

CANADA / JUDGMENT

Vickaryous v. Vickaryous

2001 BCSC 930

COURT

Supreme Court of British Columbia

DECIDED

29 June 2001

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Source record

2001BCSC0930

Citation: Vickaryous v. Vickaryous Date:

20010629

2001 BCSC 930 Docket:

F970317

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: CAROLYNE ANN VICKARYOUS
PLAINTIFFAND: VICTOR JAMES VICKARYOUS
DEFENDANTAND: No. C9958151
Vancouver Registry
CAROLYNE ANN VICKARYOUS
PLAINTIFFAND: VICTOR JAMES VICKARYOUS
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE GARSON

(IN CHAMBERS)

Counsel for the plaintiff: G. Creighton Scott

Counsel for the defendant: Michael Leslie

Date and Place of Hearing/Trial: June 12, 2001

Vancouver, BC

I. Introduction

- [1] Victor James Vickaryous ("Mr. Vickaryous") and Carlyne Ann Vickaryous (now known as "Ms. Samalack") are parties to two actions. In the first action, Ms. Samalack seeks orders respecting maintenance and division of property under the Family Relations Act, R.S.B.C. 1996 ch. 128 (the "FRA" action). In the second action, Ms. Samalack seeks damages from her husband, Mr. Vickaryous, arising from an assault in which he is said to have caused her various injuries, including broken ribs, a concussion, injuries to her back and head, and psychological problems ("the Assault action").
- [2] The applications before me are brought by Ms. Samalack to enforce a settlement which she says was made between the parties in both the FRA action and the Assault action.
- [3] On February 24, 2000, Ms. Samalack's counsel, Mr. Scott, delivered two formal offers pursuant to Rule 37 of the Rules of Court to Mr. Vickaryous' counsel, Mr. Hart. On March 1, 2000, at 3:41 p.m., the offers were accepted by Mr. Vickaryous by his counsel, Mr. Hart, pursuant to Rule 37(13) of the Rules of Court. Approximately one-half hour later, Mr. Hart withdrew the acceptance and indicated the acceptance had been made on the basis of a mistake. Before me, the parties agree that the offer to settle was validly accepted, pursuant to Rule 37(14). The issue for me to determine is whether I should enforce the settlement agreement despite the mistake of Mr. Vickaryous and his counsel in interpreting the offers to settle.

II. Facts

The background to this issue is as follows:

- [4] Mr. Vickaryous and Ms. Samalack married on August 8, 1982, and separated on June 8, 1996, after Mr. Vickaryous assaulted Ms. Samalack.
- [5] On May 21, 1997, Mr. Vickaryous was ordered by the Supreme Court of British Columbia to pay interim spousal support to Ms. Samalack in the amount of \$700 per month commencing on June 1, 1997. Mr. Vickaryous has not paid the court ordered spousal support. On June 4, 1997, Mr. Vickaryous filed an appeal of the interim spousal support judgment, which appeal has neither been heard, nor abandoned. By February, 2000, the arrears of spousal support amounted to \$25,390.19.
- [6] On February 21, 2000, Mr. Vickaryous, Ms. Samalack and their lawyers met in an attempt to settle both actions (the "February 21, 2000 meeting" or the "settlement meeting"). At the settlement meeting Ms. Samalack offered to accept a payment of \$30,000 to her from Mr. Vickaryous and agreed that she and Mr. Vickaryous were each entitled to half the value of the equity in the former matrimonial home. If this offer was accepted by Mr. Vickaryous, Ms. Samalack would abandon all claims, including her claim for damages for assault and her claims for past and prospective spousal maintenance.

- [7] At the settlement meeting, Mr. Vickaryous offered to settle on terms that he pay to Ms. Samalack the sum of \$10,000, that she pay to him one-half of the value of their equity in the matrimonial home and that she abandon all her claims, including claims for damages for assault and the claim for spousal support and arrears.
- [8] In other words, the parties were \$20,000 apart at the conclusion of the unsuccessful settlement meeting.
- [9] Following the settlement meeting, correspondence was exchanged between counsel confirming steps that would be taken to prepare for trial. These steps included obtaining an appraisal of the former matrimonial home.
- [10] Before me the parties agreed that the value of the equity in the matrimonial home is \$150,000.
- [11] On February 24, 2000, three days after the settlement meeting, Ms. Samalack's lawyer (Mr. Scott) delivered, as previously mentioned, two formal offers to settle pursuant to Rule 37 of the Rules of Court to Mr. Vickaryous' lawyer, Mr. Hart (the "formal settlement offers"). The formal settlement offer in action No. F970317, the FRA action was as follows:

