
CANADA / JUDGMENT

Rong v. Tan

2021 BCSC 1795

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1795 Rong v. Tan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rong v. Tan,

2021 BCSC 1795

Date: 20210910

Docket: E170815

Registry: Vancouver

Between:

Wei-Hong Rong

Claimant

And

Xu Juan Tan

Respondent

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

The Claimant, in person:

Wei-Hong Rong

Counsel for the Respondent:

J.C. Bellamy

Place and Date of Hearing:

Vancouver, B.C.

August 26, 2021

Supplementary written submissions:

August 27 and 31 and

September 1, 2021

Place and Date of Judgment:

Vancouver, B.C.

September 10, 2021

Introduction

- [1] Mr. Rong and Ms. Tan have been engaged in contentious family litigation since 2017. The background is reviewed in Norell J.'s unpublished decision of October 24, 2019, indexed at 2019 BCSC 1817.
- [2] The issues involve the division of assets and Ms. Tan's claim for spousal support. The assets include a house, the proceeds of sale of a condominium sold by Norell J.'s order, two companies, and many bank and investment accounts in Canada and in China. Ms. Tan has exclusive occupancy of the house pursuant to Norell J.'s order. On August 26, 2021, I dismissed Mr. Rong's application for an order that the house be sold.
- [3] On August 26, I heard and reserved until today judgment on an application brought by Ms. Tan. Since then, I have received supplemental written submissions from Mr. Rong and Ms. Tan's counsel, Mr. Bellamy.
- [4] I have considered all the submissions I received. Some of Mr. Rong's submissions, both oral and written, contain assertions that are not supported by affidavit evidence. While Mr. Rong is unrepresented, he is aware from previous applications that judges must decide on the basis of evidence. Justice Norell made this point at paras. 3, 5, 39, 41, 47, 54, 55, 57, 66, 75, 76, 77, 82, 89, and 90 of her reasons for judgment.

Overview of Ms. Tan's application

- [5] Ms. Tan seeks orders as follows:
 - a) Orders for document production;
 - b) Interim spousal support;
 - c) An interim division of property; and
 - d) Costs.

Document production

[6] Mr. Rong denies that he has failed to produce documents and Ms. Tan's position has evolved since she filed her notice of application on August 3, 2021. The state of production is difficult to discern from the correspondence, some of which relies upon orders cross-referencing paragraph numbers in earlier notices of application.

[7] In his written submission, Mr. Rong states:

All documents required already sent. If the respondent's party still can not find them, they can list the accounts, I will give authorization for them to investigate. In fact, I gave authorizations every time they asked.

[8] In his written submission, Mr. Bellamy responds:

It appears the Claimant consents to providing an authorization for all documents sought. The Respondent would be satisfied with the authorization in relation to both her enforcement and document production portions of her application, except for the Chinese and Japanese accounts, so long as all documents sought are included in the authorization.

[9] In his written reply submission, Mr. Rong clarifies his position to state that he does not consent to production of account statements after March 2018 because he has a new family now, and he views the request for production of recent account statements as an intrusion on his new family's privacy.

[10] Mr. Rong is mistaken in his understanding of what the law requires of him in this action. Pursuant to s. 87(b)(ii) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], family property is presumptively valued for the purpose of a division of assets at the date of trial, not before. Mr. Rong must produce account statements continuously to the date of trial.

[11] In light of the parties' positions, with the exception of documents from Chinese and Japanese accounts, the orders sought in paragraphs 1 to 4 of the notice of application will be addressed by an order requiring Mr. Rong to provide authorizations for the release of account records in terms I will detail at the conclusion of these reasons. I turn to the question of Chinese and Japanese accounts.

[12] In paragraph 1 of her notice of application, Ms. Tan complains that certain account statements that were ordered produced by Justice Norell on May 10, 2019 have not yet been produced. The reference is to paragraph 6 of the order, which refers to certain paragraphs of the notice of application, none of which appear to relate to Chinese or Japanese accounts.

