
CANADA / JUDGMENT

McLaren v. Casey

2016 BCSC 169

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 169 McLaren v. Casey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLaren v. Casey,

2016 BCSC 169

Date: 20160204

Docket: 12-0627

Registry: Victoria

Between:

Angeline Janet McLaren

Claimant

And

Ross Emmet Douglas Casey

Respondent

Before: The Honourable Mr. Justice Jenkins

On appeal from: An Arbitrator Award dated March 25, 2015

(McLaren v. Casey, Victoria File 12-0627)

Reasons for Judgment

Counsel for Claimant:

Angeline McLaren

(Appearing in Person)

Counsel for Respondent:

Ross Casey

(Appearing in Person)

Place and Date of Hearing:

Victoria, B.C.

October 21, 2015

Place and Date of Judgment:

Victoria, B.C.

February 4, 2016

- [1] The petitioner seeks an order setting aside an arbitrator's award dated March 25, 2015, respecting the family law dispute which had arisen between the parties. The petition was issued May 22, 2015, and an amended petition was also issued but on September 25, 2015. This proceeding has taken some strange turns before this application to set aside the award which are set out below.
- [2] The parties were self-represented on this application but acknowledged that they had the benefit of legal advice in preparation for it.

Factual Background

- [3] The parties lived in a marriage-like relationship between August 1997 to November 2011. There is one child of that relationship who was born in 2008 and is now 7 years of age.
- [4] In early 2012, the petitioner issued a notice of family claim in this proceeding, i.e. action no. 12-0627. A response to family claim was filed soon after. Both, represented by counsel, began preparing to litigate the issues in the Supreme Court. A trial was scheduled to commence on October 6, 2014 in Victoria, however, following advice from their counsel, the parties adjourned the trial by consent in order to pursue alternative dispute resolution. Previously, in or about April of 2014, the claimant contacted Mr. Eugene Raponi, Q.C. to discuss mediation/arbitration as a means to resolve her differences with the respondent. Family law lawyers consulted by both parties had recommended Mr. Raponi for a mediation/arbitration.
- [5] After initially continuing to advance the claim through the courts, the parties agreed to participate in mediation/arbitration. After an exchange of e-mails in July 2014 in which Mr. Raponi explained his recommended mediation/arbitration process and provided a form of mediation/arbitration agreement which he had prepared.

- [6] The process selected involved the parties meeting to mediate with Mr. Raponi and, failing an agreement being reached, the process was to continue in arbitration. He explained that the process would still allow for a conclusion even if the parties failed to agree to a settlement at mediation. The process overall included an exchange of information and documents and allowed the mediator to be able to understand the positions of the parties before proceeding to determine the "last, best offer".
- [7] In an email dated July 25, 2014, Mr. Raponi explained that "last, best offer" involved him choosing between the final overall offers to settle delivered by the parties and selecting that which he considered "represents the fairest outcome" following which he would deliver brief reasons for his decision. His email message concluded with the following statement:

In your situation, I would be prepared to begin the mediation part of the process without counsel, but request that counsel be involved for the arbitration stage, if that is required. In other words, in the event of an impasse, I require the parties to consult with counsel to develop their last, best offer and to make brief submissions regarding that offer.

- [8] The cost of the mediation/arbitration process was a concern for the claimant, who made inquiries. As of August 1, 2014, the respondent advised the claimant in an email that he would cover the estimated cost of an arbitration if necessary, i.e. \$6,650 plus taxes, and that there would be an adjustment following the arbitration leading to the parties eventually sharing the cost on an equal basis.
- [9] On August 11, 2014, the parties entered into the Mediation/Arbitration Agreement ("the Agreement") with Mr. Raponi. I summarize those portions of the Agreement relevant to the current application and quote from the Agreement where necessary:

- In clauses 1 and 2 the parties appointed Mr. Raponi as mediator/arbitrator with respect to the issues of "Parenting" and "Finances - division of property and support"; however, the parties agreed that the parenting issue was to be resolved by mediation only.
- The process was to begin on August 11, 2014. It was agreed that if the parties failed to settle all issues after two sessions of mediation, the process would be set over for a half-day Arbitration Session "during which the parties must be represented by counsel".
- Clause 4 obliged the parties to provide documents Mr. Raponi considered relevant to the issues.
- Clause 5, under the heading "Summaries", stated:
 5. In the event that the matter proceeds to the Arbitration Session, the spouses' lawyers will each provide the Mediator/Arbitrator with a summary of the relevant facts and of their client's perspective on the issues in dispute by no later than one day prior to the date set for the commencement of the Arbitration Session.
- Clauses 10, 12 and 13 outlined aspects the arbitration process:

10. In the event that the mediation process does not result in a resolution of any or all of the issues, the matter will be set over to the Arbitration Session with Counsel. The parties and Counsel will be given the opportunity to summarize the evidence and their legal positions and present their last, best offer. The Mediator/Arbitrator will make a binding decision with respect to any issues remaining outstanding by choosing the last, best offer that he decides represents the fairest outcome.

