

CANADA / JUDGMENT

Ward v. Ward

2023 BCSC 2584

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 2584 Ward v. Ward

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ward v. Ward,

2023 BCSC 2584

Date: 20231124

Docket: E31153

Registry: Cranbrook

Between:

Beverly Donna Ward

Claimant

And

Gordon Kenneth Ward

Respondent

Before: The Honourable Justice Schultes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

D.F. Collins

Counsel for the Respondent:

K. Pintye

Place and Date of Hearing:

Cranbrook, B.C.

June 15, 2023

September 11, 2023

October 4, 2023

Place and Date of Judgment:

Cranbrook, B.C.

November 24, 2023

Introduction

- [1] This is an application by the respondent to set aside orders that were made on August 2, 2022, when the matter was still an undefended family law proceeding.
- [2] The question is whether he has met the requirements described in *Nichol v. Nichol*, 2015 BCCA 278, at para. 35:
- 1) that he did not wilfully and deliberately fail to file a response to the notice of family claim;
 - 2) that he applied to set aside the final orders as soon as reasonably possible after having obtained knowledge of them, or has a reasonable explanation as to any delay in applying; and
 - 3) that he has a meritorious defence, or at least a defence worthy of investigation.

This is an adaptation to the family law context of the well-known test for setting aside default judgments in civil matters in *Miracle Feeds v. D.&H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co.Ct.).

Background

- [3] The parties began living together in 2007, were married in 2010, and separated in January 2022. Following the separation, they initially both remained in the family home.
- [4] The claimant filed her notice of family claim on February 25, 2022. The respondent was personally served with it on March 4. He did not file a response to family claim.
- [5] On May 27 the claimant filed a summary trial application. The parties were still both living in the family home at that point. The notice of application and the claimant's supporting affidavit were mailed to the respondent at that address by her counsel.
- [6] The application was heard on June 6.

- [7] As a threshold issue, Madam Justice Lyster, who heard the application, was satisfied that the ability to apply for final orders in an undefended family matter at "trial" pursuant to Rule 10-10(1)(b) of the Supreme Court Family Rules, B.C. Reg. 169/2009 included a summary trial (the Rules have been amended since then to explicitly add summary trial to the list of permitted proceedings under that section).
- [8] In overview, the claimant sought an order for sale of the family home, with an equal division of the proceeds after dealing with the associated costs of sale and "reimbursement to the claimant from the respondent's share of the proceeds for all amounts paid to clear financial encumbrances against the property"; allocation to the respondent of his trucking business and all of the debt associated with it; and retention by the parties of various other items, such as their respective investment accounts and vehicles.
- [9] In support of the application, the claimant had deposed that while the respondent was the original owner of the property, she had purchased a one-half share in 2008, by paying off a \$160,000 mortgage that was then in place against it. In her financial statement she estimated the property's value as \$1.4 million, although its assessed value was about half that.
- [10] She also said that she had paid for some improvements to the home, including purchasing a new furnace and completing the construction of the basement and back yard.
- [11] She sought reimbursement for the encumbrances against the property because she asserted that the \$286,000 had been taken out by the parties to allow the respondent to purchase his business.
- [12] She characterized allocating the business and its debts for the respondent as a "windfall" to him, because the value of his business, including what she described at that time as \$400,000 worth of equipment, was greater than its debts. Based on the evidence before her, Lyster J. was only able to be satisfied that the value of the business likely exceeded the line of credit.
- [13] The claimant's investment account, which was to be retained by her, contained \$227,500, and the respondent's contained \$257,000. Lyster J. found that both parties had strong excluded property claims to their respective accounts, based on the origin of the funds in them.
- [14] The proposed division of vehicles and other items of personal property that the claimant sought does not appear to be controversial.
- [15] Lyster J. addressed property division issues in her reasons for judgment (2022 BCSC 1293):
- [32] Under s. 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] both parties are entitled to an undivided one-half interest in all family property, and are equally responsible for family debt. The property in respect of which Ms. Ward seeks orders is all family property, save and except for the two investment accounts, which are in whole or large part excluded property. Under the orders sought by Ms. Ward, I am satisfied that each party would receive approximately one-half of the family property. I cannot be precise about that, given the lack

of certainty regarding the precise value of the business, but I am satisfied that Mr. Ward would receive not less than one-half of the value of the family property following the sale of the family home.

