
CANADA / JUDGMENT

Waters v. Michie

2011 BCSC 1083

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2011 BCSC 1083 Waters v. Michie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Waters v. Michie,

2011 BCSC 1083

Date: 20110809

Docket: D109625

Registry: Vancouver

Between:

Jodi Lynn Waters

Claimant

And

James Alexander Michie and Dawn Lanelle Michie

Respondents

Before: The Honourable Mr. Justice Blair

in Chambers

Reasons for Judgment

Counsel for the Claimant:

C.M. Rajotte

Counsel for the Respondents:

P. Daykin, Q.C.

E. Walker

Place and Date of Hearing:

Vancouver, B.C.

June 13, 2011

Place and Date of Judgment:

Vancouver, B.C.

August 9, 2011

- [1] The respondent, Dawn Lanelle Michie ("Ms. Michie"), brings this summary trial application pursuant to Rule 11-3 of the Supreme Court Family Rules (the "Family Rules") for an order dismissing the claims brought against her by the claimant, Jodi Lynn Waters ("Ms. Waters"), or, alternatively, for an order that Ms. Waters post security for her costs.
- [2] For the reasons following and pursuant to Rule 11-3(15) of the Family Rules, I conclude that Ms. Michie's application is inappropriate for summary judgment as there is insufficient evidence to find the facts necessary to make the determination sought by Ms. Michie and that it would be unjust to decide the issues summarily. I further conclude the circumstances are such as to preclude the granting of an order requiring Ms. Waters to post security for Ms. Michie's costs.

Background

- [3] Ms Michie, in February 2004, married the respondent, James Alexander Michie. Ms. Waters is Mr. Michie's first wife, the two marrying in 1992 and separating in 1995. Ms. Waters, on July 12, 1996, commenced this proceeding seeking a divorce, property division, as well as child and spousal support. They were divorced in 1998, and on January 9, 2001, they settled all matters between them including child support, spousal support, and division of property with the terms of their agreement being incorporated into a consent order granted on January 29, 2001 by Maczko J. Ms. Waters assumed her present surname upon her marriage to Robert Waters.
- [4] Differences arose between Ms. Waters and Mr. Michie with respect to their respective incomes upon which support for the three children of their marriage was based and their dispute was heard by Madam Justice Humphries. On May 24, 2005, Humphries J. ordered interim child support based on the parties' declared incomes after concluding that neither had established their assertions with respect to the other's income. Humphries J. noted that if the parties wished to further pursue the questions surrounding their respective incomes they would have to do so in a trial, not in a chambers application.