....

12. The Mediator/Arbitrator will decide any issues not resolved by mediation by applying the principles of law in the Family Law Act, the Divorce Act and any other applicable law.
 13. Where the parties have, on inquiry, advised that they have no further evidence to give or submissions to make, or the Mediator/Arbitrator considers further hearings to be unnecessary or inappropriate, the Mediator/Arbitrator may close the hearings.
- Under the heading "Final Decision", clauses 15 through 18 stated:
15. The Mediator/Arbitrator will make his final award as soon as reasonably possible after the joint mediation/arbitration session is completed.
 16. The Mediator/Arbitrator will make his final award but will not give written reasons for his decision, unless either of the spouses requests written reasons. The Mediator/Arbitrator will, unless otherwise expressly agreed by the spouses, determine his final award by choosing the last, best offer made by one of the spouses at the conclusion of the mediation.
 17. Subject to the terms of the Arbitration Act, the spouses are bound by the Mediator/Arbitrator's final decision and either party may seek to obtain an order from the Supreme Court of British Columbia in a form consistent with the award by the Mediator/Arbitrator, in accordance with the Arbitration Act.
 18. Except as otherwise specifically set out above, the BCICAC Shorter Rules of Procedure (attached) apply to the Arbitration.

· Under the heading "Counsel" was the following clause, presumably binding counsel to the terms of the Agreement:

28. In the event that the matter proceeds to the Arbitration Session, Counsel must sign the Agreement and be bound by its terms.

[10] The Agreement was signed by the parties and Mr. Raponi but was not signed by counsel.

[11] During the months after the Agreement was executed there was a massive amount of correspondence and an extensive exchange of documentation to be relied upon in the mediation/arbitration and meetings with Mr. Raponi in a mediation setting. It is clear from the materials before me that both parties were receiving legal advice throughout, and on occasion counsel attended sessions. An Arbitration Session had been scheduled in December 2014 which was adjourned to January 2, 2015, and ultimately adjourned until

March. On occasion, the claimant advised by correspondence that she could not afford legal counsel but it was clear she continued to receive legal advice up to the date that the final offers/submissions were made by the parties. At the final meeting before Mr. Raponi on March 20, 2015, neither party was represented by counsel.

- [12] Both parties made final submissions or proposals on March 20, 2015. Late on March 23, 2015, which was set as the deadline for submissions, the claimant submitted a further "final proposal" and the respondent did the same. Correspondence continued unabated through to early March 25, 2015. From my review of the correspondence during the week of March 23, 2015, the submissions in that period of time did not materially change the positions of the parties, but did clarify submissions.
- [13] On March 25, 2015, Mr. Raponi issued his arbitration award under a covering email message in which he explained his award in what might be considered a summary of his reasons for the award. On some issues, the parties had reached agreement but for the most part, on issues still in dispute the arbitrator found in favour of the respondent. From my review of the award and his covering email message, the award appears to be a fair resolution which appears to have been the goal of "last, best offer" arbitration keeping in mind principles of family law including applicable legislation. The award dealt with all issues then remaining between the parties child and spousal support including imputing incomes for each, reapportionment of family property and debt and included an acknowledgement of the parenting arrangements that had been agreed to in the mediation. The award called for certain funds in trust to be used to pay off a joint line of credit, the claimant to transfer her interest in a property to the respondent concurrent with the respondent re-financing the same and removing any liability of the respondent under any mortgage on the property, the respondent being entitled to 50% of the claimant's superannuation pension based upon the time the parties resided together, the parties waiving claims against CPP credits and to each other's RRSPs, sharing capital losses during the relationship and a distribution of certain other assets.
- [14] The introduction to the award included an acknowledgement that "the parties were not represented by counsel throughout, although each had access to legal advice at various points in the process" and that the parties attended before Mr. Raponi on four separate days and only on one of those days was counsel present for the respondent and on no days for the claimant.
- [15] The claimant was not pleased with the result. The respondent filed a notice of application on May 14, 2015 to enforce the Arbitration Award under s. 29 of the Arbitration Act as contemplated in the Agreement.
- [16] On May 15, 2015, the respondent obtained an order before Mr. Justice Grist in this proceeding under s. 29 of the Arbitration Act to enforce the arbitration award "in part", ordering by consent the Registrar of Land Titles to release a Certificate of Pending Litigation from the property to be re-financed and conveying the same property to the respondent

without the signature of the claimant and permitting the claimant to file a Certificate of Pending Litigation against two other properties, authorizing payment of funds from trust to pay the joint line of credit, ordering costs of \$2,080 in the claimants "judicial review or appeal action" and adjourning "the balance of the respondent's motion". The respondent was represented by counsel and the claimant was self-represented.

