

CANADA / JUDGMENT

Walker v. Kotarska

2024 BCSC 399

COURT

Supreme Court of British Columbia

DECIDED

30 January 2024

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2024 BCSC 399 Walker v. Kotarska

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walker v. Kotarska,

2024 BCSC 399

Date: 20240130

Docket: E200934

Registry: Vancouver

Between:

Leigh Jay Walker

Claimant

And:

Malgorzata Kotarska also known as Margaret Kotarska

also known as Margaret Walker

Respondent

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J.W.C. Wong

Counsel for the Respondent:

S.E. Ovens

Place and Date of Hearing:

Vancouver

January 30, 2024

Place and Date of Judgment:

Vancouver

January 30, 2024

- [1] THE COURT: These are my reasons for judgment on this chambers application. I make my usual reservation to edit or expand these reasons if a transcript is ordered or for any other reason.
- [2] The claimant and respondent are soon to be the former husband and wife, respectively. They married in 2007 and separated in 2019.
- [3] Their family law trial will start on February 20, 2024 for 14 days. This application is urgent and was brought on short leave.
- [4] Apart from being romantic partners, the parties were also business partners. A central issue at trial will be the valuation of their assets: their personal assets as well as their corporate assets.
- [5] The parties are equal shareholders in Leigh Jay Walker Consulting Ltd., a holding company that wholly owns the operating company: Lawrenson Walker Realty Advisors Ltd. ("Walker Realty"). The husband, apart from the wife, also owns a company called Hudmak Enterprises Ltd. ("Hudmak"). He is the sole shareholder of Hudmak. Hudmak in turn holds a partial interest in appraisal companies located in the Okanagan and in Calgary. Third party individuals co-own, with Hudmak, the Okanagan and Calgary businesses.
- [6] With that by way of pertinent background, I turn to the order that the wife seeks today.
- [7] She seeks a somewhat unusual order, for which her counsel frankly acknowledges there exists no precedent:

That the respondent is at liberty to share confidential financial information of Lawrenson Walker Realty Advisors Ltd. ("Walker Realty") to third parties following the third parties signing a Mutual Non-Disclosure Agreement and the claimant is not entitled to information regarding the identity of the third party(ies).

- [8] In the course of the hearing, the wife's counsel sought instructions and narrowed the scope of disclosure to specific categories of documents: financial statements for the past three or five years, tax returns, internal monthly financial statements, material contracts, insurance claim information and history, anonymized personnel records, a list of customers and suppliers, administrative service revenues paid to Walker Realty, with a general provision of liberty to apply for further categories of documents.
- [9] The wife was also able to narrow down somewhat the scope of third party recipients of the corporate materials: four potential buyers, as well as banks, for the purpose of financing.
- [10] The wife's affidavit #7 explains the reasons she seeks the order:
15. I have been exploring my options with respect to Walker Realty, including the possibility of selling Walker Realty and my obtaining financing for buying out the claimant's interest, either alone or with third parties. The third parties require financial information of the company in order to consider a purchase with me as co-owner or to provide financing.
17. The appraiser community in BC and in particular, Vancouver, is a close-knit community. I am considering a buy-out arrangement for financing with various persons, some of whom have business dealings with the claimant, and do not want their identities disclosed to the claimant. I am informed by some of the parties that I have spoken to that they do not want the claimant to know of their involvement, as they are concerned that the claimant may terminate his relationship with them and/or impose negative financial repercussions if he is aware that they are in discussions with me. One party told me, and I verily believe, that if their identity is disclosed to the claimant, they will not move forward in negotiations with me. My ability to make an offer to the claimant is dependent on these third party negotiations and my ability to make financial disclosure to the third parties, and I hope such a resolution would resolve this litigation.
- [11] For the reasons that follow, the Court denies the application, as a matter of law and as a matter of fact.
- [12] The applicant wife acknowledges that she is seeking the Court's permission for this disclosure of third-party records in order to address several constraints on her use of those documents outside of the litigation and the corporation.
- [13] The first is the implied undertaking rule, as codified in Supreme Court Family Rules, BC Reg. 169/2009, subrule 5-1(29):

