

CANADA / JUDGMENT

Sarband v. Joubin

2021 BCCA 141

COURT

British Columbia Court of Appeal

DECIDED

31 March 2021

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2021 BCCA 141 Sarband v. Joubin

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sarband v. Joubin,

2021 BCCA 141

Date: 20210331

Dockets: CA45935; CA46527

Between:

Sara Mohammadi Sarband

Respondent

(Plaintiff)

And

Ramin Joubin

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Dickson

On appeal from: Orders of the Supreme Court of British Columbia, dated

January 31, 2019 (Sarband v. Joubin, 2019 BCSC 116, New Westminster

Docket S172815); and October 25, 2019 (Sarband v. Joubin,

New Westminster Docket S172815).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

P.W. Cote

Counsel for the Respondent

(via videoconference):

M. Magaril

Place and Date of Hearing:

Vancouver, British Columbia

March 31, 2021

Place and Date of Judgment:

Vancouver, British Columbia

March 31, 2021

Summary:

Under an agreement entered into in 2008 for the purpose of dividing up the parties' debts on the dissolution of their marriage, the defendant agreed to make payments to the plaintiff. By the terms of the agreement, the payment of all outstanding amounts was to be made by August 23, 2013. The defendant made only a single payment of \$5,000 to the plaintiff, sometime in 2008. On August 20, 2015, the plaintiff commenced an action seeking to obtain payment. The defendant argued that the agreement did not require him to pay the amount claimed, and that a collateral oral agreement required the plaintiff to furnish proof of the amount of the underlying debt. Finally, he argued that the claim was brought outside the limitation period. The judge found that the agreement required the defendant to pay the plaintiff \$75,000 plus interest, and dismissed the argument that a collateral agreement modified its terms. He found that the contractual payment was due on August 23, 2013, and that the claim was brought within the limitation period. In separate reasons, the judge awarded costs on a "full indemnity basis" pursuant to the terms of the contract. The defendant appealed. Held: Appeal dismissed. The judge made no error in interpreting the contractual terms or in rejecting the contention that a collateral agreement existed. His analysis of the limitation period issue and the costs claim also exhibited no error.

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- [1] GROBERMAN J.A.: The defendant appeals from judgments finding him liable to the plaintiff in the amount of \$70,000 plus interest, and finding him liable to fully indemnify the plaintiff for costs incurred in the litigation. The judge found that the defendant was liable for those amounts under a contract the parties entered into for the purpose of dividing their debt at the time of the dissolution of their marriage.
- [2] The parties married in 2002, while both were students at the University of British Columbia. In 2006, Ms. Sarband (who is now Dr. Sarband) was admitted to medical school in the Cayman Islands. Mr. Joubin was admitted to law school in the Cayman Islands that same year, and they moved there together.
- [3] The Royal Bank of Canada had a program that provided lines of credit to students attending international medical schools. Ms. Sarband applied for and was granted a \$150,000 line of credit. Mr. Joubin did not qualify for any similar financing.
- [4] The parties rented a studio apartment in West Bay on Grand Cayman Island, and lived there together during the period of Ms. Sarband's studies. They also purchased a car. According to Ms. Sarband, she paid almost all expenses, including those for their tuition, food, lodging, and transportation. She financed the payments through her line of credit. At trial, Mr. Joubin denied that the financial arrangements were as stated by Ms. Sarband, saying that the two split expenses roughly equally, and that, apart from that, Ms. Sarband paid for only a few of their joint expenses.
- [5] The parties' marriage broke down in the months following their move to the Cayman Islands. They considered themselves to be separated as of July of 2007, though they continued to live together in their studio apartment for financial reasons.
- [6] Ms. Sarband completed her studies in July 2008 and returned to Vancouver. Mr. Joubin stayed in the Cayman Islands to complete his work there, but returned to Vancouver within a month.
- [7] Ms. Sarband wished to terminate the marriage at that stage, and consulted with a solicitor. The solicitor drafted a separation agreement, which the parties discussed in late August 2008. Ms. Sarband's solicitor advised Mr. Joubin to obtain independent legal advice before signing the agreement, but he did not do so. His evidence was that he did not have time to do so, and felt it was not necessary. Given that Mr. Joubin had a law degree, and that the agreement was quite straightforward, he may well have considered that he did not need independent advice.
- [8] Under the agreement, both parties agreed that they would keep what limited property they had. Both agreed to waive any entitlement to spousal support. With respect to debt, each party was to be responsible for debt in their name, except that Mr. Joubin agreed to repay Ms. Sarband for amounts under her line of credit. The key provisions of the agreement were as follows:
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Background/Recitals

H. In 2006, Sara borrowed \$150,000 on a Line of Credit with the Royal Bank ("the line of credit") as a student loan, and the money was used to cover the parties' living and school expenses. The Line of Credit was in Sara's name only because of her better credit rating but by agreement between the parties, was used for Sara and Ramin's joint expenses. From the time the debt was Incurred, Sara has been paying the interest charges of approximately \$950 to \$1000 per month.