[13] In paragraph 2 of her notice of application, Ms. Tan complains that certain account statements that were ordered produced by me on March 4, 2020, have not yet been produced. I ordered Mr. Rong to produce statements from his China Merchants Securities Account XXXX7584 and his China Merchants Account XXXXXX8490 or to swear an affidavit indicating that no such accounts exist.

- [14] In her affidavit sworn for this application, Ms. Tan refers to a letter written on April 19, 2021, by Mr. Bellamy to Mr. Rong's former counsel, Mr. Vlug, asking about these parts of the order, among many other requests. It appears that Mr. Vlug went off the record shortly afterwards. Mr. Rong addressed Mr. Bellamy's correspondence, and Mr. Bellamy replied, but it is not clear that he or Mr. Bellamy focused their attention on this particular request.
- [15] Ms. Tan asks me to fix a deadline for compliance and impose a penalty in default of compliance. Given the inconclusive quality of the correspondence, it is not at all clear that Mr. Rong has chosen not to comply with my order. I will not impose a contingent penalty for noncompliance. I will fix a deadline for compliance. By September 26, 2021, Mr. Rong will either (a) produce statements in his possession from China Merchants Securities Account XXXX7584 and his China Merchants Account XXXXXX8490, (b) swear an affidavit stating that no such accounts exist, or (c) provide evidence in writing that he has attempted to obtain the records from the financial institutions, including copies of his correspondence requesting the records.
- [16] In paragraph 3 of her notice of application, Ms. Tan seeks production of the following Chinese and Japanese accounts: China Merchants Bank accounts numbered XXXX XXXX XXXX 8716 and XXXX XXXX XXXX 9569 and Tokyo Mitsubishi Bank account XXX6329.
- [17] Ms. Tan acknowledges that Mr. Rong has produced documents that he says are account statements from the two China Merchants Bank accounts, but that they are not authentic because they appear to have been generated by copying electronic records into a Notepad file. Mr. Rong says that he downloaded data from the Bank's website because old statements were not otherwise available. In my view, the authenticity of the documents produced by Mr. Rong is an issue for trial.
- [18] On May 11, 2021, Mr. Bellamy wrote Mr. Rong demanding statements from 2012 to present in relation to the Tokyo Mitsubishi Bank account. Ms. Tan swears that the demand is outstanding. I do not have affidavit evidence to the contrary from Mr. Rong.
- [19] I order that, by September 26, 2021, Mr. Rong will list account statements from Tokyo Mitsubishi Bank account XXX6329.
- [20] Concerning paragraph 4 of the notice of application, I order that all future document lists issued by Mr. Rong will be in Form 20.
- [21] I will not make the order requested in paragraph 5 of the notice of application. Supreme Court Family Rule 9-1(12) requires a party to make available for inspection listed documents. Mr. Bellamy tells me that, to date, he has not asked to inspect the documents Mr. Rong has listed. I will not make an order anticipating a difficulty that has not arisen.

- [22] Concerning paragraph 6 of the notice of application, to facilitate production of records of Mr. Rong's accounts at the TD Bank, as requested by the Bank, I order that, by September 22, 2021, he will telephone Cassandra Marché of the TD Bank at 1-888-996-9128 and confirm the authenticity of the authorization for the release of records he has provided to the Bank.
- [23] Ms. Tan has withdrawn her application for the order sought at paragraph 7 of her notice of application.

