
CANADA / JUDGMENT

Tidy v. Tidy

2014 BCSC 1445

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1445 Tidy v. Tidy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tidy v. Tidy,

2014 BCSC 1445

Date: 20140703

Docket: E140573

Registry: Vancouver

Between:

Lisa Catherine Tidy

Claimant

And

Terence Thomas Tidy, Regal Tanks Ltd.,

Tidy Steel-Fab Ltd., Panridge Consultants Ltd. and Tidy Group Holdings Ltd.

Respondents

Before: The Honourable Madam Justice Gray

(appearing via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

P.S. Boles

Counsel for the Respondent Companies:

C.A. Clark

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 25, 2014 and

July 3, 2014

Place and Date of Judgment:

Vancouver, B.C.

July 3, 2014

- [1] THE COURT: The application before me has been brought in a divorce proceeding. The claimant wife and the respondent husband separated on January 27, 2014, after about 14 years of cohabitation and about 12 ½ years of marriage. They separated and reconciled during that time, but the details of that do not matter for the question before me.
- [2] The applicants on this application are the four companies which are named as respondents in the lawsuit. I refer to them as the "Corporate Respondents". They all seek to set aside a paragraph of the order of Justice McEwan which was made on February 28, 2014, without notice to them or in fact to the husband either.
- [3] I refer to the Order as the "February McEwan Order". The paragraph in question is paragraph 2, and it is as follows:

The Respondents [then it names the four Corporate Respondents] shall be restrained from disposing of, transferring, encumbering, converting or exchanging into another form any asset which is or may be a family asset and thereby subject to claims of interest therein by the Claimant.

- [4] I will refer to this paragraph as the "Corporate Freezing Order".
- [5] Paragraph 1 of the February McEwan Order is identical to the Corporate Freezing Order with one exception: it refers to restraining the husband rather than the Corporate Respondents from dealing with any asset which is or may be a family asset.
- [6] Paragraph 5 of the February McEwan Order is in handwriting which I find difficult to read. I believe it says:

This order may be set aside on two clear days notice, if the court hearing the Respondents deems that appropriate.

- [7] I assume that there is a word missing and that the paragraph meant to say, "if the court hearing the Respondents' application deems that appropriate."
- [8] The position of the Corporate Respondents is that the Corporate Freezing Order should be set aside, either on its merits or on the basis that the claimant failed to make full and frank disclosure to the court of all material facts.
- [9] I understand that the parties, through their counsel, tried to have this matter heard by Justice McEwan, but that they had difficulty finding available hearing dates, and ultimately the matter was set for hearing before me.
- [10] I will briefly set out the facts. The claimant says that she was a stay-at-home mother after the parties' daughter was born in October 2001, almost 13 years ago. In her first affidavit, which was sworn on February 27, 2014, and was evidence before Justice McEwan, the claimant wife deposed as follows at paragraph 11:

My husband is and always has been through our relationship employed by and part of, including at various times as shareholder, director and officer various companies considerable of which he kept me in the dark about.

Perhaps that should be "considerable details of which". I am not sure what word is missing there.

He was always very secretive about finances. These companies include but are not limited to [the four Corporate Respondents].

[11] Here is part of paragraph 17:

He gave me a cheque for \$2200 and \$600. That is all of the money I have received. I have no access to other of our funds. He exercise [and I think it should say "exercised"] strict control over all funds throughout our marriage. I have no idea what his genuine income is but many benefits come from the company such a [and I think it should say "as a"] truck I believe is paid for by the business, the same too I believe is true with respect to his cellphone, fuel, considerable of his meals and the like.

- [12] The evidence filed following the February McEwan Order shows that the husband is a director of only one of the four Corporate Respondents, and that is Tidy Group Holdings Ltd. The evidence shows that the husband is not a majority voting shareholder of any of the four Corporate Respondents. It shows that he is a 25 percent voting shareholder of two of them, being Tidy Steel-Fab Ltd. and Tidy Group Holdings Ltd. It also shows that he is employed as the manager of Tidy Steel-Fab Ltd.
- [13] The evidence also shows that the shareholders of the four Corporate Respondents are all members of the husband's extended family, including his siblings and a niece and nephew. It also shows that the husband's late mother had significant holdings in these companies and that the husband is a beneficiary of her estate.

