Court File No. 21-00672880-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

BAO YING CAO and 13364097 CANADA INC.

Applicants

and

XIAODONG YANG and USERS OF SUNRISE TECHNOLOGY

Respondents

BOOK OF AUTHORITIES OF THE APPLICANTS

December 3, 2021

POLLEY FAITH LLP
TD North Tower
77 King St. W.
Suite 2110
Toronto ON M5K 2A1

Andrew Faith (47795H)
afaith@polleyfaith.com

Diane Shnier (77811N)
dshnier@polleyfaith.com

Tel: 416.365.1600

Lawyers for the applicants

TO: **XIAODONG YANG**

Respondent

AND TO: **USERS OF SUNRISE TECHNOLOGY**

Respondents

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Business Development Bank of Canada v. Aventura II Properties Inc., 2016 ONCA 300 (CanLII)

Date:	2016-04-22
File number:	M46240; M46279 M46303
Other citations:	37 CBR (6th) 219 — [2016] OJ No 2918 (QL)
Citation:	Business Development Bank of Canada v. Aventura II Properties Inc., 2016 ONCA 300 (CanLII), <https://canlii.ca/t/h334d>, retrieved on 2021-12-02

COURT OF APPEAL FOR ONTARIO

CITATION: Business Development Bank of Canada v. Aventura II Properties Inc., 2016 ONCA 300
DATE: 20160422
DOCKET: M46240, M46279 M46303 (C61854)

van Rensburg J.A. (In Chambers)

BETWEEN

Business Development Bank of Canada

Applicant

and

Aventura II Properties Inc., Pavilion Sports Clubs Inc.,
Pavilion Sports Ice Inc., Pavilion Sports Food and Beverage Inc.
and Pavilion Aquatic Club Inc.

Respondents

Sean N. Zeitz, for Revital Druckmann and Jean-Jacques Myara

Kelli Preston, for the receiver Pollard & Associates Inc.

Catherine Francis, for DUCA Financial Services Credit Union Ltd.

Heard: April 5, 2016

ENDORSEMENT

A. THE MOTIONS

[1] There are three motions before the court, in respect of an appeal and proposed appeal of the order of Hainey J. dated March 4, 2016 made in the context of a court-appointed receivership (the "Order"). Pollard & Associates Inc. is the court-appointed receiver (the "Receiver") of the debtor companies (the "Debtors"). A receivership order was granted by McEwen J. on September 8, 2014 (the "Receivership Order").

[2] The Order at issue on these motions extended a Mareva injunction against Revital Druckmann ("Revital"), who is the spouse of Johny Druckmann, the principal of the Debtors. The Order also directed that the Receiver is entitled to immediate possession or "repatriation" of certain monies, which are the

proceeds of an HST refund paid to one of the Debtors and diverted in contravention of the Receivership Order. The Order dismissed the claim by Jean-Jacques Myara ("Myara") to an interest in the monies.

[3] Revital seeks leave to appeal the Order under s. 193(e) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "*BIA*"). Importantly, she asserts no claim of her own to the monies in question and does not oppose the repatriation of the funds. Rather, she challenges the procedure followed by the Receiver in obtaining, on an *ex parte* motion, the original interim Mareva injunction against her.

[4] In his appeal, Myara claims that the monies are his and resists the repatriation of the funds. The Receiver and the secured creditor, DUCA Financial Services Credit Union Ltd. ("DUCA") each move for security for costs of Myara's appeal.

[5] For the reasons that follow, I dismiss Revital's motion and grant an order for security for costs against Myara in favour of the Receiver and DUCA.

B. BRIEF HISTORY

[6] The history of this matter is described in some detail in the reasons of the motion judge reported at 2016 ONSC 1545. For the purpose of these motions, the relevant facts are as follows.

[7] The Debtors and their representatives failed to advise a court-appointed monitor, contrary to its appointment order dated October 24, 2013 and a subsequent order dated January 23, 2014, that on December 4, 2013, one of the Debtors (Pavilion Sports Clubs Inc. or "PSCI") was issued an HST refund by the Canada Revenue Agency (the "CRA") in the sum of $986,594.96 (the "HST Refund").