- [133] Mr. Ward would likely be in the stronger position to provide evidence regarding the value of the business. If Ms. Ward has overvalued the business, he could have participated and provided evidence about the value of the business. Mr. Ward has chosen not to participate in these proceedings, however, despite being given notice. In the circumstances, I consider it appropriate to proceed on the evidence of Ms. Ward, including her estimate of the value of the assets of the business.
- [16] Concluding that "the division of family property proposed by Ms. Ward is fair and equitable in accordance with the principles set out in the FLA," Lyster J. made the orders sought. She noted that the requirement that the court approve any subsequent sale would give the respondent "an opportunity, should he wish to do so to raise any concerns he may have about its sale."
- [17] The respondent's current counsel first corresponded with the claimant's counsel on December 28, 2022, and among other things requested counsel's dates in January and February for an application to set aside the final orders (and a protection order, which I will discuss shortly). She filed a notice of appointment as counsel on January 30, 2023.
- [18] Despite the existence of the current action and the communications by his counsel, on February 22 of this year the respondent filed a separate action by notice of family claim making a variety of property claims, which the claimant responded to on March 22. Pursuant to that action, he filed a certificate of pending litigation with respect to the property, which the claimant has applied to set aside in order to permit a sale that has been arranged pursuant to the final orders granted to her. The application to approve that sale has been adjourned pending the outcome of this present application.
- [19] As of the date of this application, the respondent still had not filed a response in the main action.
- [20] The present application was filed on March 24, shortly after the claimant filed her application to extend the protection order. It had been ordered by Master Keim on October 27, 2022. The claimant's affidavit in support described the respondent's efforts to thwart the sale that had been ordered in the summary trial, and more importantly her fear of him based on his alleged escalating, harassing behaviour and his possession of a handgun inside the house. For present purposes, the most important provision of the resulting protection order is that it prohibited the respondent from attending at the family home, including the shop on the property where he keeps tools and equipment for his business. That order was renewed following a further contested application on April 13 of this year.

- [21] The respondent has also brought an application to set it aside. Like the order for sale, it will be dealt with separately after the present application has been decided. It was extended on October 30 by Justice G.C. Weatherill, to prevent it from expiring before these reasons were provided.

The Respondent's Position

- [22] He deposes that after he was served with the notice of family claim, an amicable relationship continued between him and the claimant. This included "chatting" regularly and eating meals, watching television, and spending time with their dog.
- [23] After he was served with the notice of family claim, he told the claimant that he had given it to the lawyer who had assisted him when the claimant began her previous family action in 2016, which she later abandoned. He told her that he wanted to work on the house over the summer, to ensure that they could get the best possible price for it when it sold.
- [24] When he provided the notice of family claim to that lawyer, she told him she was very busy and not doing much family law anymore, but would have one of her "assistants" look at it.
- [25] Prior to the summary trial, the claimant did not speak to him about any upcoming applications. His belief was that his lawyer and the claimant's lawyer "were working on the separation and divorce."
- [26] He points out that pursuant to Rule 6-2(4) he was deemed to have received the notice of application that was mailed to him on May 27 by June 3, which was the Friday before the application date of Monday, June 6, leaving no business days before it took place. His position is that pursuant to Rule 10-6(7)(b) he was actually entitled to 12 business days' notice for a summary trial.
- [27] He asserts that he would have attended the hearing if he had known about it.
- [28] He learned on June 7 that the application had taken place, and says that he immediately contacted his lawyer. She told him that she had "totally forgotten about it" and that he should seek other assistance because she was in Winnipeg at the time, in the midst of a personal matter. She referred him to two other lawyers, neither of whom were able to take the case.
- [29] He deposes that he then contacted "numerous other lawyers and was unable to get correct legal advice or secure a lawyer to assist in an application to set aside the final order", until he retained his present counsel in December. This included law firms and individual lawyers in Cranbrook, Calgary, and Vancouver. He also mistakenly filed a notice of appeal, with the assistance of Access Pro Bono.
- [30] He described being in contact with a lawyer in Kimberley, who ultimately seemed to have no capacity to work on his case. A lawyer at a Vancouver family firm he contacted demanded a \$30,000 retainer. He retained a lawyer at another firm in Vancouver, whose supervising lawyer then demanded an additional \$20,000 retainer or for the firm to be put on title. He