- [14] I am told that in an affidavit filed within the last couple of days, there is evidence that there is a shareholder's loan by which Tidy Steel-Fab Ltd. owes the husband about \$128,000 as at the end of May 2013. I am told that the evidence shows that the loan is interest-bearing, and that previously the company owed the husband an amount in excess of \$200,000. I am told that the recent evidence also shows that another company, Tidy Industries Inc., owes the respondent husband a debt of about \$407,000, pursuant to a promissory note, which I believe is dated December 28, 2012. The recent affidavits were not provided to me because I was unexpectedly sent to New Westminster and as a result attended the hearing continuation by telephone. I am relying on counsel's description of the evidence.
- [15] The position of the Corporate Respondents is that the freezing order was properly made only against the husband, and that it is not appropriate for an order to be made against the Corporate Respondents. I will go through these arguments made by counsel for the Corporate Respondents: first, failure to make full and frank disclosure of all material facts; second, failure to advise the court about the facts relating to the urgency of the matter; third, failure to advise the court of a change in the law; fourth, the merits of the order; and finally, failure to provide an undertaking as to damages.
- [16] First, I will deal with the argument that the claimant wife failed to make full and frank disclosure of material facts. The Corporate Respondents say that the claimant wife ought to have told Justice McEwan, and provided evidence showing, that the husband was not a director of three of the Corporate Respondents, was not a shareholder of two of them, and that his shareholdings in the other two were minority shareholdings.
- [17] When a party applies for a court order without notice to the affected party, the court expects the applicant party to make full and frank disclosure of all material facts, including those which are contrary to the position of the party making the application. Where a party has not made that full disclosure, the court has the jurisdiction to set aside the order, even if the court would have made the order if the material evidence had been provided. In such a case, the court is effectively punishing the party for failing to make full disclosure when it applied to the court without notice to the other side. The case often cited for that proposition is *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America* (Canadian District) (1959), 18 D.L.R. (2d) 625 (BCCA).
- [18] It is a simple matter for a party to do a search of the records of the Companies Registry, which will disclose who are the registered directors of the company. It is well known that the registrar does not report to the company that a search has been undertaken of the records of the Registrar of Companies.
- [19] In order to determine who are the shareholders of the company, a person must review the records at the corporate records office. This is not a public office, but it is a private office where corporate records are kept. As a result, the fact that such a search was made would usually be reported to the company.

- [20] In my view, the claimant wife ought to have conducted a search of the records of the Registrar of Companies regarding all four Corporate Respondents, and ought to have advised Justice McEwan of the results of the search, which would have revealed that the husband was a director of only one of the four Corporate Respondents.
- [21] However, in my view, it was acceptable that the wife did not search the corporate records at the record office of each Corporate Respondent to determine who were the shareholders, because of the concern that doing such a search would have come to the attention of those companies. The wife's evidence that her husband gets benefits from the Corporate Respondents and that she does not know any details, particularly in the situation of a small, privately-held family company, is sufficient to explain her failure to search the shareholders' registers at the records offices of the Corporate Respondents.
- [22] In my view, the wife's failure to provide the evidence of the directorships in the context of all of her evidence was not a sufficiently serious failure to make full disclosure to the court that it would warrant setting aside the injunction.
- [23] I turn then to the question of urgency. I have reviewed the transcript of the brief oral hearing before Justice McEwan. It does not appear to me that it was brought to Justice McEwan's attention that the parties had separated a month earlier. I am referring here to the fact that the wife's evidence was that the parties separated on January 27, 2014, and the application before Justice McEwan was about a month later. There was nothing suggesting that the husband or the Corporate Respondents did anything out of the ordinary with assets during that month-long period. However, the claimant wife did not know about company financial matters and she brought that fact to the attention of the court.
- [24] In my view, the statements to the court about urgency were not sufficiently concerning to warrant setting aside the February McEwan Order.
- [25] I next refer to the law. The law regarding orders freezing family assets changed with the coming into force of the Family Law Act about a year ago. Under the previous Family Relations Act, it was mandatory for the court to make an order freezing family assets against any party to a divorce proceeding. Section 67 of the former Family Relations Act, R.S.B.C. 1996, c. 128 is as follows:

