

CANADA / JUDGMENT

## Pennors v. Pennors

2020 BCSC 550

### COURT

Supreme Court of British Columbia

### DECIDED

29 April 2020

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2020 BCSC 550 Pennors v. Pennors

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pennors v. Pennors,

2020 BCSC 550

Date: 20200429

Docket: E54903

Registry: New Westminster

Between:

Jean-Marc Pennors

Claimant

And

Miroslawa Pennors also known as Miroslawa Janota also known as

Mirka Pennors

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for Claimant:

P. Cote

Counsel for Respondent:

S. Label

Place and Date of Hearing:

New Westminster, B.C.

March 12, 2020

Written submissions by the Respondent:

April 14, 2020

Written submissions by the Claimant:

April 20, 2020

Place and Date of Judgment:

New Westminster, B.C.

**April 29, 2020**

[1] The following reasons are divided into two parts: the original reasons for judgment and then addendum reasons on Mr. Pennors' new application for orders admitting fresh evidence and for production of further bank records. I had signed the original reasons for judgment and the publication clerk of the court had notified the parties that the reasons would be released to them the following morning. However, later that same day, I received through the trial registry a request to appear filed by the respondent Mr. Pennors with respect to the above new application, and Ms. Pennors' letter of opposition. The request had been submitted a few days earlier but was forwarded to me that day. The parties agreed to proceed by way of written submissions. I have now received and considered the new application. As that application does not change the result of the original decision, I have left the original decision intact and added the reasons concerning Mr. Pennors' new application at the end.

**A. Original reasons for judgment**

[2] The respondent, Ms. Pennors, seeks an order dismissing the notice of family claim:

- a) pursuant to Rule 11-2(1) of the Supreme Court Family Rules. This was narrowed during the hearing to be an allegation this action was an abuse of process; and
- b) pursuant to Rule 11-3 by way of summary trial.

[3] The claimant, Mr. Pennors, seeks an order pursuant to Rules 9-1(11) and (14) that Ms. Pennors provide him with statements for any CIBC or RBC bank accounts held in her name from January 1, 1993 to December 31, 2013, and letters from CIBC and RBC indicating what accounts, if any, she had during that time period. An application was not brought pursuant to Rule 9-1(15) to compel production from the banks. During the hearing, the application was modified for an order that Ms. Pennors sign an authorization directed to the banks to produce such records from January 1, 1998 to December 31, 2013. As neither party has

opposed this approach, I proceed on the basis that the bank records are documents that are within Ms. Pennors' power to produce and available to Ms. Pennors if she were to sign an authorization.

- [4] Mr. Pennors opposes Ms. Pennors' applications to dismiss the notice of family claim on the basis that Mr. Pennors has a reasonable basis for bringing the action and it would be unjust to decide the issues because Ms. Pennors has not produced the bank records he requests.

Law

### Striking for abuse of process

- [5] Pursuant to Rule 11-1(1)(d), a court may strike out a pleading or dismiss an action if it is "otherwise an abuse of the process of the court".

Summary trial

- [6] Pursuant to Rule 11-3(15), the court may grant judgment in favour of a party, unless:
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
  - (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

Production of documents

- [7] Rule 9-1 provides for a two-stage process of document discovery:
- a) a first stage for production of documents in a party's "possession or control" that could "prove or disprove a material fact": Rule 9-1(1); and
  - b) a second stage, if requested by a party, for documents in a party's "possession, power or control", which "relate to any or all matters in question in the family law case", a wider scope of documents. A demand for the latter must be accompanied by a written demand that identifies the documents "with reasonable specificity and that indicates the reason why such additional documents" should be disclosed: Rule 9-1(8).
- [8] A party who opposes the production of either of the above class of document demands must indicate "why those documents are not being made available": Rule 9-1(9)(c).
- [9] A party who seeks documents which have been demanded in accordance with the above procedure may apply for an order requiring the listing party to comply with the demand: Rule 9-1(10); The court may excuse a party from compliance with certain sub-rules or the demand or may order the party to amend the party's list of documents and produce the documents: Rule 9-1(11).
- [10] In *Dufault v. Stevens*, [1978] B.C.J. No. 1219 (C.A.), the court stated, in relation to the previous Rule 26:

