
CANADA / JUDGMENT

McKenzie v. McKenzie

2013 BCSC 2194

COURT

Supreme Court of British Columbia

DECIDED

15 October 2013

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2013 BCSC 2194 McKenzie v. McKenzie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McKenzie v. McKenzie,

2013 BCSC 2194

Date: 20131015

Docket: 10-1847

Registry: Victoria

Between:

James Alexander McKenzie

Claimant

And

Melanie Louise McKenzie

Respondent

Before: The Honourable Mr. Justice Savage

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

N.J.W. Reid

Counsel for the Respondent:

J.A. Rose, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

October 15, 2013

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2013

- [1] THE COURT: There are two applications before me. The respondent, Ms. McKenzie, applies: (1) to settle the order arising out of my reasons dated May 1, 2013, and indexed as McKenzie v. McKenzie, 2013 BCSC 749; (2) for an order for costs; and (3) to appoint a joint expert to determine the value of the life interest in Shawnigan Lake cottage.
- [2] The claimant, Mr. McKenzie, applies to have me reconsider and vary the order with respect to: (1) matters concerning his interest in the Shawnigan Lake cottage; (2) the imputation of income; (3) spousal support; and applies to stay the order pending appeal.
- [3] Mr. McKenzie has not acted on any part of the decision that did not go by consent.

Reconsideration

- [4] The legal principles that govern the exercise of a judge's discretion to reopen a trial before judgment has been entered are well settled. Those principles were well stated by McKenzie J., as she then was, in Mohajeriko v. Gandomi, 2010 BCSC 60 at paragraphs 20 to 27. Those reasons were recently approved by the Court of Appeal in Moradkhan v. Mofidi, 2013 BCCA 132, and summarized as follows:
- [31] I agree with, and adopt the comments of MacKenzie J. I would summarize the main principles applicable to such an application in the following way:
- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
 - a judge's unfettered discretion to reopen a trial should be exercised with restraint;
 - a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
 - it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;

- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521 . . .)

- [5] In this case, the parties closed their cases following argument on February 1, 2013. The decision was issued May 1, 2013. The notice of appeal was filed May 28, 2013. The application for reconsideration was filed by the claimant on October 2, 2013, nine months following the decision, although this apparently has been the subject of ongoing discussions for some time.
- [6] Accompanying the application is an expert report which the respondent only received with the application.
- [7] With respect, in my opinion, the claimant's application here is an attempt to reargue, recast, or restate the claimant's case. The claimant is seeking, *inter alia*, to introduce *ex post facto* evidence concerning the state of Camaxco's affairs, the claimant's income, and introduces in evidence a letter from an appraisal.
- [8] The first two matters go to the central issues before the court which were addressed in the reasons. For example, on the question of Mr. McKenzie's income for the purposes of spousal support, the claimant argued, *inter alia*, that certain matters have been proved by subsequent evidence. The court utilized a figure between that advanced by the parties and their experts, determined a time-limited period, and then used the low end of the range in determining the final amount.
- [9] The second matter concerns the matter of entitlement to reapportionment and the manner in which reapportionment was made of the corporate family assets. Again, this matter was the subject of submissions and argument.
- [10] The third matter concerns the Shawnigan Lake cottage. The claimant argues that the decision misapplied fundamental principles of statutory interpretation in considering s. 58 of the Family Relations Act. In the result, if the claimant is correct, there is a clear error of law.
- [11] I agree with the authorities that the power to reconsider is a power that should be exercised sparingly, especially where matters were in issue in the proceedings and addressed at trial. In my view, the matters for which the claimant seeks reconsideration are matters which, if there is legal error, should be addressed by the Court of Appeal.

[12] In the circumstances, the application for reconsideration is dismissed.

Stay of Proceedings

[13] The test for a stay of proceedings was recently referenced by Madam Justice Smith and the Court of Appeal in *Palkovics v. Barta*, 2012 BCCA 306, at para.13 as follows:

[13] The test for a stay of proceedings, including execution, is set out in *Gill v. Darbar*, 2003 BCCA 3 at para. 7, and quoted in *Susan Heyes Inc. v. South Coast B.C. Transportation Society*, 2009 BCCA 348 at para. 4:

The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 . . . The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. [in Chambers]).