"The plaintiff, Carolyne Ann Samalack (previously known as Carolyne Ann Vickaryous), offers to settle this proceeding on the following terms:

- (a) the plaintiff pay to the defendant, Victor James Vickaryous, the sum of \$30,000 and costs in accordance with Rules 37(22) and 37 of the Rules of Court."

- [12] In action No. C9958151, the Assault action, the offer was as follows:

"The plaintiff, Carolyne Ann Samalack (previously known as Carolyne Ann Vickaryous), offers to settle this proceeding on the following terms:

- (a) the defendant, Victor James Vickaryous pay to the plaintiff the sum of \$20,000 and costs in accordance with Rules 37(22) and 37 of the Rules of Court."

- [13] The result of these formal offers would see a \$10,000 payment by Ms. Samalack to Mr. Vickaryous and a resulting abandonment by Mr. Vickaryous to his one half claim in the matrimonial home.

- [14] On February 28, 2000, Mr. Hart sent to Mr. Vickaryous a letter summarizing the final settlement positions of the parties at the settlement meeting. The letter also set out steps to be taken to begin preparation for trial. This letter, which was presumably dictated before February 28, 2000, and before Mr. Hart received the formal settlement offers, made no mention of the formal settlement offers.

- [15] On February 29, 2000, Mr. Hart wrote to Mr. Vickaryous and enclosed with his letter the formal settlement offers. His letter states in part:

"I am also enclosing copies of the offers to settle in the two different actions. You will see that these are formal offers. The purpose of a formal offer is to ensure that if a Judgment is given for an amount greater than the offer, then costs will be awarded against the person failing to accept the offer. I believe that Mr. Scott, [Ms. Samalack's lawyer] still intends that a \$30,000 all in payment by you with and [sic] equal division of family assets and no spousal maintenance would be acceptable to his client, but that particular offer would be without prejudice and does not affect the issue of costs at this point."

[16] As to his understanding of the formal settlement offers, Mr. Hart deposes in his affidavit, sworn on February 2, 2001, at paragraphs 5 and 6, as follows:

5. I next attended to this file on March 1st, 2000 at which time I spoke on the telephone with the Defendant who advised me at that time that he was on his cellular telephone on a job site. He also informed me that he had not received my letter of February 29, 2000, and therefore was not aware of the contents of the offers.
6. I communicated to him my understanding of the offers as set out in the final paragraph of my letter of February 29 and after a brief discussion, the Defendant authorized me to accept the offers based on his understanding of the information I had imparted to him. (my emphasis)

[17] The "final paragraph" in Mr. Hart's letter of February 29th is quoted above in paragraph 14.

[18] As to his understanding of the settlement offers, Mr. Vickaryous deposes in his affidavit sworn on January 30, 2001, that he received a telephone call from Mr. Hart on March 1, 2000 and he says at paragraph: 15:

"The manner in which Mr. Hart related the terms of the two offers to me lead [sic] me to assume that they followed in general terms the offer related in Mr. Hart's letter to me, Exhibit C herein, and at the very least, the one half of the value of the home would go to each of us. On this basis, on believing that Mr. Hart was of the same understanding as a result of this telephone conversation, I instructed him at that time to accept the offers. The equity in the former matrimonial home, based on the Plaintiff's assessment of value, is no less than \$150,000.

[19] The reference to Exhibit C in paragraph 15 of Mr. Vickaryous's affidavit is apparently a reference to paragraphs of Mr. Hart's letter of February 28, 2000 which state:

The final outcome of the offer made by Ms. Samalack was that she would accept \$30,000 over and above one half of the value of the home, with each of you retaining whatever else you had. In return, she would abandon all her claims, including her claims for damages for assault and the claim for spousal maintenance and arrears.

Your response to that offer was that you would be prepared to pay her \$10,000 over and above one half of the value of the home, with the other terms applying as set out above. This, as we expected, was rejected. Accordingly, we are to proceed to trial and will set this for 5 days when the Court calendar opens for November, 2000. Mr. Scott has confirmed his availability commencing November 20, 2000.