- [9] The intent of R. 26(11) is to provide any party to an action with the means of obtaining the production and inspection of a document if the applicant is able to satisfy the judge that the document contains information which may relate to a matter in issue, and of obtaining a copy of the document to use in lieu of the original in the event that a document does contain information which may relate to a matter in issue. No party has priority to an order for production and inspection over any other party or any paramount right to an order for production and inspection. A party applying for an order under R. 26(11) must satisfy the court that the application is not in the nature of a "fishing expedition": *Rhoades v. Occidental Life Ins. Co. of California*, supra. He must show that a person who is not a party to the action has a "document" or "documents" in his possession which relate to a matter in issue. The comments of Brett L.J. in *Cie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at 63 (C.A.), as to what constitutes a document relating to a matter in question have been quoted by this court on several occasions.
- [11] In *Moukhine v. Collins*, 2010 BCSC 621, which was cited in *N.B. v. S.B.*, 2010 BCSC 1487, relied upon by Ms. Pennors, there is a helpful discussion of whether pleadings alone are sufficient to support an application for production of records from a third party. Although decided under the former Rule 26, and in the context of a personal injury action, in my view the principles are still applicable:
- [18] In my opinion, nothing in *Dufault* is authority for the proposition that pleadings alone are insufficient to make an order under Rule 26(11) or that evidence is always necessary. Similarly, *Dhaliwal* does not address the relevance of pleadings as a basis for making a Rule 26(11) order. There is no reference in the judgment to the issues pleaded in the action and whether pleadings would have affected the outcome. The case deals only with the sufficiency of the evidence that was before the court. I do not draw from the case the proposition that pleadings standing alone and defining the issues in the action are never a sufficient basis to satisfy the court to make a Rule 26(11) order.
- [22] In an appropriate case pleadings are a sufficient basis on which to exercise a discretion to order production of at least some documents. In some cases it is reasonably obvious that records may contain relevant (in the sense that term is used in *Peruvian Guano*) information and should be produced, subject to production following a Jones or Halliday format. Evidence may be required in order to resist a production order. That does not mean, however, that an order will always go on the basis of pleadings alone and it may be premature in some circumstances to make such an order before discovery (see, for example, *Mehdipour v. Shingler* (18 March 2009), Vancouver M080517 (S.C.)). Merely pleading pre-existing conditions does not deprive the court of its discretion to refuse to make the order sought when, for example, there is no air of reality about the alleged connection between the documents sought and the issues in the action. Evidence may therefore, on occasion, be required to establish the relevant connection to overcome the conclusion that the documents are irrelevant to the claim.

## Evidence

- [12] The parties were married in 1993 in Poland. They lived in France until 1998 at which point they moved to Canada. They separated in September 2014. Ms. Pennors states that throughout their marriage, Mr. Pennors' income was always far greater than hers. At the time of separation his income was about double hers.
- [13] In September 2015, Mr. Pennors commenced a family law action, No. E152691, Vancouver Registry against Ms. Pennors (the "Vancouver Action") seeking amongst other relief, a division of family property and debt.
- [14] In January 2016, the parties attended a judicial case conference in the Vancouver Action. Following the judicial case conference, the parties entered into a settlement agreement. Both parties were represented by counsel.
- [15] On March 9, 2016, a final order by consent was made on all corollary relief including division of property and debts (the "Final Order"). The property divided included, amongst other assets, employment pensions in BC and France (unidentified), three plots of land in Poland (identified by address and number), bank accounts in BC and France (not identified), and a general statement that all other remaining property in each party's name remain their own.
- [16] Prior to the settlement and Final Order, on January 8, 2016, Ms. Pennors swore an F8 Financial Statement in the Vancouver Action. The F8 discloses property in Poland and bank accounts at TD and Tangerine.
- [17] Two years later, on March 12, 2018, Mr. Pennors commenced this action claiming an interest in property identified as follows:
1. Any and all real property in Poland the Respondent has or had an equitable interest in and did not disclose at the time the Final Order of March 9, 2016 was made.
  2. Any and all bank accounts in Poland the Respondent has or had an equitable interest in and did not disclose at the time the Final Order of March 9, 2016 was made.
  3. Any and all property, included but not limited to real property, bank accounts, investments, business interest etc. the Respondent liquidated or transferred in Poland that was subject to division pursuant to the Family Law Act at the time the Final Order of March 9, 2016 was made.
- [18] In September 2018, Ms. Pennors was served with the notice of family claim in this action and filed a response to family claim alleging that all her assets, including her assets in Poland, were disclosed to Mr. Pennors and his counsel prior to the Final Order. She has also sworn an affidavit on this application that she made full financial disclosure prior to the Final Order. She has also sworn a form F8 financial statement on February 15, 2019 listing the three properties in Poland disclosed in her January 8, 2016 form F8, and bank accounts at TD and Tangerine as well as a new bank account since separation at Scotiabank.

