

CANADA / JUDGMENT

Sotham v. Got

2020 BCSC 625

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 625 Sotham v. Got

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sotham v. Got,

2020 BCSC 625

Date: 20200423

Docket: E053824

Registry: New Westminster

Between:

Robert Sotham

Claimant

And

Diana Got

Respondent

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Claimant:

J.J. Thorsteinsson

Counsel for the Respondent:

A. Grewal

Place and Date of Hearing:

New Westminster, B.C.

November 22, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 23, 2020

Introduction

[1] This is a summary trial application in a family law proceeding. The claimant Mr. Sotham and the respondent Ms. Got were in a common law relationship that began in 1993 and ended with their separation in 2017. Several years into the relationship, the parties entered into a written agreement, described as a "marriage agreement", setting out their intentions in the event of a breakdown in their relationship. This summary trial application deals with two interrelated issues. The first issue is whether the written agreement, purporting to be a "marriage agreement", is valid and enforceable despite the fact that the parties were never married. If the agreement is valid, the second issue is whether, given that it was entered into before the coming into force of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the proceedings relating to the agreement are governed by the former Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].

Facts

[2] Mr. Sotham and Ms. Got began living together in a common law relationship on or about 28 June 1993.

[3] On 26 June 1995, almost two years to the day after their relationship began, the parties entered into a written agreement, expressly referred to as a "Marriage Agreement". I would summarize the relevant provisions of the agreement as follows:

a) The recitals to the agreement stated, inter alia, that:

i. The parties "have cohabited since 28 June 1993 and may marry in the future".

ii. The parties entered the agreement for various purposes including to address "management of, ownership in, and division of property", "during their cohabitation or any subsequent marriage".

iii. The agreement was "made as a marriage agreement under s. 48 of the FRA".

iv. The agreement was made "in consideration of the promises of marriage, and of marriage itself, and of the mutual covenants, agreements, and promises" set out within.

b) The parties expressly agreed that their relationship "resembles a marriage".

- c) All benefits conferred by either party upon the other would be treated as gifts and would not result in any unjust enrichment.
 - d) Neither party would share legal or beneficial ownership of the other's separate property.
 - e) Neither party would rely upon any oral expression or conduct of the other suggesting an intent to hold property in trust.
 - f) The parties would keep their property separately, and each would retain sole ownership of property owned or subsequently acquired by that party.
 - g) In the event of the breakdown of the relationship, with respect to any separate property that had been converted or used to acquire joint property during the relationship, the value of each party's originally separate property would be accounted for and credited to that party, with the remainder of the joint property to be divided equally.
 - h) Specific arrangements were made for the respective contributions toward, valuation, and disposition of the "matrimonial home" in the event of the breakdown of the relationship.
 - i) In the event of a breakdown of the relationship, neither party would have any financial obligation toward the other.
 - j) If any portion of the agreement were later found to be illegal, unenforceable, void or voidable, the remaining parts would remain as a separate contract.
- [4] The parties separated on 15 July 2017. They did not have any children together. Ms. Got had two children from prior relationships, who are now adults.
- [5] Mr. Sotham filed a notice of family claim on 13 September 2017, seeking equal division of family property under the FLA, or alternatively equitable relief based on unjust enrichment or constructive trust. In his claim, Mr. Sotham pled that the "marriage agreement" is "null and void", or alternatively "voidable" on the basis that the parties were never married.
- [6] Ms. Got filed a response to family claim on 12 December 2017. In it, she pled that the marriage agreement is valid and binding, and on that basis opposed any division of property under the FLA. Ms. Got further denied Mr. Sotham's equitable claims for unjust enrichment and constructive trust.

Analysis

Suitability for Summary Trial

- [7] The court can only give judgment on a summary trial under Rule 11-3(15) of the Supreme Court Family Rules, B.C. Reg. 169/2009 where satisfied that the matter is suitable for disposition in a summary hearing. This means the court must be able to find the facts necessary to decide the points in issue, and it must not be unjust to decide the matter summarily: *Sarmiento v. Villarico*, 2014 BCSC 455 at para. 14-20. Furthermore, where summary trial is sought with respect to a specific issue or issues rather than the entire case,

the court must be satisfied that it is in the interests of justice to sever those issues from the balance of the litigation: *K.M.W. v. M.D.W.*, 2016 BCSC 228 at para. 31-42.