Interim spousal support

- [24] Until April 2021, Mr. Rong was paying the mortgage payments on the house, a monthly cost of approximately \$791. His decision to stop making the payments and paying other expenses was the impetus for Ms. Tan's application for interim spousal support.
- [25] Ms. Tan seeks interim spousal support in the amount of \$2,875 per month, based on an annual income imputed to Mr. Rong of \$150,000, commencing September 1, 2021.
- [26] This is Ms. Tan's second support application. The first was dismissed by Justice Norell. She stated:
- [82] The parties are in disparate financial circumstances, but Mr. Rong is paying both the mortgage and other expenses in the House where Ms. Tan is living, and has the expense of another rental accommodation. There is no admissible evidence why Ms. Tan is not employed. The position of the parties is diametrically opposed on the threshold issue of entitlement to spousal support, particularly with respect to the separation date and a potential limitation defence. This case is also complicated by allegations of agreements between the parties.
- [83] I have obtained DivorceMate calculations using an income of \$12,500 social assistance for Ms. Tan and \$62,750 for Mr. Rong, and using the various lengths of the relationship alleged, from a low of seven years to a high of 15 years. The results were spousal support figures from a low of \$549 to a high of \$1569 per month.
- [84] Mr. Rong is currently paying the mortgage, taxes and utilities on the House and they total \$1275 per month. Ms. Tan is living there without contributing to those expenses. Mr. Rong did not indicate any intention to cease paying these expenses.
- [85] In the circumstances, I would have to make findings of fact, which are contested and involve findings of credibility, to determine whether there is a prima facie entitlement to spousal support. It is not appropriate to do so on the chambers application and on the state of the materials before me. I do not find a prima facie case to entitlement is made out. I appreciate Ms. Tan's financial situation is different than Mr. Rong's financial situation, but at this time and for the past 2.5 years, she has been living in the House without contributing to its maintenance expenses. I dismiss Ms. Tan's application.

- [27] Ms. Tan says that the circumstances are different now, because Mr. Rong is no longer making the mortgage and other payments and she is in greater need of support than she was before. She says that the evidence on this application permits a finding of prima facie entitlement to support the order that Norell J. was unable to make on the record before her.

A preliminary consideration

- [28] I have considered whether it is an abuse of process for Ms. Tan to renew an application for interim support that was previously dismissed on grounds which included her failure to make out a prima facie finding of entitlement to support. In my view, it is not. The circumstances are materially different. If interim support had been ordered, this material change of circumstance would justify reconsideration of the interim support award; FLA, s. 216(3). Neither party was represented during the earlier application, and Justice Norell emphasized deficiencies in the evidence and that she was dismissing the earlier application "on the state of the materials before me". In significantly changed circumstances, considering that the earlier application had an interim character, and was influenced by the failure of an unrepresented party to adduce evidence, it is in the interests of justice to permit Ms. Tan to pursue a further application for interim support on a more fulsome evidentiary record.

The evidence

- [29] On this application, I have Ms. Tan's account of the relationship and nothing from Mr. Rong. There is at least some common ground on the pleadings. The parties married in July 2001. They divorced in February 2005, but subsequently reconciled. They started living together again either in September 2005 or in March 2006. They agree that the renewed relationship was marriage-like. Mr. Rong says that they separated in 2013; Ms. Tan says it was in December 2016.
- [30] According to Ms. Tan, she came to Canada from China to be with Mr. Rong. In China, she had a university degree in chemical technology and five years of experience in purchasing and marketing departments of Chinese companies. She was not fluent in English and worked as babysitter on arrival in Canada, and after that was employed in a factory.
- [31] From the fall of 2005 until 2015, Ms. Tan says that she worked for Mr. Rong in his garage-door business. Most of the customers were Chinese-speaking. She helped with sales, customer service, and assisted Mr. Rong while he was installing garage doors. She did not receive a salary.
- [32] Ms. Tan says that she suffers from frequent dizziness and headaches. She does not have a driver's licence in Canada. She is 48 years old. She is a single mother of a child (not Mr. Rong's) who is about to enroll in grade 1. Her job prospects are limited by her lack of English language skills and Canadian credentials. Taking into account her health issues, child care responsibilities, and work experience in Canada, she did not look for work during the

Covid-19 pandemic and has been living on social assistance and money borrowed from family and friends.

