.

[15] From Kapoor v. Makkar, 2020 BCCA 223, at paras. 21-22, the most recent pronouncement from the Court of Appeal on orders for sale in family matters, the following principles can be derived:

- a) The factors to consider in determining whether a sale is necessary or expedite include,
 - i. The needs of the children;
 - ii. The availability (including affordability) of alternative accommodation;
 - iii. The emotional condition of the spouses;
 - iv. External economic factors;
 - v. Wasting of the asset; and
 - vi. The capacity of both parties to maintain the asset.
- b) Where it is not necessary to sell, the proposed sale must be advantageous to both parties; and
- c) The onus is on the spouse seeking to change the status quo and any doubts should be resolved in favour of the status quo.

[30] On the application for a sale of property, the key considerations are whether the sale is either necessary or advantageous to both parties. In this case, it appears in the broader sense that it is very likely that at least one of the properties are going to have to be liquidated. It is not clear to me at this point which one. There is a really complicated factual and financial background to how the debt got in place, but basically the lines of credit appear to have been used, at least in part, to fund the construction of the house on the Galiano Property. The Galiano Property estimated valuation I have been given is about \$3.557 million, and it appears to have no debt registered against it. The Whistler Property estimated valuation is \$2.875 million. It has a mortgage of \$74,000 and the third line of credit, which has a balance of about \$303,000 and change. The Balaclava Property estimated valuation is \$3,502,000, and it has two lines of credit on title, the first for \$1.1 million and change, and the second for \$228,000.

[31] Some of the line of credit debt, as I say, is attributable to the construction of the house on the Galiano Property. The Whistler Property is currently a major source of income for the respondent, in circumstances where the claimant is not currently living up to the terms of the consent order which provides for interim child and spousal support. It would not be equitable to cut off her source of support, at least on an interim basis. I think that is something that ought to remain available to her until the parties are able to settle or proceed to trial and let the trial judge sort out what the equities are.

[32] The Balaclava Property is currently the home for the respondent and the three children, or I should say the third child when she is not in the UK at university. I am not persuaded that it is inevitable that it is going to have to be sold. Yes, it does have a substantial amount of debt.

The parties put in place temporary arrangements in the consent order of May 5, 2023, that each was responsible for paying half of the servicing costs. I appreciate that may have become a financial burden to the parties if their incomes are reduced since the consent order was pronounced. However, there is a marked lack of clarity, on the material before me, as to abilities for various parties to pay. We have the respondent, who it appears is currently treading water, in terms of being able to use the Whistler Property revenue to help keep things going, with the Balaclava and the Whistler Properties, at least temporarily.

- [33] The claimant has received loans from his father, the interest-free loan from Blackheath, which appears will be forgiven eventually. He has not had to reduce his lifestyle. He could have been taking steps to do things like selling the boat to come up with funds and get rid of some of the other luxury items on the parties' roster to reduce debt, and he has not been doing so. In the circumstances, I do not think it would be equitable to allow him to basically push all of that onto the respondent's shoulders by forcing an interim sale of one of the properties that she is relying on either for her home or for her income.
- [34] I am not persuaded that this is an appropriate case in which to force a sale. It is not necessary at present. It is also not something that would be beneficial to the respondent. In the circumstances, I am going to dismiss the application for sale of either the Balaclava Property or the Whistler Property.

Mediation

- [35] On the issue of forcing a mediation, I am not inclined to make a further order on that. The parties have the existing term re mediation in their consent order. I do not think it is necessary for me to expand on that. The parties have very clearly put a considerable amount of time and effort into negotiation, and I am not sure that forcing a mediation, absent additional information from the expert reports that are pending, is likely to be fruitful at this juncture in any event. I am going to dismiss the applications relating to mediation.

Penalty and Costs

- [36] The last issue I was asked to address is the request for a penalty and costs relating to the document production application that the respondent filed but which was resolved by agreement. On that, she argues that there has been this obligation to produce documents, and that the claimant has been dilatory in complying with it. The claimant says that the parties were in negotiation mode for six months, and were content to proceed with those negotiations without the documents. They only became a pressing issue when those negotiations broke down, and now they have reached a consent regarding production of the vast majority of them.

[37] In the circumstances, that is an obligation that has been outstanding for some time, and I am persuaded that it is appropriate to grant costs of the application for the document production. It did not actually go to a contested hearing, so it would be costs for preparation for the application. I am not inclined to order a penalty at this point. I am not going to dismiss the penalty. I am just going to adjourn it, to be addressed at a future date if appropriate. I am not persuaded that it would be helpful to make an order at this juncture.

"Associate Judge Bilawich"

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