Confidentiality

- (29) Any person who has access to documents obtained under this rule must keep the documents and any information contained in them in confidence and must not disclose the documents or information to anyone other than
- (a) for the purposes of a valuation of an asset,

- (b) for a determination of the disclosing party's income, or
 - (c) in the course of permitting the documents to be introduced into evidence during the family law case.
- [14] The second is the term in the shareholders' agreement between the husband and wife that prohibits disclosure outside of the business, without consent.
- [15] Finally, fiduciary duties and duties of confidentiality would also serve as constraints against the release of these documents outside of corporate purposes.
- [16] I turn to the legal analysis and basis.
- [17] The applicant relies upon s. 222 and s. 227 of the Family Law Act, SBC 2011, c 25, as well as the court's inherent jurisdiction:

Purposes for which orders respecting conduct may be made

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

Other orders respecting conduct

227 A court may make an order requiring a party to do one or more of the following:

- (a) give security in any form the court directs;
- (b) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222.

- [18] This is not a criticism of counsel for the wife, but it is understandable that there are no published precedents and authorities founding an order such as the one sought today. The closest legal bases for the order the wife seeks are listed in paragraph 5 of the notice of application:

5. The FLA conduct sections have been used in a variety of circumstances, including requiring a party to pay a retainer (*Ho v. Chu*, 2020 BCSC 927), allowing a party to have access to vacation properties (*Armitage v. Armitage*, 2022 BCSC 1108), requiring a litigant to withdraw actions filed in other jurisdictions (*Quigg v. Quigg*, 2018 BCSC 853), and requiring a party to surrender their passport (*Potratz v. Potratz*, 2015 BCSC 1608).
- [19] I will avoid making broad pronouncements in this chambers application on the scope of ss. 222 or 227, or the Court's inherent jurisdiction. I will note, however, that those provisions, as well as the inherent jurisdiction itself, involve an exercise of judicial discretion. On the materials before me, again, I decline to exercise that discretion.
- [20] As a matter of law, I agree with the authorities put forward by the husband. I will start with the White Paper on Family Relations Act Reform - Proposals for a new Family Law Act (July 2010) [White Paper] which discusses the purpose and scope of the proposed s. 222 conduct orders[1]:

Case Management and Enforcement Tools

Include a broader range of case management and enforcement tools for judges. In particular:

- Provide for a new type of order called "conduct orders" and corresponding remedies for noncompliance to manage behaviour and facilitate resolution, for example, through referrals to a service, program, counselling or non-court dispute resolution process, providing for a party to pay the other's reasonable expenses incurred as a result of the non-compliance, and limiting frivolous or vexatious litigation.
 - Establish a general duty to disclose information, and provide for a greater range of remedies for failure to comply with an order to disclose.
- [21] While not categorically pronouncing that conduct orders could not be used to make an order such as the present, it is clear that the focus and intent of conduct orders is to address specific misconduct in acrimonious family litigation. As stated at p. 132-133:

There will be different kinds of conduct orders:

- orders to encourage compliance: a judge may dismiss an action or prohibit a party from making further applications or taking a step in a proceeding until a specified time or until compliance with another order has occurred;
- interim orders respecting property: a judge may grant exclusive occupancy of the family home, require a spouse to continue making rent or mortgage payments, or forbid the termination of basic utilities;
- orders respecting dispute resolution: a judge may refer parties to counselling or to other programs to assist in the resolution of an issue or to reduce further conflict; and