- [33] According to Ms. Tan's sworn F8 financial disclosure statement, her income from social assistance is approximately \$19,000 annually. Her monthly expenses, including the mortgage she says she cannot afford to pay, are approximately \$4,500, or \$54,000 annually. Some of Ms. Tan's expenses, such as airplane tickets to China budgeted at \$300 a month, are clearly discretionary.
- [34] Ms. Tan says that she is aware, from her work in Mr. Rong's business, that many of his customers - she estimates 80% -- pay by cash. She suggests that his pre-tax income from the business, while she was working in it, was \$150,000 annually.
- [35] According to Mr. Rong's sworn F8 financial disclosure statement, his annual income from self-employment is \$66,300 gross, and \$50,422 net. In his unsworn supplementary submissions, he gives other, lower figures. In his reply submission, Mr. Rong explains the discrepancy by reference to additional business expenses such as interest expenses not taken into account in his sworn financial disclosure statement. He says that his investment income is reported in his tax returns submitted to the Canada Revenue Agency.
- [36] Mr. Rong has not attached three years of corporate financial statements and income tax returns to his filed F8 financial disclosure statement, as required by the Rules. In his reply submission, Mr. Rong said that his tax returns and corporate financial statements were attached. In oral argument, Mr. Bellamy told me that they were missing. I have to rely on the fact that the tax returns and corporate financial statements are missing from the F8 financial disclosure statement that was filed in court. I can place no weight on what Mr. Rong tells me, in his unsworn submissions, the tax returns and corporate financial statements would disclose.
- [37] More important, Mr. Rong identifies substantial financial assets exceeding his debts (apart from an inexplicable \$500,000 debt "to have child" that I will not take into account). He does not disclose any interest or investment income and identifies dividend income of \$2,468.39. He lists monthly expenses of more than \$9,000, approximating \$109,000 annually.
- [38] The financial portrait contained in the F8 financial disclosure statement of a person whose annual expenses are more than double his income, but who appears not to be going into debt, is not believable. On the material before me, for the purpose of this interim support application, I infer that Mr. Rong's annual income matches his sworn statement of his annual expenses of \$109,000.
- [39] Summarizing, according to Ms. Tan's evidence, Mr. Rong and Ms. Tan's marriage-like relationship lasted for 15 years with a short gap in 2005. Ms. Tan has suffered and continues to suffer economic detriment because of the relationship. She emigrated from China, where she had academic credentials and five years of experience in white collar employment, to Canada, where she has not found comparable employment and is hampered by her lack of

English skills and Canadian credentials, including a driver's licence. She spent 10 years working for Mr. Rong's company without receiving a salary. Ms. Tan is now in a position to seek out paying employment, but is unlikely to earn more than minimum wage.

[40] In contrast, Mr. Rong's ability to earn an income has not suffered because of the relationship. He benefitted from Ms. Tan's unpaid services from 2005 to 2015. Assuming that Ms. Tan obtains employment at minimum wage, Mr. Rong will still earn much more than she does.

[41] I know that Mr. Rong disputes at least some of Ms. Tan's account, but I do not have his sworn evidence apart from his F8 financial disclosure statement. I can only rely on sworn evidence and admissions contained in the pleadings.

Legal framework

[42] The parties are spouses as defined in the FLA. The following provisions of the FLA set out the law governing Ms. Tan's claim for spousal support:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;

- (b) the functions performed by each spouse during the period they lived together;
 - (c) an agreement between the spouses, or an order, relating to the support of either spouse.
- [43] The cases distinguish support ordered on "compensatory" and "non-compensatory" grounds; *Chutter v. Chutter*, 2008 BCCA 507 at paras. 47-61. Compensatory support is ordered to compensate a spouse for economic disadvantage incurred in consequence of the relationship, or economic advantage conferred on the other spouse. Non-compensatory support is ordered on the basis of the respective needs and means of the spouses.
- [44] As noted in Norell J.'s decision at para. 81, an interim support order should only be made where the person requesting support has established entitlement on the face of the record, described in the cases as *prima facie* entitlement.