- [5] Ms. Waters, on January 11, 2008, obtained an order from Mr. Justice Kelleher directing that the question of Mr. Michie's income proceed to trial and granting Ms. Waters leave to seek child support retroactive to 2004. Kelleher J., in August 2009, heard a further application brought by Ms. Waters, and in his reasons for judgment filed August 28, 2009, cited as *Michie v. Michie*, 2009 BCSC 1172, permitted Ms. Waters to add Ms. Michie as a respondent and from whom Ms. Waters could claim relief in the form of a declaration that Ms. Michie held title to two properties, the first being described as the Alderwood property located in Port Coquitlam ("Alderwood") and the second described as the Patrick Road property located in Pitt Meadows ("Patrick Road") in trust for Ms. Waters to the extent of a 50 percent beneficial ownership, or, in the alternative, a declaration that the transactions by which the properties were transferred to Ms. Michie were void, together with claims against Ms. Michie for conspiracy, and for restitution or damages for fraudulent conduct.
- [6] Mr. Justice Kelleher's judgment of August 28, 2009, the terms of which were reflected in his order filed December 24, 2009, also allowed Ms. Waters to file a notice of family claim in which she sought the following relief against Mr. Michie:
- a. retroactive and prospective child support;
 - b. equal division of undisclosed family assets;
 - c. the January 9, 2001 settlement be declared void because of Mr. Michie's alleged fraudulent misrepresentations and nondisclosures; and
 - d. the January 29, 2001 consent order made by Maczko J. be varied, rescinded or set aside to remedy Mr. Michie's alleged misrepresentations and non-disclosures.
- [7] Ms. Waters, on November 19, 2009, filed her new notice of family claim against both Ms. Michie and Mr. Michie pursuant to the terms included in Kelleher J.'s August 28, 2009 reasons for judgment.
- [8] On April 30, 2009, Ms. Waters filed certificates of pending litigation ("CPLs") against Alderwood and Patrick Road which were both registered in Ms. Michie's name. Madam Justice Gerow, on May 20, 2010, heard Ms. Michie's application pursuant to ss. 256(1) and 251(1), (2) and (3) of the Land Title Act, R.S.B.C. 1996, c. 250 to have the CPLs cancelled. In her reasons for judgment given on May 25, 2010, Gerow J. cancelled the CPLs after weighing the hardship and inconvenience suffered by Ms. Michie as a result of the CPLs against what she found to be a weak claim advanced by Ms. Waters against Ms. Michie. Gerow J. wrote at para. 35:
- [35] ... While there are arguable claims between the parties such that it cannot be said that Ms. Waters' claims against Ms. Michie have no prospect of success or is a nuisance claim, it is my opinion, based on the interlocutory material, that Ms. Waters' claim against Ms. Michie is weak.

- [9] Ms. Waters submitted that if the CPLs were cancelled, Ms. Michie ought to provide \$500,000 in security. Gerow J. directed that the CPLs be cancelled on Ms. Michie providing \$5,000 as security and upon her undertaking not to either encumber Patrick Road for more than \$2.5 million or transfer the property without Ms. Waters' agreement or further order of the Court.
- [10] Ms. Waters, on August 6, 2010, requested disclosure of Ms. Michie's personal financial records. Ms. Waters, on September 14, 2010, filed an amended notice of family claim in which she alleged at paragraphs 36.16 to 36.19 that the respondents, Mr. Michie and Ms. Michie, since 2004 and continuing to the present, had committed the tort of conspiracy by devising and carrying out a joint plan or common intention to delay, hinder or defraud creditors including the claimant, Ms. Waters, of their just and lawful remedies by diverting and transferring Mr. Michie's income and assets including Alderwood and Patrick Road, the latter being referred to as the "farmlands" in the amended notice, into the name and possession of Ms. Michie. Ms. Waters pleaded that the respondents' joint plan or common intention was in breach of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, s.1, the Fraudulent Preference Act, R.S.B.C. 1996, c. 164, s.3, and the Criminal Code of Canada, R.S.C., 1985, c. C-46.
- [11] Ms. Waters in her amended claim also sought an interim Mareva injunction restraining the disposition or further encumbrance of Alderwood and Patrick Road.
- [12] Ms. Waters, on October 4, 2010, brought an application before Mr. Justice Willcock for an order that Ms. Michie produce all her personal financial records. After considering the provisions of the old and new Supreme Court Rules, Willcock J. concluded at para. 26 of his reasons for judgment given orally on October 4, 2010, that Ms. Michie was obliged to provide Ms. Waters all documents which would tend to establish the transfer of money from Mr. Michie to her directly, or by way of any corporation in which he had an interest, a controlling interest or directing mind.
- [13] Ms. Waters also sought production from Ms. Michie of documents in relation to the conspiracy claim advanced in her September 14, 2010 amended notice of claim. Willcock J., while noting the conspiracy claim may require Ms. Michie to produce a broader range of documents than she earlier produced, also acknowledged that the Supreme Court Civil Rules 7-1(10) and (11) established when she had to make further disclosure, and that before Ms. Michie was required to provide further disclosure she could seek to set aside or strike all or some of Ms. Waters' amended pleadings.
- [14] Mr. Justice Willcock dismissed Ms. Waters' application for an injunction restraining Ms. Michie from encumbering or selling any interest in Alderwood or Patrick Road after concluding that the injunction application involved a reconsideration of the same factors addressed by Gerow J., when she cancelled the CPLs. He found such reconsideration ought not to occur in the absence of evidence of some change in circumstances or factors that could lead to the court exercising its discretion in a different fashion.