67 (1) On application by a party to a proceeding under this Part or Part 6, the court must make an order restraining another party to the proceeding from disposing of a family asset or any other property at issue under this Part or Part 6 until or unless the other party establishes that a claim made by the applicant under this Part or Part 6 will not be defeated or substantially impaired by the disposal of that family asset or other property.

- (2) On application by a party to a proceeding under this Part or Part 6, the court may make an order for the possession, delivery, safekeeping and preservation of a family asset or other property at issue under this Part or Part 6.

(3) The court may make an order under this section before notice of the application is served on the other party or may order that notice of the application be served on the other party.

(4) On application by a party to a proceeding under this Part or Part 6, the court may vary or rescind an order made under this section on terms it considers appropriate.

[26] The Family Law Act, S.B.C. 2011, c. 25 is different. It provides that it is mandatory for the court to make such an order against any spouse, but not against a non-spouse party to a divorce proceeding. Section 91 of the new Family Law Act is as follows:

91 (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [Pension Division] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

(2) The Supreme Court may make one or more of the following orders:

(a) for the possession, delivery, safekeeping and preservation of property;

(b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,

(i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or

(ii) vesting all or a portion of property in, or in trust for, the applicant.

(3) The Supreme Court may make an order under this section before notice of the application is served on the other spouse, or may order that notice of the application be served on the other spouse.

(4) Despite section 215 (2) [changing, suspending or terminating orders generally], the Supreme Court may change, suspend or terminate an order made under this section.

[27] In my view, it would have been better if counsel had drawn this change in the law to the attention of Justice McEwan; however, judges are taken to know the law. I do not know whether Justice McEwan was aware of the change, but in my view, the failure of counsel to refer to that specific change is not something that would require the court to set aside the February McEwan Order.

[28] As I have said, it is no longer mandatory for the court to make a freezing order in respect of assets in the hands of non-spouses, such as the Corporate Respondents. The application against the Corporate Respondents on the merits therefore depends on the general law rather than the Family Law Act. Generally, the courts avoid freezing assets prior to judgment.

[29] The court has jurisdiction to make an order restraining dealing with property which is the subject of a lawsuit. That is set out in Supreme Court Family Rule 12-1.

- [30] As discussed by the Supreme Court of Canada in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, an order for the preservation of property should be made where the property is the very subject matter of the proceeding and where, but for the order, it would be destroyed before the dispute is resolved.
- [31] Another way the court has dealt with the concern about assets being dissipated before judgment is the order commonly called a "Mareva" injunction. One of the leading cases is *Sekisui House Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima* (1982), 42 B.C.L.R. 1. That case refers to the applicant for a Mareva injunction being required to satisfy these tests:
- a) make full and frank disclosure of all material matters;
 - b) give particulars of the claim, the grounds for it, and the amount;
 - c) fairly state the points made against the claim by the defendant;
 - d) show some ground for believing that the defendant has assets in the jurisdiction;
 - e) show some ground for believing that there is a risk of the assets being removed before judgment is satisfied; and
 - f) give an undertaking in damages, supported in suitable cases by a bond or security.
- [32] I will not take the time to read them out in their entirety, but Supreme Court Family Rules 12-1 and 12-4 are of interest here: 12-1 is regarding detention, preservation, and recovery of property. Subsection (4) says:
- If a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the party, pending the outcome of the family law case, either unconditionally or on terms and conditions, if any, relating to giving security, time, mode of trial or otherwise.
- [33] Subsection (5) says:
- Unless the court otherwise orders, if an order is made under subrule (4) in favour of a party, the order must contain the party's undertaking to abide by any order that the court may make as to damages arising out of delivery of the property to the party or compliance with any other order.
- [34] My point in referring to that is to show that the reference to an undertaking as to damages is only with regard to the 12-2(4) orders where specific property is claimed and the specific property is given up to a party pending the outcome of the case.
- [35] Supreme Court Family Rule 12-4(5) is the general injunction rule, and provides that unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages.