[8] In September 2014, pursuant to an order dated August 20, 2014, the monitor made inquiries of the CRA and learned that the HST Refund had been issued to the Debtors eight months earlier. The monitor was then appointed as receiver by order dated September 8, 2014 in a contested receivership application. After obtaining an order dated October 28, 2014 requiring the Toronto-Dominion Bank ("TD") to release certain information, the receiver traced the HST Refund from a new TD account opened in the name of PSCI into a TD account in the name of "S. Stern" (Revital's sister), over which Revital had power of attorney. That account had been debited by a bank draft issued to S. Stern in the amount of $1,016,007.50 on August 26, 2014.

[9] On April 17, 2015, Pollard & Associates Inc. was substituted as receiver of the Debtors. The Receiver learned from TD that the bank draft had been cashed on March 6, 2015 and deposited into an unknown account.

[10] On December 4, 2015, Hainey J. granted the Receiver's *ex parte* motion for an interim "freeze and disclosure" order against Revital (the "Mareva Order"). The Mareva Order provided that it would cease to have effect if Revital provided security by paying the sum of $1,016,007.50 into court. The Mareva Order was later extended on consent to January 29, 2016.

[11] As a result of obtaining the Mareva Order, the Receiver traced the HST Refund through the S. Stern account (the draft had in fact been held and then re-deposited into that account on March 6, 2015) to, among other things, two non-registered mutual fund accounts with TD and Royal Bank of Canada ("RBC"), a personal account at RBC, and a 2015 Volkswagen Jetta, all in the name of Revital. Some funds remained in the S. Stern account.

[12] The Receiver brought a motion against Revital to repatriate the funds, also returnable on January 29, 2016. On January 26, 2016, counsel for Myara contacted the Receiver to advise that his client claimed an interest in the funds in the S. Stern account, and was seeking an adjournment.

[13] The motion to extend the Mareva Order and to repatriate the funds was heard on February 26, 2016. Myara attended at the motion. He sought intervener status, claiming to be a "former lender" to the Debtors. He claimed a beneficial interest in all the funds that were in the S. Stern account and in the two mutual fund accounts. He claimed to be an investor in the Debtors and referred to "loan advancements" totalling $1,241,290.01 made between March 2003 and August 2005 to Aventura II Properties Inc.[1] Myara said that after he wanted his money back in 2012, Johny Druckmann had promised to pay him the HST Refund, and he had directed it to be deposited into the S. Stern account. He had directed Revital to issue a bank draft in the name of S. Stern in August 2014, and seven months later to make investments on his behalf in her name. He claimed that internal records showing that he had been paid back were inaccurate.

[14] Of course, Revital's dealings with the HST Refund, that Myara claims occurred on his behalf, took place after the appointment of the monitor and in violation of court orders requiring the disclosure of the HST Refund. At no time prior to January 26, 2016 did anyone suggest that the HST Refund had been

received but belonged to Myara. Revital's affidavit of December 28, 2015 stated that the mutual funds were her property.

[15] On March 4, 2016, Hainey J. granted the Order. He found that the diversion of the HST Refund was in breach of the order dated January 23, 2014, which required the Debtors to advise the monitor immediately on the receipt of any refund from the CRA and prohibited the deposit or disbursement of any refund received. The Debtors breached the order and Revital was party to the breach. They engaged in deliberate and blatant acts of fraud. Hainey J. also found that Revital was in breach of the Receivership Order. He referred to the Receiver's powers under that order and para. 4, which required anyone with notice of the order to advise the Receiver of any property of the Debtors in their possession or control and to deliver such property to the Receiver at the Receiver's request. He rejected Revital's arguments that the Mareva Order was procedurally defective.

[16] Hainey J. rejected Myara's claim, which he characterized as a fraudulent attempt to divert the HST Refund away from the Receiver. Even if Myara had a claim to the funds, it would be as an unsecured creditor of a bankrupt company, and his alleged interest would be subordinate to the Receiver's interest in the HST funds. He extended the Mareva Order until further order of the court, and granted the Receiver's motion to repatriate the funds.

C. REVITAL'S MOTION FOR LEAVE TO APPEAL

[17] Revital seeks leave to appeal the Order under s. 193(e) of the *BIA*. Leave is discretionary and the court must take a flexible and contextual approach. In deciding whether to grant leave, the court must consider whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy and insolvency matters or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly hinder the progress of the bankruptcy or insolvency proceedings: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, at para. 29.