[20] In his affidavit, Mr. Hart says that following preparation and delivery of the acceptance to Mrs. Samalack's lawyer, he "... returned to the file and further reviewed my letter of February 29 and the offers", at which point he "appreciated the erroneous assumptions that must have been made by the defendant in considering my explanation of the offers, and in providing me with his instructions to accept same". As noted above, Mr. Hart then took steps to withdraw the offer. Mr. Vickaryous says, at para. 16 of his affidavit:

" Within approximately 30 minutes, Mr. Hart again telephoned me to say that he had sent an acceptance of the offers by letter to counsel for the Plaintiff, and then realized that the terms of the offers ignored the division between us of the value of the home, and he accordingly sought my immediate instructions which I gave at that time to withdraw the acceptance of the offers on the basis of the common mistake of Mr. Hart and I. Neither of these offers would have been acceptable to me given that I have always maintained that I have a substantial interest in the former matrimonial home, even after allowing for the possibility of a damage award in favour of the Plaintiff with respect to her claim for damages for assault, and even after allowing for some payment having to be made by me on account of the arrears of spousal support if my application to vary is not entirely successful."

[21] Mr. Hart does not say in his affidavit that he misinterpreted the formal settle offers. I cannot determine from Mr. Hart's affidavit, nor from his February 29, 2000, letter to Mr. Vickaryous what he understood as to the terms of the formal settlement offers. What Mr. Hart does say, is that he realized Mr. Vickaryous must have misunderstood the offers, based on his advice. Mr. Vickaryous says that both he and Mr. Hart made a common mistake regarding the division of equity in the former matrimonial home. I cannot determine from the affidavit evidence exactly what Mr. Vickaryous thought he was agreeing to pay, or receive in cash. However, the affidavit evidence is clear that in accepting the formal offers, Mr. Vickaryous understood he would, consistent with the previous negotiations, still receive his one half share of the equity in the former matrimonial home. Based on this evidence, I find that Mr. Vickaryous was mistaken as to the terms of the offer he accepted, and that Mr. Vickaryous did not intend to accept an all inclusive payment of \$10,000 in settlement of the FRA and Assault actions.

III. Analysis

[22] Ms. Samalack's counsel estimates the amount of her claim, if she were successful at trial, approximately as follows:

Arrears of maintenance \$25,000

Damages for Assault \$10,000 to \$20,000

Special costs for civil assault \$3,000 to \$ 4,000

Approximate value of future claim to maintenance based on 10 to 15 years @ \$250 per month
\$30,000

Total \$68,000 to \$79,000

This estimated amount of \$68,000 - \$79,000 would be owing to Ms. Samalack and would be set off against Mr. Vickaryous' one-half share in the matrimonial home, which all parties agree is worth \$75,000. (Ms. Samalack has title to the property and continues to occupy the former matrimonial home). Consequently Ms. Samalack says, the offers to settle, which cumulatively amounted to an all inclusive payment by Ms. Samalack to Mr. Vickaryous in the amount of \$10,000, were reasonable.

- [23] Mr. Vickaryous' counsel, on this application, assessed the likely outcome for his client at trial. He says that Ms. Samalack is and has been employed for some period of time and her claims to past and future spousal support are doubtful. Mr. Vickaryous works sporadically. Mr. Vickaryous minimises the severity of the assault, although he admits the assault occurred. Mr. Vickaryous's counsel says that Mr. Vickaryous has a meritorious claim to \$75,000 (one-half the house equity) without any offsets for maintenance arrears or future maintenance.
- [24] Mr. Vickaryous says that settlement based on the settlement offers would constitute a "windfall" to the plaintiff.
- [25] I make no comment on the merits of the respective claims and defences of the parties to spousal support and damages, other than to note that a settlement on the terms of the settlement offers would provide to Ms. Samalack all or almost all her counsel's estimate of the value of her various claims, including a lump sum for future spousal support estimated in the range of ten to fifteen years at \$250 per month.
- [26] As I said above, I find that Mr. Vickaryous did not intend to accept the net all inclusive payment of \$10,000 made in the formal settlement offers in satisfaction of all claims between the parties (including Mr. Vickaryous's claim to one half of the equity in the house). At that stage of the litigation, it would have been a most improvident settlement. I have concluded Mr. Vickaryous, based on Mr. Hart's erroneous advice, mistakenly assumed the formal settlement offers were based on the same general terms as the earlier settlement discussions of February 21, that is over and above a division of the value of the house equity.
- [27] Given these findings of fact, the issue for me to decide is whether to enforce a settlement on the terms set out in the formal settlement offers.
- [28] This application is brought pursuant to Rules 1, 2, 18A, 27 and 57 of the Rules of Court and s. 8 of the Law and Equity Act.

