

CANADA / JUDGMENT

Vandenberg v. Vandenberg

2024 BCSC 1499

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1499 Vandenberg v. Vandenberg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vandenberg v. Vandenberg,

2024 BCSC 1499

Date: 20240516

Docket: E51168

Registry: New Westminster

Between:

Carla Denise Vandenberg

Claimant

And:

Richard Andrew Vandenberg

Respondent

Before: The Honourable Justice Caldwell

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant,

appearing via videoconference:

W.L. Scott, K.C.

Counsel for the Respondent,
appearing via videoconference:

A.T. Briscoe

Place and Date of Hearing:

Chilliwack, B.C.

May 13, 2024

Place and Date of Judgment:

Chilliwack, B.C.

May 16, 2024

- [1] THE COURT: I will just say at the outset this matter was heard on Monday. It has a clear tone of urgency because of a pending sale of property. I have cobbled these reasons together, but if a copy of the reasons is ordered, I do not think this is necessary but I will say, as I rarely do, that I may amplify the reasons. I am not going to read extensively from case authorities, but if the reasons are requested, I reserve the right to edit or supplement, not change the meaning or substance or tenor of the decision but simply to clean it up, because it may be less than completely elegant at this point.
- [2] This is an application heard on Monday seeking multiple relief regarding income and support for a spouse and children. The trial related to the matter is set for three days. The parties have been divorced for some time. The immediate focus is on paras. 6 and 8 of the notice of application. In a nutshell and in layman's terms, it seeks to secure all or part of the net proceeds of a house sale by way either of a--Supreme Court Family Rules, Rule 12-1 in particular, or as I have found more appropriate, by way of a Mareva-style injunction or what has come to be known as a preservation order.
- [3] The parties began living together in June 1997. They married in June 1998. They separated in November 2015, and they were divorced by final order in November 2017. The claimant wife is 51. The respondent husband is 59. He has an ownership interest in a company called Infinite Gravity Digital Media Ltd. There are three children, all daughters, the eldest being 21 and the younger two being twins aged 19.
- [4] There was a separation agreement made and executed in October 2017. It was filed with the court in November 2017 and thus became effectively an order of the court with respect to enforcement and variation. That agreement provides for spousal and child support and for financial disclosure on an ongoing basis. Over the years, it is fair to say that certain disclosure has been made, and support has been adjusted. That disclosure for the most part represented the respondent's various line 150 income figures. He has paid support based on those calculations.

- [5] At some point, the claimant wife became suspicious. She was concerned about the level of disclosure relating to actual available income for Guideline purposes. After discussions, the details of which are unnecessary, it was agreed between the parties with the assistance of counsel to commission a Guideline income report. That was to be done by a chartered business valuator for the years 2018 to 2022 inclusive.
- [6] The firm of Blair Mackay Mynett was engaged to do that, and the author of the report was Kiu Ghanavizchian. The report was undertaken and was subsequently completed in February 2024. That report proceeded on the basis of information provided solely and only by the respondent husband, as well as on records and documents provided solely by him. It was paid for solely by him.
- [7] Upon release, the opinions contained in the report seem to indicate that in 2018 and possibly 2020, the line 150 income for the respondent bore at least some passing resemblance to the actual available Guideline income. In the other years, his actual income, which may or may not have been available for Guideline calculations, was double, triple, or even quadruple the line 150 amount referred to. It reached a possible high of \$569,000 in 2022.
- [8] It is fair to say that the respondent husband disputes the opinion contained in the report. He also disputes as being inaccurate and improper the unpaid support calculation provided to the court by counsel for the claimant and based upon their interpretation of the income determinations.
- [9] Those calculations provided by counsel for the claimant using the figures in the report indicate a potential underpayment by the respondent husband to about today's date of something in excess of half a million dollars. That figure is probably high. It seems clear, however, that there may very well be a shortfall, and that it may be significant.
- [10] Of note, following the receipt of the report, the respondent husband has entered into a contract of purchase and sale to sell his home of long standing in Maple Ridge. It is a home that I believe he referred to as having been in for 20 years. He indicates that he is moving to Kelowna, where he now owns a "fixer-upper home," which is in need of, I think in counsel's submissions and the material, hundreds of thousands of dollars in repair simply to make it insurable and inhabitable. He is moving his business to Kelowna as well, and there is expense indicated as being related to that.
- [11] After payment of the various mortgages and other debts related to the Maple Ridge home and payment to his current spouse for her contribution to that Maple Ridge property, the net proceeds are in the range of \$300,000. The claimant wife seeks by her application to secure or to preserve the sum of \$250,000 of that net proceeds, saying in essence that the respondent has not been forthright with respect to his actual income, and that has operated to the prejudice of herself and the children. In short, his actions show him to not be trustworthy.

