
CANADA / JUDGMENT

Tomic v. Tough

2013 BCCA 212

COURT

British Columbia Court of Appeal

DECIDED

3 May 2013

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2013 BCCA 212 Tomic v. Tough

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Tomic v. Tough,

2013 BCCA 212

Date: 20130503

Docket: CA040692

Between:

Tomislav Doce Tomic

Respondent

(Petitioner)

And

Marion Louise Tough

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Chiasson

(In Chambers)

On appeal from: Supreme Court of British Columbia, February 4, 2013

(Tomic v. Tough, Vancouver Docket Nos. S123193 and E122677)

Counsel for the Appellant:

J. Richter

Counsel for the Respondent:

S. Booth

Place and Date of Hearing:

Vancouver, British Columbia

April 18, 2013

Place and Date of Judgment:

Vancouver, British Columbia

May 3, 2013

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

- [1] Ms. Tough seeks a number of orders: an extension of time to bring an application for leave to appeal; leave to appeal; and, a stay of execution pending hearing of the appeal if leave is granted. The application to extend the time for bringing the application for leave to appeal is not opposed.
- [2] The applications raise the issue of whether leave is required when there are multiple orders made by a judge, some of which require leave to appeal and others do not.

Background

- [3] The parties were in a long-standing common-law relationship. They lived together in a waterfront home in Tsawwassen, British Columbia (the "Home"), which they purchased as tenants-in-common in March 1992. In March 2012, the respondent, Mr. Tomic, moved out of the Home and began living with his daughter in Vancouver. This appears to have been as a result of his deteriorating health. He is 77 years old; Ms. Tough is in her 60s.
- [4] Mr. Tomic wanted to sell the Home; Ms. Tough did not want to do so. In May 2012, he filed an application for partition and sale under the Partition of Property Act, R.S.B.C. 1996, c. 347 (the "Partition Proceeding"). Ms. Tough took the position that the matter was required to be addressed in a family law proceeding, which she commenced on August 30, 2012 (the "Family Law Proceeding").
- [5] On January 21, 2013, Mr. Tomic filed an application in the Family Law Proceeding pursuant to s. 8 of the Family Relations Act, R.S.B.C. 1996, c. 128. He sought the following: an order joining the Partition Proceeding with the Family Law Proceeding, an order providing that affidavits filed in the Partition Proceeding be admitted as evidence in the Family Law

Proceeding and an order for sale of the Home pursuant to the Partition of Property Act, or alternatively, pursuant to Rule 15-8 of the Supreme Court Family Rules, B.C. Reg. 169/2009. On January 29, 2013, Ms. Tough filed an application for an order declaring the Partition Proceeding a nullity.

[6] The applications were heard on February 4, 2013. The judge delivered oral reasons that day. The affidavits filed in the Partition Proceeding were appended to affidavits filed in support of Mr. Tomic's applications. The judge addressed the partition petition in paras. 9 and 12:

[9] ... [Mr. Tomic] brought a petition respecting the division of interests and sale of the house. Whether it was rightly or wrongly brought, I do not think I need to decide. If I were forced to decide the issue concerning the petition, I would decide that the petition was an irregularity not a nullity, because it seems to me that to proceed by petition was a logical choice to make in light of the way that he had conducted his relationship, that is, he chose not to marry and to keep separate his financial affairs.

...

[12] In my view, that has rendered the petition action otiose so that we may now consider that it is joined in the family law action. It is not a nullity because the Rules instruct me not to consider it as a nullity but as an irregularity. I consider that it is appropriately joined and I grant [Mr. Tomic's] application in this respect.

[7] The judge ordered the sale of the Home. She did so pursuant to Rule 15-8(1), which is apparent from her statement in para. 7 that the test was "whether it is necessary and expedient that the interest in the house be severed and the house sold", which is the language of the Supreme Court Family Rules and not of the Partition of Property Act. The judge stated:

[13] ... it is my view that an interim order should be granted for the sale of the house ... I will delay the entry of the order to sell the house for 60 days from today's date so that Ms. Tough may consider how she wishes to try to buy the house. In my view, in any event of her success in the actions it is highly unlikely that she will ever be able to afford to buy half the equity in the house. But on the basis that she has made this request, I will allow her to try to find financing in the next 60 days.

