

CANADA / JUDGMENT

Malkin v. Baccardax-Scully

2020 BCSC 2122

COURT

Supreme Court of British Columbia

DECIDED

17 December 2020

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2020 BCSC 2122 Malkin v. Baccardax-Scully

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malkin v. Baccardax-Scully,

2020 BCSC 2122

Date: 20201217

Docket: E182117

Registry: Vancouver

Between:

Nigel Cramond Malkin

Claimant

And

Christopher Michael Baccardax-Scully

Respondent

Before: The Honourable Mr. Justice Skolrood

Oral Reasons for Judgment

(In Chambers)

The Claimant, appearing on

his own behalf via teleconference:

N.C. Malkin

Counsel for the Respondent

via teleconference:

A. Chan

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 27, 2020 and

December 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 17, 2020

- [1] THE COURT: On November 27, 2020, I heard cross-applications by the parties, both dealing with essentially the same issue arising out of an order granted by Madam Justice Russell dated December 20, 2019. At the conclusion of the hearing, I reserved my decision with the intent of delivering oral reasons for judgment in due course.
- [2] Subsequently on December 10, 2020, while the first applications were still under reserve, the parties appeared in chambers on a further application brought by the claimant. While I am not seized of this matter, it just so happened that I was the assigned chambers judge on December 10, so the application came on for hearing before me. At the conclusion of that hearing, I advised the parties that I would give reasons on both sets of application together on December 17.

Background

- [3] I do not intend to go into the background facts in any great detail.
- [4] Briefly, the parties began cohabitating in a marriage-like relationship in February 2000. They differ on the date of separation. The claimant says January 2018 whereas the respondent says November 2017. Nothing turns on this for the purposes of these applications.
- [5] The respondent is a realtor who carries on business through a personal real estate corporate ("PREC"). Valuation of the PREC and the parties' respective interests therein is a significant issue in the litigation.

- [6] The bulk of the real estate trades engaged in by the respondent are with respect to presales. Presales occur when buyers enter into contracts to purchase properties, typically strata properties, that will not be completed for some time. As I understand it, the respondent's entitlement to a commission on the sale arises at the time the contract of purchase and sale is executed; however, the entitlement does not actually crystallize until a sale is completed. This sometimes can involve a lag time of a number of years.
- [7] The breakdown of the parties' relationship has been acrimonious, and there have been numerous applications before the court. The matter is currently set for a 10-day trial in July of 2021.

The Management Representation Letter Applications

- [8] I will deal first with the applications dealing with the management representation letter ("MRL"). The original application before Russell J. was brought by the claimant seeking an order that the respondent produce a MRL, in respect of his PREC. During the course of the hearing before Russell J. at which both parties appeared in person, Russell J. expressed some uncertainty about what an MRL is. The claimant then directed her to a document attached to an affidavit that accurately described it as a "form letter written by a company's external auditors signed by senior company management."
- [9] Justice Russell went on to ask the claimant if what he was really asking for was audited financial statements. He did not answer that question directly, but made it clear that he takes the view that the financial statements are inaccurate because a PREC is legally prohibited from owning real estate. He wants to make the point that the statements are inaccurate by demanding the MRL, which he believes a licensed accountant will not be able to sign.
- [10] Justice Russell and the respondent then had an exchange about whether the respondent would or could direct his accountant to provide the MRL. That exchange included the following:

The Court: Well, it's a direction, in fact, because she's your accountant. You direct her what you want her to do.

The Respondent: Okay. And if she says no, then--sorry, I'm asking because I don't know.

The Court: You prepare her, and you ask her to sign that document. And she swears that the--by doing that she swears that the financial statements are accurate.

The Respondent: Okay.

The Court: And if she can't do that, then that's going to lead to your friend arguing an adverse inference should be drawn against you.

The Respondent: Meaning? Sorry, adverse--

The Court: Meaning that if you can't get your accountant to attest to the accuracy of your financial statements--

The Respondent: Yes.