- [8] In the case at bar, both parties agree that the issues raised in their respective notices of application are suitable for determination in a summary trial. There is no dispute about the relevant facts and it would be disproportionate to require a trial on these issues in light of the relatively straightforward facts of the case. I accept that position. The parties also submit that the issues are discrete and severable from the balance of the litigation. The parties say a determination on the two issues raised in their notices will advance the litigation. I agree with this assessment.
- (1) Whether the Written Agreement is Valid and Enforceable
- [9] Mr. Sotham submits that the written agreement, expressly said to be a "marriage agreement" made under s. 48 of the former FRA, is void or otherwise invalid because the parties never married. Mr. Sotham relies on the text of s. 61 (formerly s. 48) of the FRA, and on the case law interpreting and applying that provision.
- [10] Under s. 61(2) of the FRA, a "marriage agreement" is described as "an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later". Thus, a marriage agreement may be entered into before the parties are married, but it only takes effect on the later of the date of the marriage or the execution of the agreement. This implies that where the parties never marry, the agreement never takes effect.
- [11] This interpretation is confirmed by the case law. In *Trautmann v. Baker*, 1996 CanLII 1692 (B.C.S.C.) [Trautmann] at para. 10, R.B. Harvey J. explained that this provision "contemplates a situation where a marriage agreement is entered into before marriage but states that in this situation, the agreement takes effect on the date of the marriage", such that, "[w]here the parties never marry, it appears that the agreement does not take effect". His Lordship concluded at para. 16 that the legal basis for the agreement in the case before him was "derived entirely from" what was then s. 48 of the FRA and since the parties never married, the agreement was "of no force and effect". See also the obiter comments of Master Bishop in *Williams v. Friesen*, 1994 CanLII 373 (B.C.S.C.) [Williams] at p. 5-6.
- [12] In *Wiest v. Middelkamp*, 2003 BCCA 437 at para. 36, Rowles J.A., speaking for the Court, suggested that "in light of the reasoning" in *Williams* and *Trautmann*, "there may be a question as to whether [an agreement entered into between two parties who never married] is enforceable or whether it would fall within the definition of 'marriage agreement' in the FRA in any event".
- [13] Ms. Got submits that even if the agreement in this case does not qualify as a "marriage agreement" within the meaning of the FRA, this does not necessarily make it a nullity or invalidate it. Counsel for Ms. Got says that when one has regard to the agreement as a whole, it is clear that the parties intended to enter into a binding agreement regarding their

relationship, knowing that they may or may not marry in the future. Whether or not this qualifies as a "marriage agreement" under the FRA, there is certainly nothing unlawful or improper about it.

- [14] Ms. Got relies on *Wiest v. Middelkamp*, 2008 BCSC 1774 [Wiest]. There, the parties made an agreement entitled "cohabitation agreement", but which was expressly stated to be a "marriage agreement" under s. 48 of the FRA. The parties never married. In a subsequent action by Ms. Wiest seeking equitable relief under the doctrine of unjust enrichment, Mr. Middelkamp relied on the agreement as a juristic reason for Ms. Wiest's deprivation. After reviewing *Williams and Trautmann*, Gerow J. accepted that the agreement did not qualify as a "marriage agreement" under the FRA, but did not conclude that this made it invalid or unenforceable. Her Ladyship reasoned at para. 52 that it was "an open question in cases where the statute does not expressly declare a contract - or certain conduct governed by the contract - illegal, as to whether the inconsistency with the statute renders the contract illegal and therefore void".
- [15] Under the "modern approach" to the question of conflict between a statute and a contract, courts consider whether enforcement of the contract would be consistent with or alternatively would subvert the policies underlying the statute. Applying this modern approach, Gerow J. determined that Ms. Wiest and Mr. Middelkamp entered into a bona fide agreement with the intention of keeping their assets separate. Ms. Wiest, who was a lawyer, had drafted the agreement, and it would have been against public policy for her to benefit from the inclusion of a term stating that the agreement was a marriage agreement under s. 48 of the FRA to later argue that the contract was invalid. Gerow J. concluded that Mr. Middelkamp was entitled to rely on the agreement in support of his position, but ultimately found on the facts of the case that the agreement was not a juristic reason for the deprivation alleged by Ms. Wiest.
- [16] Applying the legal principles discussed above to the facts of the case at bar, I agree with the position advanced by Ms. Got. It seems beyond dispute that since the parties never married, the written agreement between Mr. Sotham and Ms. Got does not qualify as a "marriage agreement" under the FRA. However, that does not necessarily make the agreement void or otherwise unenforceable. I find that the term stating that the agreement was a "marriage agreement" within the meaning of former s. 48 of the FRA is severable and does not affect the validity of the balance of the agreement. Beyond this, I find the written agreement to be a valid and enforceable contract, intended to give effect to the intentions of the parties regarding their relationship.