I. The parties each have a general knowledge of the assets, liabilities, financial position, and prospects of the other, and are content to enter into this Agreement without:

- (a) detailed financial particulars for each party, or
- (b) any further investigation of such matters

NOW THEREFORE THIS AGREEMENT WITNESSETH that in pursuance of the premises and in consideration of the covenants, agreements and undertakings hereinafter expressed, the Parties hereby mutually covenant and agree each with the other as follows:

1. Sara and Ramin acknowledge that they have read the recitals constituting the preamble to this Agreement and agree that the said recitals are true and correct, and form part of this Agreement.

Debts

4. (1) Each party is responsible for paying one-half of the Line of Credit.
- (2) Any payments made by Sara towards the Line of Credit shall not constitute any release of Ramin from his obligations to pay his share of the Line of Credit as set out in this agreement.
- (3) Ramin shall pay his share of the Line of Credit as follows:
 - (a) \$10,000 lump sum by November 1st, 2008 and another \$10,000 lump sum by February 1st, 2009;
 - (b) an additional \$500 per month minimum when he commences employment;
 - (c) in the event that Ramin receives money from his parents, or from any other source by way of inheritance, gift, windfall or lottery winnings, that money shall firstly be applied to payment of the outstanding balance Ramin owes on the Line of Credit by; and
 - (d) the balance owing by Ramin on the Line of Credit, including interest, shall be paid in full no later than August 23, 2013.
- (4) When the Line of Credit is paid in full

- (a) the parties will carry out an accounting to determine whether a payment must be made by one party to the other so that each pays their respective share of the amount borrowed and interest on each parties' share, and
 - (b) it will be assumed that each party's payment is allocated to that party's share of the amount borrowed on the Line of Credit; and
 - (c) a party's responsibility for interest paid on the line of Credit will be calculated separately on the declining balance of that party's share.
5. Subject to clause 4 of this agreement, each party will be solely responsible for payment of his or her student loan and any other debts or liabilities in his or her own name, and will indemnify the other from any expense or liability with respect to his or her student loan or other debts.

Releases

10. Except as otherwise provided in this Agreement, Sara and Ramin release each other from all claims at common law, in equity or by statute against each other .

General Terms

17. The parties may vary this agreement only by a written agreement executed in the same manner as this agreement
19. Sara and Ramin each acknowledge that he or she has a general knowledge of the other's financial affairs and that he or she has been fully advised as to his or her entitlement to discovery and other legal means by which he or she may obtain further information with respect to the other's financial affairs and each is satisfied on the basis of the information which he or she now has to accept this Agreement as a final settlement of any and all claims he or she may have against the other.
20. Sara and Ramin consent to Sara's filing this agreement in the Supreme Court of British Columbia for enforcement purposes and Ramin shall indemnify Sara for any legal expenses and disbursements incurred to enforce this agreement.
21. Sara and Ramin herewith acknowledge that this Agreement has been entered into without any undue Influence, fraud or misrepresentation whatsoever and each has read the within Agreement in its entirety and acknowledges the contents herein and is signing it voluntarily.
- [9] Mr. Joubin suggests that the agreement does not establish the amount of indebtedness to Ms. Sarband, but the judge disagreed. He considered that the agreement stated that \$150,000 had been borrowed on the line of credit, and that Mr. Joubin was responsible for ½ that amount, plus interest going forward.

[10] Apart from his contention that the agreement did not establish the amount owing, Mr. Joubin also contended that there was a collateral oral agreement, under which Ms. Sarband was required to provide documentation to prove his indebtedness to her. Ms. Sarband denied the existence of any collateral agreement.

[11] The evidence surrounding the drafting and execution of the written agreement was limited. It showed that Mr. Joubin obtained a draft of the agreement sometime between August 22 and August 27, 2008. He sent an email to Ms. Sarband on August 27 attaching revisions. The body of the email was as follows:

Many of the terms were untrue or unnecessary, and would make no difference to our gains and deal anyway. If you disagree with anything let me know. I really prefer not to compromise the changes in the attached document, as I don't find they are necessary or true, and I think they make us too against each other without giving any benefit at all to either of us.