Applicant's position

[8] Two draft orders were provided to me. One is in the Family Law Proceeding. It states:

1. The Claimant shall have 60 days from February 4, 2013 to purchase the personal Respondent's interest in 506 Centennial Parkway, Delta, BC, more particularly known and described as PID: 008-579-661 Lot 27 Section 1 Township 5 New Westminster District Plan 39631 (the "Property");
2. The entry of the Order set out in paragraph 1 is stayed for a period of 60 days;

3. In the event that the Claimant does not purchase the personal Respondent's interest in the Property within 60 days, the Property shall be listed and sold with the parties to have joint custody of sale;
 4. On the sale of the Property:
 - a. The sum of \$250,000 of the net proceeds of sale shall be sequestered and paid into trust as security for the Claimant's claims until further order of the Court or agreement of the parties; and
 - b. All necessary costs of sale and discharge, and payment of taxes will be paid.
 5. Supreme Court Proceeding No. S123193 (the "Petition Proceeding") shall be consolidated with Supreme Court Proceeding No. E122677 (the "Family Law Case") so that the two proceedings will be heard and tried together in the Family Law Case;
 6. All Affidavits sworn in the Petition Proceeding shall be admitted as Affidavits in the Family Law Case.
- [9] Ms. Tough asserts that she does not need leave to appeal the orders in paragraphs 1, 2, 3, 4(a) and 4(b). She concedes she needs leave to appeal the order in paragraph 5 because it is an interim order under the Family Relations Act. I comment further on this below.
- [10] The draft order in the Partition Proceeding provides:
1. The Respondent's application for a declaration that this proceeding is a nullity is dismissed.
 2. The Respondent's application that this proceeding be wholly set aside ex debito justitiae (as a matter of right) is dismissed.
 3. The Respondent's application that the petition in this proceeding be struck out as unnecessary and/or an abuse of process is dismissed.
 4. The Respondent's application for special costs or, in the alternative, costs of this proceeding are adjourned to the trial judge in the consolidated proceeding.
 5. Supreme Court Proceeding No. S123193 (the "Petition Proceeding") shall be consolidated with Supreme Court Proceeding No. E122677 (the "Family Law Case") so that the two proceedings will be heard and tried together in the Family Law Case.
 6. All Affidavits sworn in the Petition Proceeding shall be admitted as Affidavits in the Family Law Case.
- [11] Ms. Tough contends that she does not need leave to appeal the orders in paragraphs 1, 2 and 3. It is common ground that if the appeal dismissing Ms. Tough's application for a declaration that the Partition Proceeding is a nullity were allowed, paragraph 5 in both orders would become irrelevant.