[15] Ms. Michie, on March 2, 2011, before Madam Justice Loo, applied pursuant to Rule 11-2(1)(a) of the Family Rules for an order that Ms. Waters' claims for conspiracy and for restitution or damages be struck as disclosing no reasonable claim. Loo J. gave her reasons for judgment on March 15, 2011, and at para. 36 she summarized Ms. Waters' action as involving a claim for retroactive and prospective child support based on Mr. Michie's alleged undisclosed income and/or assets. Loo J. noted that Mr. Michie had a statutory duty to pay child support and Ms. Waters had a statutory remedy to ensure that Mr. Michie pay child support.

[16] Loo J. wrote at para 37:

[37] I conclude on the basis of the principles enunciated in *Frame v. Smith* [1987] 2 S.C.R. 99, that her claim based on the tort of conspiracy should be dismissed as disclosing no reasonable claim. As Madam Justice Wilson stated in that case, extending the tort of conspiracy into the family law context is not in the best interests of the children.

[17] The B.C. Court of Appeal, on June 15, 2011, heard Ms. Waters' appeal (Vancouver Appeal File No. CA38918) from the decision of Loo J., striking her conspiracy claim and reserved its decision.

The Present Application Brought by Ms. Michie

[18] Ms. Michie's application to summarily dismiss Ms. Waters' claims against her comes as the November 14, 2011 commencement date of the trial approaches. Counsel estimate the trial will take three weeks to complete. In her application brought pursuant to Rules 11-3 and 22-1(6) of the Family Rules, Part 5 of the Family Relations Act, and the Fraudulent Conveyance Act, Ms. Michie seeks the dismissal of the claims on the grounds that they are without merit. Alternatively, Ms. Michie seeks an order that Ms. Waters post security for her costs of the trial and that the action be stayed pending the posting of that security.

[19] Ms. Michie describes this action as following from Ms. Waters' allegation that Mr. Michie concealed his income and assets from her since their 1995 separation, and seeks to impute income to Mr. Michie for child support retroactive to 2004 and to set aside the January 2001 agreement and consent order which divided the family's assets. Ms. Waters added Ms. Michie as a defendant alleging that she was the ultimate recipient of family assets concealed by Mr. Michie as well as being the volunteer recipient of fraudulent conveyances of Alderwood and Patrick Road. The background of the conveyances follows.

[20] Mr. Michie purchased Alderwood on December 7, 1999, three years after the November 20, 1996 order of the court declaring there was no possibility of reconciliation between Mr. Michie and Ms. Waters. The order constitutes a triggering event pursuant to the then s. 44, now s. 57 of the Family Relations Act. Mr. Michie's evidence is that he paid \$265,000 for Alderwood, financed by a \$40,000 loan from his father Alexander Michie and a conventional mortgage of \$230,000 from CIBC Mortgages Inc. Mr. Michie disclosed to Ms. Waters his purchase of Alderwood and its corresponding debt in his August 17, 2000 financial statement sworn during their divorce proceeding and prior to their January 2001 settlement agreement

and consent order.