[12] The provisions that Mr. Joubin wished excised (and which were, ultimately, omitted from the final agreement) were the following:

Background/Recitals

J. There have been no previous separation or marriage agreements between the parties.

K. It is the intention and desire of the Parties that there shall be a complete, final and effective settlement of their respective rights in and to the property of each other and the property held by them jointly and responsibility regarding their debts, as well as their rights and obligations regarding spousal support, and of all other claims of any kind or nature which either party may now or hereafter have against the other.

Releases

10. This Agreement is a full and final settlement of all issues between Sara and Ramin and all rights and obligations arising out of their relationship. [This provision appeared immediately before the clause that became clause 10 in the final agreement]

General Terms

12. There are no representations, collateral agreements, warranties or conditions affecting this Agreement. There are no implied agreements arising from this agreement and this agreement between the parties constitutes the complete agreement between them. [This was the first item under "general terms" in the draft agreement]

21. Sara and Ramin herewith acknowledge that they have received independent legal advice with respect to the legal effect of this Agreement and with respect to the alternatives available to him or to her instead of signing this Agreement or alternatively have had independent legal counsel recommended to them and have elected not to obtain the same. [This provision immediately preceded what became clause 19 in the final agreement].

- [13] Mr. Joubin did not elaborate on his reasons for wishing to have these provisions deleted, except for the comment "simply not true" in respect of recital "J" and "not true and unnecessary" in respect of recital "K".
- [14] Mr. Joubin also requested some changes to the payment terms, and clause 4 of the draft agreement was amended as he requested.
- [15] Ms. Sarband responded to Mr. Joubin's comments, saying "I have forwarded your message to my lawyer and she replied that J, K, 10, 12 and 21 are standard clauses in any separation agreement and cannot be removed from the document." Mr. Joubin responded with four emails, all sent within a brief period of time. They read as follows:
- "Why can't she take them out? I have a serious problem with them. Surely they can respect differences with their culture, no?"
- "I can't sign a lie or something I don't agree with. That's the whole point of an 'agreement'."
- "It shouldn't matter that they are standard terms. I have a problem with the standard terms that are 'part of every agreement'. Just tell her to take them out and stop wasting our time and money! And it should be free of charge the second time, as we asked 1 time already and we shouldn't have to repeat ourselves."
- "If it's not free of charge the second time I will gladly take her to court."
- [16] Again, Mr. Joubin did not elaborate on what he saw as problematic about the paragraphs he wished to have omitted. At trial, he claimed that his objection was based on a collateral oral agreement that required Ms. Sarband to furnish evidence of each expenditure from the line of credit for which she was claiming reimbursement.
- [17] Nothing in the correspondence indicates that he disagreed with the fundamental propositions set out in recital H to the agreement: that Ms. Sarband had borrowed \$150,000 on a line of credit, and that the two of them had used the money to cover living and educational expenses. Nor was there anything in the correspondence that suggests that he disagreed with the proposition that he was responsible for paying half the amount of the line of credit.
- [18] The changes demanded by Mr. Joubin were incorporated in the final agreement, which was dated August 29, 2008, but appears to have been signed by each of the parties a few days after that date.
- [19] Mr. Joubin did not make the payments required by the agreement. At some time between the signing of the agreement and November 8, 2008, he made a \$5,000 payment. At trial, he claimed that he believed he owed Ms. Sarband less than that, and intended the surplus as a gift. Again, there is no contemporaneous evidence to support that position.
- [20] Mr. Joubin made no further payments, and Ms. Sarband made no demands until filing the notice of civil claim on August 20, 2015.

