
CANADA / JUDGMENT

Squair v. Squair

2016 BCSC 645

COURT

Supreme Court of British Columbia

DECIDED

13 April 2016

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2016 BCSC 645 Squair v. Squair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Squair v. Squair,

2016 BCSC 645

Date: 20160413

Docket: E36951

Registry: New Westminster

Between:

Nancy Squair

Claimant

And

Ian Squair

Respondent

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Claimant:

G.K. Thomas

Appearing on his own behalf:

The Respondent, I. Squair

Written Submission of the Claimant Received:

January 6, 2016

Written Submission of the Respondent Received:

February 4, 2016

Place and Date of Judgment:

New Westminster, B.C.

April 13, 2016

Introduction

- [1] Reasons for judgment in this family law action, indexed at 2015 BCSC 2321, were pronounced on December 10, 2015, following a trial that had taken approximately 15 hearing days, spread out over approximately two-and-a-half years.
- [2] The claimant submits that she was substantially successful at trial. She submits that her costs inclusive of disbursements amount to approximately \$67,000. She asks that she be awarded costs; that the award be satisfied in part through payment to her of the remaining funds in court, which total approximately \$23,000; that the amount of costs remaining after payment-out incur interest; and that she be permitted to pursue the respondent for the balance of her costs beginning in October 2016.
- [3] The respondent says that it was he who was the substantially successful party at trial, and that he should be awarded costs accordingly. Alternatively, whether it was the claimant who is found to have been substantially successful, or whether success is found to have been divided, it is submitted that the court ought to exercise its discretion in favour of awarding costs to the respondent in any event.

Background

- [4] The irregular nature of the proceedings is described in the trial reasons. In brief, after the first six days of trial - in October 2012 and March 2013 - counsel were on a schedule to exchange written argument, with a final day to be scheduled for oral submissions in late July 2013. That plan was thrown into disarray through Mr. Squair suffering a complete nervous collapse following dismissal from his employment, and losing contact with his legal counsel, who took steps to formally withdraw following an appearance before me in September 2013. (The date of the latter hearing is wrongly stated at paragraph 7 of my reasons as September 23; the correct date, as noted on the face page of the reasons, is September 25.)

- [5] When the trial finally reconvened in February 2014, Mr. Squair disclosed in his testimony that he had exhausted his liquid savings and had collapsed all of his U.S.-based 401K retirement accounts, Individual Retirement Accounts and pensions.
- [6] A succession of further court appearances was required before Mr. Squair was able to provide a full accounting of his funds and transfer them into Canadian bank accounts. There were hearings conducted on April 17 and August 8, 2014 that resulted in orders being made against Mr. Squair. A case management conference was convened on November 7, 2014 where further orders were made, and in my absence orders were made yet again by Groves J. on February 10, 2015. The trial concluded with four further hearing days, April 7-10, 2015.

The Legal Test for an Award Of Costs After Trial

- [7] Costs are to be awarded to the "successful party", unless the court orders otherwise, as provided in subrule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009. The Rule has been interpreted as incorporating the test of "substantial success" that had been formulated in the case law under the old Rule 59(7); see the decision of Mr. Justice Pearlman in *MacLean v. Mio*, 2011 BCSC 148, at paras. 17-31, and the subsequent decisions cited by Madam Justice Fitzpatrick in *Walburger v. Lindsay*, 2015 BCSC 959, at para. 7.
- [8] "Substantial" success is generally taken to mean a success rate of about 75% or better, as a "rough and ready guide", taking into account each of the various matters in issue and weighing their relative importance: *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd, 2002 BCCA 454, at para. 45.
- [9] The basis upon which the court may exercise its discretion to "order otherwise" was described by McEachern C.J.B.C. in the unanimous judgment of the Court of Appeal in *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180, 32 B.C.A.C. 287, at para. 20:

To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

Discussion

- [10] This action essentially proceeded in three phases: first up to the end of July 2013, when the parties were originally scheduled to have made final submissions; then to February 2014, when the trial reconvened; and then a final phase, to hearing of further evidence and of the parties' closing submissions, in April 2015.