- [21] Alderwood became the home for Mr. and Ms. Michie. On July 14, 2008, Mr. Michie transferred title to Alderwood to Ms. Michie who deposed the transfer was intended to provide her with a home in the event of Mr. Michie's death. Ms. Michie did not provide any consideration to Mr. Michie for the transfer of Alderwood into her name. Alderwood's current BC Assessment value is \$584,000 with two mortgages totalling approximately \$475,000 presently registered against the title.
- [22] Ms. Waters asserts that Mr. Michie purchased Alderwood with securities and other assets which he possessed, but did not disclose to her prior to the January 2001 settlement agreement and consent order. However, Ms. Waters made no claim to Alderwood after Mr. Michie disclosed his purchase in August 2000 and her contention that Mr. Michie acquired Alderwood with undisclosed family assets and securities is inconsistent with Mr. Michie's evidence that the Alderwood purchase involved a loan from his father and a CIBC mortgage. Ms. Waters has not provided any material supporting or describing the assets and securities purportedly used by Mr. Michie to purchase the Alderwood property.
- [23] The circumstances surrounding Ms. Michie's acquisition of Patrick Road are somewhat more complicated than those surrounding Alderwood. Ms. Michie, on November 6, 2008, acquired Patrick Road from a numbered company, 646904 B.C. Ltd. ("646904"), the consideration for the transfer being Ms. Michie's assumption of 646904's mortgage of some \$1.651 million with HSBC Bank Canada ("HSBC"). Upon the assumption of the \$1.651 million mortgage, Ms. Michie then remortgaged Patrick Road with the HSBC for the principal amount of \$2,05 million with Mr. Michie being a covenantor on the new mortgage. On December 18, 2008, Ms. Michie then borrowed \$275,000 from Gelt Holdings Ltd., secured by a second mortgage against Patrick Road, a mortgage to which Mr. Michie and his friend and business associate, Robert Wayne Knight, were covenantors.
- [24] 646904 was incorporated on May 2, 2002 and went into voluntary dissolution on November 28, 2008. Robert Wayne Knight had been a director, president and secretary of 646904 and retained the company's records following its dissolution. The BC Assessment record indicates that 646904 purchased Patrick Road for \$539,000 cash on October 24, 2002, and on November 3, 2005, 646904 used the Patrick Road property as security for a \$2.4 million line of credit granted to 646904 by HSBC. Mr. Knight signed the mortgage as the authorized signatory of 646904 and Mr. Michie and Ms. Michie both signed as covenantors for 646904's \$2.4 million mortgage with HSBC.
- [25] Ms. Michie deposed Mr. Michie requested her to sign as covenantor to 646904's \$2.4 million mortgage as HSBC would not accept 646904's signature alone and required B.C. residents to sign as guarantors. She also deposed that she had kept her horses at Patrick Road from 2003, and commencing in 2005 had been involved in the design of the house being constructed on the property. Ms. Michie deposed that she and Mr. Michie hoped to buy Patrick Road, and in the autumn of 2008 Mr. Michie advised her that Erwin Speckert, whom he identified as the

true owner of Patrick Road between 2002 and 2008, was prepared to sell the property if Ms. Michie assumed the existing mortgage debt of \$1,651 million and that led to Ms. Michie's acquisition of Patrick Road in November 2008.

- [26] Ms. Waters alleges that Mr. Michie was the beneficial owner of Patrick Road through 646904 and that he used 646904 as the repository of his unreported offshore income. Her allegation that Mr. Michie owned Patrick Road was contrary to the contents of Mr. Speckert's letter dated April 19, 2005, in which Mr. Speckert, a resident of Switzerland, wrote that he was the beneficial owner of Patrick Road through 646904 and had purchased the property with the assistance of Mr. Michie, who had been his business associate for over five years. Mr. Speckert wrote that he had purchased Patrick Road with a view to relocating to Canada, but that recently his wife had become less certain about moving to Canada.
- [27] However, Mr. Speckert, in another letter dated November 13, 2008 and addressed to Ms. Waters, wrote that his April 19, 2005 letter had been prepared by Mr. Michie to show Mr. Speckert as the owner of Patrick Road in order that he, Mr. Michie, would not appear as an owner of the property. Mr. Speckert wrote that in fact he never at any time had any interest or made any investment in Patrick Road. He further wrote that Mr. Michie was the ultimate beneficial owner of Patrick Road through one or more B.C. companies, including 646904. He wrote that all his statements in his April 19, 2005 letter were false and he had signed the letter solely because he worked for a company which was 90 percent owned and controlled by G.M. Capital, a company owned by Mr. Michie.
- [28] Mr. Michie, in response, deposed on July 10, 2009, that in early 2005 he had discussed with Mr. Speckert what the latter might write in a letter responding to Ms. Waters' allegation that he, Mr. Michie, owned Patrick Road. Mr. Michie stated that Mr. Speckert was at that time the owner of Patrick Road. Mr. Michie asserted that Mr. Speckert wrote the letter dated November 13, 2008 as a spiteful ex-employee who was attempting to cause Mr. Michie financial and other harm.