- [19] On July 10, 2019, Ms. Pennors' counsel wrote to Mr. Pennors' counsel requesting the basis upon which Mr. Pennors claims that property in Poland was not disclosed. There is no evidence of a response to this letter.
- [20] On October 23, 2019 the parties attended a judicial case conference in this action. The parties were ordered to exchange lists of documents.
- [21] On November 6, 2019, Mr. Pennors delivered his list of documents. The documents of relevance to this application are described by Mr. Pennors' counsel in the letter delivering the list of documents:

Documents 4.1 and 4.2 are the product of a paid search for international transactions in Ms. Pennor[s'] name. Mr. Pennors had to provide her Date of Birth and SIN information as part of the search. From document 4.1 it appears that Ms. Pennors has bank accounts at RBC and CIBC that have been involved in international transactions that were not listed as part of the original proceeding. Document 4.2 list[s] Kredyt Bank which I am advised is a Polish bank. Document 5.1 shows the sale of two properties in Poland of which Ms. Pennors was either an owner or co-owner and which were not disclosed as part of the original proceeding.

Please provide all relevant records in this matter, including records associated with the above noted banks and transactions.

- [22] The documents referred to are attached to an affidavit and I will describe them. Document 5.1 is an email chain in March and April 2015 (prior to the Final Order) between Mr. Pennors and a person identified as a notary in Poland. Mr. Pennors inquired about how he can obtain information regarding three lots in Poland. The notary found two properties where Ms. Pennors was noted as owner and co-owner and gave Mr. Pennors a link that would provide him with more information. There is then a gap in time until September 2017 when Mr. Pennors emailed the notary again and asked how he could get the contracts for "donation of the properties by the parents (about year 1996) and for the sale of one lot (in year 2004)". The notary provided him with the information on how he could file an application to obtain two documents at the District Court in Poland.
- [23] Document 4.2 is an email dated September 14, 2016 from "Asset Locate Services" in Florida. The email states:

Re: Search Results for Mirosława Pennors

The following financial institutions are associated with this individual, unfortunately the accounts numbers and balances are indeterminate:

FINANCIAL RESULTS:

**KREDYT BANK**

They continue to monitor these for an additional six (6) months. Should any additional account information be returned, we will forward the results to you immediately.

In the meantime, if you need any other information, please let us know and we will endeavor to satisfy your search needs at no additional cost.

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[24] Document 4.1 is a similar email for a search regarding Ms. Pennors, except it is dated March 3, 2018 and instead of the Kredyt Bank, it states:

**FINANCIAL RESULTS:**

CIBC

**ROYAL BANK OF CANADA**

[25] Ms. Pennors has sworn an affidavit stating she did not sell any property in Poland. She provides the history of the properties. In June 1995 her parents gifted five lots to her, all attached to the farm property on which her parents live. In 2000, sixteen years prior to the Final Order, her parents asked her to transfer back to them two lots, and she did. Her mother told her at the time they were worried about their financial future. When Ms. Pennors transferred the two properties back to her parents in 2000, no money changed hands. The three lots she still owns after the transfer in 2000 are the three lots she owned at the time of the Final Order. There is a small access road in Poland that is not a separate property, although it is given a lot number. It is a small, private dirt road, 300-400 metres in length and is attached to the titles of all the properties which it accesses, including hers and several others. If she were to sell any or all of her three remaining properties, title in her name to the access road would automatically go to the new owner without additional consideration.

[26] With respect to the searches from Asset Locate Services, Ms. Pennors swears that she has never had bank accounts at Kredyt Bank, CIBC or RBC.

- [27] Ms. Pennors' counsel subsequently did an internet search of the Kredyt Bank in Poland. According to a Wikipedia page, it no longer exists, having merged with a bank seven years ago. The internet search was appended to an affidavit. While this is not admissible evidence on a summary trial, Mr. Pennors has now withdrawn his claim that Ms. Pennors had any bank account at Kredyt Bank. However, I discuss this because it is relevant to Ms. Pennors' argument as to the nature of this action and her claim for costs.
- [28] Ms. Pennors also obtained letters from CIBC and RBC confirming that she did not have any bank accounts with those institutions from January 1, 2014, eight months prior to the parties' separation, to March 9, 2016, the date of the Final Order.
- [29] On November 8, 2019, Ms. Pennors' counsel wrote to Mr. Pennors' counsel providing her client's list of documents and providing Polish land title documents, and various internet searches she had done concerning Asset Locate Services, along with the letters from CIBC and RBC. She stated:

The documents listed under item E are printouts of a number of asset search websites, of which your client used one. All these websites have different domain names with identical or almost identical content, and they all lead back to the same Florida address.

You will note from our documents that the Polish bank your client's search results refers to and which your client relies on as part of his claim that she failed to disclose it in 2016, has not existed since 2013.

Your client's "search results" for the Canadian Banks CIBC and RBC do not establish that my client had accounts with them at any time, let alone in 2016. The search results have a disclaimer on them that they might contain errors. I note that the "search" failed to uncover the accounts my client actually had, and that were disclosed on her 2016 F8.

