

CANADA / JUDGMENT

O'Connor v. Mills

2024 BCSC 1842

COURT

Supreme Court of British Columbia

DECIDED

7 October 2024

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2024 BCSC 1842 O'Connor v. Mills

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O'Connor v. Mills,

2024 BCSC 1842

Date: 20241007

Docket: E191117

Registry: Vancouver

Between:

Nicola Elizabeth O'Connor

Claimant

And

Michael John Mills

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Re Stay of Costs Order

Counsel for the Claimant:

S.L. Beebe

Counsel for the Respondent:

A. Winters

Place and Date of Hearing/Trial:

Vancouver, B.C.

October 1, 2024

Place and Date of Judgment:

Vancouver, B.C.

October 7, 2024

- [1] This contentious family law matter first came before me in late 2022 to address a preliminary trial motion about expert evidence.
- [2] Since that time, there was a lengthy trial resulting in a comprehensive final order, a supplementary post-trial hearing for clarification of the orders made at trial and a determination of costs.
- [3] The four separate reported written reasons for judgment are indexed, respectively, at:
- a) 2022 BCSC 2236 ("Pre-trial Order");
 - b) 2023 BCSC 1886 ("Final Order");
 - c) 2024 BCSC 20 ("Supplementary Order"); and
 - d) 2024 BCSC 804 ("Costs Order").
- [4] There have been further additional appearances before me which did not require written reasons for judgment, the most significant being on December 14, 2023 which resulted in a consent order ("Consent Order").
- [5] The matter comes back before me again principally to determine the how the Consent Order is to be interpreted in light of the Costs Order. Alternatively, the respondent seeks a fresh order seeking a stay of the Costs Order.
- [6] To put the Consent Order into important context, the lengthy reasons for judgment setting out my findings of fact and legal conclusions underlying the terms of the Final Order were released on October 30, 2023.
- [7] The respondent promptly filed a notice of appeal of the Final Order on November 17, 2023 ("Appeal").
- [8] The respondent thereafter filed an application on December 4, 2023 seeking a stay ("Stay Application").
- [9] That same day, and again within the requisite timeframe required under the Supreme Court Family Rules [Rules], the claimant filed her own notice of appeal ("Cross-Appeal").

- [10] Departing from the chronology briefly, the parties have since filed factums in the Appeal and the Cross-Appeal and both intend to pursue same. The Appeal and Cross-Appeal are scheduled for hearing before the Court of Appeal on October 23, 2024 (some approximately three weeks from issuance of these reasons for judgment).
- [11] As I acknowledged to counsel in the course of submissions, the factums are well prepared and raise meritorious arguments. Neither is, in my view, frivolous.
- [12] However, when the Stay Application came before me on December 14, 2023, the appeal process was in its true infancy for both parties. The Cross-Appeal had been filed, by my count, seven business days prior that appearance. The notice of appeal in the Cross-Appeal was further filed by counsel who had not been trial counsel and neither counsel yet had copies of the transcripts of the evidentiary portion of the trial. The notice of appeal in the Cross-Appeal thus raised a multitude of alleged errors, which have since been narrowed appropriately in the course of factum preparation.
- [13] It is within that factual matrix that counsel for the parties spoke to the terms of the Consent Order.
- [14] The material term of Consent Order is paragraph 1 which provides that:
1. Subject to paragraph 2 herein, execution of the orders of Justice Hardwick flowing from reasons for judgment released October 30, 2023 (the "Reasons"), but not yet entered, are stayed pending the hearing of B.C. Court of Appeal File No. CA49481, or further written agreement between the parties.
- [15] Paragraph 2 is a very specific carve out of the stay regarding the return of a piece of artwork mandated under the terms of the Final Order. It is uncontroversial in its wording and is not material to the primary financial issues between the parties but is relevant, I accept, because of the fact that it was carved out of the stay agreed to in the Consent Order.
- [16] There is, in contrast, no specific carve out for the issue of costs. The extent of any orders made regarding costs as of that date (December 14, 2023) was paragraph 12 of the Final Order (as of then not even settled and entered as noted) which provided that "leave is granted for counsel to make further submissions as to costs".
- [17] Underlying paragraph 12 of the Final Order were paras. 259 to 262 of the Reasons (as so defined in paragraph 1 of the Consent Order) which state as follows:
- [259] Costs pursuant to R. 16 of the Supreme Court Family Rules are always at the discretion of the trial judge.
- [260] In a lengthy trial such as this, it is difficult for the parties to make fulsome submissions on costs given that the outcome of the trial is unknown to the parties at the conclusion of submissions.