- [11] Had the trial concluded as originally planned in July 2013, I would not have found the claimant to have been substantially successful. I can say this without having had the benefit of counsel's post-March 2013 submissions, because the final outcome of several of the issues was determined by the evidence given in 2012-2013, and unaffected by later events.
- [12] The parties did not appear to be far apart or substantially at odds over issues surrounding care of the children. The parties did not appear to be in disagreement over an equal apportionment of family assets. The respondent made no claim to an inheritance the claimant had received during the marriage. In respect of those issues, there was no "clear winner" in the first phase of the trial.
- [13] There were, however, some substantial issues - substantial in terms of trial time, and in terms of the financial consequences - on which the respondent prevailed. Much of the first six days of trial was given over to a detailed review of the employment history of the respondent, and the education and employment history of the claimant, through their marriage. This evidence bore most directly upon a claim being made by the claimant for a compensation payment. As noted in the trial reasons at para. 78, the claimant's pleadings had sought modest ongoing spousal support: a payment of \$500 per month, limited to a period of 24 months. This position was abandoned at the opening of trial, and instead the claimant sought, on compensatory grounds, a payment reflecting one-half the present value of the respondent's U.S. social security entitlement, based on the opinion evidence of an actuary. The claimant did not succeed on this issue; I found the actuarial evidence wanting as to present value of an equal after-tax share, and in any event I found there not to be a strong basis for a compensatory claim on the evidence generally.
- [14] A further, substantial issue was quantification of the respondent's income, for child support purposes. The claimant sought imputation of income to the respondent for the period January-July 2010, and sought to have the respondent's income for the year 2011 assessed as including an incentive payment. Both of those claims were unsuccessful.
- [15] Having said that, the claimant did succeed in obtaining orders for retroactive basic child support of more than \$14,300 and more than \$2,400 in retroactive s.7 expenses.
- [16] To this analysis, I would add that to the extent the respondent could be viewed as having been successful to that point in the trial, I would have to, in fairness, recognize two factors. First, a disproportionate amount of trial time was devoted to these financial issues, in no small measure due to what I described in the trial reasons (para. 58) as the respondent's pedantic, exacting responses to straightforward questions put to him on cross-examination. Points that ought to have been easily conceded were instead turned into matters of contention. I found that the respondent was not wilfully being obstructionist; nevertheless, his behaviour had consequences for the duration and therefore the cost of the trial. More significant than that is a second point, that the claimant's task of preparing for trial had undoubtedly been made more complex than necessary due to the respondent having failed to make adequate financial disclosure through the pre-trial process. The claimant had been

obliged to obtain an extensive order for financial document disclosure in March 2012, and that order was only complied with shortly before the trial commenced in October 2012. Both of these factors substantially weigh against any entitlement the respondent might otherwise have to an award of costs.