- [36] In this case, there is a basis for the finding that the Corporate Respondent Tidy Steel-Fab Ltd. is in possession of a family asset, in the sense that the company owes money to the defendant husband pursuant to the shareholder's loan. The relationship between the husband and Tidy Steel-Fab Ltd. is actually a debtor/creditor relationship. I do not suggest that there are specific dollar bills that are being held in some place that belong to the husband, but the indebtedness is owed by the company to the husband.
- [37] Similarly, the corporation, Tidy Industries Inc., which is not a party to this lawsuit, owes a debt to the defendant husband.
- [38] I referred counsel in argument to the proposition that a party who knows about a court order can still be in contempt of it if they aid in the breach of it. I referred to the case of *Glazer v. Union Contractors* (1960), 33 W.W.R. 145, 25 D.L.R. (2d) 653, a Supreme Court decision which was affirmed at (1960) 34 W.W.R. 193 by the Court of Appeal. That case stands for the proposition that a non-party is in wilful contempt of court when he aids and abets others in defying the court and deliberately treats an order of the court as unworthy of notice.
- [39] In this case, it would be possible to give notice to the Corporate Respondents that there is an order restraining the husband from dealing with family assets, and it would be possible to bring proceedings for contempt against one or more of the Corporate Respondents if they participated in a breach of the order. The argument made on behalf of the claimant wife is that it would be better to be more specific, so the company knows clearly what its obligations are, rather than for the wife to be required to rely on an allegation of assisting in a contempt if the order is breached.
- [40] It is important in this case, in my view, to look at the precise words of the Corporate Freezing Order. It is an order restraining the Corporate Respondents from disposing of or dealing in other ways with "any asset which is or may be a family asset and thereby subject to claims of interest therein by the claimant".
- [41] The position of the Corporate Respondents is that they do not know what is or may be a family asset, and that this could hamper them in dealing with the business. There is no evidence that they have been hampered, but the argument is made that they are in a difficult position when there is an order that is imprecise in this way.
- [42] The position of the claimant wife is that she has only very recently been able to learn about the shareholder's loan owing by Tidy Steel-Fab Ltd. to the respondent husband. She says she has not yet received certain financial information, being financial statements, income tax returns, and minute books for three companies, being Panridge, Regal U.S.A., and the non-party company, Tidy Industries Inc. She says that as a result, she is not in a position to know if one or more of those three companies owe any shareholder's loans to the husband.

- [43] In my view, it is appropriate to make it clear to the Corporate Respondents what is the property in question, rather than have an order which talks about "any asset which is or may be a family asset".
- [44] So what I am going to do is to vary the February McEwan Order in paragraph 2, and to provide that the four Corporate Respondents shall be restrained from disposing of, transferring, encumbering, converting, or exchanging into another form "any debt that they may owe to the respondent husband".
- [45] I will hear further submissions from both counsel as to whether there should be a reference to any other assets.
- [46] I asked Ms. Boles if her client was prepared to give an undertaking as to damages --
- [47] MS. BOLES: She's now here, My Lady.
- [48] THE COURT: I beg your pardon?
- [49] MS. BOLES: My client is now here.
- [50] THE COURT: And she told me her client was not here.
- [51] A moment ago I read out Rule 12-1(5), which seems to limit the need for an undertaking under that rule to the subsection (4) order, which is not the order in this case. Because this is an order restraining or seeking to preserve specific property which is named, in my view it is not necessary under the Supreme Court Family Rule to have the claimant wife give an undertaking as to damages.
- [52] What I have done then is made an order varying paragraph 2 of the order of Justice McEwan of February 28, 2012.
- [53] MS. CLARK: So --
- [54] THE COURT: I do want to hear, though, if counsel will argue that it should be more broad than simply my reference to indebtedness. You should probably go first on that, Ms. Boles.
- [SUBMISSIONS AT 9:56:59 TO 9:59:04 A.M.]
- [55] THE COURT: I have heard further submissions on whether there are other assets I should refer to in this variation order. The position of the claimant wife is that the order should also restrain the Corporate Respondents from dealing with or interfering in any way with the husband's shares. The position of the Corporate Respondents is that such a term is not necessary, because the Corporate Respondents should not assist the husband to breach the injunction against him.
- [56] In my view, it is better to have clarity here for the benefit of the companies. It is also possible for a small, privately-held company to reduce the value of shares; for example, by issuing many other shares and diluting the value of the husband's shares.