- other orders: a judge may limit communication between parties, order a party to report back to the court, or prohibit a party from making frivolous or vexatious applications.
- [222] Such provisions permit orders barring a party from certain obstreperous behaviour that is contrary to the best interests of the parties, their children, and the justice system. Such provisions also permit mandatory orders to prevent obdurate roadblocks in the proper conduct of the relationship between the litigious family members and their conduct of that litigation in the court.
- [231] Accordingly, orders expressly envisioned by the White Paper include referrals to counselling programs, mandatory disclosure of information, and communications orders. The provisions allow a wide range of remedies to address a failure of a party to comply with a disclosure order. In short, the thrust of s. 222 as originally drafted was to avoid mischief and acrimony, and facilitate the proper and orderly adjudication of family law litigation.
- [241] The wife relies upon the s. 222 subsections designed to facilitate settlement and resolution:
 - (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
 - .
 - (d) to facilitate arrangements pending final determination of a family law dispute.
- [251] I am satisfied that the thrust of those provisions, as set out in the White Paper, is to allow specific directions ordering a settlement conference (e.g. s. 224) or disclosure of documents, or participation in other disclosure or settlement provisions or fora that will facilitate settlement of a dispute and require parties to engage in such settlement.
- [261] I am satisfied that the White Paper, at least, does not contemplate the broad issuance of any order that might in theory or in effect push the parties towards settlement, particularly an order that might promote a pressurised settlement by providing an advantage to one party or putting pressure on the other party. Put more neutrally, the conduct order regime does not contemplate an order as sought here, allowing a party to use documents disclosed in litigation or otherwise protected by, for example, a shareholders' agreement, in order to drum up potential purchasers. That is considerably far removed from the White Paper description of the intent and purpose of s. 222 conduct orders.
- [271] With respect to the inherent jurisdiction of the court, I also accept the comprehensive analysis performed by Justice Pearlman in *Yates v. Lee*, 2014 BCSC 1298, relied upon by both parties:
- [251] From these decisions of the Court of Appeal, I take the following principles concerning the scope and limits of this Court's inherent jurisdiction:
 - Inherent jurisdiction is not a panacea for parties or the court: Buchan at para. 29;

- Inherent jurisdiction is an auxiliary power that a judge may draw upon to assist in the exercise of the ordinary jurisdiction of the court: Lines at para. 24;
- While inherent jurisdiction presumptively exists to assist judges, it can be ousted by statute, or a judge may refuse to exercise it when inappropriate: Buchan at para. 29;
- A Judge of the Supreme Court should not resort to inherent jurisdiction to grant orders where a party has failed to avail him or herself of the Rules appropriate to their situation: Buchan at para. 32, Lines at para. 26;
- Inherent jurisdiction is a special and extraordinary power: Lines at para. 23;
- Even where inherent jurisdiction exists, it should be exercised only sparingly and in a clear case, particularly where concurrent authority has been provided to another decision-maker: Buchan at para. 30; or where the exercise of inherent jurisdiction is contrary to and inconsistent with the common law and ancient usage, and no authority has been presented supporting a particular use: Endean at para. 61; and Lines at paras. 25, 27;
- For the Court to invoke its inherent jurisdiction, there must be some extenuating circumstances which the Rules do not appear to contemplate. Where no extenuating circumstances exist, there is no basis for a judge to employ the "unusual power" of inherent jurisdiction: Buchan at para. 30.

[28] Inherent jurisdiction is not some magic wand to be waved whenever a statute is silent or an outcome is desired by a party or by the court. Indeed, as set out in paragraph 25, inherent jurisdiction is a special and extraordinary power: even where inherent jurisdiction exists, it should be exercised only sparingly and on a clear case. These are further reasons for me to decline to exercise my inherent jurisdiction.

[29] The decision of Justice Gomery in *Lun v. Lun*, 2020 BCSC 871 to be particularly useful to the present case. In that case, the applicant relied upon s. 222(b) in an effort to obtain an order requiring the husband to sign a non-competition agreement. Justice Gomery posed the issue before him as follows:

[8] Before turning to Ms. Lun's arguments in favour of her application, I begin with a basic question. On what basis could the court order Mr. Lun not to engage in lawful business activities?