- [29] In an application such as this, the court may grant or dismiss the application to enforce a settlement, pursuant to Rule 18A. Alternatively, pursuant to s. 8 of the Law and Equity Act the court may exercise its discretion in favour of granting a stay of the proceedings pending completion of the settlement agreement. The court also has a discretion to leave the settlement issue to be resolved at trial. (*English v. Storey*, [1999] B.C.J. No. 1647 (Q.L.) (B.C.S.C.) and *Hawitt v. Campbell* (1983), 148 D.L.R. (3d) 341, 46 B.C.L.R. 260 (C.A.).
- [30] In the cases of *256593 B.C. Ltd. v. 456795 B.C. Ltd.*, 1999 B.C.C.A. 137, B.C.J. No. 486 and *Nelson v. Higgins (Executor)*, [1994] 2 W.W.R. 595, 86 B.C.L.R. (2d) 64 (S.C.) the courts dealt with enforcement of settlements where one party made a mistake in accepting the offer. In *256593 B.C. Ltd.*, the British Columbia Court of Appeal held at paragraph 28 per Donald, J.A.:

All the elements for a decision on unilateral mistake are present here:

- (1) a mistake;
 - (2) on a material term;
 - (3) known actually or constructively by the non-mistaken party;
 - (4) an unconscionable result if the settlement agreement is enforced.
- [31] Applying the test set out in *256593 B.C. Ltd.*, to this case, I am satisfied that Mr. Vickaryous accepted the offer on the basis of a mistake. Mr. Vickaryous thought the offer was over and above the division of the equity in the matrimonial home and he may have been mistaken as to the amount of the cash component of the offer. There is no question that the mistake was in respect to a material term of the settlement. As to Donald, J.A.'s fourth component of the test, in my view, there would be an unconscionable result here if the settlement is enforced at this time, because it gives Ms. Samalack all or almost all the value of her claim including a lump sum for prospective maintenance, to which she may or may not have established any entitlement, at trial.
- [32] With respect to the third element of the test set out by Donald J.A., the issue in the case before me, is whether the mistake was "known actually or constructively" by the non-mistaken party.
- [33] In *256593 B.C. Ltd.*, the Court of Appeal adopted the statement made by Madam Justice Baker in *Nelson*, *supra*, as follows:

The court may grant relief from a contract entered into on the basis of unilateral mistake where the plaintiff has established, and has met the high burden imposed upon it of doing so, that a mistake has been made and that it would be unjust or inequitable for the court to allow the other party to uphold the bargain. One of the grounds on which a court may find that it would be unfair or inequitable is if the party seeking to enforce it had actual knowledge or constructive knowledge that a mistake had been made prior to the acceptance of the offer.

[34] In *Robertson v. Walwyn*, [1988] 4 W.W.R. 283, 24 B.C.L.R. (2d) 385 (C.A.), it was held that the court cannot refuse to give effect to a settlement agreement purely on the basis that the settlement may not be just. Mr. Justice Taggart noted further in *Robertson* that "a completed settlement agreement is the same as any other contract, if the contract is valid and enforceable by ordinary principles of contract law, and if it is put in issue in appropriate proceedings, then the court, in the end, must give effect to it".

[35] It is therefore necessary for me to determine if Ms. Samalack or her counsel, (the non-mistaken party) had constructive knowledge of the unilateral mistake present here, there being no evidence that either had actual knowledge of such mistake.