- [17] On May 22, 2015 the claimant issued the petition seeking an order setting aside the award of Mr. Raponi. The petition, which is an originating document under the Rules of Court, was somehow issued in the family law proceeding which had been initiated by a notice of family claim.
- [18] On June 15, 2015, a further order was granted by Mr. Justice Grist to correct the order of May 15, 2015, also under s. 29 of the Arbitration Act, which directed the Victoria Land Title Office to "convey to and vest in the respondent" the same property referred to in the order of May 15, 2015 and other relief, most of which was very similar to the terms of the order of May 15, 2015. The order was granted "in order to meet the requirements of s. 34 of the Land Title Act. Counsel for the respondent and the claimant both appeared on the application.
- [19] On August 12, 2015, a further order was granted in this proceeding by Mr. Justice Thompson to cancel a further Certificate of Pending Litigation which had been filed against title to the same property on June 19, 2015 and to cancel another Certificate of Pending Litigation filed against the "Wesley property" which CPL had been contemplated and permitted in the May 15, 2015 order. Para. 2 of the August 12, 2015 order also stated:
2. THIS COURT FURTHER ORDERS that:
- a) the claimant shall preserve and retain all of her pension for 120 days from the date of this order as security;
 - b) as further security, the requirement under the Award that the claimant make loan payments to the respondent is hereby suspended for 120 days from the date of this order; and
 - c) as further security, the respondent may not sell either the Cualta property or the Wesley property for 120 days from the date of this order.

The parties appeared in person at the August 12, 2015 hearing.

- [20] The claimant submits that there were several arbitral errors made by Mr. Raponi. The alleged errors include proceeding without lawyers present for the arbitration portion of the mediation/arbitration proceeding, the arbitrator extending deadlines for the filing of materials including a revision of the final submission by the respondent, errors in imputing income of each of the parties, that the mediation/arbitration procedure was a "miss-match" as a proceeding due to the "polarized views" of the parties, that the arbitrator did not allow the claimant's accountant to attend the arbitration, that the claimant was given limited access to the respondent's documents and several other allegations. The claimant continued to allege that she was denied the opportunity of having her lawyer participate in the

arbitration, however, no evidence of such a denial was included in the affidavits.

- [21] The court has not located references to the above orders in the materials filed in support of the claimant's petition, which orders were located in attempting to review the history of this proceeding.
- [22] For the reasons set out below, it will not be necessary for me to review in detail the many allegations of arbitral error submitted by the claimant.

Legislation

- [23] The petition asks this Court to set aside the award, relying on s. 2.1(3) or, in the alternative, s. 30(1)(a) of the Arbitration Act, R.S.B.C. 1996, C. 55.
- [24] Subsections 2.1(3) and (4) of the Arbitration Act state:
- (3) An arbitration agreement respecting a family law dispute, and an award arising from a family law dispute, may be set aside or replaced by the court under the Family Law Act if the court is satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need or distress;
 - (b) a party did not understand the nature or consequences of the agreement;
 - (c) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) A court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the arbitration agreement with an order that is substantially different from the terms set out in the arbitration agreement.
- [25] Alternatively, subsection 30(1) of the Arbitration Act states:

Court may set aside award

30 (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may

- (a) set aside the award, or
 - (b) remit the award to the arbitrator for reconsideration.
- (2) The court may refuse to set aside an award on the grounds of arbitral error if
- (a) the error consists of a defect in form or a technical irregularity, and
 - (b) the refusal would not constitute a substantial wrong or miscarriage of justice.

- (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

....

- (4) Nothing in this section restricts or prevents a court from changing, suspending or terminating all or part of an award, in respect of a family law dispute, for any reason for which an order could be changed, suspended or terminated under the Family Law Act.

[26] According to s. 1 of the Arbitration Act, "arbitral error" means:

... an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

- (a) corrupt or fraudulent conduct;
- (b) bias;
- (c) exceeding the arbitrator's powers;
- (d) failure to observe the rules of natural justice;

[27] The petitioner provides 19 examples of irregularities or errors. She suggests that if uncorrected these defects constitute substantial wrongs and would perpetuate a miscarriage of justice.

[28] Also relevant to this application is s. 29 of the Arbitration Act, which states:

Enforcement of an award

29 (1) With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

- (2) Despite subsection (1), leave of the court is not required if the award is in respect of a family law dispute.