[14] The first matter, it seems to me, is to consider the appropriate form of order and then consider what part of that order should or should not be stayed.

[15] The parties, I note, do not take issue on the legal test for a stay.

[16] With respect to paragraph 5 of the order, the proposed form of order, and that paragraph reads:

The claimant, James Alexander McKenzie, shall pay to the respondent, Melanie Louise McKenzie, the sum of ONE MILLION EIGHT HUNDRED TWENTY-ONE THOUSAND DOLLARS (\$1,821,000.00) as compensation for her thirty percent (30%) interest in the shares of Camaxco Holdings Ltd.

[17] With respect to that paragraph in the order, that is not a matter that I addressed in my decision. Rather, I left outstanding matters for determination, one of which would be the consequences of my order for reapportionment of Camaxco. It seems to me the proper manner to proceed here was to apply for a compensation order and to address the various circumstances of such an order in submissions.

- [18] That said, I am satisfied that, were I to have made a compensation order, Mr. McKenzie would have to realize on the real property assets to pay Ms. McKenzie's entitlement to reapportionment. That would result in irreversible changes with significant consequences. In the circumstances of an outstanding appeal, given the other requirements were met, I would have stayed the compensation payment in any event pending the appeal.
- [19] In my view then, the proper form of order should omit paragraph 5 pending the application to which I refer. That said, in the circumstances here, I would in any event have stayed making of the compensation payment pending the decision on appeal.
- [20] The real matter at issue then concerns whether I should stay any other part of the order. In my view, there is no basis for staying any other part of the order, including the order requiring payment of lump-sum spousal support.
- [21] The further matter then arises concerning costs. Each party claims costs. The question of costs turns on substantial success. In this case, Ms. McKenzie was successful on the entitlement issues concerning property division issues, Camaxco and Shawnigan Lake cottage, and spousal support. Neither party received what they asked for in their alternative positions and the division of property and spousal support.
- [22] In the scheme of things, however, I am satisfied that Ms. McKenzie has achieved substantial success based on the matters in dispute and the degree of success, the importance of those matters to the litigants, and a global assessment of who was successful. There are no reasons, in my view, to otherwise order.
- [23] In the result, the respondent, Ms. McKenzie, is entitled to her costs.
- [24] The respondent's form of order applies then with the changes noted to paragraph 2, that is replacing paragraph 2 with the claimant's paragraph 2; the deletion of paragraph 5, which I have said which matter should follow upon a proper court application; and the omission of paragraph 9 which is the redundancy. In addition, as I have said, the respondent is entitled to costs.
- [25] In my view, however, it is also important to make some ancillary orders in the circumstances here. Unless Ms. McKenzie is paid lump-sum spousal support and costs within 30 days, she is entitled to take payment of the spousal support lump sum, plus her costs herein, as a first deduction from the proceeds of the sale of the Midland property. If no sale of the Midland property is effected within 60 days, she is entitled to mortgage the Midland property to raise these sums plus post-judgment interest on the spousal lump-sum support order.
- [26] For the purposes of facilitating this matter, Mr. McKenzie is required to remove his CPL from the property.
- [27] As I have said, in the event the Midland property is sold, the proceeds of sale following payment as aforesaid shall be divided equally.

