

CANADA / JUDGMENT

Liapis v. Keshow

2020 BCCA 28

COURT

British Columbia Court of Appeal

DECIDED

28 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 28 Liapis v. Keshow COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Liapis v. Keshow, 2020 BCCA 28 Date: 20200128 Docket: CA46341 Between: Amalia Liapis Respondent (Claimant) And Aron Damien Keshow, 0880881 B.C. Ltd., King Tiger Investments Ltd. Appellants (Respondents) And 0892868 B.C. Ltd. Respondent (Respondent by Counterclaim) Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Groberman The Honourable Mr. Justice Abrioux On appeal from: Orders of the Supreme Court of British Columbia, dated August 14 and 16, 2019 (Liapis v. Keshow, Vancouver Registry E162841). Counsel for the Appellants: H.M. Dale Counsel for the Respondents: P.R. Albi, Q.C. S.E. Ovens Place and Date of Hearing: Vancouver, British Columbia January 15, 2020 Place and Date of Judgment: Vancouver, British Columbia January 28, 2020 Written Reasons of the Court Summary: Trial judge in family law case, being dissatisfied with expert evidence concerning the value of a major asset, ordered that the property be sold before she made a final order for the division of property. This order had not been sought by counsel for either party and they had not had the opportunity to make submissions on the possibility of such an order. Appeal allowed. Trial judge had erred in making the order without hearing counsels' submissions thereon, and she had not considered other alternatives that might be preferable. Order for sale was set aside and the case was remitted to the Supreme Court. Reasons for Judgment of the Court:

- [1] We are all of the view that this appeal should be allowed and that the trial in the court below should resume - if possible, before the trial judge who has already heard several days of trial. If that is not possible, the Chief Justice of the Supreme Court will have to nominate a new trial judge under R. 22-2(10) of the Supreme Court Family Rules.
- [2] The order under appeal was made in the course of a family law trial in which it became necessary to determine the value of a piece of real estate. The real estate is located in downtown Vancouver and consists of a large commercial/residential building called the "Boulder". It is owned by the respondent King Tiger Investments Ltd. ("King Tiger"), a subsidiary of the respondent 0880881 B.C. Ltd. (the "Numbered Company"), the shares of which are owned by Mr. Keshow (the "husband"). He is involved in a time-consuming and complex project to re-develop the property.

- [3] A joint expert report on the fair value of the Boulder had been filed at trial; the claimant in this proceeding, Ms. Liapis (the "wife"), had disagreed with it; and she sought to adduce into evidence the opinions of two other experts. In general terms, the experts disputed the method of calculating the cost of the planned redevelopment of the Boulder, in respect of which the husband had successfully reached a "Heritage Revitalization Agreement" with the City of Vancouver. The Agreement included the grant to King Tiger of so-called "transferable density" rights. According to the husband's testimony, the terms of the Agreement prohibit the sale of the building without the City's approval.
- [4] The trial commenced in October 2018 but was adjourned to February 2019 and then to early April 2019. On the 17th day of trial, both parties had filed written submissions on the legal issues that had to be resolved. The husband sought the equal division of the parties' family assets and submitted that there was no need to "force a liquidation of one of the party's companies", citing *Blackett v. Blackett* (1989) 63 D.L.R. (4th) 18 (B.C.C.A.) at 23-5. Counsel for the wife submitted that "everything about the Boulder project" was "speculative" and as we read his argument, suggested that the Court should determine the fair market value at \$4.1 million, the amount for which a tenant of the Boulder property had made an offer to purchase. There may be legitimate objections to using this tenant's offer as indicative of fair market value.
- [5] At the end of the day on April 5, 2019, the trial judge asked counsel for the husband if she would require more time "next time we meet". Counsel replied that she had "a great deal more submissions" to make, but that she had finished her submissions explaining the table of assets she had provided to the Court.
- [6] When the trial resumed on August 14, the judge told counsel she had had time to 'cogitate' over the summer and had come to some decisions. The second of these was that because she saw "substantial deficiencies" in the expert reports, the only way she could be "confident in a fair value to be assessed is by ordering the building to be sold." No further reasons were given; nor did the judge explain why the Boulder itself was to be sold rather than the husband's shares of the Numbered Company or the Numbered Company's share of King Tiger.
- [7] The husband's original notice of appeal was filed on August 28, 2019.
- [8] On September 5, 2019, the trial judge stayed the order of sale and an ancillary order pending the husband's appeal. The trial was also adjourned pending appeal.
- [9] On October 30, 2019, Mr. Albi on behalf of the wife wrote to counsel for the husband as follows: Considering the issue of proportionality and having regard to the timelines before trial arguments are concluded, we do not consider it expedient or in the best interests of either party for the subject appeal to proceed. While our position is that the Order for Sale is appropriate having regard to the valuation evidence before the court, in order to address concerns raised in the appeal, we will advise the trial judge that the continuation of the trial in November that Ms. Liapis is prepared to agree to vacate the Order for Sale to allow the

trial arguments to be concluded before judgment is rendered on all issues. In our view, this will allow full argument on whether an Order for Sale should be granted, and will render the appeal of the Order for Sale unnecessary. [Emphasis added.] Strangely, counsel for the husband did not accept this offer, apparently because she regarded it as offering only a 'suspension' of the order for sale and believed that it was "too late" to get a "fair" solution from the trial judge.

