
CANADA / JUDGMENT

P.T. v. K.T. and others

2017 BCSC 520

COURT

Supreme Court of British Columbia

DECIDED

30 March 2017

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2017 BCSC 520 P.T. v. K.T. and others

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.T. v. K.T. and others,

2017 BCSC 520

Date: 20170330

Docket: E141550

Registry: Vancouver

Between:

P.T.

Claimant

And

K.T.,

E.T., in her personal capacity and in her capacity as
trustee of the T. Family Trust, V.T., and Kryos Holdings Ltd.

Respondents

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Acting on his own behalf:

P.T.

Counsel for the Applicant Kryos Holdings Ltd.:

S.L. Booth

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 15, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 30, 2017

Introduction

- [1] On December 16, 2016 following a thirteen day trial in a relatively complex matrimonial dispute, I released Reasons for Judgement indexed at 2016 BCSC 2367 (the "Reasons"). The Reasons addressed numerous claims and forms of relief. In the Reasons, I awarded P.T. (the "Respondent"), inter alia, a \$1,019,250 monetary award that reflected a twenty-five percent interest in a strata-tilted four-plex in the 300 block of West 14th Avenue in Vancouver (the "West 14th Property").
- [2] On February 6, 2017, Kryos Holdings Ltd. ("Kryos") filed a notice of application to re-open the trial, before judgement was entered, asking that I revisit the monetary award that I had made on account of a potential latent capital gains tax on the West 14th Property.

Background

- [3] The trial of this matter followed the breakdown of a more than twenty year marriage between the Respondent and K.T. Among the issues to be resolved was the Respondent's interest in the West 14th Property. In the Reasons, I held that the Respondent had a beneficial interest, by way of an unjust enrichment claim, in the West 14th Property, and I quantified that interest on the quantum valebatur scale or value survived basis, allowing the Respondent to participate in the growth of the property's value.
- [4] By way of background, K.T.'s parents, E.T. and V.T., owned the West 14th Property and treated it as an investment property. In 1994, E.T. and V.T. made use of an estate planning technique colloquially referred to as an "estate freeze". Specifically, E.T. and V.T. transferred the West 14th Property beneficially to Kryos in exchange for preferred shares and loans valued at \$600,000. At the same time, the T. Family Trust (the "Trust") subscribed for the common participating shares of Kryos while E.T. and V.T. retained the voting shares and control of Kryos. E.T. and V.T. controlled the Trust as trustees with discretion to manage and distribute the Trust property, namely, the class B shares; Reasons para. 9.

- [5] In the Reasons I accepted that the Respondent and K.T. had, as a family unit, made substantial contributions to the redevelopment of the West 14th Property beginning in 2000. I canvassed these contributions at length at paras. 46-70 of the Reasons. By way of brief summary, the Respondent and K.T. were involved in family deliberations regarding the best possible use of the property, liaised with architects and project managers, and managed and worked alongside contractors and subcontractors. The Respondent did general labour, designed the electrical system, laid cable, and assisted with the security system. K.T. left her employment to devote more time to the project. Once complete, the Respondent and K.T. occupied one of the units, maintaining the property and the financial records. They managed all aspects of the tenancies in the remaining units.
- [6] In the Reasons I held that the Respondent had established an unjust enrichment claim to the West 14th Property. After reviewing both the Respondent's and K.T.'s contributions to the property, I awarded the Respondent a monetary award of \$1,019,250. This award represented twenty-five per cent of the West 14th Property's value. My award did not account for future contingent taxes that would become payable if either the West 14th Property, or one of the units in that property, was sold to satisfy the Respondent's monetary award. On this application the Applicant argues that the Respondent's award should be reduced by \$172,431.50 to reflect twenty-five per cent of the capital gains tax that would be incurred in the event that the entire property is sold.

Issues

- [7] Should the trial be re-opened to address the narrow issue of allocating the latent capital gains tax that would arise from the sale of all or a part of the West 14th Property?
- [8] If the trial is re-opened, should the Respondent's monetary award be reduced to reflect a latent capital gains tax, and if so, what is the proper reduction?