was not prepared to agree to either option, so that lawyer withdrew. He briefly retained another lawyer, who told him he had obligations to other cases and would be gone for a month, which led him to locate and retain his current counsel with the assistance of friends.

- [31] In support of his account of these efforts he has attached initial consultation forms for two family firms in Vancouver (one of which is dated in August and the other undated); a retainer letter from another Vancouver firm with an indication of payment (this was the firm whose supervisor demanded the additional retainer); a handwritten list of family law firms in the East Kootenays and elsewhere, some of which have checkmarks beside them and others have phone numbers attached; and a notice of appeal which appears to have been filed on September 29.
- [32] In one of the consultation forms he referred to the same lawyer he had describes in his affidavit as his previous counsel in this matter.
- [33] The claimant herself has attached notices of appointment for two different counsel, one of which is from the firm that provided the retainer letter, which were filed on the respondent's behalf in November. She also refers to correspondence from a lawyer in Rossland, who described herself as having been retained on his behalf. In his subsequent affidavit the respondent accepts that this may be the lawyer he previously referred to as being from Kimberley, but maintains that he did not actually retain her.
- [34] He also deposes that before he was excluded from the property by the protection order, he told the claimant several times that he was "having a hard time finding a lawyer and getting going."
- [35] With respect to his defence to the property claims that were dealt with in the summary trial, he explains that he purchased the property on which the family home is located in 1994 and carried out all of the improvements to it, including building the house and shop. The assessed value when the claimant paid off the mortgage in 2008 was \$657,000.
- [36] He describes putting the claimant on title as "an emotional endeavour", which he did out of love for her as "a placeholder of sorts", so that she could get back her contribution, which was her excluded property. He also described it as "an easy way of keeping her contribution protected." He quotes the claimant as saying that she only wanted that money back (in the event of a break-up, I took it) because by living with him she could "keep all her own money" and be supported on what he earned. He denies that her investment represented a purchase of half of the property.
- [37] Beyond the question of what having the claimant as an owner signified, the respondent points out that the property division ordered at the summary trial did not take into account his approximately 14 previous years of ownership, and its exclusion as family property by virtue of that.

- [38] He was unable to complete the home during the parties' time together, because he had to do all the work himself and the claimant was not prepared to contribute any meaningful employment earnings or personal efforts to that task. More generally, he denies that the claimant made any significant financial contributions to the household, or to the maintenance of the home. Her asserted that "she paid very little aside from her original cash injection to pay off the mortgage", although he conceded that she bought a furnace for the house as well as certain other items.
- [39] The other major property issue that is said to be subject to a defence is the value that was ascribed to the respondent's business. He deposes that it is not worth the \$400,000 alleged by the claimant, and that its value is chiefly in the few items that the company through which he operates the business owns, and in the value of the work that he performs as a trucker. He is also subject to very high operating costs for fuel and maintenance. He maintains therefore, that there was no windfall to him in the manner in which the business and its accompanying debt were allocated under the property division obtained by the claimant.
- [40] In this regard, he clarifies that the line of credit that was attributed to the business in the property division was obtained jointly so that it would be available "for personal reasons", as well as "potential use for [his] trucking if need be."
- [41] Finally, the respondent alleges that there was an additional item that was subject to property division but was not dealt with in the summary trial. The claimant purchased and then sold another house during their marriage, and none of the funds she obtained from selling it or renting it out in the interim were ever shared with him.