[30] Ultimately, Gomery J found that s. 222 could not be stretched to prohibit conduct and business activities that the respondent party was entitled to do:

[24] It may well be appropriate for C & D to be valued on the basis of an NCA given by Mr. Lun, in which case the consequence of Mr. Lun's refusal to give an NCA will be that the value realized from the sale of C & D's assets will be less than it should have been. If the result is substantial unfairness to Ms. Lun, she may be entitled to a reapportionment of the proceeds of sale in her favour pursuant to s. 95 of the FLA. This is an issue to be addressed at the trial. The possibility that Ms. Lun will succeed on this point would not justify an order submitting Mr. Lun to a restraint that is not otherwise legally justified.

[25] Finally, Ms. Lun relies on s. 222(b) of the FLA, which authorizes the court to make an order to manage behaviours that might frustrate the resolution of a family law dispute by agreement or order. I do not think that Mr. Lun's refusal to agree to the NCA qualifies as a behaviour that might frustrate the resolution of this dispute, as contemplated by this provision. He is taking a position that he is legally entitled to take.

[emphasis added]

[31] I view the present circumstances in the same manner as Justice Gomery viewed Lun. The husband is entitled to rely upon his confidentiality rights under the shareholders' agreement, and to refuse the wife's request to disclose confidential company documents to third parties. Of course, the wife is a signatory to the agreement, and agreed to those confidentiality protections.

[32] Turning to factual objections to the orders sought. I accept that the husband has legitimate concerns about the disclosure of this information to anonymous third parties. As he states in his affidavit #9, para 6:

- a. The emails attached as Exhibit "D" are email exchanges between counsel regarding a third party buyout of the business, which would involve both of us.
- b. I agree that the appraisal community in Vancouver is a small, close-knit community. In fact, there are appraisers and/or appraisal firms who are competitors and hostile against Lawrenson Walker.
- c. There are competitors who would want to access our confidential financial and other information. The fact that the individuals have approached the Respondent and specifically requested that they review Walker Realty's confidential information without my knowledge has exacerbated my concerns regarding whether the alleged negotiations are genuine.
- d. For instance, one of our most fierce competitors today is [name redacted]. He had worked for Walker Realty for three years before we terminated his employment. During his employment with us and after he left, he copied our client list, logo, website, slogan and procedures.
- e. In the case of these competitors, any non-disclosure agreement is intended to prevent such competitors from accessing the confidential information.

[33] Further, the wife, although a shareholder of Walker Realty, works for a competitor of present Walker Realty clients. Needless to say, those clients might be alarmed by her disclosure of these documents to unnamed and unknown third parties.

[34] The wife does not allay these fears. She advises the Court that the proposed third-party recipients are all legitimate potential purchasers. She explains that as a matter of fairness to those individuals, she must be vague about the identity of those proposed recipients and the intended use of the confidential information.

- [35] That said, the wife's silence in providing to the Court reassurances that would address the specific concerns raised by the husband in the affidavit speaks volumes. For example, at paragraph 6(d) of his affidavit, as quoted above, the husband raises the specific concern about a "fierce competitor" of the company: a former partner in the Walker Realty company. According to the husband, during that individual's "employment with us and after he left, he copied our client list, logo, website, slogan, and procedures." It would have been a simple matter for the wife to provide the express reassurance that that disgruntled ex-employee is not one of the potential third-party recipients of confidential corporate information. She did not.
- [36] The wife is also vague on the circumstances of the people who would be interested in receiving the confidential information, who those people are, the circumstances of how they became interested, how serious they are, whether they are hostile, whether they are competitors, or whether third-party interests might be engaged by the disclosure of the information.
- [37] There is no reassurance provided to the Court or to the husband that the potential purchasers are acting in good faith. Even if the wife herself is acting in good faith, it is certainly not outside the realm of contemplation that these putative potential purchasers might well be interested in seeing these confidential records, with little intention of advancing a serious offer. Even if the wife is reasonably convinced of their bona fides, she cannot guarantee it in today's application and does not attempt to do so.
- [38] In these circumstances, the non-disclosure agreement that she proposes would be applied to those third-party recipients offers little comfort to the husband and to the Court.
- [39] This concern is compounded by the fact that the wife has access to a database of documents, at least until this Friday, that, as illuminated by the lists of documents provided in this litigation, contains a very broad range of financial records. Even with her pared-down list of categories of financial records sought, neither the Court nor the husband is reassured that the personal or confidential or commercial information of third parties would not be compromised by the disclosure of these records.
- [40] I have already mentioned the potential disclosure of sensitive Walker Realty client information. Another example amongst the categories the wife proposes to disclose is anonymised Walker Realty personnel information. I do not know how many employees Walker Realty has, but I suspect that it is a small enough number, in an industry that both sides acknowledge is tightly knit. I have no confidence that even anonymised information would protect the employees' personal rights to confidentiality.
- [41] Further, I have a sense from the documents and the background information on this application that there is a real risk that information about the Okanagan and the Calgary associated businesses, which are, again, co-owned by third parties, might be compromised by the order as sought.