Re-opening the Trial

- [9] Reopening a trial is matter of judicial discretion. The scope of that discretion is wide and unfettered, but it is to be used sparingly; see *Vander Ende v. Vander Ende*, 2010 BCSC 597 at para. 84; *Clayton v. British American Securities Ltd.* (1934), [1935] 1 D.L.R. 432 1934 at para. 98; *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 at para. 9 (B.C. C.A.). The source of the power to re-open is the inherent jurisdiction of the court to control its own processes and to prevent an injustice; see *Chutter v. Chutter*, 2009 BCCA 177 at para. 9.
- [10] The discretion to re-open a trial is exercised with the view of avoiding a miscarriage of justice; see *Vance v. Vance* (1981), 34 B.C.L.R. 209 at para. 4; and *Grewal v. Grewal*, 2016 BCCA 237 at para. 7. In *Sykes* at para. 10, Wood J.A. identified four circumstances that may call for a trial to be re-opened: (1) new, relevant evidence not available at the time of trial; (2) overlooked material evidence; (3) misconstrued material evidence ; or (4) misapplication of the law; see *Moradkhan v. Mofidi*, 2013 BCCA 132, at paras. 28-32, for a recent summary of

the pertinent legal principles.

- [11] The Applicant relies on *Wilson v. Fotsch*, 2010 BCCA 226 at para. 50, for the proposition that a proprietary remedy confers both the benefits and the risks of ownership, and it asks this court to extend that proposition to cover a monetary award quantified on a value survived basis. At bottom the Applicant argues that to allow the Respondent to share in growth of the property's value without sharing in the associated costs, in this case a contingent future tax liability, would be a miscarriage of justice.
- [12] The Applicant correctly observes that one of the schedules to an expert report filed at trial identified and calculated the latent capital gains tax that would arise from the sale of the West 14th Property. The Applicant further provided a table, in its closing submissions, that indicated what tax consequences would ensue from a sale of the West 14th Property. Kryos acknowledges, however, that no party made any submissions at trial on the issue of whether potential latent capital gains taxes should discount a monetary award measured against the value of the West 14th Property.
- [13] The Respondent argues that this failure, on the part of the Applicant at trial, should be determinative of this application. He further argues that focussing on this narrow issue ignores that nature of the holistic or global assessment that I undertook in the Reasons; Reasons paras. 140 and 162.
- [14] Though aspects of the Respondent's position are correct I consider that it is appropriate to revisit the award I initially made and to consider, on a principled basis, the issue that the Applicant has raised. The potential injustice to the Applicant outweighs any prejudice that might be visited on the Respondent. Simply put, to allow the Respondent to benefit from the increased value of the West 14th Property without responsibility for associated costs has the potential of being unfair.

The Latent Capital Gains Tax

- [15] In *Stein v. Stein*, 2008 SCC 35 at para. 8, the Supreme Court of Canada held that the Family Relations Act, R.S.B.C. 1996, c. 128, (the "FRA") did not preclude an order dividing a future liability that could not be valued at the time of trial, for the purposes of equalizing matrimonial property. This rule ensures that the distribution of family assets between spouses is fair.
- [16] *Stein* has not been interpreted, however, to require trial courts to divide future contingent liabilities between spouses. The distinction between speculative and determinate contingent future liabilities both informs and governs whether a court will divide such liabilities between the parties. In *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 29, 31-32, decided under the current Family Law Act, S.B.C. 2011, c. 25, the British Columbia Court of Appeal reviewed a number of relevant authorities and confirmed that future contingent tax liabilities need not necessarily be taken into account where "it is not known when, if ever, the asset would be sold" or where those costs are "hypothetical and speculative"; see paras.

28 and 32.

[17] The clearest historical antecedent of this principle is *McPherson v. McPherson* (1988), 48 D.L.R. (4th) 577 (Ont. C.A.), where the court said:

20 The cases appear to turn on their own facts and, if I might hazard a broad distinction, an allowance should be made in the case where there is evidence that the disposition will involve a sale or transfer of property that attract tax consequences, and it should not be made in the case where it is not clear when, if ever, a sale or transfer of property will be made and thus the tax consequences of such an occurrence are so speculative that they can safely be ignored.

[18] Accordingly, if an asset must be sold in order to effect the division of assets and tax consequences will arise, those tax consequences should be accounted for in the division of assets; see *Laxton v. Coglon*, 2008 BCCA 414 at para. 52; and *Cochrane v. Cochrane*, 2013 BCSC 2114 at para. 38.

[19] *Mohajeriko v. Gandomi*, 2009 BCSC 393, is perhaps the most analogous decision to the facts before me. In that case, the court considered the allocation of latent capital gains taxes for the purposes of property equalization; see paras. 121-127. The defendant's accountant calculated that the capital gains tax on the subject property would amount to \$37,750.00. The court, at para. 122, distinguished the case before it from *Stein* on the basis that there was no evidence that the defendant had any intention to sell the property, and therefore, any prospect of a capital gains tax was, at best, speculative.