[12] Secondly, his actions since the report appear to be aimed at some form of liquidation, and there is a risk that he is alienating the money that he has available from that sale away from the reach of other parties, including the wife and children, once arrears or shortfalls are established, if in fact they are established.

[13] Another concern which I must make comment about which was not really voiced by the claimant but became quite clear on my review of the overall material, which is somewhat extensive. That concern arises from a series of what are at best referred to as unfortunate text communications between the respondent's new spouse and at least one or more of the children. In those text communications, she expresses considerable fear that the respondent is going to die and that he is going to die in the near future. She writes in one of her texts, and I will not refer to some of the less savoury portions of that text, but she writes:

I worry every day about him dying, especially since no male in his family has lived past 60.

[14] I note in that regard the respondent is currently 59. He will turn 60 in April 2025, the month following the scheduled trial in this matter.

[15] I focus on the authorities relating to preservation orders of this type, often referred to as Mareva-type injunctions or orders. I read first from tab 3, a long standing decision of a highly-respected jurist, Lord Denning, Master of the Rolls, in the case of *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.*, [1980] 1 All E.R. 213 (C.A.). At the second page of that decision, the learned justice says in the middle paragraph:

In *Beddow v. Beddow* Jessel MR gave a very wide interpretation to that section. He said: "I have unlimited power to grant an injunction in any case where it would be right or just to do so ..."

[16] Later on that same page in the bottom full paragraph, Master of the Rolls Denning says:

In my opinion, that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.

[17] Later, quoting from a decision of Justice Francis of this Court, in the case of *United States Securities and Exchange Commission v. Sharp*, 2023 BCSC 425, in particularly at paras. 8 and 9, she says:

[8] This application must be considered in the context of the test that must be met by the plaintiff. On a Mareva application, the Court is not being asked to find facts on the civil standard of balance of probabilities. Rather, the Court is tasked with reviewing a body of evidence and determining whether it is satisfied that the plaintiff has a good arguable case, such that it is appropriate to tie up the assets of the defendant pending judgment. The authorities are clear that this calls for a flexible approach that is not unduly rigid or compartmentalized.

- [9] In *Silver Standard Resources Inc. v. Joint Stock Co.* (1998), 59 B.C.L.R. (3d) 196, 168 D.L.R. (4th) 309 (C.A.), the Court of Appeal endorsed the flexible approach to Mareva injunctions set out by Justice Huddart in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335, 33 C.P.C. (3d) 31 (S.C.):
- [19] By taking a flexible approach, the court may take account of a wide variety of circumstances, including "the relative strengths of the parties' cases, evidence of irreparable harm one way or the other, potential effects on third parties, and factors affecting the public interest." (At 349) Further, Huddart J. Said, such an approach:
- prevents the judge from becoming a prisoner of a fixed formula and places the emphasis where it belongs, on the justice and fairness of the order inter partes. It is fair to both sides, because, while maintaining the burden on the plaintiff to establish grounds for the application, it justifies calling upon the defendant to meet the case brought by the plaintiff, by putting forth evidence to support his position.
- [18] Justice Fitzpatrick in the case of *Devathasan v. Devathasan*, 2017 BCSC 1010, applied this type of reasoning in a high-conflict matrimonial case. She says, among other things, at para. 52:
- [52] The Claimant's evidence was also that the Respondent was very secretive about the family finances to the point that she did not know what assets were actually owned by him or how the family income was being spent. Just before this action was filed, the Claimant learned that the Respondent was planning to buy another property in West Vancouver. Not only did he not disclose this to the Claimant, he told his son, D.D., not to tell his mother about it.
- [19] Again, in the current situation, it was the respondent himself and only himself who had access to and true knowledge about his cash flow and may or may not have been truly forthcoming.
- [20] In his book "*Mareva and Anton Piller Preservation Orders in Canada: A Practical Guide*", (2017, Irwin Law Inc., Toronto), David A. Crerar, now Justice Crerar, writes (at p. 25):