The Court: for the period ending November of 2016--30th of November, 2016, then he can ask that the mediator, I suppose, to draw an inference that your statements were not accurate because she won't sign that.

[11] At the conclusion of the hearing, Russell J. issued her order as follows:

by 08-Jan-2020, the respondent file with the Court, and provide to the claimant a Management Representation Letter signed by the respondent and an accredited accountant regarding the financial statements of Chris Malkin PREC (the "PREC") for the fiscal year ending 30-Nov-2016, and which specifically addresses the legal basis under the Real Estate Services Act ("RESA") upon which the parties' home at 4106-1480 Howe Street, Vancouver has been reflected as a \$574,680 item characterized as "Other Income" in the PREC's financial statements.

[12] The respondent has not filed the MRL ordered by Russell J. He now seeks to vary that order to provide that he is not required to produce an MRL, or alternatively that he be required to direct his accountant to produce an MRL.

[13] The claimant seeks to enforce the order or, alternatively, to vary it in a manner that complies with the spirit and intent of the order. For example, he proposes that each of the respondent and his accountant swear an affidavit indicating the legal basis upon which the parties' former family home is listed as other income in the PREC financial statements.

[14] The respondent deposes that he asked his accountant, Ms. Liu, about preparing an MRL. She provided him with an undated letter that states as follows, in part:

I have been asked by Mr. Baccardax-Scully to provide a description of the process and requirements for Mr. Baccardax-Scully and his PREC to produce a management representation letter, called a management information letter in Canada. I have advised Mr. Baccardax-Scully that a management representation letter is a letter signed by the senior management of a company that attests to the accuracy of the financial statements that the company has submitted to an external auditor for their analysis.

I have advised Mr. Baccardax-Scully that for a company to be able to produce a management information letter, it would need to be subject to an audit from an external auditor. An external auditor is a public accountant independent of the company which it is being asked to audit. I am unable to perform an external audit of Mr. Baccardax-Scully's PREC. I estimate that an external audit of a company of Mr. Baccardax-Scully's size would cost approximately \$10,000 and could be performed in approximately three months, but this estimate may be affected by the current COVID-19 pandemic. Only once an audit is performed by an external auditor can Mr. Baccardax-Scully's PREC prepare a management representation letter.

- [15] The respondent submits that the information provided by Ms. Liu about the necessity of an audit constitutes a material change in circumstances warranting a variation of Russell J.'s order. He submits further that the parties have minimal assets and considerable debt and that they can ill afford the cost of an audit, and that the claimant has failed to adequately explain why an MRL is necessary in this case.
- [16] In dealing with the cross applications, it is useful to make a few preliminary observations.
- [17] First, the claimant initially took the position that the respondent's application should be dismissed on the basis that he should have appealed Russell J.'s order if he disagreed with it.
- [18] As I indicated at the hearing, I do not agree. Russell J.'s order was interlocutory in nature and was essentially an order for document production. The respondent would not have a right of appeal from that decision, and an application for leave to appeal would add another layer of cost, time and complexity that this matter hardly needs. Further, it is well within the jurisdiction of this court to revisit interlocutory orders in appropriate circumstances.
- [19] Second, while the respondent framed his application as an application to vary Russell J.'s order, the principal order sought, that he not be required to produce an MRL, is not really a variation at all, but rather an attempt to set aside Russell J.'s order. Similarly, the alternative relief that he simply be required to direct his accountant to prepare the MRL is essentially meaningless given the accountant's letter saying it cannot be done without an audit.
- [20] I do agree with the respondent that the claimant has not clearly identified why he says an MRL is required. It appears that he wants to make the argument that the PREC financial statements are inaccurate, which may then support his position in the litigation.
- [21] I accept that in order to have an MRL produced and signed, an external audit of the PREC would be required; however, I am not prepared to order such an audit. To my mind, that would be an unreasonable and unnecessary expense and would be of minimal relevance to the issues that will ultimately have to be determined. Further, it is not clear to me that I have jurisdiction to require a company to conduct an audit.
- [22] Frankly, as things currently stand, it is open to the claimant to argue before the trial judge, presumably with reference to the relevant legislation, that the PREC financial statements are inaccurate. Justice Russell alluded to this point when she noted that without an MRL or some indication of the accuracy of the financial statements, it will be open to the claimant to argue that an adverse inference should be drawn vis-à-vis the statements.
- [23] That said, it is not unreasonable for the claimant to demand some explanation as to how or why the proceeds of sale of the former family home are characterized as they are in the PREC financial statements. Those statements are, on their face, said to have been prepared without an audit or review and are based upon information from management. There are no notes to the statements.