Following receipt of your List of Documents, my client has taken the unnecessary and extraordinary measure of obtaining letters from CIBC and RBC confirming that she did not have any accounts with them between 2014 and March 2016.

The property title numbers your client's search has produced are the same properties listed by my client in her January 2016 Financial Statement. The additional title number is a small access road (given its own lot number by Polish Land Titles) built for the purpose of accessing several different properties with different owners, as can be seen from the document. As access to my client's property is through that road, her name is listed on the additional title number along with several others whose properties are accessed by that road.

- [30] Counsel for Ms. Pennors requested a consent dismissal of the claim failing which she would bring an application to have the claim dismissed and seek special costs. A similar letter was sent November 19, 2019.

- [31] On February 5, 2020, Mr. Pennors' counsel responded by letter and stated:

Mr. Pennors acknowledges that the Polish properties were disclosed prior to the terms of the Final Order being negotiated. If there was any confusion here it appears to be mine.

I have the November 6, 2019 letter from RBC and the undated letter from CIBC and I note that the period covered by the RBC and CIBC letters is January of 2014 to March of 2016.

Mr. Pennors is not satisfied by the date range and suspects that Ms. Pennors, knowing that the parties were going to separate, closed her accounts with both institutions.

[Emphasis added.]

[32] Counsel for Mr. Pennors requested that Ms. Pennors request account numbers and dates and closing of any accounts from the date of marriage, and requested Ms. Pennors sign an authorization for that purpose. He suggested this was the most cost-effective route to resolving the dispute. The parties were living in France and did not move to Canada until 1998. When this was pointed out during the hearing, counsel advised that his client would be content with searches going back to 1998.

[33] On February 6, 2020, a new matter arose. Mr. Pennors' counsel wrote a further letter to Ms. Pennors' counsel:

Please be advised that it has come to my attention that Ms. Pennors is in possession of a municipal pension that was not disclosed at the time of separation. Attached is a form P2, in Ms. Pennors' handwriting, adding Mr. Pennors as a member. It is my understanding that this was never followed through on.

Please confirm whether or not Ms. Pennors does in fact have a municipal pension plan.

[34] The form is attached to an affidavit. It is not signed or dated. It states that Ms. Pennors' employer is "unknown", which is odd. There is no information in Mr. Pennors' affidavit where the document came from and why it was being produced four years after the Final Order.

[35] On February 10, 2020 counsel for Ms. Pennors responded to the pension issue by providing a copy of Ms. Pennors' statement of earnings from December 2015 which was attached to her 2016 F8, as well as her statement of earnings from January 2016. These documents show there were no contributions to the Municipal Pension Plan. Counsel also enclosed an email from Ms. Pennors' employer dated February 7, 2010 confirming that Ms. Pennors was never a member of the Municipal Pension Plan as she was not eligible.

[36] The pension form was forwarded to Ms. Pennors, who responded that the handwriting on the form is not hers, or that of Mr. Pennors. She does not recall ever seeing this document in the past and does not know who wrote it. This statement from Ms. Pennors is not in a sworn affidavit, and is in the form of her email attached to a legal assistant's affidavit. It is therefore not admissible evidence on a summary trial application; however, Mr. Pennors has now withdrawn any claim with respect to a Municipal Pension Plan. Again, I set this out because it is relevant to the argument Ms. Pennors' counsel makes with respect to the nature of this

action and special costs.

[37] Counsel for Ms. Pennors also advised of her position that the request for further bank records was a fishing expedition and her client would not be signing an authorization. Her client had already provided confirmation there were no bank accounts for more than two years prior to the date of the Final Order. She again advised she would be proceeding with an application seeking special costs.

[38] Mr. Pennors swears that after the Final Order he:

began to suspect that the Respondent had other bank accounts she had failed to disclose prior to entering into the Final Order.

[Emphasis added.]

[39] He did an internet search and came across a company called Asset Locator. He provided this company with Ms. Pennors' name, date of birth and social insurance number. He states:

It is my understanding that when a bank account is used for an international money transfer, Asset Locator is able to obtain details regarding the bank institution and the name of the individual who is transferring money internationally.

[40] This is unattributed hearsay and inadmissible.

[41] Mr. Pennors also states that:

On or about February 5, 2020, I called the Asset Locator company to confirm how far back in time they conduct their search for assts. They informed me that they go back as many as 10 to 15 years. At no point in the Respondent's Financial Statements filed in the Vancouver Action did she include RBC or CIBC bank accounts. Despite the letters from RBC and CIBC advising that the Respondent did not have accounts with either of them between January 2014 to March 9, 2016, it was possible that the Respondent did have accounts with them prior to separation that she had closed without me knowing since the asset search would have gone back 10 to 15 years.

[Emphasis added.]

[42] Again, the statement from Asset Locator is unattributed hearsay and inadmissible.