Analysis

- [45] Two of the four considerations listed in s. 161 of the FLA support Ms. Tan's claim that she is entitled to interim spousal support. She is suffering an ongoing economic disadvantage because of her 15 year marriage-like relationship with Mr. Rong, a compensatory ground. She is presently living on social assistance and is experiencing economic hardship consequent on the breakdown of the relationship, a non-compensatory ground. The hardship has become acute with Mr. Rong's decision to stop making mortgage payments, because Ms. Tan now faces the possibility of a foreclosure proceeding that will deprive her of a place to live.
- [46] A third consideration, promoting the economic self-sufficiency of each spouse within a reasonable period of time, mitigates against a support order, because it has been five years since the parties separated. Ms. Tan should have made some progress towards self-sufficiency in that time. However, the Covid-19 pandemic and her health issues provide some explanation for her apparent lack of progress.
- [47] The fourth consideration listed in s. 161, involving child care responsibilities, does not apply in this case because Ms. Tan and Mr. Rong did not have a child together.
- [48] Balancing the three relevant considerations I have identified, I am satisfied that Ms. Tan has established a *prima facie* or presumptive entitlement to spousal support in this case. The duration of her entitlement is not likely to be indefinite, but it is likely to endure for at least another year or so, and it is likely that the trial will take place in 2022.
- [49] I turn to the quantification of an interim support order. For this purpose, I will assume a relationship of 15 years' duration, Mr. Rong's income of \$109,000, and Ms. Tan's income at \$27,500 (a 35 hour week at the minimum wage of \$15.20 per hour). Applying the Spousal Support Advisory Guidelines based upon these amounts suggests support payable for 7.5 to 15 years in the range of \$1,528 to \$2,037 per month.

- [50] I think that the interim support ordered should be lower than this range suggests for the following reasons. There are substantial issues of credibility in this case and I should bear in mind the possibility that Ms. Tan's evidence will be discredited at trial. This is not a reason not to order support based on her uncontradicted evidence on this application, but it is a reason to be cautious as to the amount ordered. Until April of this year, Ms. Tan was receiving, in effect, spousal support through Mr. Rong's payment of mortgage and property expenses. They totalled, according to Norell J.'s reasons, \$1,275 per month. It would be anomalous to increase the support payable at this late date. Mr. Rong says that his business has suffered due to the Covid-19 pandemic. I do not have sworn evidence from him to this effect, but it is a plausible possibility.
- [51] Taking everything into account, I order Mr. Rong to pay interim spousal support of \$1,275 per month commencing September 1, 2021 and continuing until further order of the court. I emphasize that this is an interim order that will be superseded by any support order made at trial. The consequence may be that Mr. Rong would have to pay additional support, if Ms. Tan obtains a larger support award at trial, or Ms. Tan would have to repay some of the support she will receive pursuant to this order, if she obtains a smaller support award or even no support at all at trial.

Interim distribution of property

- [52] Ms. Tan seeks orders for the interim distribution of the net proceeds of the sale of the condominium. The amount paid into court was \$242,558.46. Ms. Tan seeks distribution of all but \$100,000 to her, with the \$100,000 balance to be paid to her lawyer on undertakings to use the funds to pay the fees of a joint accounting expert appointed pursuant to a consent order. Ms. Tan seeks the distribution in order that she will have sufficient funds to retain Mr. Bellamy for the trial. She says that the distribution is necessary to level the playing field in light of the disparity of resources between the parties.
- [53] Ms. Tan's materials include an estimate from Mr. Bellamy that his fees, taxes, and disbursements to complete the trial, including outstanding accounts, will total approximately \$103,000.
- [54] Mr. Bellamy advises that, since he filed Ms. Tan's application, the joint accounting expert has estimated fees in the range of \$50,000 to \$75,000. Mr. Rong did not appreciate that the cost would be so large, and now regrets having consented to an order for the appointment of a joint expert. I should say that, based on my experience and from what I have seen of the volume of material to be reviewed by the expert, I do not find the estimate surprising or unreasonable.
- [55] On August 26, 2021, I made an order providing for the appointment of a joint appraiser. Consideration must be given to the fees of both the joint accountant and the joint appraiser.