[18] The second part of the test requires the applicant to convince the court that there are "legitimately arguable points raised so as to create a realistic possibility of success on the appeal": *Re Ravelston Corp.* (2005), 2005 CanLII 63802 (ON CA), 24 C.B.R. (5th) 256 (Ont. C.A.), at paras. 28-29; see also *Osztrovics Estate v. Osztrovics Farms Ltd.*, 2015 ONCA 463, at para. 11. Although this is a relatively low bar, I am not persuaded that there is any arguable merit to Revital's proposed appeal.

[19] First, Revital does not claim any interest in the HST Refund, or in the funds in the S. Stern account, or, even now, the property and investments she acquired using such funds. As such, she does not and cannot appeal the repatriation part of the Order. Nor does Revital challenge the substantive grounds on which the Mareva Order was made and extended. Rather, as her counsel acknowledges, Revital's concerns are strictly procedural.

[20] In her proposed appeal to this court Revital raises the same procedural issues she argued before the motion judge. She asserts that the motion judge erred in continuing the Mareva injunction against her because there were procedural defects in the *ex parte* Mareva Order dated December 4, 2015.

[21] Revital says that Hainey J. erred in granting the Order because (a) the Receiver had not made full and frank disclosure on the original *ex parte* motion; (b) he did not require an undertaking for damages from the moving party or grant an order dispensing with that requirement; and (c) the Order could not be made against her as a "third party" where there was no pending or intended proceeding against her.

[22] I do not see any merit to any of Revital's arguments.

[23] There is no question that the Receiver, in moving for the *ex parte* order, was required to make full and frank disclosure of material facts, and to inform the court of any material facts or points of law that favoured the other side: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 39.01(6); *Chitel v. Rothbart* (1982), 1982 CanLII 1956 (ON CA), 39 O.R. (2d) 513 (C.A.); *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.). Revital's complaint is not with respect to the *facts* that were put to the court; rather, she says that the Receiver ought to have delivered a factum and provided the court with legal authorities on Mareva injunctions, in particular referring to the need for an undertaking as to damages and a pending legal action against the target of the order.

[24] First, the obligation on a moving party to file a factum in an injunction motion applies in contested, but not *ex parte*, motions: see r. 40.04(1). Second, the motion judge's granting of the Mareva Order was based on the application of settled principles and entirely justified by the evidence placed before him. And, as I will explain, the points that Revital raises were not in fact impediments to the relief granted by the court in this case.

[25] As for the failure to require the Receiver to provide an undertaking as to damages, the motion judge rejected this argument, on the basis that the order was made in a court-appointed receivership. The purpose of such an undertaking is "to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined": Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (2015-Rel. 24), 4th ed. (Toronto: Canada Law Book, 2012), at para. 2.470. The Receiver is not a self-interested party. A receiver is an officer of the court with a fiduciary duty to comply with the powers granted in the receivership order and to act honestly and in the best interests of all parties, including the debtor: *Toronto Dominion Bank v. Usarco Ltd.* (2001), 2001 CanLII 24004 (ON CA), 196 D.L.R. (4th) 448 (Ont. C.A.), at para. 30, leave to appeal refused, [2001] S.C.C.A. No. 217. The Receiver has a duty to recover the property of the Debtors, including the HST Refund, and the order sought was in aid of powers granted to the Receiver by court order. The motion judge, under r. 40.03, was entitled to grant the Mareva Order without requiring an undertaking as to damages, and he did so for good reason in this case.

[26] Finally, Revital says that the Mareva Order should not have been issued against her because there was no existing or proposed action in which she was a defendant. She relies on cases stating that such orders cannot be made in the absence of a law suit or "litigation process" in which she could assert her defences: see e.g. *Standal Estate v. Swecan International Ltd*. (1989), 26 C.P.R. (3d) 421 (Fed. C.A.). Without commencing proceedings against her, Revital says it was impossible for the Receiver to meet the "strong *prima facie* case" requirement for a Mareva order.

[27] Again, this argument has little merit, and I reject entirely the suggestion that the Receiver had an obligation to sue Revital in a separate action for recovery of the funds before moving for a Mareva injunction.