[43] The above evidence from Mr. Pennors is the entirety of the basis upon which he seeks the bank records going back 22 years to 1998.

## Parties' positions

[44] Ms. Pennors' counsel argues this is worse than a fishing expedition and that it is an abuse of process. In January 2016 Ms. Pennors filed an F8 which disclosed three years of financial records. In Mr. Pennors' own words his action is based simply on "suspicion". There is no basis at all for this action.

- [45] Mr. Pennors' counsel argues that there is an efficient and simple resolution to this action and it is that Ms. Pennors provide the authorization to request the bank records and if it does not show any bank records, his client will likely file a discontinuance. He argues it is not plain and obvious that this action should be dismissed. He states that once Mr. Pennors was satisfied regarding the Polish properties, he properly conceded there was no longer such claim, and similarly, once the Kredyt Bank and Municipal Pension Plan were clarified, Mr. Pennors confirmed there was no longer such claims. The only outstanding issue is the Canadian bank accounts.
- [46] He also concedes that if Mr. Pennors did not have any basis for thinking there were bank accounts that were not disclosed, this would be a fishing expedition, but argues that Mr. Pennors does have objective evidence and it is the search results from Asset Locate Services. This is an independent company, and in an arms length transaction, Mr. Pennors paid it money to locate assets. The bank records will prove or disprove a material fact and they should be disclosed. A summary trial is not appropriate because those records have not yet been produced.
- [47] In response, Ms. Pennors' counsel argues that "associated with" in Asset Locate Services' email means nothing. She points to the searches she did on the internet of this company, which has multiple domain names which all point to an address in Florida. The only admissible and relevant evidence is Ms. Pennors' evidence by way of her F8 sworn in 2016, her F8 sworn in 2019 and her current affidavit filed on this application that she has not failed to disclose assets. While it may be simple for Ms. Pennors to sign an authorization, "enough is enough", and Mr. Pennors has not shown any basis for production of personal records. The history of this action, as evidenced by the Polish property issue, then the bank accounts, and then the pension plan issue, shows this will not end.

## Analysis

- [48] The only remaining issue is with respect to production of Canadian bank records going back to 1998. As Mr. Pennors' application for bank documents is the reason he argues this court should not dismiss this action, I will address his application first.

## Application for bank records

- [49] I am satisfied the parties have complied with the requirements for a demand for documents and response under Rule 9-1. The two issues to decide are whether:
- a) the bank records may prove or disprove a material fact in issue, or may relate to a matter in issue; and
  - b) whether there is a reasonable basis for concluding the bank records would contain such information.

- [50] The only possible allegation to which the RBC and CIBC bank records could be relevant is that Mr. Pennors claims an interest in:
3. Any and all property, included but not limited to real property, bank accounts, investments, business interest etc. the Respondent liquidated or transferred in Poland that was subject to division pursuant to the Family Law Act at the time the Final Order of March 9, 2016 was made.
- [51] The allegation does not specify any time period in which it is alleged that Ms. Pennors liquidated assets. The parties were married for over 20 years. Nor does the allegation identify with any specificity what assets were liquidated. Mr. Pennors' allegation is based on his "suspicion" since the Final Order, the searches done by Asset Locate Services, and two conversations with an unidentified person at Asset Locate Services. I will address each of these in order.
- [52] Mr. Pennors has not provided any basis at all for his initial "suspicion" that lead to him contacting Asset Locate Services. If he had some reasonable basis for suspecting that Ms. Pennors had liquidated assets that were not disclosed, and that these were at a time period during which it might be relevant to a family law proceeding, then that could potentially be a basis to order production of records, but he has not given any such basis. The only thing he points to is the Asset Locate Services search, which I will address below. He has provided no information as to why he thought it necessary to hire Asset Locate Services. The parties entered into a Final Order in 2016. Mr. Pennors was represented at that time. He had made inquiries regarding property in Poland in 2015, a year prior to the Final Order. There is nothing at all in his affidavit to support his suspicion that up to 20 years earlier, Ms. Pennors had liquidated assets which were not accounted for in the parties' assets at the time of the separation.
- [53] Reviewing the internet searches done by Ms. Pennors' counsel regarding Asset Locate Services, and the emails received by Mr. Pennors from this business, I have no confidence in any search done by Asset Locate Services. One wonders how a business operating out of an address in Florida, which purports to have access to presumably U.S. "City, County, State or Federal Court Records or Data Bases" could have any access to highly confidential bank records in Canada, in a regulated financial industry bound by privacy legislation. There is no information regarding how Access Locate Services obtained this information, from what data base, for what time period, or what "associated with" means. The search identified a bank that had been closed for several years in Poland. It also failed to disclose the banks where Ms. Pennors in fact has bank accounts. Given the searches allegedly go back 10-15 years, there is no evidence to explain how the search in 2016 uncovered Kredyt Bank, but a search in 2018 uncovered CIBC and RBC. Further, any search results are not guaranteed.