[56] Mr. Rong says that, if proceeds are to be distributed to Ms. Tan, there should be an equal distribution to him.

[57] This is Ms. Tan's second application for an interim distribution. Her first application sought a distribution from investment accounts in Mr. Rong's name. Justice Norell adjourned the first application, commenting that she did not have sufficient information to show that the amount then requested by Ms. Tan -- \$340,000 - was needed, and that a distribution from investment accounts in Mr. Rong's name was not appropriate given an issue as to whether or to what extent they are family property. She stated, at para. 90:

Once the Condo is sold, Ms. Tan may make application for an interim distribution with payment out of court, with proper affidavit evidence supporting the amount that is required to retain counsel.

Legal framework

[58] This is an application governed by s. 89 of the FLA and the issues are grounded in the statutory language. It provides:

Orders for interim distribution of property

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[Emphasis added.]

[59] Section 89 requires me to address:

- (1) whether the interim distribution sought is one in relation to family property that is at issue in the action;
- (2) whether the interim distribution would harm Mr. Rong's interests;
- (3) whether the interim distribution is necessary to provide money to fund resolution of the dispute; and
- (4) if all these conditions are satisfied, whether the interim distribution is in the interests of justice.

See *Bartch v. Bartch*, 2018 BCCA 271 at para. 56, aff'g 2017 BCSC 210.

- [60] The cases recognize that an order for an interim distribution is extraordinary in nature; McKenny v. McKenny, 2015 BCSC 1345 at para. 57.
- [61] The requirements of s. 89 are interpreted purposively, bearing in mind that "[t]he blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets", as Justice Ballance put it in I.F. v. R.J.R., 2015 BCSC 793 at para. 192. In Bartch, Saunders J.A., speaking for the Court, further described its purpose and added a note of caution, stating:
- [75] Section 89 is a special provision crafted to allow a financially disadvantaged spouse funds to participate in family dispute resolution by sharing in financial resources despite the parties' ultimate respective entitlement not having been determined. While sometimes this is referred to as 'levelling the playing field', I would describe this as a measure to further balanced participation in the dispute resolution processes. Every order under s. 89 entails a degree of risk the case will not turn out as expected, with prejudice to the distributing spouse. This special character demands careful application of the section, so to keep any distribution squarely within the parameters of s. 89.
- [Emphasis added.]
- [62] Where a proposed interim distribution has the potential to prejudice the opposing party if triable issues are ultimately resolved in his or her favour, it does not follow that the application must be dismissed. Rather, the court must address the apparent strength of the parties' respective positions and make a preliminary assessment of the merits, asking whether the applicant has established "a prima facie case of sufficient merit to warrant pursuit"; Bartch, at paras. 57-63.
- [63] In Etemadi v. Maali, 2021 BCCA 298, Butler J.A. spoke for the Court in summarizing the governing principles as follows:
- [50] With a view to the live issues in this appeal, I would summarize the principles applicable to s. 89 interim distribution orders as follows. First, a chambers judge must determine whether the applicant is economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution. If so, then it may be appropriate to make an order that "levels the playing field" or provides for "balanced participation" in dispute resolution. Justice Saunders' reference to "balanced participation" is instructive because it emphasizes the need for an order that establishes or maintains some equality between the parties to the family litigation as to their ability to pursue dispute resolution. An order made under s. 89 should seek to achieve balance between the spouses (as opposed to parties by counterclaim), as they are the parties contemplated within "the parameters of s. 89", to use Justice Saunders' language, and the property to be distributed is family property.