- [17] The action then moved into what I have described as its second phase, a period of delay, and a necessary further day of evidence in February 2014. This second phase came about because the respondent became unable to instruct his counsel in the summer of 2013, due to his change of employment and, more significantly, a deterioration in his mental or emotional state, specifically issues with anxiety and depression and exacerbation of symptoms of ADHD. The delay during this second phase was not due to any fault on the part of either party.
- [18] Following the resumption of trial in February 3, 2014, the claimant took the position that the respondent was still employable, and sought imputation of income for child support purposes in the amount of \$50,000 for the years 2014 and 2015. Ultimately I did not accept that position, finding on a balance of probabilities that the respondent had been and continued to be functionally disabled. Nevertheless, I would not conclude that this finding weighs in favour of the respondent being deemed to have been "successful" on that issue such as to entitle him to an award of costs against the claimant. Although the claim for imputation of income was advanced by the claimant, child support is a right of the children. There had been a material change in the respondent's circumstances after he had given evidence in March 2013, and in the circumstances the onus was on the respondent to persuade the court as to the existence of a disability that relieved him of the financial burden of supporting his children.
- [19] By far, the greatest portion of the additional effort and cost associated with the continuation of the trial after February 3, 2014 was as a consequence of the respondent's collapse of his U.S. accounts, and his persistent failure or inability to provide a full accounting, and to comply with orders and directions of the court. In the trial reasons, I did take the respondent's difficulties in complying with the numerous orders the court was subsequently obliged to make to be some evidence of the extent of his functional disability. My conclusion was, and is, that at least to some significant extent his actions, or his inaction, were a consequence of his personality, his emotional state, and/or his ADHD. But those factors did not and do not relieve the respondent of responsibility for his behaviour. Nor ought they to relieve the respondent of responsibility for the additional costs the claimant was put to as a consequence.
- [20] The respondent submits that regardless of what finding I might make as to which party was substantially successful, I ought to exercise my discretion by way of awarding costs to him - or, in any event, not awarding costs against him - in view of his current financial situation. He submits that he is effectively indigent, is unemployed and unemployable, and has employment prospects that are dismal at best. He invites me to contrast his situation with that of the claimant, who has received a substantial judgment in her favour and who has

secure employment.

- [21] As sympathetic as I might be towards the respondent's current situation, I find that his position on costs essentially amounts to a claim for spousal support. No such claim was put forward at trial. Even when Mr. Squair retained new counsel to represent him, in the latter half of 2014, no steps were taken to counterclaim for support. Whether he is or has been entitled to spousal support is not an issue before me. I cannot find that it is in the interests of justice to allow the respondent to avoid all liability for the claimant's costs on the basis of his financial situation, particularly given my finding that his liability arises out of his own conduct. I do, however, find it appropriate to take the respondent's financial circumstances into account by limiting his costs liability to, at a maximum, the amount of funds currently being held in court.
- [22] Alternatively, the respondent submits that my discretion ought to be exercised in his favour by reason of what the respondent asks I find to have been reprehensible conduct on the part of the claimant in the conduct of this action. The respondent presents a lengthy list of grievances as to the steps taken by the claimant, and submits that he was victimized by a campaign of harassment and intimidation. I do not accept this characterization of what transpired between the parties. Even taking the respondent's recounting of the history of the litigation at face value, what is described are strong, forceful litigation tactics. The actions described do not rise to the level of reprehensible conduct necessitating sanction. The claimant was frustrated and justifiably aggrieved by the respondent's handling of his U.S. accounts, and the steps taken by the claimant to obtain compliance with court orders, including threats of contempt proceedings, were reasonably necessary.
- [23] In the circumstances of this most unfortunate case, I find the fair result is as follows:
- a) Each party shall bear their own costs to and including February 3, 2014;
 - b) The claimant will have her costs as incurred after that date, up to the pronouncement of the trial reasons on December 10, 2015;
 - c) The claimant's costs will be payable only out of the funds currently being held in court; and,
 - d) Each party shall bear their own costs from December 10, 2015 to the date of these reasons.
- [24] There is one further issue I must address. The written submissions of the respondent made numerous pejorative comments aimed at the ethics of the claimant's counsel. I will not dignify the comments by repeating them. Where a party makes unfounded allegations concerning the professional integrity of an opposing party's counsel, an award of costs, including an award of special costs, may be made: see *Leger v. Metro Vancouver YWCA*, 2013 BCSC 2021, at paras. 74-77. As the Court of Appeal stated recently in *The Owners Strata Plan LMS3254 v. Sze Hang Holding Inc.*, 2015 BCCA 424, litigation is not a free-fire zone where litigants - including self-represented individuals - are free to make accusations regardless of the harm that might be done to others and their reputations. Having said that, I view the respondent's remarks as likely having been born not out of malice but out of

frustration, anger and possibly fear. I will not pronounce a sanction in regard to the content of the respondent's submissions, but he is put on notice that accusations and insinuations of the type he has made may in future result in a significant costs award being made against him.

"A. Saunders J."

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