Summary Judgment

[29] Rule 11-3(15) of the Family Rules provides that:

(15) On the hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, (1989), 36 B.C.L.R. (2d) 202 (C.A.) McEachern C.J, at para 48, expressed the factors which a trial judge is entitled to consider in determining whether it will be unjust to give judgment:

- [48] In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.
- [31] *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263, *aff'd* by 2006 BCCA 369, at para. 12 *et seq* described further factors for consideration, including whether the litigation is extensive, will the summary trial take considerable time, is credibility a crucial factor and has there been cross-examination of the deponents of conflicting affidavits, will the summary trial involve a substantial risk of wasting time and effort and produce unnecessary complexity, and does the application have the potential for litigating in slices.
- [32] In the instant case, the amount involved in Ms. Waters' claim has not yet been ascertained. Ms. Waters asserts that Mr. Michie failed to fully disclose his income over a number of years which, if proven, could lead to his owing retroactive and prospected child support. Ms. Waters further alleges that Mr. Michie failed to fully disclose the assets he possessed as their marriage ended, and if she is able to prove the existence of these assets and that they are family assets, she seeks her share of those assets. Ms. Waters has not yet quantified either the income or the assets, but is pursuing that information.
- [33] It appears from the material filed at this summary trial application, together with that adduced during earlier applications, that there is some complexity to Ms. Waters' claims which suggests that this matter is better dealt with at a trial rather than in a summary fashion involving affidavits and transcript evidence.
- [34] Ms. Michie brings this summary trial application some five months before the November 14, 2011 commencement of the three-week trial of this action in an attempt to remove herself from this litigation thereby avoiding the costs associated with a lengthy trial in which she submits that she has no interest, being a dispute between her husband and his former wife, Ms. Waters. While I appreciate that this application is a financially logical approach on Ms. Michie's part as a means to minimize her legal and other costs associated with a conventional trial, I believe that given all the factors I must consider, a conventional trial is necessary to properly dispose of this action.
- [35] Counsel took just one day to present their submissions on the summary trial application, although covering in detail the steps taken to date in this action, together with the evidence and the applicable authorities. I do not consider the summary trial wasted time or effort, although the end result is the dismissed Ms. Michie's application.
- [36] Another difficulty in reaching a conclusion on this summary application lies in the absence of full disclosure and evidentiary gaps in the material. While the parties' preparations for trial are proceeding, full disclosure of documents has not yet been completed. Ms. Waters' counsel is preparing interlocutory applications for the production of documents from third parties including credit card companies, banks and other businesses believed to possess

records relating to Mr. Michie's financial records. Mr. Michie's financial history appears linked to that of Ms. Michie, although the extent and how it bears on Ms. Waters' claims is not clear at this point in the process.