Discussion

Procedure

- [12] The judge's direction that her order not be entered is somewhat unusual. If the order cannot be entered, it is questionable whether it is an order. The direction creates a potential lacuna in any process initiated in this Court until the order is operative. In my view, a better approach would be simply to direct that the order for sale is stayed for 60 days.
- [13] Ms. Tough filed a notice of application for leave to appeal on March 6, 2013. The style of cause referred to both the Partition and Family Law Proceedings. Leave to appeal was sought for all of the orders made by the judge on February 4, 2013. The parties agree that insofar as leave is not required, the notice of application for leave to appeal can be treated as a notice of appeal. In the circumstances of this case, it is not inappropriate to do so (see *Arbutus Excavating Ltd. v. Homewood Constructors Ltd.*, 2003 BCCA 236, 180 B.C.A.C. 314 at para. 4 (Low J.A. in Chambers); and *Lindholm v. Hy-wave Inc.* (1997), 86 B.C.A.C. 89, 31 B.C.L.R. (3d) 274 (Southin J.A. in Chambers)).
- [14] Although the judge stated in para. 19 that her order was "that the petition be consolidated with the family law claim", as noted, the application was to join the Partition Proceeding with the Family Law Proceeding pursuant to s. 8 of the Family Relations Act. There was no application to consolidate. Section 8(1) states:
- 8(1) If, in a proceeding under this Act, it appears to the court that other matters under this Act or under any other Act or law of British Columbia or of Canada should be determined first or simultaneously with the matters at issue in the proceeding, the court may, on its own motion, or on application of a party to the proceeding,
- (a) join and hear all proceedings together, in so far as this is within the court's jurisdiction, or
 - (b) direct that the application stand over until other proceedings are brought or determined
- as the court, in its discretion, considers appropriate.
- [15] In my view, an order under s. 8 does not consolidate proceedings. As is consistent with the meaning of the word, consolidation combines different proceedings into single proceeding. Joinder leaves each proceeding separate, but provides for them to be dealt with at the same time, usually before the same judge.
- [16] There is some confusion in the reasons concerning whether the Partition Proceeding was determined to be a nullity. In para. 9, the judge stated that she was not required to decide whether the petition "was rightly or wrongly brought", but that if she were obliged to decide, she would hold it to be an irregularity only. In para. 12, she found the Partition Proceeding to be otiose, that is, to serve no practical purpose. She stated for that reason "we may now consider that it is joined in the family law action." The judge continued, stating "[i]t is not a nullity because the Rules instruct me not to consider it as a nullity but as an irregularity."
- [17] In para. 27, the judge observed:

Ms. Tough's application is dismissed. I do not find that the petition is a nullity. As I have made clear, it is a mere irregularity if it is anything. And, in any event, it is time for the matter to be joined in the family law action.

Leave to appeal

[18] The focus of Ms. Tough's application for leave to appeal is stated in her motion book as follows:

23. Whether leave should be granted, in support of which, the appellant raises:

- a. Did the chambers judge err in law by finding that the petition was an irregularity and not a nullity;
- b. Did the chambers judge err in law in consolidating the family law case with the petition; and
- c. Did the chambers judge err in law by applying the wrong legal test and misapprehending certain important facts in determining that the family home should be sold?

[19] In my view, Ms. Tough does not require leave to appeal. She has an appeal as of right from orders made in both proceedings. These orders are not "limited appeal orders" as defined under the Court of Appeal Rules, B.C. Reg. 297/2001. They include the dismissal of her application for a declaration that the Partition Proceeding is a nullity made in that proceeding and the order for sale made in the Family Law Proceeding. The authority for making the joinder application was the Family Relations Act and it might be considered an interim order requiring leave to appeal pursuant to Rule 2.1(c) of the Court of Appeal Rules, but I do not think that matters in this case.

[20] In any event, having an appeal as of right from orders made in both proceedings, I am of the view that Ms. Tough does not require leave to appeal the joinder or any other components of the orders. This conclusion is consonant with the approach of Madam Justice Saunders in *Bentley v. The Police Complaint Commission*, 2012 BCCA 514 (in Chambers); see also, *Royal Bank of Canada v. Miller*, 2012 BCCA 419, 329 B.C.A.C. 72 at para. 10 (Lowry J.A. in Chambers); to the contrary is *Wallman v. Gill*, 2013 BCCA 110 (Neilson J.A. in Chambers).

[21] The only issue with respect to which Ms. Tough sought leave at the hearing was the order joining the two proceedings. If I am not correct in my conclusion that leave to appeal the joinder order is not required, I would not grant it.

[22] The criteria for granting leave to appeal were addressed by Saunders J.A. in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (in Chambers). They include:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

[23] On an application for leave to appeal, the "overarching concern is the interests of justice": *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2, 72 B.C.L.R. (4th) 341 (Saunders J.A. in Chambers). The four factors listed in *Goldman* are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Saunders J.A. in Chambers).

