

CANADA / JUDGMENT

Su v. Lau

2021 BCSC 2315

COURT

Supreme Court of British Columbia

DECIDED

29 October 2021

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2021 BCSC 2315 Su v. Lau IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Su v. Lau, 2021 BCSC 2315 Date: 20211029 Docket: E172289 Registry: Vancouver Between: Susan Chun Hui Su Claimant And Hon-Tung James Colin Lau also known as Hon Tung James Colin Lau also known as Hon-Tung James Lau also known as James Hon Tung Lau and Megagain Investments Ltd. Respondents Before: Master Bilawich Oral Reasons for Judgment In Chambers Counsel for Claimant, via teleconference: M. Ellis, Q.C. Counsel for Respondents, via teleconference: J. Bennett Place and Date of Trial/Hearing: Vancouver, B.C. October 29, 2021 Place and Date of Judgment: Vancouver, B.C. October 29, 2021

- [1] THE COURT: The claimant applies for a direction that the cost of various joint expert reports that are being prepared be shared equally by the parties in the first instance on a without prejudice basis.

Background

- [2] The parties were in a marriage-like relationship. They disagree about when it began. The claimant says it began in August 2009, while the respondent says it began in August 2013.
- [3] The parties separated on August 26, 2017.
- [4] The parties signed a cohabitation agreement dated August 23, 2013, which states in the recitals that the parties "are soon to be residing together in a marriage-like relationship and whereas they wish to continue to reside together". The respondent says this particular recital supports his position.
- [5] The claimant is taking the position that the agreement is unconscionable and should be set aside with regard to both spousal support and division of property. The grounds alleged for this include that the respondent failed to provide proper financial disclosure, that he took advantage of the claimant's vulnerability, undue influence, and the claimant says she did not understand the nature or consequences of the agreement, including her lawyer not advising her at the time and not meeting the requisite standard for independent legal advice. Alternatively, she says the agreement is significantly unfair. In the further alternative, she makes claims in constructive trust.

- [6] The respondent's position is that the agreement is effective and binding upon the claimant. If found to be so, he says the agreement would be a full answer to the claim such that the provisions of the Family Law Act would not apply and the length of the parties' relationship would not be relevant. If the agreement is set aside, the parties' positions on appropriate date for start of the relationship differ significantly. The relevant joint expert opinions relate to four properties and four companies. For each of these, appraisals at three dates are being sought including August 2009, which is the claimant's separation date, August 2013, which is the respondent's separation date, and present date.
- [7] The B.C. properties for which valuations are being sought include:
- a) 6607 Arbutus Street, Vancouver, B.C.;
 - b) 8233 Redrooffs Road, Half Moon Bay, B.C.;
 - c) 111 West Broadway, Vancouver, B.C. (this is the property owned by one of the companies mentioned below) and
 - d) 53 and 55 West Broadway, Vancouver, B.C.
- [8] The respondent also owns a property at 2205, Block 1, 227 Bay Road, Zhuhai, Guangdong Province in China, for which an appraiser has been identified and joint appraisals are being prepared as of August 2013 and present day.
- [9] The companies for which valuations are sought include:
- a) Megagain Investments Ltd.;
 - b) City Corp. Realty Ltd. (the respondent is a 40 percent shareholder);
 - c) 513679 B.C. Ltd.; and
 - d) 377189 B.C. Ltd.
- [10] The respondent says the two numbered companies have been inactive since about 2011, and the realty company is also inactive more recently.
- [11] Accordingly, the total number of appraisals and valuations sought in this case is daunting.
- [12] The claimant suggests there is a significant financial imbalance between the parties in that the respondent's net worth is reported to be in the \$5 - \$10 million range and that her financial resources are much more modest at about \$500,000.
- [13] The respondent says that he is 67 years of age and retired, while the claimant is 56 years of age and still working. He argues that the claimant's financial resources are actually similar to his, as they properly include four properties she owns in Taiwan, which appear to be worth about \$5 million. The claimant says her father registered these Taiwan properties in her name without her knowledge. Her position is that she holds them in trust for him and has no beneficial interest in them.