[20] At trial I was told by V.T. and K.T., and by Kryos' accountant, that the Respondent and K.T.'s two children were to receive the beneficial interest in the West 14th Property. There was no evidence at trial of any intention, imminent or otherwise, to sell the property. Furthermore, I was expressly asked by Kryos, V.T. and K.T., in their final submissions, to provide them with some period of time that would allow them to refinance the West 14th Property so that they could pay the amounts to the Respondent that he was owed.

[21] In this application, Counsel for Kryos advised me that the Applicant was still endeavoring to refinance the West 14th Property for the purposes of satisfying the Respondent's award but that it was not clear if it could do so. Thus, more than five months post trial, the stated intention of the Kryos continued to be to hold the West 14th Property.

An "If and When" Order

[22] Accounting for a speculative future contingent tax liability in property division runs the risk that the division of assets will be unfair to one party if that tax liability never materializes or only does so in the distant future. Failing to account for a potential or speculative future contingent tax liability runs the same risk of unfairness but for the other party.

- [23] The "if and when" order has been crafted to address these risks. In *S. (M.) v. M. (M.)*, 2015 BCSC 1599, Justice Pearlman, at paras. 156-175, discussed the relevant authorities and their application to the circumstances before him at some length. Justice Pearlman ultimately ordered, at para. 175, that in the event that it became necessary to draw funds out of a corporation, subject to a personal income tax rate of thirty-four percent, to pay a compensation order, the contingent tax liability would be shared by the parties.
- [24] In *Jaszczywska v. Kostanski*, 2016 BCCA 286, the chambers judge had divided the value of shares in a company without adjusting for the tax consequence of that order. On appeal, at paras. 69-70, the court granted an "if and when" order. The Court ordered that \$99,318 be deducted from the compensation order that had been made and that that sum be paid into an interest-bearing trust account pending satisfactory proof that the tax liability had materialized. The Court limited the life of the order with a sunset provision of two years; see para. 70. The Court concluded that if no tax liability had been incurred in that time the funds could be released to Mrs. Jaszczywska with no further liability on her part for any taxes if they were incurred at a later time.
- [25] Courts are generally reluctant to make "if and when" orders on the basis that the parties are best served and judicial resources are best preserved when finality is brought to a dispute; see *Jaszczywska* at para. 69. Nevertheless, the British Columbia Court of Appeal in *Maguire v. Maguire*, 2016 BCCA 431, at paras. 36-37, again confirmed, in obiter, that the "if and when" orders in *S. (M.)* and *Jaszczywska* were appropriate in the circumstances of those cases.
- [26] The court also summarized the state of the law, albeit under the FRA, and said:
- [38] The case law that developed under the FRA provided that there is no absolute rule as to whether tax consequences should or should not be taken into account in the division of family assets. Where there is evidence that a division of family assets will attract tax consequences, an allowance should be made for tax. Where it is not clear when or in what amount taxes will be exigible, an allowance may not be made: *Murchie v. Murchie* (1984), 53 B.C.L.R. 157 at para. 390 (C.A.); *Halpin* at para. 63; *McPherson v. McPherson* (1988), 48 D.L.R. (4th) 577 at 583 (Ont. C.A.). Likewise, where taxes are "speculative" the court may not take taxes into account: *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 at para. 54 (C.A.); *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 31-32.
- [27] There is no principled reason that a different set of conclusions or a different result would ensue under the Family Law Act. This conclusion aligns with the principles expressed in *Ouellette*.
- [28] In this case I do not consider that there is any reasonable prospect that the whole of the West 14th Property will be sold in the foreseeable future in order to satisfy the award made to the Respondent. Instead I consider that that prospect is both hypothetical and speculative.

- [29] There is, however some prospect that the Applicant may have to sell one of the units in the West 14th Property to satisfy the Respondent's monetary award. I was provided with calculations which would fix the tax liability for the sale of a specific unit at \$53,025.63.
- [30] Based on the foregoing authorities, findings and calculations, I order that \$53,025.63 be deducted from the Respondent's award of \$1,019,250 and paid into an interest bearing trust account with the Applicant's lawyer, Mr. Booth, pending satisfactory proof that the Applicant has sold a unit in the West 14th Property and incurred a capital gains tax. If one of the units of the property is not put on the market within thirty days of this judgment, these funds are to be released to the Respondent without his having any further responsibility for taxes should they be incurred at a later date. At that point more than four months will have passed since the Reasons were first issued. If a unit is put on the market within thirty days, then the funds are to be retained in trust for an additional six months pending satisfactory proof that the Applicants sold that unit and incurred a capital gains tax. If the property is not sold within the additional six months, the funds are to be released to the Respondent without his having any further responsibility for taxes should they be incurred at a later date.
- [31] The parties are to bear their own costs of this application.

"Voith J."

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Prepared on 28 October 2026 · Esheria