- [17] I should note that the obiter analysis in Williams affords some support for the view that a "marriage agreement" between parties who never marry is invalid due to a lack of consideration. In Williams, Master Bishop reasoned that where the parties never marry, an agreement between them cannot qualify as a marriage agreement under s. 48 and thus "cannot be saved by" s. 48(4), which provides that marriage agreements are binding "whether or not there is valuable consideration".
- [18] In the case at bar, I did not take Mr. Sotham to argue that the agreement was invalid due to a lack of consideration. His submission, as I understood it, was that the written agreement is void and unenforceable due to its failure to meet the requirements for a "marriage agreement" under the FRA. In any event, I do not find this particular agreement invalid due to a lack of consideration for two reasons. First, the agreement states that it is made "in consideration of the promises of marriage and of marriage itself and of the mutual covenants, promises, and agreements contained herein". This is the very same language found in the agreement in issue in Wiest, wherein Gerow J. found a valid and enforceable contract despite non-compliance with the FRA. Second, the exchange of covenants in the agreement itself constitutes valid consideration, in the sense that each party assumed certain legal obligations and made certain forbearances in exchange for the reciprocal assumption of obligations and forbearances of the other party. Such mutual promises contained within a contract can afford "good and valid consideration": Downey v. Ecore International Inc., 2012 ONCA 480 at para. 58.
- [19] There may be a third basis on which to hold that the agreement is not invalid for lack of consideration, namely the fact that it purports to be made under seal. As stated in Friedmann Equity Developments Inc. v. Final Note Ltd., 2000 SCC 34 at para. 20, "[t]he law will enforce a contract under seal even without consideration". There is some discussion in the case law about what form of seal is necessary to create a "sealed instrument". The copy of the agreement attached to Ms. Got's affidavit does not appear to have any discernible mark or seal, but the line immediately above the signature block reads, "In witness thereof the parties hereto have set their respective hands and seals the day and year first above written". Each party's signature then appears under a line stating that the agreement has been "signed, sealed and delivered", and each signature is witnessed by that party's counsel. In view of my conclusion on the other two points discussed above, I need not make any finding as to whether this agreement qualifies as one made "under seal" so as to overcome any objection as to lack of consideration.
- [20] My conclusion is that the written agreement between Mr. Sotham and Ms. Got is not void, invalid, or otherwise unenforceable on the basis that the parties were never married. But that is not the end of the matter as far as the agreement is concerned. Before going on to address the second issue - whether this agreement, having been executed prior to the FLA, falls to be dealt with under the former FRA - it is necessary to characterize the nature and legal effect of the written agreement between Mr. Sotham and Ms. Got.

- [21] In interpreting the written agreement, the court must consider its full text read in light of the factual matrix of the case, including the surrounding circumstances when the parties entered into it: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47. See also *Lotimer v. Johnston*, 2019 BCSC 2098 beginning at para. 11, applying *Sattva* in the context of a written agreement between spouses in family law proceedings.
- [22] A key part of the context in the case at bar is the distinct treatment of married spouses and common law partners at the point in time when Mr. Sotham and Ms. Got made their written agreement. Married spouses could make property division claims under the FRA, whereas the only recourse for common law partners was through the equitable doctrines of unjust enrichment and constructive trust. Reading the written agreement between Mr. Sotham and Ms. Got in this context leads to the conclusion that the intent of the agreement was twofold. First, the parties intended - in the event that they were to marry at some point - to set out arrangements for property division upon breakdown of the relationship. Second, the parties intended - in the event that they never married - to mutually agree that all benefits conferred by the one upon the other would be gifts not resulting in any unjust enrichment or constructive trust. Thus, considering the context that property division under the FRA was only available to married spouses, the property division aspects of this written agreement would only take effect if the parties married.
- (2) Whether the Written Agreement is Governed by the FLA or the FRA
- [23] Because the written agreement between Mr. Sotham and Ms. Got was entered into prior to the coming into force of the FLA, a question arises as to whether Mr. Sotham's argument seeking to set aside the agreement and Ms. Got's counter-argument seeking to enforce it are to be dealt with under the new law or the old. To answer this question, it is necessary to have regard to the transitional provision set out in s. 252 of the FLA, which reads as follows:

Transition -- proceeding respecting property division

252(1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

- (2) Unless the spouses agree otherwise,
- (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
- (b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

- [24] The parties disagree as to the scope of s. 252(2)(a), and more specifically on the proper interpretation of phrase "a proceeding to enforce, set aside or replace an agreement respecting property division" made before coming into force of the FLA.