- [10] It is unfortunate that counsel misunderstood Mr. Albi's offer, especially since in this court, both counsel acknowledged that neither party had been afforded the right to be heard on the issue of whether the Boulder should be sold before the judge divided the parties' property. The sale of the Boulder was at best premature; and if some division becomes necessary under the Family Law Act, a better method might well be to re-allocate corporate shares rather than to sell the property itself. Obviously, shares can be divided in a way real estate cannot, and various taxes and fees, as well as negotiations with the City, might be avoided.
- [11] In the circumstances, we are of the view that the sale order and the ancillary order should be set aside. The only remaining question for this court is whether it will be necessary to order a new trial or whether the trial can simply continue before the trial judge. This is complicated by the fact that the judge has announced she is retiring effective May 30, 2020.
- [12] Ms. Dale argued initially before us that the trial judge had breached the rules of procedural fairness in making the sale order without hearing full argument on the issue from counsel and that her client should not be required to go back before a judge who has "made her mind up" on the question of sale. Counsel referred us to a number of cases, including *Boury v. Iten* 2019 BCCA 81. In that instance, a judge in chambers had made an (interlocutory) order in respect of which he had received written submissions but had not heard oral argument from counsel. This court ruled that the judge had thereby breached the rules of procedural fairness. In Tysoe J.A.'s words: The legal argument to be set out in the Notice of Application is not intended to be a substitute for oral submissions or more elaborate written arguments permitted by R. 8-1(16) in the event the hearing of an application will take more than two hours. Two of the valuable functions of oral advocacy are to answer questions the judge may have and to phrase submissions in a persuasive fashion that may be slightly different from legal arguments set out in the Notice of Application or written submissions. [At para. 32.] Since it was not "plain and obvious" the procedural error had not affected the outcome, the Court remitted the application to the Supreme Court for a new hearing. (At paras. 44-5; see also *Felker v. Felker* [1946] O.W.N. 368 (Ont. C.A.); *Investors Group Financial Services Inc. v. Corby* 2005 BCSC 666.)
- [13] We are concerned here, however, with an interlocutory order made by a trial judge mid-trial. As we told Ms. Dale, this court often refers matters back to trial judges after correcting errors of law or fact. It is assumed the trial judge will proceed without any predisposition against the successful appellant. This was not an instance in which a truly discretionary order was made that might justify a litigant in perceiving a predisposition on the judge's part. (Ms. Dale confirmed she was not alleging bias on the part of the trial judge, in which

event cases such as *Malton v. Attia* 2016 ABCA 130 would have been relevant.)

- [14] In our discussions with counsel, Ms. Dale conceded that as long as the trial judge was aware of the "correct test" applicable to the question of when a sale of property such as the Boulder is required under the Family Law Act, S.B.C. 2011, c. 25, an order of this court remitting the matter to the trial judge would be an appropriate "remedy". Mr. Albi was also content to have the question of sale determined by the trial judge at the end of trial, not as a means of determining value but as a method of dividing it between the parties after proper argument.
- [15] It is obvious, in our view, that the sale order and the ancillary order should not have been made until the trial judge had heard counsels' submissions and considered all relevant factors under the Family Law Act, including whether a sale of the real estate would affect the Heritage Revitalization Agreement and rights related thereto, the advantages and disadvantages to each of the parties, and (if a division is found to be necessary) whether an apportionment of corporate shares might be a preferable alternative. Further, we note that while valuation issues are often difficult, trial judges must at the end of the day do the best they can with the evidence they have. As stated by this court in *Cyprus Anvil Mining Corp. v. Dickson* (1986) 33 D.L.R. (4th) 641: The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. No apology need be offered for that. Parliament has decreed that fair value be determined by the courts and not by a formula that can be stated in the legislation. [At 652.]
- [16] In the result, we would allow the appeal, set aside the sale order and the ancillary order, and remit all outstanding issues to the trial judge for determination. We acknowledge that it may not be possible for her to hear this matter before her retirement, in which case the Chief Justice of the Supreme Court will have to consider making an order under R. 22-2(10) of the Supreme Court Family Rules, and a new judge will have to determine how to conduct the trial under R. 22-2(11). "The Honourable Madam Justice Newbury" "The Honourable Mr. Justice Groberman" "The Honourable Mr. Justice Abrioux"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/00/2020BCCA0028.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/liapis-v-keshow-2020-bcca-28>

Prepared on 27 October 2026 · Esheria