- [51] Second, in determining whether to order an interim distribution, a judge must go through a preliminary assessment of the circumstances and arguments that touch on both requirements: whether the applicant can show that it would not be harmful to distribute property and whether it is necessary for a purpose listed in s. 89. A preliminary assessment means determining whether the applicant can establish a "prima facie case of sufficient merit to warrant pursuit." Each issue that is raised with respect to necessity and potential harm must be examined contextually, with a view to the objectives endorsed in the FLA.
- [52] Third, whether an interim distribution is necessary for a purpose enumerated in s. 89 involves careful consideration of the amount or quantum required. This follows from the principle that such orders are extraordinary in nature and must be assessed carefully.
- [53] Finally, a judge must always exercise their discretion by deciding whether, in the particular circumstances of the case, it is in the interests of justice to grant the order sought.

Analysis

- [64] There is no question that the funds in court are family property.
- [65] It is easy to see that an interim distribution for the purpose of paying the costs of the joint experts is necessary, beneficial to both parties, and in the interests of justice. The parties consented to orders appointing both experts. Before they consented to an order appointing a joint accounting expert, I advised them at a judicial management conference that I was considering appointing an expert of the court's own motion, pursuant to Family Rule 13-5. In the end, the parties took the initiative to appoint an expert accountant. This was wise because it would not be practicable to trace the flow of funds through some 40 accounts and determine whether funds have been hidden or dissipated in this case without expert accounting assistance. Both parties will benefit from the involvement of both joint experts. The trial will be shorter, easier to manage, and the result will be more predictable in advance.
- [66] In view of the joint accountant's estimate of fees, and taking into account the involvement of the appraiser, \$85,000 should suffice as a reserve to secure the payment of the fees of both experts. That will leave \$157,558 for possible distribution to the parties.
- [67] Mr. Bellamy's estimate of anticipated legal fees is reasonable. It reflects an hourly rate of \$275 for Mr. Bellamy's services to this point, and \$300 going forward. It anticipates two days for examinations for discovery, one day of preparation for examinations for discovery, 10 days for trial and 10 days of preparation for trial, billing only five hours per day. These are modest estimates. More generously, it allows \$30,000 for interpretation and translation, and \$20,000 for applications, pretrial conferences, and other pretrial work. I accept Mr. Bellamy's estimate as a reasonable forecast of Ms. Tan's past and anticipated legal costs to the conclusion of the trial.

- [68] Bearing in mind that the \$157,558 is family property belonging to both parties, and given the positions of the parties, there are three possible orders I could reasonably make: (1) distribute to Ms. Tan \$103,000 to cover her legal costs, and distribute the balance of \$54,558 to Mr. Rong, a difference of \$48,442 to Ms. Tan's benefit; (2) distribute \$78,779 to each party, leaving Ms. Tan with a shortfall of approximately \$24,000 if she is to continue with counsel; or (3) distribute nothing, leaving the \$157,558 in court. Having ordered Mr. Rong to pay interim spousal support, I think it would be obviously unreasonable to distribute the entire \$157,558 to Ms. Tan to cover daily living expenses, in addition to legal expenses, as sought by Ms. Tan.
- [69] Applying the analysis mandated by Butler J.A. in Etemadi, I conclude that the first of these options is the most appropriate order in the circumstances.
- [70] Ms. Tan is clearly at an economic disadvantage in the litigation. She has no savings of any significance; her F8 financial disclosure statement lists financial assets of less than \$200. She says that she owes friends and relatives \$290,000, though she does not provide details of these debts. In contrast, Mr. Rong lists financial assets totalling \$355,709 and pensions and RRSPs totalling \$126,474. Apart from the purported \$500,000 debt "to have child" that I am not taking into account, Mr. Rong lists unsecured debts totalling \$166,366. In short, he has financial assets exceeding his liabilities and ready access to cash. Ms. Tan does not.
- [71] For the time being, Mr. Rong is choosing not to retain counsel. I have urged him to retain counsel. He has the means to afford a lawyer, if he chooses to. Absent an interim distribution, Ms. Tan does not.
- [72] I must consider whether an interim distribution is necessary, and whether it may be harmful to Mr. Rong. This is important litigation for the parties, involving the division of significant assets. In his F8 financial disclosure statement, Mr. Rong values the house at \$778,300 and the bare land at \$82,400, and lists secured debt (a mortgage against the house) of less than \$200,000. As I have noted, there are many bank and investment accounts, some of them overseas. Ms. Tan alleges that Mr. Rong has real property overseas. The case is not a simple one: in her reasons at para. 34, Norell J. lists 11 possible issues that may have to be addressed. In my view, it is necessary, in the interests of justice, that Ms. Tan have the assistance of counsel, if she wishes it, in the preparation and presentation of her case.
- [73] Mr. Rong will not be harmed by an unequal distribution of the condominium proceeds that gives Ms. Tan \$48,000 more than Mr. Rong at this stage, because he will obtain a credit in the future distribution and it is virtually certain that Ms. Tan's ultimate entitlement on the division of family property will be large enough to fund the credit. There is an apparent equity of more than \$500,000 in the house which is, on its face, a family asset having been purchased in the course of the relationship.