[24] Joinder is a matter of discretion. This Court will interfere with discretionary decisions only in exceptional circumstances. I see no error in principle in the judge's exercise of discretion. More importantly, the joinder order was not relevant to the important issue in this case: the order for sale. That order was made in the Family Law Proceeding using criteria in the Supreme Court Family Rules. If leave is required, I do not consider it to be in the interest of justice to grant leave to appeal the order joining the Partition Proceeding to the Family Law Proceeding.

Stay of execution

[25] Mr. Justice Smith succinctly described the general principles for granting a stay of proceedings in *Gill v. Darbar*, 2003 BCCA 3 at para. 7 (in Chambers):

The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. [In Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. [In Chambers]).

[26] The onus lies on the applicant to establish the right to a stay: *Re Taylor* (1986), 4 B.C.L.R. (2d) 15 at 16 (Craig J.A in Chambers). The ultimate question on any application for a stay of execution is the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607, 96 B.C.L.R. (3d) 327.

[27] Although Ms. Tough's notice of motion seeks to stay execution of the judge's "order proclaimed February 4, 2013", I understand that the stay application concerns the order for sale. There are three relevant parts to that order: one, Ms. Tough had 60 days to purchase Mr. Tomic's interest in the Home; two, failing her doing so, the Home is to be listed for sale and sold (by agreement, this will not happen pending my decision); three, \$250,000 of the net proceeds of such sale "shall be sequestered and paid into trust as security for [Ms. Tough's] claims".

[28] Several passages in the judge's reasons are relevant to this issue:

- [4] First of all, let me say that as I understand the substance of Mr. Richter's argument in opposition to the application for an order for sale,-- and this is not to trivialize it, but to indicate what I have gleaned from his lengthy submissions today -- is essentially that his client wants the house and the only way she can get it is if she wins on all of her claims against the other assets that are owned now or were owned by Mr. Tomic. That seems to me to be a bootstraps argument and I am not prepared to grant the relief he seeks on that basis. I also do not find merit in the position the respondent takes that she will amend to bring her claim under the new family law statute which will be proclaimed in March 2013 because she is likely to have greater rights under the new statute than the present one. Mr. Richter asks that I take the new statute into account. However, as I said to Mr. Richter, I do not deal with the law as it will be, I deal with it as it is now.
- [5] When I consider the submissions here today, I am also minded that this application has been brought by Mr. Richter as if it were an injunction application and he argues irreparable harm on behalf of his client.
- [6] Even if this were the test, the full answer to it is that any loss is remediable in damages.
- [7] In any event, that is not the test that I must consider. I must look at whether it is necessary and expedient that the interests in the house be severed and the house sold. In the context of this action, I find it is both necessary and expedient that these steps be taken.

...

- [13] With respect to the sale of the house, it is my view that an interim order should be granted for the sale of the house. However, I will delay the entry of the order to sell the house for 60 days from today's date so that Ms. Tough may consider how she wishes to try to buy the house. In my view, in any event of her success in the actions it is highly unlikely that she will ever be able to afford to buy half the equity in the house. But on the basis that she has made this request, I will allow her to try to find financing in the next 60 days.
- [14] I will also order that \$250,000 of the proceeds of the sale of the house be sequestered and held in trust as a way of securing the claims that she makes. In my view -- and I accept Mr. Booth's submissions on this point -- that is a reasonable assessment of the outside success that she could achieve because it is 50% of Mr. Richter's estimate of the amount of \$500,000 Mr. Tomic is alleged to have disposed of. Whether he had the right to do so is not before me. I think that amount is likely overstated, but, in any event, I will make an order that half of the amount of \$500,000 which is \$250,000, be set aside until the trial of this matter so that the status quo remains in place to allow the equities between the parties to be determined.