Analysis

[29] Under s. 2.1 of the Arbitration Act the petitioner argues she "not fully informed" about the contract prior to signing it. This argument focused on the petitioner's unfamiliarity with the concept of "last, best offer" arbitration and the British Columbia International Commercial Arbitration Centre's Domestic Commercial Arbitration Shorter Rules of Procedure at the time of signing, and an uncertainty which arose as to whether the offer submitted by either side was to be a "package" or was to be structured "issue by issue".

[30] Regarding the "last, best offer" argument, although not common, this process was clearly agreed to by the parties and has been accepted by courts in Canada as fair. Prior to the arbitration portion of the mediation/arbitration process, Mr. Raponi provided the parties with a copy of the decision of Madam Justice Herman of the Ontario Superior Court of

Justice in *Kroupis-Yanovski v. Yanovski*, 2012 ONSC 5312, in which Herman J. commented at length on the process and approved its use where the parties agreed to it, particularly with respect to financial issues.

- [31] While these may be aspects of the agreement on which the petitioner was unknowledgeable or uncertain, it is difficult to see them as misunderstandings of the nature or consequences of the agreement - those being to enter arbitration to resolve the family dispute outside of the courts with an arbitrator and customized process.
- [32] To this latter point, the parties entered into the Agreement following receipt of legal advice from counsel of their choice. Clauses 14 through 16 inclusive of the Agreement acknowledge the agreement of the parties to proceed with the arbitration process set out in the Agreement and that the parties were to be bound by the final decision of the arbitrator. On receiving the decision, the Agreement allowed that either party "may seek to obtain an order from the Supreme Court of British Columbia . . . consistent with the award . . . in accordance with the Arbitration Act".
- [33] Regarding s. 30 of the Arbitration Act, the claimant places emphasis on decisions of the arbitrator she feels made it more difficult to participate in the arbitration, particularly decisions regarding disclosure, and on the Agreement calling for representation by legal counsel in the Arbitration Session, with the lawyers providing summaries of their clients' positions and presenting their "last best, offer". Regarding the latter, the lawyers did not appear during the Arbitration Session, although they were involved in advising their clients. While it would have been preferable for the parties to have counsel present, both made the decision to proceed without counsel and the arbitrator himself proceeded on that basis, knowing the parties had access to legal advices throughout the process.
- [34] In my view, however, it is not necessary for this Court to consider whether these amount to breaches of natural justice. Regard must be paid to the facts surrounding the applications before this court following delivery of the award on March 25, 2015. A hearing took place before Mr. Justice Grist on May 15, 2015. That hearing was an application under s. 29 of the Arbitration Act to enforce the arbitration award "in part". Mr. Justice Grist made such an order. The parties returned to court on June 15 and August 12, 2015 on applications to further implement the "last, best offer" award. The award which the petitioner seeks to challenge has thus been at least partially enforced by the court. Other portions of the award not specifically referred to in the orders were adjourned. The court has thus exercised its jurisdiction to act under s. 29 of the Arbitration Act, in effect approving the award and giving orders enforcing the same. As the award was an award of the whole of the respondent's "last, best offer", and portions of that award have been implemented, it was necessary for the claimant, if not satisfied with the award, to seek an adjournment of the applications pending the petition, combine the appeal and enforcement proceedings (see: *Farrar v. Bojan High End Kitchens Inc.*, 2013 BCSC 1881; *On Call Internet Services Ltd. v. Telus Communications Co.*, 2013 BCCA 366; *Williston Navigation Inc. v. BCR Finav No. 3*, 2007 BCSC 190) or subsequently appeal the orders. So far as I am aware, those orders were not appealed by the

claimant. If a notice of appeal has been filed in a timely manner, then the remedy for the claimant is to speak to an appeal before the Court of Appeal.[1] Until then, Mr. Justice Grist's order stands and a collateral attack on that ruling through this Court should not proceed: see *R. v. Wilson*, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577; *R. v. Litchfield*, [1993] 4 S.C.R. 333.

[35] Though the court may have discretion to overlook this issue in the circumstances, I would not. In my view, and considering the intention for the arbitration to have been a final determination of the issue and the substantial deference to decisions made in arbitration; the need for the orderly administration of justice; the fact that the litigation surrounds a financial dispute rather than a public law issue; and my view of the lack of merit to the proceeding, it is not appropriate for the matter to proceed.

[36] The respondent has been substantially successful on this application and is entitled to his costs: see *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330; 4 W.W.R. 524; *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2008 BCSC 979.

"Jenkins J."

[1] I come to this conclusion aware that the proper procedure, as I have outlined it, was not followed in the context of an appeal under s. 31 of the Arbitration Act in *Boxer Capital Corp. v. JEL Investments Ltd.*, 2015 BCCA 24. However, in that case the issue of collateral attack went unaddressed.

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