[28] In the typical "Mareva" case, the moving party seeks security for a future judgment, where neither liability nor the amount of the judgment has been determined. Here, however, the order granted was contemplated by and expanded upon powers granted to the Receiver under the Receivership Order. Those powers authorize the Receiver to take possession and control of the Debtors' property and proceeds from such property, receive and collect all monies owing to the Debtors, and apply to the court for assistance in carrying out its duties: see especially paras. 2, 3(a), 3(f), 12 and 28 of the Receivership Order. The Receiver had the duty and right to collect the HST Refund, and Revital was in breach of the Receivership Order when she placed it beyond the Receiver's reach and failed to disclose its existence. Indeed, the misappropriation of the HST Refund precipitated the appointment of the Receiver and part of the Receiver's mandate was to find and recover the HST Refund.

[29] The Mareva Order was granted on the basis of overwhelming evidence. The Receiver not only had a strong *prima facie* case that Revital had misappropriated the HST Refund proceeds, but had directly traced the monies into the S. Stern account, the mutual fund accounts, Revital's personal RBC account, and the automobile. Revital admitted she had used or disposed of the remaining funds. Any requirement for a pending action is met by the fact that the motion was brought in the context of the receivership proceedings. This is the framework in which the Mareva Order was made, and contrary to Revital's assertions, this was the forum in which she could assert any available defences.

[30] While this is sufficient to dispose of Revital's motion for leave to appeal, I also note that there is nothing in her proposed appeal that raises any issue of general importance to bankruptcy and insolvency practice or the administration of justice. Contrary to Revital's submission, the motion judge did not apply a new test for the order he granted, exempting receivers from the usual requirements for a Mareva injunction. The motion judge applied settled legal principles to the facts of the case that demanded the relief he granted.

D. SECURITY FOR COSTS MOTIONS

[31] The Receiver and DUCA are respondents to Myara's appeal and both move against him for security for costs of his appeal. Their motions are under r. 61.06(1)(a). The moving party must establish that there is "good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal."

[32] The second part of the test is not in dispute. Myara lives in Florida and apparently owns a casino in Peru. There is no evidence that he has assets in Ontario.

[33] The first part of the test involves a consideration of "[t]he apparent merits of the appeal, the presence or absence of an oblique motive for the launching of the appeal, and the appellant's conduct in the prosecution of the appeal" as well as other factors that may be specific to the case: *Schmidt v. Toronto Dominion Bank* (1995), 1995 CanLII 3502 (ON CA), 24 O.R. (3d) 1 (C.A.), at para. 18.

[34] The moving parties rely on the fact that the motion judge found Myara's version of events had no air of reality and did not accord with common sense, and that his "story" was simply another fraudulent attempt to divert the HST Refund away from the Receiver. They say there is no merit to his appeal and that its purpose is to simply further delay the Receiver's recovery of the Debtors' property.[2]

[35] Myara contends that his appeal has merit. He says that, because he was not cross-examined on his affidavit, his evidence about his claim to the HST Refund was uncontroverted and ought to have been believed by the motion judge. He argues that DUCA lacks standing to bring the motion for security for costs. Finally, he says that an order for security for costs should not be made against him because he was "forced into" the jurisdiction: see *Diversitel Communications Inc. v. Glacier Bay Inc.* (2004), 2004 CanLII 11196 (ON CA), 181 O.A.C. 6, at para. 8 (C.A.).

[36] I am satisfied that each of the Receiver and DUCA is entitled to security for costs of Myara's appeal. The appeal appears to have little chance of success. Myara seeks to overturn the motion judge's factual findings, which were made on a compelling record with little, if anything, to support Myara's claim and much to contradict it.

[37] The fact that DUCA is a respondent to Myara's appeal and that Myara seeks costs of the appeal and of his motion in the court below from DUCA, is sufficient to satisfy the standing requirement for its motion for security for costs.