- [28] Part of the orders sought by Ms. McKenzie relate to the joint expert and the appointment of a joint expert. The parties have not really addressed that before me in their submissions, and I would like to hear from you briefly concerning that. It seems to me there is no reason, and I am not going to ask for your submissions on whether or not to appoint such an expert, what I want to hear from you is concerning how the appointment of such expert can be facilitated and that aspect of the matter moved along.
- [29] MS. REID: My Lord, in light of your directions, we will proceed to cooperate with the appointment of a joint expert. We were awaiting today for your ruling, and so if the court believes that it would facilitate matters, we will proceed with that.
- [30] THE COURT: Mr. Rose?
- [31] MR. ROSE: I am satisfied that my friend has said that.
- [32] THE COURT: All right.
- [33] MR. ROSE: And I take it that means that appointment of the joint expert and the calculation of the value of the life interest, because I am sure that the Court of Appeal will want to know the value of that amount of that interest when they are looking at the judgment.
- [34] THE COURT: Yes, it seems to me the parties should be moving along the matter to get a conclusion with respect to the value and that, in the decision of Justice Bauman that I had not been referred to, he refers to how that is to be done, but the starting point, of course, is an appraisal of the property, and then one moves from the appraisal of the property to the value of a life interest, and then of course the value of half a life interest.
- [35] So that is the method that it seems to me the cases contemplate and it seems to me entirely appropriate, but the appraisal is the first aspect of that, and the appraiser may well be able to do all of those things.
- [36] The decision that is referenced, the decision of Justice Bauman, of course, relates to matters as they existed at that time, at that point in time, and that discount rates and so on are time sensitive and interest rate sensitive and so on. So that is a matter that is not a precedent in the case. All right.
- [37] MR. ROSE: My Lord, just one more matter arising from your determination today. In the normal course, after a judgment in a family law case, the payor comes to court with, as I said, an arrangement for compensation and that has not happened. And may I have leave then to bring on, if Mr. McKenzie does not, within a certain amount of time, may I have leave to bring on the application that Your Lordship alluded to, so that that matter can be determined? But in the normal course, it is if -- in the normal course, if the payor does not want -- wishes an order less than gross or wishes a tax to be taken into account, it is he or she that brings it, the application. So either I would like a time limit for Mr. McKenzie to or I would like leave to do that.

- [38] MS. REID: Well, My Lord, my understanding from what you said earlier was that you would have granted a stay on that, in any event.
- [39] THE COURT: I would have granted a stay on execution of a compensation order.
- [40] MS. REID: Yes.
- [41] THE COURT: However, there is not a compensation order at this point in time.
- [42] MS. REID: Yes, I was wondering if perhaps that ought to await the ruling from the Court of Appeal.
- [43] MR. ROSE: Well, my friend is going to be asking for terms of payment, as I understand it, and I'm prepared to put whatever, to do this in a brief written submission as to what each party's position is on the compensation order, because that was clearly contemplated by Your Lordship, a compensation order, that Ms. McKenzie would have her share of the business. So I am prepared to put a -- if my friend puts in writing what Mr. McKenzie suggests, I'm prepared to reply to that.
- [44] MS. REID: Well, as I say, My Lord, the difficulty from my perspective is that the matter is under appeal and we don't know what the ultimate outcome is going to be on the Court of Appeal, and it would create irreparable harm if he were to have to pay it, whatever it is, before the appeal is heard.
- [45] THE COURT: What I have said in my reasons is that I would have stayed the compensation --
- [46] MR. ROSE: Yes.
- [47] THE COURT: -- payment under the compensation order, in any event --
- [48] MR. ROSE: Yes.
- [49] THE COURT: -- pending the appeal.
- [50] MS. REID: Yes.
- [51] THE COURT: Especially given the -- I might add here, given the circumstances to do with the expeditiousness of hearing the appeal. So I am happy to deal with the form of compensation and the amount of a compensation order, but what I have indicated is that I am not prepared to -- I would have been prepared to enter a stay, in any event.
- [52] MR. ROSE: Yes, and I heard that and that was not my submission at all. My submission was simply that Your Lordship intended an order for payment --
- [53] THE COURT: Yes.
- [54] MR. ROSE: -- and I understand it is stayed in any event.
- [55] MS. REID: It does not really --

[56] THE COURT: All right. So I will leave it to either party to bring on that application, if they wish, and I am happy to determine that amount, the amount of a compensation order that would follow, but I think that should be the subject of a separate application.

[57] MR. ROSE: Okay. Much obliged, thank you.

[58] THE COURT: All right. Either party can bring that on.

"The Honourable Mr. Justice Savage"

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