[57] In these circumstances, in my view, it is appropriate to include reference to the shares in the variation order. The Corporate Respondents shall be restrained from disposing of, transferring, encumbering, converting or exchanging into another form any loan owing by them to the respondent husband, and shall be restrained from altering the shareholdings of the companies or transferring, encumbering, converting, or exchanging into another form any shares of the respondent husband held in those companies. I think that will capture it.

[58] MS. BOLES: I think, absolutely.

[SUBMISSIONS AT 10:01:25 TO 10:05:53 A.M.]

[59] THE COURT: I hope that you can agree upon the wording of the exception by exchanging documents within the next week. If you cannot, please write the registry and request another hearing before me, and we will figure out this exception.

[60] MS. BOLES: I think that that may solve the problem, My Lady, quite frankly, it's just the documents.

[61] THE COURT: All right, so I am going to have to conclude this hearing. Ms. Clark, is that clear then? I am prepared to give an exception relating to --

[62] MS. CLARK: Yes.

[63] THE COURT: -- the amalgamation of Panridge into Tidy Industries.

[64] MS. CLARK: Yeah. I mean, the only thing I would say is it doesn't affect the value. You know, everything that was in Panridge is now -- would now be in Tidy. I mean, I don't see what information my friend needs, but certainly I'm willing to try and discuss this with her.

[65] THE COURT: All right. Well, if you cannot agree on that within a week, please request a further hearing. Hopefully you will agree on the wording, but it will be something like "except that the amalgamation of Panridge into Tidy Industries can go ahead".

[66] MS. BOLES: Thank you, My Lady.

[67] THE COURT: All right.

[68] MS. CLARK: Thank you, My Lady.

[69] MS. BOLES: My Lady, as to costs?

[70] THE COURT: Yes?

[71] MS. BOLES: I'd ask that Ms. Tidy be awarded costs.

[72] THE COURT: All right, and what is your position, Ms. Clark?

[73] MS. CLARK: Well, in my position, the companies have seen success on this application and that the terms of this very broad order have been delineated so that the companies can actually know what they are limited from doing and the companies should get their costs.

- [74] THE COURT: All right. I am going to make an order then -- Ms. Boles, is there something else you wanted to say?
- [75] MS. BOLES: Nothing further, My Lady.
- [76] THE COURT: All right. I am being asked to make an order as to costs in this case. Neither party was entirely successful. I have varied the order of Justice McEwan to specifically name assets that are the subject of the order. In that sense, the companies were successful in clarifying the order, but the companies were not successful in having the terms set aside entirely, so there has been mixed success.
- [77] I was concerned that the application response on behalf of the claimant wife was too thin. Under "factual basis", it simply said "there is no basis in law for the relief sought". Under "legal basis", there was just a reference to two Acts and the Supreme Court Family Rules. In my view, there should have been a more comprehensive application response.
- [78] In consideration of all of that, in my view, the appropriate order is no order as to costs of this application.
- [79] MS. BOLES: Thank you, My Lady.
- [80] THE COURT: All right, thank you.
- [81] MS. CLARK: Thank you, My Lady.
- "Gray J."

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