- [14] It is not necessary for me to work through these differing positions and estimated valuations for the purposes of this application. Suffice to say that both parties appear to have substantial financial resources available which they can access to fund a robust approach to this litigation. This is not a case where one party is obviously at a substantial disadvantage in terms of their ability to fund the litigation. History of the Application
- [15] This issue was originally raised as part of a broader notice of application filed August 7, 2019. It was adjourned generally in 2019.
- [16] The claimant filed a requisition on October 13, 2021, setting parts of the application for hearing on October 20, 2021, without prior notice to the respondents and without their consent. From their perspective, they considered the issues relating to initial costs of joint expert reports to have been previously resolved.
- [17] The respondent points to the fact that counsel for the claimant stated in several instruction letters to experts that the claimant would pay the experts' accounts, and suggests that this is a binding commitment to bear the initial cost of relevant joint reports. The claimant argues that these statements were necessary to give the relevant experts the assurance they required in order to start work on their opinions immediately so that the opinions would be available to the parties as soon as possible. It was not intended to foreclose the claimant's ability to seek appropriate sharing of initial costs associated with jointly retained experts.
- [18] The respondent also highlights the fact that he opted to retain an expert in Taiwan to prepare appraisals of the four properties registered to the claimant there. The claimant apparently declined to get involved in a joint retainer on those particular appraisals, so the parties agreed the respondent could pursue them as individual expert reports. He now suggests that this should be taken into consideration when deciding what is fair in terms of initial cost sharing for joint expert reports. Law and Analysis
- [19] Rule 13-3 and 13-4 of the Supreme Court Family Rules deal with jointly appointed experts.
- [20] Rule 13-3(2) provides that:
- (2) If any party wishes to present to the court expert opinion evidence on a financial issue,
 - (a) that evidence must be presented to the court by means of a jointly appointed expert unless the court otherwise orders or the parties otherwise agree, and
 - (b) Rule 13-4 applies.
- [21] Rule 13-4(1) provides that:
- (1) When an expert is to be jointly appointed by 2 or more parties under Rule 13-3 (2) or (3) (a), the following must be settled before the expert is appointed:
 - (g) responsibility for fees and expenses payable to the expert.

[22] In this case, the parties did not reach a clear express agreement on sharing of expert fees and expenses for the joint experts. The respondent appears to have resisted accepting responsibility for several reports, while the claimant pressed ahead with issuing retainer letters which gave certain experts assurances that the claimant would be responsible for their fees in order to get the experts' work on valuation started.

[23] Rule 13-4(3) provides that:

(3) If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with Rule 10-5 for an order

(a) appointing a joint expert, and

(b) settling any matter relating to the appointment of the joint expert.

[24] I consider that this includes settling disputes regarding initial responsibility for fees and expenses of the various experts retained to prepare the joint valuations the parties have expressly agreed need to be prepared.

[25] Neither counsel was able to direct me to any authorities which shed light on how to approach this issue. Counsel for the claimant argues that since the expert was a joint expert, the starting point ought to be joint financial responsibility for the expert services in the first instance. It is occasionally the case that the court will apportion all or a greater share of the initial financial burden for a joint expert to the party with greater financial means as a way to ensure reports are prepared and available for trial when the other party has difficulty bearing that cost. This is consistent with the object of the rule set out in Rule 1-3.

[26] In the present case, the claimant did argue that the financial means of the parties are disproportionate, but she does this not to try to avoid bearing an equal share on a without prejudice basis; she simply objects to being forced to pay the full cost of many reports without contribution of the respondent.

[27] In this case two historical reports are necessary for each of the B.C. properties and valuations for companies due to the substantial dispute regarding the start date for cohabitation plus a present day valuation.

[28] I do not consider it to be necessary or appropriate to engage in an analysis of the respective merits of the parties' positions relating to enforceability of the cohabitation agreement or historical valuation dates. I do not have the necessary evidence before me to do that properly, and it would not be desirable to unduly complicate what should be a relatively straightforward pre-trial issue. Appropriate allocation of costs associated with the reports can be addressed in the fullness of time after trial. For now, it is clear that both parties are well able to bear a fair share of the initial cost of the joint expert services and of the litigation generally. In my view, there is no persuasive reason to diverge from the "default" presumption that joint expert fees and expenses should be initially shared, without

prejudice to each party's ability to claim the share they pay as a disbursement should they be awarded costs at the conclusion of the eventual trial of the action.

- [29] With respect to the appraisals of the Taiwan properties, the parties agreed that the respondent could pursue these as individual expert reports rather than as joint expert reports. As such, the initial fees and expenses for those are not subject to what I have characterized as the "default" presumption.

Conclusion

- [30] The claimant and the respondent will be equally responsible for the fees and expenses relating to the joint experts retained for valuations of the four B.C. properties, the Chinese property and the four companies, without prejudice to their ability to claim their share as costs following the trial of this action.
- [31] The parties will each bear their own costs of this application.
- [32] CNSL M. ELLIS: Thank you, Your Honour. Just for the sake of the clerk's notes and to be clear, and perhaps this is where the lines crossed, the 53 and 55 West Broadway properties were sold, and so those are not included in the valuation. The B.C. ones are, as you have stated, Arbutus, Red Redrooffs, and 111 West Broadway. I'm not sure how it's going to show up on the transcript. Just to be clear.
- [33] THE COURT: Yes. If a property has been sold and an appraisal is not required, I am not trying to add ones that the parties themselves agree are not necessary.
- [34] CNSL M. ELLIS: Thank you, Your Honour.
- [35] CNSL J. BENNETT: Your Honour, Bennett, initial J. speaking. In terms of the distributed tax reports, they were part of the valuations. Are those included in the cost sharing?
- [36] THE COURT: Yes. If they are joint reports, the same principle applies for those.
- [37] CNSL J. BENNETT: Thank you, Your Honour.
- [38] THE COURT: We are adjourned. "Master Bilawich"

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Prepared on 28 October 2026 · Esheria