[The] British Columbia [court] has taken a more flexible approach, which has its genesis in the province's more flexible approach in the general test for injunctions. While most provinces following the three-part *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, test, itself an adoption of the modern English test for injunctions British Columbia courts frequently follow their homegrown two-part injunction test (albeit one also approved by the Supreme Court of Canada) in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.). The Wale test requires a good arguable case and that the balance of convenience favours the injunction. Irreparable harm is rolled into the overall consideration of the balance of convenience.

- [21] In *Wale*, Justice McLachlin, as she then was, famously stated that a judge considering an injunction "must not allow himself [or herself] to become the prisoner of a formula", (at para. 51).
- [22] In dealing with the balance of convenience, I return again to the decision of Justice Francis in the *United States Securities* and read from para. 76. In addressing that specific question, Francis J. says this referring again to a previous case:
- [76] In *Shakeri-Saleh* at para. 321, Matthews J. enumerated a number of relevant factors that may be considered on the balance of convenience analysis:
- a) the residency of the defendant;
 - b) enforcement rights of judgment creditors in the jurisdiction where the defendant's assets are located;
 - c) evidence showing the existence of assets within British Columbia or outside;
 - d) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;
 - e) evidence of irreparable harm;
 - f) the strength of the plaintiff's case;
 - g) the nature of the transaction giving rise to the action;
 - h) the risks inherent in the transaction;
 - i) the amount of the claim;
 - j) the defendant's assets;
 - k) evidence that the injunction would have a material adverse effect on an innocent third party; and
 - l) the history of the defendant's conduct.
- [23] Here, addressing the issues of a good arguable case and the balance of convenience, I find that there is a good arguable case. In many aspects, I am not sure that counsel seriously argued that there was not at least a good arguable case. I find that on the basis that with the expert evidence which was generated by agreement and based on a structured report commissioned by the parties and on information provided for by the respondent, the numbers have generated what they have generated thus far. There is on the basis of those numbers an arguable significant undervaluing the support paid.

- [24] I am also concerned about the expressed lack of appreciation by the respondent on the actual state of affairs here before the court. His position seems to be very narrow. "I told them what my line 150 income was, and I paid on my line 150 income". He ignores and does not even recognize that that probably almost certainly does not end his responsibility. He was in control of the moneys. He had information relating to the true state of affairs, and that can of worms has been opened by this report.
- [25] In my view, he had a greater duty to his children and lesser to the respondent. I refer to the Family Law Act, S.B.C. 2011, c. 25 [FLA] which refers to the best interests of children. There is also the famous Supreme Court of Canada case, I believe it is called D.B.S. v. S.R.G., 2006 SCC 37 that refers to blameworthy conduct when a payor fails to meet parental obligations.
- [26] In insurance law, the terms "fiduciary duty" and "uberrima fides" or "utmost good faith" are well known as governing the relationship between commercial parties. In this present case, we are dealing with parental obligations to children. Overall, are we not really beginning, in my view, to recognize that a payor parent has a fiduciary duty to his or her children involving many aspects of their lives, if not all aspects of their lives, but certainly involving them as relates to support and to the extent that it requires full, frank, and unreserved disclosure of their true financial circumstances for purposes of calculating appropriate child support.
- [27] In my view, such a duty as between payor parents and children really needs to be recognized. This relationship is at least as important as the relationship between commercial entities, even in such situations as insurance law.
- [28] On the balance of convenience, I find there is also a basis here to find that the balance of convenience favours if not the claimant then certainly the children. There is the risk of disposal of the money. In both the material and circumstances, it appeared to me that most, if not a significant chunk, of this intended net proceeds is to be directed to the repairs to the Kelowna home and would disappear into the bricks and mortar there simply to make that home insurable.
- [29] There is potential irreparable harm, particularly given the reference to concerns about the respondent's pending death. Certainly no one has that crystal ball, but it seems to me a clear statement in the material that if he survives more than the next year, he will be the first male in his family to do so. Tying this claim into a claim against his estate meets neither the proportionality nor the efficiency requirements of the Supreme Court Family Rules in dealing with litigation, and certainly not in dealing with litigation involving the interests, including financial interests, of the children.