- [37] Other evidence outstanding apparently lies with the B.C. Securities Commission relating to its investigation of Mr. Michie and companies with which he is involved. Ms. Waters' counsel is seeking production of documents from the Commission. Ms. Waters' appeal from Loo J.'s decision striking the allegation of conspiracy also remains outstanding. If the Court of Appeal restores Ms. Waters' conspiracy claim, Ms. Michie might be required to produce a broader range of documents to respond to the conspiracy pleading as noted by Willcock J. in his October 4, 2010 judgment. Ms. Waters has not yet completed her examinations for discovery of the respondents with counsel anticipating scheduling the discoveries following the full production of documents.
- [38] Credibility is also a factor and is difficult to ascertain on affidavit or transcript evidence alone, further suggesting that a summary trial is inappropriate in the circumstances of this case. As noted earlier in these reasons, there is conflicting evidence, not just within Mr. Speckert's correspondence, but also as between Mr. Speckert and Mr. Michie with respect to the ownership of Patrick Road.
- [39] The conflicts in the evidence of Mr. Michie and Mr. Speckert where they address the ownership of Patrick Road goes to their credibility. While Inspiration Management does not preclude a trial judge from reaching conclusions where there are conflicts in affidavits, I would find it difficult to do so in this situation. Messrs. Michie and Speckert are in direct conflict and the assessment of credibility, particularly that of Mr. Michie, would be assisted in a conventional trial in which evidence is given *viva voce*. I would anticipate that the weight to be given to Mr. Michie's evidence will be important considering Ms. Waters' allegations as well as her submission that Mr. Michie is under investigation by financial authorities in Switzerland, the United States, as well as British Columbia for the manner in which he conducted his business.
- [40] Another factor leading to my dismissing Ms. Michie's summary application involves the Alderwood property which Ms. Waters submits is a family asset, and that Ms. Michie is holding 50 percent of it in trust for her. Given the history of Alderwood's purchase, I find it difficult to conceive on the evidence before me how Ms. Waters might establish that Alderwood is a family asset purchased by family assets and to which she is entitled to a one-half interest. Mr. Michie's evidence describes his December 7, 1999 purchase of Alderwood, three years after the 1996 triggering event and how he financed the purchase, information that he disclosed to Ms. Waters in his August 17, 2000 financial statement.
- [41] Ms. Waters submits that Mr. Michie purchased Alderwood with securities and other assets which he possessed, but had not disclosed to her prior to their January 2001 settlement agreement and consent order. Although advised of the Alderwood purchase prior to January 2001, Ms. Waters did not advance a claim to the property before signing the settlement

agreement and consent order. Her present submission that Mr. Michie financed the Alderwood acquisition with undisclosed family assets and securities appears inconsistent with the evidence surrounding the purchase. Ms. Waters has not yet provided any material describing the assets and securities purportedly used by Mr. Michie to purchase Alderwood, although further disclosure might possibly support Ms. Waters' position.

- [42] Based on the evidence presently available, Ms. Waters appears to have a weak claim to an interest in Alderwood. However, I will not dismiss Ms. Waters' claim to Alderwood at this point in the proceeding because of my concern that more complete disclosure prior to or during the trial will in some fashion support Ms. Waters' claim against Alderwood, perhaps placing the trial judge in a quandary were I at this time to dismiss Ms. Waters' claim to Alderwood. I have concluded it is preferable given this and other factors that Ms. Waters' claims to both Alderwood and Patrick Road be dealt with at trial.
- [43] Another factor I considered when dismissing Ms Michie's application is Ms. Waters' claim that the 2008 transfers of Alderwood and Patrick Road amounted to fraudulent conveyances given that Ms. Michie's acquisition of the properties coincided both with a significant decrease in Mr. Michie's income and the commencement of investigations by B.C., U.S., and Swiss authorities into Mr. Michie's share trading operations. Ms. Waters submits that the transfers to Ms. Michie of both Alderwood and Patrick Road were part of a scheme to put Mr. Michie's assets and income out of reach of his creditors with the intention of delaying, hindering, or defrauding his creditors, including Ms. Waters, and hence the transfers were contrary to the Fraudulent Conveyance Act.
- [44] Mr. Michie's reported income was \$103,000 in 2006, \$105,000 in 2007, \$113,000 in 2008, but dropped to \$10,000 in 2009 and zero in 2010, as found in his financial statement filed July 21, 2010. The latter financial statement also indicated his financial picture included unsecured debts in excess of \$462,000 and an outstanding claim against him for \$500 million (US) arising from a 2010 decision of the U.S. District Court.
- [45] Ms. Waters filed affidavits containing hearsay evidence describing the various investigations being conducted against Mr. Michie and his business operations. This hearsay evidence is not admissible for the purpose of summary disposition of the claims, but as found by Fraser J. in *Calder v. King* (1994), 91 B.C.L.R. (2d) 336 (S.C.), at para 6, hearsay evidence can be used to support an argument that it would be unjust to decide the issue by way of a summary trial. I accept the hearsay evidence adduced by Ms. Waters for that limited use and I similarly accept the hearsay evidence provided by Ms. Waters' counsel that in June 2008, Swiss authorities shut down GM Capital Partners Ltd., a business associated with Mr. Michie by Mr. Speckert in his correspondence dated November 13, 2008. The hearsay evidence supports to some extent Ms. Waters' submissions that Mr. Michie's business activities went beyond those which he had previously acknowledged and required further disclosure in order to properly consider Ms. Michie's application for summary dismissal of Ms. Waters' claims.