- [29] Ms. Tough contends that the judge erred by insufficiently taking into account the family context of the dispute. She states that the judge was wrong in refusing to consider the implications of the new family law legislation, which materially altered her potential financial position. She asserts that providing \$250,000 as security is inadequate and does not address her real concern: the loss of her Home.
- [30] The judge made no reference to Ms. Tough's plan to attempt to purchase the Home with the assistance of her son, Cameron. Cameron works and resides in Indonesia. Ms. Tough deposed that she discussed purchasing Mr. Tomic's interest in the Home with Cameron beginning in December 2012. In support of her application for a stay, Ms. Tough provided a copy of a March 25, 2013 letter from a bank, which stated it was
- ... currently working on an application for Marion Tough for her intention to purchase half of her current principal residence.
- We are in the process of securing Cameron Tough as a guarantor for the above mentioned financing.
- Also note that Marion originally came into our office in mid-February to start this application. Cameron Tough began negotiating with us on March 2, 2013.
- [31] In my view, there is sufficient merit in the appeal concerning the order of sale, particularly the timing of the sale, to meet the first criterion for a stay.
- [32] Mr. Tomic presently is in Crofton Manor where he receives care for his illnesses. Both parties are suffering financially. Their on-going expenses exceed their incomes. There can be little doubt that Mr. Tomic's interest in the Home will be sold. The issue is to whom and when.
- [33] The trial of the Family Law Proceeding is scheduled to begin on September 3, 2013. Ms. Tough intends to attack an estate freeze undertaken by Mr. Tomic as a fraudulent preference. She also will rely on the recently proclaimed Family Law Act, S.B.C. 2011, c. 25. That legislation contains provisions extending to common-law relationships the presumption that family assets are held equally. Her pleading in the Family Law Proceeding has been amended to include these matters. She disputes the contention that the most she will recover at trial is \$250,000.
- [34] Ms. Tough considers the Home unique. It is clear she strongly desires to continue living in it. The judge did not consider that the loss of the Home was irreparable harm because "any loss is remediable in damages". In my view, in the circumstances of this case, that may be too narrow an approach to the issue. This Court has taken uniqueness into account, albeit with mixed results (see *Hutchingame v. Johnstone*, 2006 BCCA 332; *HGE Administrative Services Ltd. v. Perrick*, 2010 BCCA 576; *Palkovics v. Barta*, 2012 BCCA 306). In any event, I conclude that a stay of relatively short duration is in the interest of justice.

- [35] Ms. Tough advised that she would be prepared to have the Home used to fund Mr. Tomic pending the sale of his interest. The details of such an arrangement would have to be determined, but the Home is worth at least \$2 million net of encumbrances.
- [36] It may be that Ms. Tough will not be able to finance the purchase of Mr. Tomic's interest in the home, but in my view, she should have the continued opportunity to do so pending the determination of her appeals or the order of the trial court after trial, if that should render the appeals moot.
- [37] Counsel advises that they could have the appeals ready for hearing by July 15, 2013. A division of this Court is sitting that week. Counsel have advised the Registry that they are prepared to proceed on July 15, 2013.

Conclusion

- [38] The application to extend the time for bringing the application for leave to appeal from March 6, 2013 to March 8, 2013 is granted.
- [39] The application for leave to appeal is dismissed as not required.
- [40] The notice of application for leave to appeal shall stand as a notice of appeal of the orders made on February 4, 2013, in both Supreme Court action S123193, the Partition Proceeding, and Supreme Court action E122677, the Family Law Proceeding.
- [41] The order for sale of the Home is stayed and Ms. Tough may continue her efforts to finance the purchase of Mr. Tomic's interest in the Home pending the hearing of the appeals.
- [42] The appeals will be scheduled to be heard on July 15, 2013. The division hearing the appeals will consider whether the stay should continue and, if so, on what terms.
- [43] I am not seized of this matter, but if it would assist the parties, I would endeavour to make myself available if they require further directions.

"The Honourable Mr. Justice Chiasson"

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Prepared on 29 October 2026 · Esheria