[261] Further, it is possible that there are submissions to be made with respect to formal offers that may have been exchanged pursuant to R. 11-1.

[262] In the circumstances, counsel for the parties agreed that the issue of costs should be addressed after the issuance of these reasons for judgment.

[Emphasis added.]

[18] Paragraph 263 of the Reasons then set out a schedule for, inter alia, the exchange of submissions. The schedule was subsequently modified by agreement. However, the key takeaway is that prior to agreeing to the terms of the Consent Order the parties were aware that the issue of costs was very much live and that timeline for exchange of written submissions and the scheduling of a possible oral hearing as provided for in the Final Order had not yet expired.

[19] Ultimately the issue of costs was decided exclusively on the basis of written submissions. As set out in the reasons for judgment indexed at 2024 BCSC 804 and as articulated in the Costs Order, I concluded that the claimant was entitled to her costs of this action, except where previously disallowed by court order herein, pursuant to R. 16-1 of the Rules on the basis that the matter was of ordinary difficulty.

[20] Following the Costs Order, the claimant sought to have her costs quantified.

[21] The respondent was, I accept, rather skeptical about whether this was a good use of litigation resources given the Appeal and the Cross-Appeal. However, the respondent did, through his counsel, ultimately engage in correspondence on this issue.

[22] The result of this correspondence was a negotiated agreement that the claimant's court ordered costs of the proceeding are fixed at \$77,806.56 ("Agreed Costs").

[23] The claimant then sought to have the Agreed Costs incorporated into a certificate of costs.

[24] A certificate of costs permits the claimant to take enforcement measures to collect the Agreed Costs.

[25] This raises an important point because any distribution of the Monck Park Trust Funds (as defined in the Reasons) in accordance with the Final Order is, without question, stayed pending the hearing of the Appeal and Cross-Appeal unless there is written agreement of the parties.

[26] Accordingly, if the claimant were to initiate enforcement measures to collect the Agreed Costs at this juncture it would presumptively be against other property held in the name of the respondent or through possible garnishment of wages. This is a broad generalization of the enforcement remedies available to a creditor at law but it suffices for these purposes.

[27] Before moving on, I recognize that in the course submissions counsel for the respondent indicated that if a stay is not maintained/ordered afresh that the Agreed Costs can simply be paid out of the Monck Park Trust Funds to avoid potential complications with enforcement

and associated costs. That is, however, because the respondent consents to same. Failing that concession, which is an alternative submission to the primary relief sought, the Consent Order puts the Monck Park Trust Funds out of the claimant's reach pending the hearing of the Appeal and the Cross-Appeal.

- [28] Consistent with the foregoing, the claimant recently, on September 27, 2024, obtained a certificate of costs signed on the bench by Associate Judge S. Hughes for \$77,078.56 on the express condition that it not be submitted to the registry for entry until after the respondent's present application proceeded before me.
- [29] Moving now to the applicable legal considerations. The interpretation of the Consent Order needs to be done using the framework set forth in *Sattva Capital Corp v. Creston Moly Corp.*, 2014 SCC 53 [Sattva].
- [30] I reach this conclusion on the basis of the foundation principle, established pre-Sattva by our Court of Appeal in *D. (B.G.) v. D. (R.W.)*, 2003 BCCA 259 at para. 10 [D. (B.G.)], that a consent order "is really the formal expression of an agreement between the parties and that it must be interpreted and dealt with as if it were a contract". In relying on this statement, I recognize the factual context of *D. (B.G.)*, as contained in the brief oral reasons for judgment authored by Justice Smith and commented on by Justice Lambert, is quite different, but the underlying premise remains the same.
- [31] Returning to Sattva, the portions of the Supreme Court of Canada's decision which are relevant to interpreting the Consent Order are, in my view, paras. 46-58. For brevity, I summarize the key principles as follows:
- a) When interpreting a consent order, as with an agreement, my role as the presiding chambers judge is to look for the common intent of the parties and the scope of their understanding (para. 47); and
 - b) While the circumstances surrounding formation of the consent order, assessed objectively, may be helpful in interpreting its terms, they "must never be allowed to overwhelm the words of that agreement" (para. 57).
- [32] Applying this law to the facts as I have laid out above, I am satisfied that the Consent Order contemplated, by necessary implication, a stay of the Costs Order. I reach this conclusion for the following reasons:
- a) The parties were aware that the issue of costs remained outstanding;
 - b) The parties were operating on the basis that their respective positions, as then asserted in the Appeal and the Cross-Appeal, put significantly all of the substantive orders contained in the Final Order in issue. Whilst the scope of the Appeal and the Cross-Appeal have narrowed in due course, that was not the case on December 14, 2023;