- [54] Mr. Pennors refers to a conversation with someone at Asset Locate Services that a search would uncover "international transactions" and a later conversation that Asset Locate Services could go back 10-15 years. This is unattributed hearsay and inadmissible. But even if it were admissible, there is no evidence at all as to what "international transactions" are, how Asset Locate Services could possibly obtain this information, and how far back this "association" was.
- [55] Further, although Mr. Pennors has now been satisfied that Ms. Pennors did not fail to disclose her three lots in Poland, and is now satisfied that she did not have a Kredyt Bank account and does not have a municipal pension plan, these requests certainly suggest, along with the above information, that this is simply a fishing expedition embarked upon by Mr. Pennors. With respect to the properties in Poland, a review of the January 2016 F8 and the Final Order would have shown those properties were disclosed, although there may have been a question regarding the lot which is the private road. With respect to the municipal pension plan, there was no explanation from Mr. Pennors of why a document, in neither parties' handwriting, was produced by Mr. Pennors a month prior to this application, and four years after the Final Order.
- [56] In all the circumstances, I decline to order that Ms. Pennors sign authorizations for production of the CIBC and RBC bank records. The pleadings are not specific as to time, asset, or transaction. The pleadings could encompass any time period from the time of the parties' marriage in 1993 to the Final Order in 2014. Mr. Pennors' initial application to seek the Canadian bank records back to 1993, five years prior to the parties moving to Canada, is emblematic of his fishing-expedition approach. The pleadings could encompass any asset, and the "etc" in the pleading supports the conclusion this is a fishing expedition. There is no transaction alleged other than "liquidation". Mr. Pennors has not persuaded me that the bank records back to 1998 would prove or disprove a material fact or are relevant to an issue in the action because there is no allegation in the pleadings that is specific enough to conclude that these records would contain such information.
- [57] Even if I were to have found the bank records are relevant to the very broad allegations, I would decline to exercise my discretion to order the production of the bank records due to the complete absence of any credible or admissible evidence of why Mr. Pennors "suspects" Ms. Pennors has liquidated assets sometime in the last 22 years. A party is not entitled to private financial records on the basis of suspicion alone. As described above, Ms. Pennors has refuted each one of his suspicions.
- [58] Mr. Pennors' application for production of the bank records is dismissed.

## Summary trial

- [59] Ms. Pennors has sworn that she made full financial disclosure prior to the Final Order. Mr. Pennors has no evidence to the contrary other than his "suspicion". A summary trial application is a trial, and a party is obligated to produce all evidence they rely upon.

- [60] Mr. Pennors' counsel argues that a summary trial is not appropriate as he has not had an opportunity to obtain the bank records. I have dismissed that application.
- [61] I am satisfied that I am able on the whole of the admissible evidence to find the facts necessary to decide the issues of fact or law. I am also satisfied that it would not be unjust to decide the issues on the application. Mr. Pennors' failure to identify any basis at all upon which he had a "suspicion" is fatal to his position. The Asset Locate Services searches do not persuade me there is any credible basis for his suspicion.
- [62] I dismiss Mr. Pennors' action against Ms. Pennors. There is no need to consider the alternate application to dismiss the action on the basis that it is an abuse of process.

## Costs

- [63] Ms. Pennors seeks special costs. The onus is on Ms. Pennors to establish the basis for such an award: *Hollander v. Mooney*, 2017 BCCA 238 at para. 96, leave to appeal ref'd [2017] S.C.C.A. No. 356.
- [64] Special costs may be awarded where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Reprehensible behaviour "encompasses scandalous or outrageous conduct" and "milder forms of misconduct deserving of reproof or rebuke": *Garcia v. Crestbrook Forest Industries Ltd.*, 119 D.L.R. (4th) 740, 1994 CanLII 2570 at para. 17 (C.A.). The conduct must be related to the conduct in the litigation and not pre-litigation conduct: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 133 and 134.
- [65] Ms. Pennors' counsel argues that Mr. Pennors knows this litigation is a financial drain on Ms. Pennors. Mr. Pennors' counsel argues that Mr. Pennors acted reasonably in obtaining information from a notary and an asset locator company. As soon as Ms. Pennors produced information or documents that showed there was no basis to his allegations with respect to the property in Poland, the Kredyt Bank and the municipal pension plan, he promptly agreed to abandon those allegations. He offered a cost-effective way to address the remaining allegation concerning the RBC and CIBC accounts, and offered to discontinue the action if those searches did not reveal any bank accounts.
- [66] Although it now appears Mr. Pennors did not have a sustainable basis to bring this action, I do not conclude that his behaviour was reprehensible. It appears possible he genuinely believed the searches in Poland revealed another property and he thought the Asset Locate Services searches were credible and revealed some basis for the action, although I have found otherwise. I therefore decline to award special costs.