[36] In 256593 B.C. Ltd., the court cited the judgment of Mr. Justice Shaw in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1995), 21 C.L.R. (2d) 39 S.C. where he described what I would call an objective test of constructive knowledge, as follows:

"While I agree with what Madam Justice McLachlin said, so far as it goes, I do not believe she intended to imply that there must be a conscious taking advantage by one party of the other in all cases. The element of constructive knowledge based upon what a reasonable person "ought to know" is premised upon that person not being conscious of the error. Thus, while the idea of "snapping up" may well apply in cases where one side is aware of the other side's error, I do not think it can be applied literally in the constructive knowledge cases. Rather, in my opinion, constructive knowledge alone will suffice to invoke equity's conscience." (my emphasis)

[37] In this case, Ms. Samalack and her counsel did not have actual knowledge of the mistake made by Mr. Vickaryous. But, given the position of the parties at the settlement negotiations immediately preceding the acceptance of the formal offer, and given the quantum of the claims of Ms. Samalack in total, Ms. Samalack and her counsel must have been astounded by the rapid acceptance of the formal settlement offers. In *Nelson*, supra, Madam Justice Baker, said at paragraph 33:

I find that the plaintiff has established that counsel for the defendant ought to have known that the offer made on behalf of the plaintiff contained an error with respect to amount. I place my decision on the grounds of constructive rather than actual knowledge despite the fact that Mr. Richardson was commendably forthright in his admission in his affidavit that:

"The thought that he had made a mistake did occur to me but, given the circumstances set out above, I dismissed that thought."

Here, no similar admissions are made by Ms. Samalack or her counsel. Given that Mr. Vickaryous' last settlement offer made at the February 21, meeting would have resulted in a net payment to him of \$65,000, (taking into consideration a one-half division in the matrimonial home), it ought to have crossed the mind of someone in the position of Ms. Samalack or her counsel, that settlement on the basis of an all inclusive payment of \$10,000 to Mr. Vickaryous was premised on a mistake. As noted above, according to Ms. Samalack's counsel a settlement on the terms of the formal settlement offers was the best possible result she could have achieved at trial.

[38] In Nelson, supra, at paragraph 29, Madam Justice Baker said this:

" ... The court held that it was sufficient, however, that counsel had remained silent when he should have spoken. In all of the circumstances, the court held that a reasonable person in the position of the defendant's counsel, with his familiarity with the proceedings, would and should have concluded that plaintiff's counsel had made a mistake.

In its argument, counsel for the defendant properly asserted that the court ought not to lightly interfere with contracts, particularly those concluded between solicitors acting under a general retainer. The defence asserts that if a client is not bound by his solicitor's settlement in such circumstances, then the system is subject to great abuse. Furthermore, the defendant says that to require counsel who has received a settlement proposal to call counsel for the opposing party and inquire as to whether or not they were really serious about the offer and its contents, is placing an unrealistic and unfair onus and introducing too large an element of uncertainty into the settlement process..." (my emphasis)

[39] I have concluded, as did Madam Justice Baker in Nelson, supra, that the circumstances here ought to have alerted a reasonable person in Ms. Samalack's position and that of her counsel to the fact that a mistake had been made by Mr. Vickaryous and his counsel, particularly as the two formal offers are easily misread. Those circumstances are as follows:

1. Formal offers were made within one week of the unsuccessful negotiation;
2. Acceptance of the formal offers would have been almost a complete capitulation by the defendants in respect of all claims including costs.
3. There was no explanation for the defendant's apparent and sudden capitulation.
4. The defendant certainly had a triable case with respect to his liability for damages for assault, arrears of spousal support and in respect to his liability for payment of future spousal support.

[40] Mr. Scott argued that parties do change their position in the course of litigation, sometimes without explanation. I agree, but in the circumstances of the February 21, 2000, negotiations and the almost immediate acceptance of the February 24, 2000, formal offers, a reasonable person in Mr. Scott's position ought to have been alerted to the fact that a mistake had been made by Mr. Vickaryous. This does not mean that counsel who has received an acceptance of a settlement offer, must, in all circumstances, enquire as to whether opposing counsel has properly understood its terms. But in the limited circumstances where the elements of a unilateral mistake are present, as they are here, the settlement ought not to be enforced.

IV. Decision

[41] The application of the plaintiff in both actions for judgment pursuant to Rule 18A or for a stay of proceedings pursuant to s. 8 of the Law and Equity Act is dismissed.

[42] Each party should bear their own costs.

"N. Garson, J."

The Honourable Madam Justice N. Garson

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Prepared on 29 October 2026 · Esheria