- [24] In the circumstances, I think the reasonable course of action is to order that the respondent direct his accountant to amend or restate the PREC financial statements for the year ending November 30, 2016, to include a note explaining why the amount of \$574,680, being the proceeds of sale of the former family home, is listed as "Other Income".
- [25] The respondent will also disclose in affidavit form any instructions provided to the accountant with respect to the treatment of the sale proceeds. If the accountant is unwilling or unable to provide a note to the financial statements, the respondent will indicate this in his affidavit, including providing any response received from the accountant. The respondent will provide this information within 30 days of today's date.

Claimant's Application to Restrain the Respondent from Bringing Further Applications for Release of Funds

- [26] The second application that was heard on December 10 was brought by the claimant. The first two orders sought are to vary previous orders issued by Master Vos dated August 10, 2018, and Madam Justice Burke dated April 4, 2019. Both of those orders permitted the respondent to access certain funds in the PREC for the purpose of paying expenses. Alternatively, the claimant seeks an order restraining the respondent from bringing further applications to access funds in the PREC relating to any real estate deals that predate the parties' date of separation.
- [27] The claimant's notice of application also seeks a penalty of \$5,000 payable by the respondent, but the claimant did not push this issue at the hearing. I would note that had the claimant in fact sought the imposition of a penalty, I would have declined that relief.
- [28] The concern underlying the claimant's application, as I understand it, and indeed a central theme running through this litigation, is that the respondent is dissipating family assets with the likely result, according to the claimant, that there will be little left to divide when this matter gets to trial.
- [29] In considering the present application, it is useful to look briefly at the orders of Master Vos and Burke J. Paragraphs 6 to 8 of Master Vos' order states, paraphrasing somewhat:
- [6] The respondent is permitted to withdraw up to \$4,000 per month only for his personal expenses from the PREC.
- [7] By consent, subject to para. 8 of this order, pursuant to s. 91 of the Family Law Act, the respondent in his capacity as director and shareholder of the PREC is prohibited from causing the PREC to transfer, encumber or assign as property pending final determination of this family law case without written consent of the claimant or without further order of this Honourable Court.
- [8] The respondent in his capacity as director of the PREC may withdraw up to \$30,000 per month only from the accounts of the PREC to pay for the expenses of the PREC.