[74] In my view, it is in the interests of justice that Ms. Tan receive a distribution of \$103,000 for the payment of her legal expenses and, if she is to receive this money, Mr. Rong should receive the balance of the funds held in court, apart from the amount set aside to pay the joint experts, to minimize the discrepancy in their treatment at this interim stage.

Disposition

[75] For these reasons, I make the following orders:

- a) By September 26, 2021, Mr. Rong will deliver to counsel for Ms. Tan written authorizations for the release of account records covering the period from 2012 to the present for the following bank, investment, and credit card accounts:
 - i. Dynamic Funds accounts XXX XX2 385 and XXX XX7 447;
 - ii. Scotiabank account XXXX XXX XX2 908;
 - iii. Mackenzie Investments account XXXX477-4;
 - iv. American Express account XXXX XXXXXX X2008;
 - v. Canadian Tire accounts XXXX XXXX XXX 3186 and XXXX XXXX XXXX 3275;
 - vi. Home Depot account XXXX XXXX XXXX 1728;
 - vii. First National Mortgage account;
 - viii. Records of any e-transfers sent to wa.ple@hotmail.com.
- b) On request, Mr. Rong will update all authorizations for the release of account records provided by him to Ms. Tan on an ongoing basis until the trial of this action.
- c) By September 26, 2021, Mr. Rong will either (a) produce statements in his possession from China Merchants Securities Account XXXX7584 and his China Merchants Account XXXXXX8490 for the period from 2012 to present, (b) swear an affidavit stating that no such accounts exist, or (c) provide evidence in writing that he has made reasonable attempts to obtain the records from the financial institutions, including copies of his correspondence requesting the records.
- d) By September 26, 2021, Mr. Rong will list account statements from Tokyo Mitsubishi Bank account XXX6329 for the period from 2012 to present.
- e) All future document lists issued by Mr. Rong will be in Form 20.
- f) The application for the order sought in paragraph 5 of part 1 of Ms. Tan's notice of application is dismissed.
- g) By September 22, 2021, Mr. Rong will telephone Cassandra Marché of the TD Bank at 1-888-996-9128 and confirm the authenticity of the authorization for the release of records he has provided to the Bank.

- h) Mr. Rong will pay interim spousal support of \$1,275 per month commencing September 1, 2021 and continuing until agreement of the parties in writing or further order of the court.
- i) Pursuant to s. 89 of the FLA, \$85,000 of the funds held in court to the credit of this action will be paid to Jonathan C. Bellamy in trust on his undertaking that those funds will be used only to pay the accounts of joint experts retained for this proceeding, or as the parties may jointly direct in writing.
- j) Pursuant to s. 89 of the FLA, \$103,000 of the funds held in court to the credit of this action will be paid to Ms. Tan, and the balance of the funds in court will be paid to Mr. Rong.

[76] The costs of this application will be costs in the cause.

"Gomery, J."

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