- [42] I note, further, that no notice of this application has been given to the personnel, or the clients, or the Okanagan and Calgary co-owners, or other third parties who may well have a say and interest in the potential disclosure of documents relating to their lives and businesses.
- [43] Finally, I note that the wife herself acknowledges in her response to the further amended notice of family claim the harm that could result from the disclosure of information outside of the company:
6. The claimant has limited the respondent's access to corporate financial documentation of the parties' jointly owned corporations, following marriage breakdown. The parties earn employment and dividend income through jointly owned corporations, managed by the claimant, and rental income. The respondent believes that the available total Guideline income is approximately \$725,000 based on average income in 2016- 2018. The claimant caused the corporations to declare dividends to the Parties equally but retained a disproportionate share for his own use and benefit, and the Respondent claims compensation or lump sum spousal support to equalize the benefit.
- [44] I will add two other brief points before concluding.
- [45] The wife argues that the disclosure of this confidential information to potential third-party purchasers will facilitate settlement: it could facilitate the sale of the business to a third party and thus assist both parties in resolving the matter. Alternatively, it might better allow her to purchase the husband's interest, through obtaining financing.
- [46] There are two responses to this.
- [47] The first is that the wife is still hedging her bets. She has not taken the position that she herself will definitely buy the business or that the business must be sold on the open market to a third party. She is still holding on to the potential outcome requiring the husband to buy out her interest. The husband may be stuck with a company potentially significantly damaged by this disclosure of confidential financial information to competitors.
- [48] The wife offers the reassurance that if the value of the company is diminished by the release of this information to third parties, there would be leave for the husband to seek to address such harm through a damages award at trial or otherwise.
- [49] I agree with counsel for the husband that it is not clear that the damage would be quantified in time for the trial. Further, it is notoriously difficult to quantify in dollar terms the harm caused by the disclosure of confidential corporate information. Indeed, such disclosure is often provided as a quintessential example of irreparable harm that would justify an injunction in a commercial scenario.

- [50] Second, it would appear that the wife is presently in a position to buy out her husband's interests, without financing. The jointly-retained Patti Daum report sets out that the couple's ample real estate holdings are worth more than the value of the company, such as to allow the wife to liquidate her real estate holdings and thus buy the husband's entire interest in Walker Realty. She thus has no need to hedge her bets: she could assure the Court that the husband's interests would not be compromised if the Court grants her order.
- [51] The final point to address is the wife's contention that the husband has apparently already disclosed some of this confidential information to a Calgary associate, himself in breach of the shareholders' agreement. There is a dispute about whether this occurred, and the extent of it. The husband indicates that he simply provided the gross value of business, rather than actual confidential documents. It is not clear to the Court that any earlier disclosure released the same scope of documents that are presently being sought by the wife for third party disclosure. In any case, tit for tat is not a legal maxim: I am satisfied that that any past disclosure in itself does not provide a satisfactory basis for making the unusual order sought.

(SUBMISSIONS ON COSTS)

- [52] THE COURT: I will give the costs of this action to the husband, of this application alone, one-half day. Thank you both.

"Crerar J"

- [1] British Columbia Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, White Paper on Family Relations Act Reform - Proposals for a new Family Law Act (July 2010), online: <<https://www.courthouselibrary.ca/sites/default/files/inline-files/family-law-white-paper-2010.pdf>>.

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