[38] Myara's reliance on the *Diversitel* case is misguided. In that case, this court considered a motion for security for costs of an appeal under r. 61.06(1)(b), which allows this court to make an order for security for costs where it appears that "an order for security for costs could be made against the appellant under rule 56.01". Interpreting the combined effect of those provisions, this court in *Diversitel* held that r. 61.06(1)(b) is confined to making an order for security for costs against an appellant who was the plaintiff or applicant in the initial proceeding. A respondent on appeal may not rely on rule 61.06(1)(b) to obtain an order for security for costs against an appellant who was the defendant or respondent in the initial proceeding. Armstrong J.A. explained that "[t]he policy rationale is not to impose security for costs upon foreign or impecunious defendants who are forced into court by others." See also *Donaldson International Livestock Ltd. v. Znamensky Selekcionno Gibridny Center LLC*, 2010 ONCA 137.

[39] Here, the motions are brought under r. 61.06(1)(a), which permits security for costs to be ordered against an appellant where there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal. Application of this subrule is not restricted to appeals by appellants who were plaintiffs or applicants in the initial proceedings. In any event, Myara was not "forced into" court by anyone. He brought himself into the jurisdiction to assert a claim to the HST Refund proceeds, by attempting to intervene in the motion below.

[40] I fix the amount to be paid by Myara as security for the costs of his appeal in the sum of $15,000 for each of the Receiver and DUCA. This is a reasonable estimate of the party and party costs each of these respondents might expect to recover if successful in responding to Myara's appeal.

E. DISPOSITION

[41] For the foregoing reasons, Revital's motion for leave to appeal the Order is dismissed and the Receiver's and DUCA's motions for security for costs are granted. I order Myara to pay into court as security for the costs of his appeal the sum of $30,000 on or before May 2, 2015, failing which a judge of this court may dismiss the appeal on motion. No assets covered by the Receivership Order may be disposed of or pledged in order to post security for costs.

[42] The Receiver and DUCA shall have their costs of responding to Revital's motion fixed in the sum of $10,000 each, inclusive of HST and disbursements. The Receiver and DUCA shall have their costs of their motions for security for costs against Myara fixed in the sum of $5,000 each, inclusive of HST and disbursements. These costs amounts are inclusive of the costs of the March 27, 2016 attendances before Roberts J.A.

"K. van Rensburg J.A."

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[1] Myara explained that the loans were recorded on the ledger of "Aventura Properties Inc.", which is not one of the Debtors, but claimed that this corporation and Aventura II Properties Inc. are in fact the same corporate entity.

[2] They also contend that Myara has no standing to appeal the repatriation order. That issue was directed by Roberts J.A. on consent to be heard by the panel hearing the appeal.

CITATION: Canadian Imperial Bank of Commerce v. Costodian Inc. et al, 2018 ONSC 6680
COURT FILE NO.: CV-18-597240-00CL
DATE: 2018/11/09

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

APPLICANT

COSTODIAN INC., BILLERFY LABS INC., JOSE REYES, and 0984750 B.C. LTD. d/b/a QUADRIGACX

RESPONDENTS

APPLICATION UNDER Rule 43.02 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194

COUNSEL: *Geoff R. Hall* and *Trevor A. Courtis* for the Applicant

Margaret L. Waddell for the Respondent, 08984750 B.C. Ltd. d/b/a QuadrigaCX

Peter W.G. Carey and *Philip Holdsworth* for the Respondent, Jose Reyes, Custodian Inc, and Billerfy Labs Inc.

BEFORE: Hainey J

HEARD: June 29, 2018

ENDORSEMENT

OVERVIEW

[1] Canadian Imperial Bank of Commerce ("CIBC") seeks an interpleader order pursuant to rule 43 of the *Rules of Civil Procedure*.

[2] CIBC is currently holding approximately CAD $25.7 million and USD $69,000 (the "Disputed Funds") related to intended cryptocurrency transactions by hundreds of individuals on an exchange platform operated by 0984750 B.C. Ltd. d/b/a QuadrigaCX ("Quadriga") using payment processor Costodian Inc. ("Costodian").

[3] From December 2017 to February 2018, 388 individuals or corporations ("Depositors") made 465 total deposits in the aggregate amount of approximately $67 million into accounts held by Costodian with CIBC. Jose

Reyes ("Reyes"), the sole officer and director of Costodian, transferred a portion of the Disputed Funds to his own personal accounts with CIBC.

[4] On January 8, 2018, CIBC froze Costodian's two business accounts and three personal accounts of Reyes (collectively, "Disputed Accounts"). CIBC conducted an investigation into the Disputed Funds and the Disputed Accounts. CIBC has not been able to determine to what extent the Depositors, Costodian, Reyes, Quadriga and/or Billerfy Labs Inc. ("Billerfy") are entitled to the Disputed Funds.