- [67] I order that Mr. Pennors pay to Ms. Pennors her assessable costs of the action at Scale B.

## B. Mr. Pennors' new application

- [68] Mr. Pennors' new notice of application seeks orders that:

- a) the Asset Locate Services results concerning the parties' daughter be admitted as fresh evidence;
  - b) within 30 days the respondent provide to Mr. Pennors statements for any CIBC or RBC bank accounts held jointly by Ms. Pennors with their daughter or solely by their daughter from 2005 to March 9, 2016.
- [69] The parties' daughter is now 15 years old, and Mr. Pennors is requesting records from the time she was born. As notice of this application was not given to the daughter, nor do I find it is in her best interests to be involved in this, I have treated this as an application to produce bank records only over which Ms. Pennors has control either as a joint owner or as an authorized user. Further, Mr. Pennors' submissions were focused on these particular accounts.

## Law

- [70] In *Zhu v. Li*, 2007 BCSC 1467 at para. 20, Mr. Justice Ehrcke summarized the principles on an application to re-open a case after judgment had been given but before the formal order was entered:

From the cases, I conclude that the following principles apply to an application to re-open a trial to adduce fresh evidence:

1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.
3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened and second that the new evidence would probably change the result.
4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.

- [71] In *Jens v. Jens*, 2008 BCCA 392, the Court reviewed the difference between fresh evidence and new evidence on appeal, and noted that the test to adduce fresh evidence on appeal is slightly more elastic in family law cases:

- [27] Of particular relevance to this appeal is the distinction Ryan J.A. drew between "fresh" evidence and "new" evidence that became available subsequent to trial. As she explained, fresh evidence is evidence that existed at the time of the trial, but for various reasons could not be put before the court: see *Struck v. Struck*, 2003 BCCA 623 at para.37, (2003), 20 B.C.L.R. (4th) 242.
- [28] In deciding whether to admit fresh evidence on an appeal, the court applies the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R.759 at 775-776; *Spoor v. Nicholls*, 2001 BCCA 426 at para. 16, 90 B.C.L.R. (3d) 88.
- [30] This Court has said that in family law cases, a "slightly more elastic approach" is taken to the admissibility of fresh evidence, taking into account the interests of justice in not having a decision that is contrary to the known facts: see *Luney v. Luney*, 2007 BCCA 567 at para. 31, 74 B.C.L.R. (4th) 203, leave to appeal to S.C.C. denied, [2008] S.C.C.A. No. 90 (Q.L.), citing *Shabaga v. Shabaga* (1992), 75 B.C.L.R. (2d) 128 at paras. 14-15 (C.A.).

## Evidence

- [72] Mr. Pennors swore another affidavit in which he states that after Ms. Pennors denied having any bank accounts with CIBC and RBC, he "began to wonder" why the asset locator search he obtained previously indicated Ms. Pennors was associated with these financial institutions. He states:
3. As a result, I began looking into ways the Respondent could be associated with a Financial Institution but not have an account in her name.
  4. It is my understanding that when a child under the age of 18 opens a bank account the financial institutions often requires a parent or guardian to be listed jointly or as an authorized user on the account.
- [73] Mr. Pennors ordered another search from Asset Locate Services for their daughter and on March 26, 2020 received an email, in exactly the same form as the previous emails from Asset Locate Services, which states that his daughter was "associated" with CIBC and RBC.
- [74] Mr. Pennors also relies upon the affidavit of an associate lawyer in the office of his counsel, who swears that on April 2, 2020 she contacted Asset Locate Services and that "a representative" advised the following:
- a. in Canada they are only able to search for bank accounts and brokerage accounts associated with an individual;
  - b. that they charge a flat fee and [perform] a country wide search for any bank accounts or brokerage accounts associated with an individual;
  - c. that they have access to databases that allow them to search and determine if any accounts are associated with a particular individual;