- [30] I should add that Master Vos's order also permitted the claimant to withdraw \$8,000 per month for his personal expenses and \$4,000 per month for business expenses from his business accounts.
- [31] Justice Burke's order subsequently varied Master Vos's order by increasing the amount that the respondent may withdraw for personal expenses to \$12,000 per month. That order went by consent.
- [32] Master Vos' and Burke J.'s orders were further effectively varied by the order of Justice Basran dated November 22, 2019. I say effectively because Basran J.'s order is not framed as a variation, but the parties agree that that was its effect. Paragraph 1 of Basran J.'s order states:
- RE/MAX Crest Westside Realty and Coldwell Banker Prestige Realty are not to disburse any funds to Christopher Michael Baccardax-Scully, Chris Malkin Personal Real Estate Corporation or Nigel Cramond Malkin without written consent of Nigel Cramond Malkin and Christopher Baccardax-Scully or until further order of the court. This order applies to RE/MAX on amounts over and above the \$90,000 interim distribution of property amount each of the parties are to receive and are in the course of proceeding from the RE/MAX account.
- [33] RE/MAX and Coldwell Banker are the real estate brokerages that the respondent was affiliated with at various material times. As noted in the term of Basran J.'s order, each party was to receive a \$90,000 interim distribution, and the effect of the order, the parties agree, is to prohibit any further distributions over and above the \$90,000, thus effectively superseding Master Vos' and Burke J.'s orders.
- [34] On October 29, 2020, the parties entered into a consent order to vary Basran J.'s order. Paragraphs 1 and 2 of the consent order states:
- [1] The November 22, 2019 order of Justice Basran is varied so that Coldwell Banker may distribute funds to the PREC and/or Christopher Michael Baccardax-Scully for any deal or contract with an original accepted offer date of February 1, 2018, or later as reflected on the original deal contract between the vendor and the original buyers without prejudice to any position that either party takes regarding property division at trial.
- [2] Except as otherwise set out herein, and subject to further court order or agreement between the parties, all remaining commissions of the PREC that are at issue in these family law proceedings, including all funds held in accounts of Coldwell Banker for deals or contracts with an original accepted offer date of January 31, 2018, or earlier as reflected on the original deal or contract between the vendor and the original buyers, will continue to be frozen pursuant to the November 22, 2019 order of Justice Basran or until further agreement or court order.
- [35] The consent order then goes on to list a number of specific contracts, the commissions of which are to continue to be frozen.

- [36] On September 28, 2020, the respondent filed a notice of application seeking a further variation of Basran J.'s order. A second application seeking essentially the same relief was filed on October 9, 2020. The notice of application seeks a number of orders, the most contentious of which is an order for the release of funds to pay certain debts which the respondent claims are family debts. He seeks release of funds from accounts that are frozen pursuant to Basran J.'s order. Other orders sought, including an order permitting access to funds generated by transactions entered into post separation, are dealt with in the consent order.
- [37] I am advised by the parties that the respondent's application came on before Madam Justice Jackson, and she adjourned it on the basis that it would require a full-day. I understand that the parties have a day reserved on January 6, 2020, but have not formally reset the application to that day. It is against that background that the claimant now seeks an order restraining the respondent from bringing any further applications to access pre-separation commission funds.
- [38] With respect to the first two orders sought in the claimant's notice of application, those being to vary the orders of Master Vos and Burke J., I agree with the respondent that the relief sought is moot and that the material terms of those orders have again been superseded by the order of Basran J. I therefore decline to make those orders.
- [39] With respect to the third order sought restraining the respondent from making any further applications to access funds from pre-separation deals, I note that the principal application in issue has already been filed, was set for hearing, and was adjourned on the basis that it required a full-day hearing. With respect, there is no basis for me to intervene now and prohibit the respondent from rescheduling that application. Whether the respondent should be granted the orders he seeks or whether, as the claimant submits, he should be prohibited from further accessing funds generated by pre-separation deals will be up to the judge hearing the application.
- [40] With respect to the fourth order sought permitting the parties to access funds from post-separation deals, that is already available to the parties, and as such the relief sought is unnecessary.
- [41] The claimant's November 20, 2020 application is therefore dismissed.
- [42] Success was largely divided on the two sets of applications, with the claimant having some success with respect to the MRL application, and the respondent having success on the second application. The parties will therefore bear their own costs of all applications.
- [43] Before closing, it is worth making a couple of additional observations. While I declined the claimant's request for an order restraining the respondent from bringing further applications, it is clear that an inordinate amount of time, energy and money has been invested in this litigation to date. There have been numerous court applications, and the volume of material that has been filed is excessive. On these applications alone there were

12 binders of material, much of which was not referred to. It is not particularly helpful to parse the record to add up how much court time should be allocated to applications brought by one or the other party. Rather, the parties' time and effort should be directed at settling this matter and bringing the litigation to an end. If that is not to occur, then I urge the parties to do whatever they can to hold on to the existing trial date with a view to achieving some degree of finality.

[44] Those are my reasons.

"Skolrood J."

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