The Claimant's Position

- [42] In overview, she submits that the final orders were fair to the respondent, that his credibility in seeking to get them set aside now is fatally compromised by his conduct in the litigation, that he did not respond in a timely way to service of the notice of family claim or the final orders, and that he has no valid property claims to pursue if he were allowed to proceed.
- [43] On the issue of the timeliness of his response, the claimant deposes that after being served with the notice of family claim he told her he would not be responding to it until he had finished the renovations to the house. Given that he had been engaged in that process since the outset of their relationship, she was not prepared to await their completion before proceeding with an application to resolve matters between them.
- [44] She points out that the lack of a response to family claim from him entitled her to proceed without further notice, although he was in fact notified of the summary trial application by her counsel.
- [45] His claim to have provided the notice of family claim to his former counsel is said to be suspect in the absence of any affidavit from that counsel, particularly in light of his claim that she then forgot about his request for assistance. It is also inconsistent for him to claim

entitlement to notice and special consideration from opposing counsel as a self-represented litigant, when in fact he had sought his counsel's assistance by then. Oddly, he also had no contact with this counsel for months after initially being served. Although he referred to her in one of his online consultation forms, in the other one he advised the prospective lawyer that he had had no previous representation.

- [46] After he found out about the orders on June 7 (and, he alleges, that his original counsel could not act for him), there is no objective evidence of efforts to seek counsel until the correspondence from the Rossland counsel in August, who said she was retained by him despite his present assertion to the contrary. As potential proof of his efforts, the online consultation forms are said to be self-serving and incapable of verification as to their true dates. These efforts were followed by a rapid succession of additional counsel going on and off the record, none of whom actually took any action with respect to the final orders until his present counsel.
- [47] Although the claimant's counsel was unavailable, due to his trial commitments, to respond to an application to set the final orders aside until the March 2023 Cranbrook assize, she points out that the respondent's counsel took no steps to schedule the application until after she had served her application to extend the protection order, at which point his counsel sought short leave to have it heard on March 31.
- [48] The respondent is also said to have proceeded improperly by commencing a new family action. Nichol makes it clear that an application to set aside a final order made in the absence of a party should be brought in the family proceeding in which the order was obtained, as has now been done.
- [49] More generally, the claimant points out that courts have required considerably more compelling circumstances than the respondent can point to before being willing to set aside final orders in a family law context, such as mental health issues that inhibited a response (*Cretu v. Cretu*, 2022 BCSC 305); complete unawareness on the part of the respondent that the action had been commenced (*Prasad v. Prasad*, 2021 BCSC 430); failure of the claimant to give accurate notice of the relief being sought (*J.M.G. v. S.G.*, 2022 BCSC 1218); or misleading affidavits in support of the undefended application (*Hang v. Vu*, 2019 BCSC 1369). Courts have also looked askance at efforts to set aside final orders based on unreliable affidavit material from the respondent (*Zhang v. Ton*, 2014 BSCS 122).
- [50] With respect to litigation conduct that undermines the respondent's credibility, a serious concern is said to arise from the text messages that he alleged he had been sent by the claimant in January 2022, just before the service of the notice of family claim. These messages, which he attached to an affidavit, included one in which she said how sexy he was and that she loved him. Presumably, these were intended to support his position that the parties were interacting amicably during this period, and that therefore he was not acting unreasonably in his response to having been served. In fact, her cell phone records for that month show no such messages from her, suggesting that the ones he relied on may be

fabricated. Her counsel advises that Lyster J., who also heard the application to extend the protection order in April, found that those messages had not been sent by the claimant, resulting in an adverse conclusion with respect to the respondent's credibility.