- [25] For his part, Mr. Sotham says the entirety of s. 252(2) applies only to married spouses. He says it would make no sense to interpret this provision to apply to unmarried spouses who never had the ability to seek "property division" under the FRA. In support of this position, Mr. Sotham relies on *Newton v. Crouch*, 2016 BCCA 115 [Newton], *Matteucci v. Greenberg*, 2016 BCCA 116 [Matteucci], and *B.L.S. v. D.J.S.*, 2019 BCSC 846 [B.L.S.]
- [26] In *Newton*, the claimant commenced an action prior to the coming into force of the FLA, and the respondent later filed an amended counterclaim seeking division of family property after the FLA came into force. The claimant then applied to a chambers judge for a declaration that the property division provisions in Part 5 of the FLA did not apply. The chambers judge dismissed the application. In upholding that conclusion, the Court of Appeal reasoned at para. 41-42 that, "[s]ection 252(2) applies only to married spouses as proceedings in connection with property division could not be 'commenced under the former Act' by unmarried persons". Thus, unmarried spouses "who had commenced a property action in equity before the FLA was enacted are not required to continue the action in equity", making it open to "pursue a claim under the FLA in addition to their other equitable or legal rights".
- [27] The Court in *Newton* further explained that in framing the transitional provisions this way, the Legislature appears to have made a policy choice. On the one hand, property division claims commenced prior to the new legislation (that is, claims that could be pursued by spouses who had been married) were to be decided under the FRA. On the other hand, equitable claims commenced prior to the new legislation (that is, claims by unmarried partners) could be continued and coupled with property division claims under the new FLA. Speaking for the Court, Savage J.A. took the view that the Legislature most likely made an intentional policy choice to treat these two situations differently "to fulfill the remedial aspects of the FLA" in regards to unmarried partners: *Newton* at para. 43.
- [28] In the companion case of *Matteucci*, an unmarried couple separated in 2012 leading to the commencement of proceedings under the FRA later that same year. After the coming into force of the FLA in 2013, the respondent filed a counterclaim seeking spousal support and property division. The trial judge dismissed those claims on the basis that the relationship ended prior to the coming into force of the FLA. The Court of Appeal overturned the trial judge's decision. In doing so, the Court once again addressed the FLA's transitional provisions, stating at para. 49, "Of course, s. 252 cannot apply to unmarried persons formerly in marriage-like relationships as those persons have no statutory property entitlements under the FRA."
- [29] Ms. Got points out that both *Newton* and *Matteucci* dealt with s. 252(2)(b), which applies to proceedings that were commenced under the FRA. Neither case dealt with the particular subparagraph raised in the case at bar, s. 252(2)(a), which deals with property division agreements entered into before the FRA's coming into force. Ms. Got argues the text of s. 252(2)(a) is different from and broader than the text of s. 252(2)(b). Specifically, the latter makes express reference to proceedings for "property division started under the former

Act", whereas the former refers to proceedings to enforce, set aside or replace agreements "respecting property division" made before the coming into force of the FRA. Thus, subparagraph (a) makes no express reference to property division "under the former Act".

- [30] This brings me to the case law interpreting and applying s. 252(2)(a) of the FLA. Unfortunately, there appear a divergence of views regarding the proper scope of this particular provision.
- [31] Ms. Got relies principally on *Blunt v. Lee*, 2019 BCSC 351, in which Young J. distinguished *Newton and Matteucci* and went on to hold that s. 252(2)(a) is not limited to spouses who were or had been married. Young J. found it significant that s. 252(2)(a) does not refer to "the former Act", and instead refers to agreements "made before the coming into force of this section". On this basis, Young J. concluded at para. 21 that "[i]f the Legislature wished to exclude agreements between common law spouses from the application of s. 252(2)(a), it would have done so explicitly".
- [32] Ms. Got also relies on *Harris v. Duin*, 2018 BCSC 1144 [Harris], which similarly applied s. 252(2)(a) to an agreement between unmarried partners. In *Harris* the Court did not consider the argument made in the case at bar, that is, that s. 252(2)(a) does not apply to unmarried partners because they had no statutory entitlement to property division under the FRA regime. Thus, the court in *Harris* did not consider the Court of Appeal's comments in *Newton and Matteucci* to the effect that s. 252(2) does not apply to unmarried partners. Moreover, this aspect of *Harris* can fairly be considered obiter, because the presiding judge went on to find that even if the claimant had the ability to pursue a claim under the FLA, it was barred by the statutory limitation period in s. 198(2).
- [33] Mr. Sotham relies on *B.L.S.*, in which Norell J. applied the reasoning in *Newton and Matteucci* to hold that s. 252(2)(a) did not apply to an agreement between unmarried partners. The crux of the analysis in *B.L.S.* is the following passage at para. 35 of the reasons:

I am bound to follow *Newton and Matteucci*. With respect to property division, the decisions in *Newton and Matteucci* state that s. 252 does not apply to unmarried spouses because they did not have any statutory property entitlements under the FRA. This is consistent with the remedial nature of the FLA, which is to generally grant unmarried spouses the same rights as married spouses.

- [34] Unfortunately, it appears that the *Blunt* decision was not brought to the attention of the court in *B.L.S.*
- [35] For reasons explained below, the case at bar can be decided without resolving the rift in the case law. For my part, I have some sympathy for Norell J.'s view in *B.L.S.* that the underlying principle in *Newton and Matteucci* is not limited to s. 252(2)(b). The gist of the Court of Appeal's reasoning in *Newton and Matteucci* is that s. 252(2) was never intended to apply to unmarried partners since they had no statutory entitlement to property division in the era

of the FRA. This reasoning would appear to apply to proceedings to enforce, set aside or replace agreements concerning property division as contemplated in s. 252(2)(a). Although common law partners could make agreements, those agreements would almost invariably be focused on equitable claims in the event of breakdown of the relationship, rather than property division claims as contemplated under the FRA.[1] I also agree with Norell J.'s comment at para. 35 of B.L.S. that interpreting s. 252(2)(a) to apply only to married spouses would be "consistent with the remedial nature of the FLA" in regards to unmarried partners.

- [36] In any event, the case at bar can be decided without conclusively resolving the conflict in the case law regarding the scope of s. 252(2)(a) of the FLA. That is because the result in this case turns on the nature of the written agreement between Mr. Sotham and Ms. Got. As explained above, there were two aspects to the written agreement. First, the parties agreed that if they were to marry at some point their property would be kept separate and divided in a certain way. Second, the parties agreed that if they never married all benefits conferred upon one by the other would be treated as gifts not resulting in any unjust enrichment or constructive trust. On this interpretation, the property division aspects of the written agreement would only take effect if the parties married, which they never did.
- [37] I conclude that whatever the scope of s. 252(2)(a) may be in the abstract, the instant case is not a proceeding to "enforce, set aside or replace an agreement respecting property division" within the meaning of this provision. Insofar as the agreement between Mr. Sotham and Ms. Got is concerned, this case is a proceeding to enforce or set aside an agreement respecting equitable claims as between unmarried partners. As such, it is not caught by the transitional provision, and it falls to be dealt with under the FLA.

Conclusion

- [38] To summarize, my conclusions are as follows. First, the written agreement between Mr. Sotham and Ms. Got is not invalid by reason of the fact that the parties never married. The written agreement is binding and enforceable as an agreement between two common law partners. Second, this case is not a proceeding to "enforce, set aside or replace an agreement respecting property division" within the meaning of s. 252(2)(a) of the FLA. As such, the proceeding is to be dealt with under the FLA.

Costs

- [39] If the parties are unable to agree on costs, they can file written submissions. Counsel for Mr. Sotham may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of the release of these reasons. Counsel for Ms. Got may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of receiving Mr. Sotham's written costs submissions. Counsel for Mr. Sotham may file a reply of two pages or less (plus any reply affidavit material) within one week of receiving the written costs submissions of Ms. Got. If either party takes the view that submissions on costs cannot effectively be dealt with in writing,

that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

"Riley J."

- [1] The one exception would be agreements under former s. 120.1 of the FRA, under which common law partners could "opt in" to the FRA's property division provisions. Whatever the impact of s. 120.1 might have on the statutory interpretation analysis, it has no bearing on the case at bar because the written agreement between Mr. Sotham and Ms. Got was made prior to the enactment of s. 120.1.

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