- [30] The nature of this transaction is in the nature of child support. I have already referred to what I feel are the duties, and overall there is the history of the respondent's conduct in providing only the s. 150 numbers when he was aware of the financial backing of that and his apparent lack of recognition of his duty to do more or potentially do more for his children.
- [31] On balance, I am satisfied that a preservation order is appropriate. Even with the discounting, I think counsel for the claimant's figure is too high. In the circumstances, in my view, the appropriate amount to be preserved is \$200,000 from the sale proceeds.
- [32] Counsel have provided in para. 8 of the application what may be the ultimate wording. I know that for orders of this type, there are standard forms of order much more extensive than that contained in para. 8. Have counsel discussed what exact terms you want and how you want this order worded?
- [33] CNSL W. SCOTT: No, we have not, Mr. Justice.
- [34] THE COURT: All right. Well, the difficulty is you got to have it very clear. Because one of the things that arises with these type of orders is the order has to be absolutely clear if there is going to be a subsequent contempt issue or concern. Now, I am not saying it is going to arise here, but injunctions are very important and particular types of relief, and often in commercial situations not infrequently contempt applications flow.
- [35] Barring anything else, I would make the order in the terms at para. 8 of your notice of application.
- [36] CNSL A. BRISCOE: Can I--I might--
- [37] THE COURT: Yeah. Sorry, go ahead, Mr. Briscoe--
- [38] CNSL A. BRISCOE: I might suggest, rather than going through the--the difficulties of having it paid into court, off in these types of scenarios, the term is--hear from my friend--that \$200,000 would be paid to my office to be held in trust pending court order in this proceeding or a written agreement between the parties.
- [39] THE COURT: I am content to keep it simple and leave it with that, if ...
- [40] CNSL W. SCOTT: I think that works just fine.
- [41] CNSL A. BRISCOE: The other point I would make, and I just raise, is it is a requirement of a Mareva injunction that someone making an application like by Ms. Vandenberg give an undertaking as to damages.
- [42] THE COURT: That normally follows, and that was one of my other questions.
- [43] CNSL W. SCOTT: Well, I do not think there is case law about --since this is not an appropriate case for damages just be--or not damages but for security to be put forward by the claimant--claimant in this case.

- [44] CNSL A. BRISCOE: Sorry, I am just looking at one of my friend's cases. It does set out specifically that it is one of the requirements.
- [45] THE COURT: Yeah, in preservation orders, it normally is. I assume that was something you had already dealt with. There is--one of the terms for a Mareva-type preservation order is that the successful party had to provide an undertaking as to damages, if damages ultimately flow. I do not know whether they will, but ...
- [46] CNSL W. SCOTT: I am open to what the court might suggest.
- [47] THE COURT: All right. Well, the order will go, and she will be required to provide an undertaking as to damages. Failing that, basically, well, that is a term of the order. She is going to have to provide that in order for the preservation to proceed.
- [48] Now, I also ruminated for some time last evening about the issue of costs. Clearly you have been successful here, but it seems to me that in a situation like this, like with the undertaking as to damages. This is one where the costs of this application should be determined either by way of final agreement of the parties and resolution or by way of a court who hears what is going on and says, well, yes, there has been significant underpayment, or poppycock, he had every reason to maintain this, he did nothing wrong.
- [49] So subject to further submissions, I would leave costs in the cause.
- [50] CNSL W. SCOTT: That makes sense to me too.
- [51] THE COURT: All right.
- [52] CNSL A. BRISCOE: That makes sense to me as well.
- [53] THE COURT: All right. Well, there we are.
- [54] The order is that the \$200,000, I think Mr. Briscoe had the wording pretty well there, \$200,000 from the net sale proceeds of the Maple Ridge home, and it will reflect the address, et cetera. It will be paid into the trust account of Patten Thornton, which is Mr. Briscoe's law firm, and be held there pending further order in this action, order of the court in this action or final written agreement of the parties.
- [55] The claimant will provide an undertaking as to damages, and costs will be in the cause. Counsel, does that properly summarize your understanding? All right.
- [56] CNSL W. SCOTT: Yes.
- [57] THE COURT: All right. Thank you.
- "Caldwell J."

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