- [46] The evidence available on Ms. Michie's application for the summary dismissal of Ms. Waters' claims leads to another basis for refusing her application. The evidence suggests that the financial affairs of Mr. Michie and Ms. Michie have over time become intertwined to an extent that a conventional trial involving both respondents would better allow the appropriate adjudication of Ms. Waters' claims rather than just Mr. Michie alone if Ms. Michie's summary application were allowed.
- [47] After considering the various factors expressed in *Inspiration Management and Dahl* and the evidence and submissions, I conclude that I am unable to find the facts necessary to decide the issues of fact and, further, in my opinion, it would be unjust to decide the issues raised by Ms. Michie's application.

Security for Costs

- [48] Ms. Michie applies for an order that if she is unsuccessful in her application to have Ms. Waters' claims against her dismissed, that Ms. Waters be required to post security for the considerable costs which Ms. Waters anticipates paying should this action proceed to trial.
- [49] Ms. Waters is a woman of limited means, with an income of just \$30,000 in 2010. She has borrowed funds in order to press this action against the respondents and she notes that Mr. Michie as of February 2011, owed her \$38,162.48 in outstanding child support payments and interest. Her position is that she will be unable to proceed with this litigation if ordered to post security for Ms. Michie's costs.
- [50] Mr. Justice Kelleher in his reasons for judgment filed August 28, 2009, dealt with an application brought by Mr. Michie that Ms. Waters post security for his costs of \$57,000 for a three-week trial. In denying Mr. Michie's application, Kelleher J. relied on the principles expressed in *Siddoo v. Siddoo*, 2006 BCSC 445 in which Mr. Justice Edwards considered security for costs in the matrimonial context.
- [51] At paras. 25-26, Edwards J. noted that the governing principle on any application for security for costs is that a plaintiff is not to be permitted a free ride on an unlikely claim at the defendants' expense: *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231 at para. 15 (C.A.), but that under its inherent jurisdiction the court will order security for costs against plaintiffs other than corporations "cautiously, sparingly and under very special circumstances": see *Tordoff v. Canada Life Assurance Co.* (1985), 64 B.C.L.R. 46 at 50 (S.C.). Edwards J. also noted at para. 36 that if the actions have a reasonable prospect of success, the plaintiff ought not to be barred from pursuing them by an order that they post security for costs that will preclude them from doing so.
- [52] In the present situation, although weaknesses appear in Ms. Waters' action, there also appears some prospect of success. I conclude that at this time she should not be prevented from pursuing her action by an order directing her to post security for costs as sought by Ms. Michie.

Conclusion

[53] I dismiss both Ms. Michie's summary trial application as well as her application that Ms. Waters post security for costs. Costs will be in the cause.

"R.M. Blair J."

BLAIR J.

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