- c) The parties, both represented by counsel, were cognizant to carve out the return of the artwork in paragraph 2 of the Consent Order. They did not carve out the issue of costs; and
 - d) The subsequent cooperation of the respondent in quantifying the costs which the claimant is entitled to pursuant to the Costs Order cannot be allowed to overwhelm the plain reading of paragraph 1 of the Consent Order.
- [33] In light of my above conclusion, I am not going to address the alternative argument for an expansion of the stay provided for in the Consent Order in significant detail.
- [34] However, it is important to consider that one of three components in obtaining a stay of execution is a consideration of the balance of convenience: see *Rotaru v. Rotaru*, 2009 BCSC 480 at para. 10.
- [35] In making submissions in opposition of an expanded stay, claimant's counsel appears to have possibly not entirely appreciated the significance of the wording of paragraph 1 of the Consent Order which says, as I quoted above, "execution of the orders are stayed pending hearing of [the Appeal]".
- [36] Paragraph 1 of the Consent Order expressly does not say "the determination of" the Appeal, the "conclusion of" the Appeal or other similar words to that effect. The present stay, as contemplated by the Consent Order, is tied to the "hearing" of the Appeal. That is, again as noted, October 23, 2024.
- [37] This fact alone, I conclude, would strongly push the balance of convenience in favour of the respondent given the chronology of this family law matter which initially was commenced in 2015 and then discontinued (a point covered in the Reasons), refiled afresh in 2019, and eventually proceeded to trial commencing in late 2022. Three weeks is but barely a blink in that litigation timeline.
- [38] In pointing out the above, I acknowledge that there is nothing precluding the respondent from seeking a further stay in the event that judgment is reserved on the Appeal and Cross-Appeal. However, it is not this Court's role to renegotiate or redraft the Consent Order. Both parties have capable counsel and that is the wording that they agreed upon and confirmed in writing on December 14, 2023. If this Court were to "tinker" with that wording at this juncture to account for the disagreement over payment of the Agreed Costs (as now confirmed by Associate Judge S. Hughes subject to my order), it substantially changes the scope of the Consent Order.
- [39] I thus order that any enforcement of the Costs Order, as quantified in the certificate of costs endorsed by Associate Judge S. Hughes on September 27, 2024 is stayed pending the hearing of the Appeal and the Cross-Appeal pursuant to the Consent Order.
- [40] Costs of chambers applications are always at the discretion of the presiding justice. Specifically, R. 16-1(7) provides that the costs are to be awarded to the successful party unless otherwise ordered. This is a matter of judicial discretion.

- [41] I outlined the applicable portion of the Rules and the law interpreting same in 2024 BCSC 804. I do not think the parties or counsel need to hear me reiterate myself again.
- [42] Ultimately, the respondent was substantially successful in obtaining the stay of the Costs Order pending the hearing of Appeal pursuant to my interpretation of the Consent Order.
- [43] The respondent's costs are payable in any event of the cause and to be assessed, consistent with the Costs Order, on the basis that the application is of ordinary difficulty. These are not payable forthwith given that the ultimate determination of which parties owes what costs is tied to the outcome of the Appeal and Cross-Appeal.

"Hardwick J."

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