[5] As a result, CIBC brings this application for an interpleader order seeking to pay the funds into court so that the 388 Depositors may be put on notice and the entitlement to the Disputed Funds can be resolved.

[6] The respondents, Billerfy, Reyes and Quadriga oppose CIBC's application. They submit that the Disputed Funds should be distributed to them in accordance with their business arrangements.

FACTS

[7] Quadriga is an online cryptocurrency exchange. Billerfy is a payment processor that facilitates payments to and from various online platforms such as Quadriga. Costodian is a payment platform that was incorporated for the sole purpose of holding funds deposited by individual investors for buying and selling bitcoin and other cryptocurrencies on the Quadriga exchange. Reyes is the sole officer, director and shareholder of Billerfy and Costodian.

[8] Billerfy and Costodian work in tandem to facilitate payments to and from individual cryptocurrency investors and Quadriga. The business relationship can be summarized as follows:

(a) a cryptocurrency investor sends a wire transfer to a Costodian account at CBIC;

(b) Billerfy provides the identity of the investor and the amount of their deposit to Quadriga;

(c) Quadriga credits the investor's online wallet with "QuadrigaCX Bucks" which they can use to buy and sell bitcoin and other cryptocurrencies on the Quadriga exchange;

(d) When the investor wishes to cash out their QuadrigaCX Bucks, they submit a withdrawal request to Quadriga, which forwards these requests to Billerfy;

(e) Billerfy aggregates these requests, rounds up to the nearest $500,000 or $1,000,000, and makes a draw on Costodian's accounts at CIBC to an account held by Billerfy at another financial institution; and

(f) Billerfy subsequently transfers the withdrawn funds from that account to the individual investors who submitted the withdrawal requests.

[9] Quadriga and Billerfy entered into an agreement on November 3, 2016, which provides, among other things, that (i) Billerfy was to establish accounts and facilitate payments to and from third parties, (ii) all transactions involving funds in these accounts were carried out solely in accordance with Quadriga's instructions, and (iii) Billerfy had the right to make a withdrawal from these accounts to cover its fees and expenses.

[10] Costodian is not a party to this agreement, and does not have any other contractual relationship with Quadriga.

[11] On September 26, 2017, Reyes applied to open three commercial banking accounts on behalf of Billerfy at the CIBC Branch located at 300 West Beaver Creek in Richmond Hill (the "Beaver Creek Branch").

[12] On September 27, 2017, Reyes attended at the CIBC branch located at 2901 Bayview Avenue in North York (the "Bayview Village Branch") and opened personal chequing, savings and US dollar accounts.

[13] In accordance with CIBC's procedures, the account opening documentation at the Beaver Creek Branch was reviewed by its anti-money laundering ("AML") department. The AML department determined that Billerfy was a money service business and therefore CIBC closed the accounts on November 28, 2017.

[14] On November 30, 2017, Reyes applied to open two small business banking accounts at the Bayview Village Branch on behalf of Costodian with account numbers 02-75115 ("Corporate Expense Account") and 48-10716 ("Transaction Account") Reyes stated in an e-mail to his financial advisor at the Bayview Village Branch that Costodian was "[n]ot related to Billerfy's CMO business".

[15] Between December 4, 2017 and February 20, 2018, 388 Depositors made 465 deposits to the Transaction Account in the total amount of $67,056,870.68 Nine withdrawals of between $4 million to $6 million

were made from the Transaction Account to the account held by Billerfy at another financial institution.

[16] Between December 22-28, 2017, Reyes transferred $1.3 million from the Transaction Account to his personal chequing account, and another $1 million from the Transaction Account to his personal savings account. Reyes has admitted that he has no interest in these funds and did not notify Quadriga prior to transferring them to his personal accounts.

[17] After the Disputed Accounts were frozen by CIBC, the Transaction Account continued to accept deposits, which gradually decreased over the next several weeks. No deposits have been made to the Transaction Account since February 20, 2018.

[18] CIBC conducted an investigation and requested information from Reyes regarding the activity in the Disputed Accounts and the relationship between the Depositors, Costodian, Billerfy and Quadriga. According to CIBC, the information provided by Reyes was incomplete.