- d. that often private investigators use their services to locate assets for clients but that individuals can retain their services directly for a flat fee which often is at a much lower rate than retaining a private investigator; and
  - d. that once they are provided with the personal information of the individual to be searched it takes approximately 48 hours for them to provide search results.
- [75] Hearsay is admissible on certain interlocutory applications, but the "source" must be identified and the deponent must be able to say he or she verily believes those facts to be true: Rule 10-4(12) and (13). This is unattributed hearsay and on that basis alone is inadmissible. The source must be an identified person: *Meier v. Canadian Broadcasting Corp.* (1981), 28 B.C.L.R. 136 (S.C.). I would expect the name and position of the person who provided this information to be disclosed. Given the existing privacy laws in Canada as well as the regulation of the financial services industry, I am also concerned that there is no detail of what databases are allegedly available to this company in Florida, and on what basis the deponent believes those statements to be true. Once again, there is no evidence of what "associated with" means.
- [76] Ms. Pennors filed an affidavit on this application. Ms. Pennors returned to CIBC and RBC and obtained letters from both institutions, which she appended to her affidavit. Those letters, dated April 16 and 17, 2020, state that neither she nor their daughter have ever held accounts with those institutions. The letters are admissible hearsay on an interlocutory application, but not on a summary trial. Ms. Pennors also expressed concern that Mr. Pennors has disclosed both hers and their daughter's names, dates of birth and social insurance numbers to an on-line company in the United States and she has no assurance regarding its level of security.

## Parties' positions

- [77] The parties repeat their arguments made in the original applications with respect to the Asset Locate Services searches. Further, Mr. Pennors argues he has met the test in *Zhu* because the fresh evidence is relevant on a material issue and he could not have known Ms. Pennors was allegedly hiding assets in this manner. He argues the evidence is "reasonably credible", and if believed could affect the result as to division of assets. He argues it would be a miscarriage of justice if the summary trial is not re-opened. He argues the court should take a flexible approach as he was relying upon the good faith of Ms. Pennors when she swore her F8 financial statement in 2016 prior to the Final Order. Ms. Pennors argues Mr. Pennors does not meet the test for admission of fresh evidence and this is just more baseless harassment from someone who has far superior financial resources to her.

## Analysis

### Application for production of the daughter's alleged bank records

- [78] I do not order production of these records for the same reasons I did not order the production of Ms. Pennors' bank records as set out in paras. 56 and 57 in the original judgment. Mr. Pennors again does not give any reason for his "suspicion" that Ms. Pennors had not disclosed assets at the time of the Final Order. He is now "wondering", if Ms. Pennors set up bank accounts in their daughter's name. Mr. Pennors does not provide evidence of any basis for his conclusion that the daughter's name may have been used to hide assets in bank accounts at the time of the Final Order and which led him to order another search from Asset Locate Services. Nor does he provide any particulars of what alleged assets were hidden, and how and when this took place. The basis is his "wondering". I have no confidence in the Asset Locate Services search for reasons I set out in the original judgment. This is a fishing expedition.
- [79] Mr. Pennors' application for production of bank records in their daughter's name which are held jointly with Ms. Pennors or over which Ms. Pennors is an authorized user, is dismissed.

### Application to adduce fresh evidence in the summary trial application

- [80] Using the test in Zhu, should the evidence of the new Asset Locate Services search be admissible on the summary trial application, not as hearsay evidence of a fact, but as evidence as to why it is not appropriate to proceed by way of summary trial? I will consider the principles in Zhu. This court has a wide discretion to consider the fresh evidence. The discretion should be exercised sparingly, so as to prevent fraud and abuse of the court's process.
- [81] In my view, this new application is an abuse of the court's process. It is not appropriate for Mr. Pennors to bring another application to which Ms. Pennors must respond based only on his "wondering". Given my findings on the application to order production of the records, in particular that this is a fishing expedition without basis and the Asset Locate Services search is not reliable, the result will not change the result of the summary trial application. This is evidence that would have been available to Mr. Pennors through the exercise of due diligence, and could have been presented at the original hearing. Further, he still has not provided any basis for his beliefs which led to him ordering the Asset Locate Services searches. I find there will not be any miscarriage of justice by refusing to admit this fresh evidence.
- [82] Mr. Pennors' application to introduce this fresh evidence on the summary trial application is dismissed.

## Costs

[83] Ms. Pennors renews her application for special costs. In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Madam Justice Gropper summarized the guiding principles:

[73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[84] In my view, given the history of this litigation, this new application for admission of fresh evidence and production of the daughter's bank records going back from the time she was born to the time of the Final Order (when was 11 years old) has crossed the line into reprehensible behaviour deserving of rebuke. Mr. Pennors was present in court during the first application and heard the discussion with respect to the lack of evidence regarding any basis for his beliefs that led to the Asset Locate Services searches. Given the restraint courts should exercise with respect to special costs, I was prepared to give him the benefit of the doubt that he may have genuinely believed the searches in Poland revealed another property and he thought the Asset Locate Services searches were credible and revealed some basis for the action. Given the discussion at the hearing, he still did not provide any basis for his beliefs that led to the Asset Locate Services searches. As Ms. Pennors argued would likely happen at the first hearing, the original allegations "did not end". I order that Mr. Pennors pay to Ms. Pennors her special costs of this new application, including the cost of her counsel attending at the telephone conference on April 9, 2012.

"Norell J."

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