- [51] In a subsequent affidavit he deposed to his belief that these were old messages that were somehow sent to his phone from the screen in his truck that shows text messages. She characterizes that as an admission on his part of knowing fabrication, although in context I read it as an explanation for his inadvertent reliance on them, whether or not one accepts it.
- [52] Other litigation conduct that is said to cast doubt on the respondent's credibility includes thwarting the efforts of the realtor to market the property after the order for sale by excluding him from it; posting a note forbidding access to the property; and removing necessary fixtures, all of which were undertaken with knowledge of, and in defiance of the final order authorizing the sale. Along the same lines, he has said to have returned to the property after the initial protection order was in place, although he claims he did so only in the company of the police to retrieve necessary items.
- [53] Turning to the validity of the respondent's property claims, the argument that she purchased something less than a half interest in the property in 2008 founders on her registration as a joint tenant under the Land Title Act, R.S.B.C. 1996, c. 250. Some evidence of a trust claim would be required to undermine the presumption arising from that registration, and none has been plead thus far. Counsel submitted originally that recent legislative amendments precluding reliance on resulting trusts and the presumption of advancement in family proceedings now bar such claims in any event (although, as I pointed out during submissions, the amendments expressly do not apply to cases that arose before they were proclaimed). Regardless, the claimant submits that those doctrines would have no application here in any event because the claimant paid value for her share of the property pursuant to an agreement. There is the additional point that the parties would not yet have met the definition of spouses in 2008 due to the length of their cohabitation, so the considerations that arise in transactions between spouses are not applicable in any event.
- [54] It is also relevant, when assessing the credibility of the respondent's evidence surrounding this purchase, that a 2010 assessment of the property suggests that it was worth meaningfully less than the respondent claims.
- [55] As to the suggestion that the business was of minimal value, so that allocating it to him in the property division along with the line of credit left him at a disadvantage, the claimant has provided documents showing the purchase of a total of about \$900,000 in assets for its use over the years, including \$229,000 for a truck and trailer in 2017 and \$82,000 for another trailer; the purchase of a business itself for over \$200,000 in 2011; and indications in the records of the line of credit and that it was used primarily for business-related purchases.

- [56] Notably, despite claiming a minimal value for this business, in one of his online consultation forms for a Vancouver family law firm the respondent represented himself as earning \$200,000 per year.

Discussion

- [57] First of all, the claimant is correct that because the respondent did not file a response to family claim within 30 days of having been served with the notice, pursuant to Rule 4-3(2) he was "not entitled to receive notice of any part of the family law case including, without limitation, any court appearance, hearing, conference or trial." Of course, the degree of actual notice may still be very informative on the reasonableness of a party's response to subsequent applications made without notice to them.
- [58] In *Nichol*, the Court of Appeal cited with approval the following passage from *Director of Civil Forfeiture v. Doe*, 2010 BCSC 940, on the correct approach to an application of this nature:
- [15] [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds* precludes them from being successful on an application under Rule 17(12) [the rule in the previous Supreme Court Rules that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion.
- [59] On the first aspect of the *Miracle Feeds* considerations, *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341, provides helpful guidance on the meaning of a willful or deliberate failure to file a response:
- [23] The starting point is understanding what the words "wilful or deliberate" mean. In *Hubbard v. Acheson*, 2009 BCCA 251, Chief Justice Finch said:
- [20] It is settled law that wilful delay carries with it the connotation of blameworthy conduct: See [*Anderson v. Toronto-Dominion Bank* (1986), 70 B.C.L.R. 267 (C.A.)] and [*Brar v. Sahota* (1998), 1998 CanLII 6477 (BC CA), 166 D.L.R. (4th) 764 (B.C.C.A.)], referred to by the Supreme Court judge. I can see nothing in the reasons of the Provincial Court judge to suggest she applied this test to the respondent's conduct in failing to file a reply. Her reasons appear to equate the intentional failure to reply with blameworthiness. But as this Court said in *Anderson*:

The failure may have been "purposeful, deliberate or intentional" but, depending on the circumstance, it may not be blameworthy.

See also *Meade v. Armstrong City* at paragraphs 21 to 22.

[24] The comments of the Court in *Anderson* recognize that, "depending on the circumstance," "purposeful, deliberate or intentional" conduct may also constitute "blameworthy" conduct.