- [21] At trial, Mr. Joubin contended that there was a collateral oral agreement to the effect that Ms. Sarband would provide him with an accounting of all of the expenses she paid, and that, after agreement, he would reimburse her. He considered that the amount would be fairly small. He argued that the written agreement, together with the oral collateral agreement, meant that he had no outstanding indebtedness to Ms. Sarband, and had not had any such indebtedness since 2008.
- [22] Neither party provided any useful documentation from their time in the Caymans to show who paid expenses. The judge found both parties to be unsatisfactory witnesses, but he was able to make some findings of fact. He concluded:
- [32] [O]bjectively the intention of the parties was to settle their financial affairs. They did not have any assets of significance. What was significant was the debt in Dr. Sarband's name. There is sufficient evidence, which I accept, supporting the view that Dr. Sarband used the line of credit to fund the schooling and living expenses of the parties during their time in the Cayman Islands and to establish that Mr. Joubin acknowledges this in the Agreement and agreed to pay one-half of the \$150,000 borrowed.
- [23] On the issue of whether the claim had been filed within the limitation period, the judge found that the balance owing came due on August 23, 2013, and that the action was commenced within two years of that date.
- [24] The judge originally awarded costs on Scale B, having omitted to consider that both parties, in their trial briefs, sought solicitor-client costs on the basis of clauses in the contract, including clause 20. He acceded to a re-opening of the trial to hear submissions on costs, and awarded Ms. Sarband costs on a full indemnity basis, pursuant to clause 20 of the agreement, which reads as follows:
20. Sara and Ramin consent to Sara filing this agreement in the Supreme Court of British Columbia for enforcement purposes and Ramin shall indemnify Sara for any legal expenses and disbursements incurred to enforce this agreement.
- [25] Mr. Joubin alleges some twelve grounds of appeal, plus an appeal from the award of full indemnity for costs, but they all come down to an assertion that the judge erred in interpreting the language of the contract and in failing to find a collateral agreement to the effect that Ms. Sarband was required to account for all expenses, and then get Mr. Joubin's agreement to those expenses before she could collect any funds.
- [26] The simple point here is that the contract, while perhaps not perfectly drafted, is clear on its face. It recites that Ms. Sarband borrowed \$150,000 on a line of credit, and states that the parties were in agreement that each was required to pay half the amount. It provides for an accounting, once the line of credit is retired, to ensure that each had paid one-half of the principal, together with the interest attributable to their portion of the principal.

- [27] Nothing in the agreement comes remotely close to the interpretation Mr. Joubin wishes to place on it. Indeed, on his version of the agreement, it is not a contract at all, but an agreement to reach agreement on indebtedness at some time in the future.
- [28] Mr. Joubin read the agreement carefully before executing it. He was well-educated, and had a law degree when he signed it. He clearly understood its terms. He does not allege that the agreement is fraudulent or unconscionable.
- [29] I am not convinced that the trial judge erred in any respect in his interpretation of the contract, or in his application of its terms. Further, I find no error in the judge's rejection of the contention that there was a collateral agreement. Issues of credibility were to be determined by the judge, and his findings were reasonable. Indeed, it would be difficult, given the wording of the agreement, to comprehend how a collateral agreement of the sort alleged by Mr. Joubin could possibly have existed.
- [30] The contemporary correspondence shows only that Mr. Joubin had some, unstated, basis for objecting to particular clauses. It is difficult to know what those objections were, but given his reference to "differences with their culture", and the fact that the parties wished to obtain a "Persian divorce" in addition to the Canadian court order, there may have been collateral religious or cultural matters that were to be dealt with separately. Nothing in the contemporaneous discussions suggests that the substance of the agreement dealing with the repayment of debt was the subject of a collateral agreement.
- [31] In terms of the limitation period, Mr. Joubin argues only that, because nothing has been proven to have been owing after he made his \$5,000 payment, the claim was statute barred long before the claim was filed. It is clear, however, that \$70,000 plus interest remained owing as of August 23, 2013--indeed, this assumes, in Mr. Joubin's favour, that the entirety of his \$5,000 payment was to be directed to the principal amount owing. Therefore, the judge was correct in determining that the claim was not statute barred.
- [32] I am also of the view that the judge was right to find that clause 20 of the agreement constitutes an agreement that the full costs of collecting on the contract were properly recoverable by Ms. Sarband. Although the clause refers only to "legal expenses and disbursements incurred to enforce this agreement", it seems to me that those words are broad enough to include the taking of this action.
- [33] My only other concern with respect to the costs order is that the notice of civil claim did not claim full indemnity for costs, nor did it refer to clause 20 of the agreement. In the circumstances, Mr. Joubin might well have objected to a claim for full indemnity costs being pressed on a re-opening of the trial after the judge had already purported to address costs by awarding them on Scale B. Given, however, that Mr. Joubin not only did not object, but himself, in his trial brief, sought solicitor-client costs, relying on contractual provisions, it is clear that any deficiency in the pleadings was not prejudicial to Mr. Joubin. I note, as well, that Mr. Joubin has not made the failure to plead entitlement to indemnity costs a ground of appeal.

[34] As Mr. Joubin has failed to demonstrate any error in the judge's analysis, I would dismiss the appeal. I would award Ms. Sarband special costs in this appeal, based on the contractual costs provision.

[35] WILLCOCK J.A.: I agree.

[36] DICKSON J.A.: I agree.

[37] GROBERMAN J.A.: The appeal is dismissed with special costs awarded to Ms. Sarband.

[Discussion with counsel re: the release of security for costs]

[38] GROBERMAN J.A.: I direct that the security for costs shall be released.

"The Honourable Mr. Justice Groberman"

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