[60] *Forgotten Treasures* also assists on the correct approach to deciding whether there is a defence worthy of investigation:

[27] In *Schmid v. Lacey* (1991), 1991 CanLII 1817 (BC CA), 7 B.C.A.C. 77 at para. 10 (B.C.C.A.), Locke J.A. said:

The leading case in setting aside a default judgment is that of *Bank of Montréal v. Erickson* (1984), 1984 CanLII 277 (BC CA), 57 B.C.L.R. 72, a case in this Court. The phrase was used in there as to the third ground that the applicant "has a meritorious defence, or at least a defence worthy of investigation". In my opinion, the phrase "worthy of investigation" does not mean that one is merely entitled to make the allegation. One must, I think, descend to details such as to enable the judge to correctly exercise his mind upon whether there is indeed such a defence.

See also *Andrews* at para. 44; *Rangi v. Rangi*, 2007 BCCA 352 at para. 81.

[28] Further guidance is found in *Brar v. Sahota* (1998), 61 B.C.L.R. (3d) 194 (C.A.). The chambers judge had refused to set aside a default judgment because he considered that there was inadequate evidence of the defence that was to be advanced. On appeal, the Court concluded, at para. 11: "In my judgment, the averments of Mr. Sahota in his affidavit are sufficient to raise a defence that is worthy of investigation." The Court then said:

[12] It is not, in my view, necessary for a person seeking to set aside the default judgment to swear to all the evidence that he believes might support his defence. When it is a simple cause of action, and I do not say that to diminish the claim, but when it is a simple cause of action like an assault, it is sufficient, in my view, to plead that the defendant did not assault the plaintiff and he did not participate in any way in the assault. There could be particulars, and there could, of course, be discovery to add flesh to those allegations, but I think that that would be a defence that would withstand an application to have it struck out as being insufficient.

See also *Klonarakis Estate*, 2013 BCCA 481 at paras. 35-36.

[29] It is thus necessary for a defendant who seeks to set aside a default judgment to file some evidence that supports the defence it wishes to advance. In some straightforward or simple cases, a denial, in affidavit form, of the allegations in the notice of civil claim may be sufficient. In other cases, more may be required.

[30] In neither instance does the chambers judge engage in a searching, extended, or detailed weighing of the evidence. The threshold the applicant must meet is, as the words "worthy of investigation" suggest, not onerous.

[31] In *Klonarakis*, the Court asked whether the appellant had "an arguable claim" and whether there was a "live issue": at paras. 34 and 36 respectively. In *Brar*, the Court concluded at para. 13 that "although the case is close to the line, there was enough" to set aside the default

judgment. In *Miracle Feeds* itself, the chambers judge concluded at 62 that the applicant had a defence "which may well be meritorious." Recently, in *National Home Warranty Group Inc. v. Red Rose Appliances & Plumbing Ltd.*, 2018 BCSC 234 at para. 59, the chambers judge concluded that all the applicant was required to show was that it had "an arguable defence" and that there were "triable issues."

- [61] I would describe the respondent's approach to being served with the notice of family claim and to learning of the final orders as unsophisticated and lacking in skill, but I am unable to attribute any particular degree of blameworthiness to it.
- [62] His contemporaneous statement to the claimant, which she herself reports, that he would not be responding until he had renovated the house enough to bring the best price in a sale certainly reflects a mistaken and somewhat naïve view of the timing of his obligations after having been served, and of the risks to which he was thereby subjecting himself, but it was still the expression of a belief in his ability to postpone a response. In this regard, while I do not suggest that the claimant actively misled the respondent, the circumstances of their continuing cohabitation and the absence of any specific indication to him of her intentions to make further applications would certainly have detracted from any sense of urgency on his part, particularly in the absence of any indication to him of a pending application. As I have said, he was not entitled to notice as a matter of procedure, but it would certainly have been open to the claimant to inform him of her plans, which could well have modified his approach and the urgency of his response.
- [63] Similarly, even leaving aside whatever contact he may have had with his lawyer in the previous action, his efforts to obtain counsel after being informed of the final orders, although poorly executed and not brought to fruition until December, do show fairly persistent efforts from the end of August (the month in which the final orders to his detriment were actually made) onwards. The documents, for example the retainer letter from the Vancouver firm and the various notices of appointment, offer some circumstantial support for his account. In determining whether he made the efforts to set the orders aside as soon as reasonably possible, one has to take into account the practical realities of retaining counsel for a relatively unsophisticated litigant, including the availability of suitable counsel and the upfront cost, particularly in circumstances of financial stress. Although they were far from ideal, in my opinion the evidence shows reasonable efforts in the context of apparently limited capabilities, and I would not weigh the length of the period from the granting of the orders until the respondent retained his present counsel against him in the analysis.
- [64] From there, the ill-advised decision to bring a separate action and the failure to apply to set aside the final orders until the claimant applied to extend the protection order are not sufficiently attributable to the respondent himself, as opposed to the professional judgment of his counsel, to weigh them against him as lack of efforts to bring the matter forward.

- [65] With respect to the respondent's credibility, his reliance on text messages that could not have been sent by the claimant during the period alleged and his cantankerous and disruptive response to the order for sale, show, respectively, a certain deceptiveness, and a lack of regard for court orders. These factors certainly mandate caution when assessing the rest of his evidence, but I do not think they render it entirely lacking in weight, particularly when he is simply taking a contrary position on a common body of evidence, as in the case of the property issues.
- [66] Turning to those issues, the claimant's counsel has engaged in an admirably thorough analysis of the strength of the respondent's claims, but as the authorities indicate, this is not the time for a searching, extended, or detailed weighing of the evidence.
- [67] On any version of the evidence, the claimant paid less than half of the apparent value of the family property, ostensibly for a joint share on title, and paid off a specific identifiable debt in the course of doing so. The possibility that as a result the title is not a conclusive indication of their respective interests, and that she held some portion of it exceeding the amount of her contribution for him in trust, is at least worthy of investigation at this stage, whether or not a trust claim has yet been pleaded. In some respects, this analysis is potentially even more compelling if the parties had not yet acquired the status of spouses, leaving their agreement to be construed only as concerning their respective degrees of investment in the property. If it is accepted that the transfer was not a reflection of the parties' actual intentions, then the loss of the respondent's exclusion based on it would also not necessarily follow. By no means do I characterize these as ironclad or overwhelmingly strong defences - I can only say that they meet the threshold set out in the authorities.
- [68] Similarly, however much the purchased goodwill of the previous owner and the accumulated assets of the business may add up to when the entire period since 2011 is considered, the respondent has put forward a defence at least worthy of investigation that its overall value, in light of its actual profitability and the ability to realize on those assets at their current age and remaining usefulness, does not actually exceed the balance of the line of credit, as Lyster J. found on the only evidence before her. I appreciate his position that the claimant had no interest in that business, but I do not see how that could be so, since it was acquired during the relationship and there is no evidence of an agreement between the parties that it was to be held separately. This means that it is by no means clear that the line of credit is not family debt, even if it was used principally to fund the acquisition of equipment for the business.
- [69] Finally, there is the allegation that the claimant purchased, rented out, and then sold and retained the proceeds of another house during the relationship, while retaining all of those proceeds for herself. This was not even addressed in the summary trial judgment, and it could be a meaningful aspect of property division.
- [70] Therefore, despite the able efforts of claimant's counsel to uphold them, I conclude that the orders must be set aside, with costs in the cause.

- [71] I make that order with respect to costs because at this stage it is still not clear whether the strength of the respondent's proposed defences will ultimately exceed the modest threshold that is presently required, and while it was unwise in retrospect for the claimant to attempt to steal a march on the respondent in this manner, it was not overtly improper.
- [72] In light of the amount of time that it has regrettably taken to resolve this application, I do not wish my schedule to restrict counsel's ability to make the remaining applications, which have a degree of urgency to them. So, rather than remaining seized of them, I will say that I remain prepared to hear them if counsel request it, but that they are free to set them before any judge, whether in regular chambers or as a long chambers hearing, if that will result in them being heard sooner.

"Schultes J."

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