[19] On February 16, 2018, CIBC requested Reyes' consent to speak to the appropriate person at Quadriga about the Disputed Accounts. Reyes initially declined to provide his consent because the CEO of Quadriga, Gerald Cotton ("Cotton"), had indicated that he was not interested in speaking with anyone at CIBC. Reyes eventually provided his consent on March 6, 2018.

[20] On March 15, 2018, CIBC sent an e-mail to Cotton asking to speak with him briefly. He declined and requested that CIBC send questions to him in writing. On March 21, 2018, CIBC sent him an e-mail with a number of questions regarding the relationship of Quadriga with Costodian/Billerfy and the Depositors, and Quadriga's entitlement to the Disputed Funds. Neither Cotton nor anyone associated with Quadriga responded to this e-mail.

[21] CIBC obtained an order in these proceedings authorizing and directing it to disclose the names and contact information of the 388 Depositors and the amounts of the 465 deposits to the Transaction Account, and information regarding the seven Depositors that submitted wire recalls requesting a return of their deposited funds. The issuance of the order was opposed by Costodian, Billerfy, Reyes and Quadriga. CIBC has disclosed this information to the respondents in a confidential Disclosure Brief which has been filed under seal.

ISSUE

[22] Is CIBC entitled to an interpleader order with respect to the Disputed Funds?

POSITIONS OF THE PARTIES

[23] CIBC submits that it is entitled to an interpleader order because it has no beneficial interest in the Disputed Funds and there is a real foundation for the expectation of competing claims for the Disputed Funds.

[24] The respondents submit that there are no competing claims for the Disputed Funds and therefore CIBC is not entitled to an interpleader order and the funds should be released to them.

ISSUE

[25] The sole issue that I must decide is whether CIBC has met its onus of demonstrating that adverse claims have been made against the Disputed Funds, suffice to make interpleader relief available to it.

ANALYSIS

[26] The following principles apply to an interpleader application:

(a) The applicant is not required to prove competing claims have actually been filed against it;

(b) The applicant is only required to demonstrate that there is a real foundation for the expectation of competing claims; and

(c) The applicant is not required to establish that competing claims are valid or likely to succeed only that they are not frivolous.

[27] CIBC submits that there are competing claims among Billerfy, Reyes and Quadriga as to their respective entitlement to the Disputed Funds for the following reasons:

(a) Reyes states in his affidavit that the Disputed Funds "represent a mix of my personal funds, funds belonging to Costodian and funds held by Costodian and beneficially owned by Quadriga.". He has not indicated what proportion of the Disputed Funds belong to each of these parties.

(b) Cotton states in his affidavit that the Disputed Funds are all beneficially owned by Quadriga.

[28] I agree with CIBC's submission that this evidence suggests that there are competing claims among these parties to the Disputed Funds.

[29] CIBC also submits that there are competing claims of the Depositors to the Disputed Funds for the following reasons:

(a) On February 2, 2018, Reyes sent an email to CIBC stating that "I am under extreme pressure from many clients to address this asap as funds are frozen for a while …"

(b) On February 7, 2018, Reyes sent another email to CIBC stating that "lawsuits are being filed against us."

(c) On February 8, 2018, Reyes sent another email to CIBC stating that "we can't hold funds, not ours … Legally myself personally and my company cannot freeze other people's money … I need an ETA please so I can advise all involved."

(d) On February 13, 2018, Cotton sent an email to Reyes stating that "we also have multiple lawsuits now as we can't pay clients."

[30] Reyes and Cotton have both sworn in their affidavits that no lawsuits have been filed against any of the respondents by Depositors seeking the return of their deposited funds despite what they said in the emails set out above.

[31] However, Reyes has testified as follows:

> Q. So you would have been concerned on February 7th that the people using the Quadriga exchange who had deposited funds, may sue Quadriga if they couldn't get their money out?
>
> A. Absolutely, yes.
>
> Q. Okay. And as you just mentioned, you were concerned that they might sue you if they couldn't get their money out as the payment processor, correct?
>
> A. Correct.
>
> Q. Okay. And given that the funds remain frozen in the CIBC accounts, I take it you still have those concerns about potential lawsuits from the users of the Quadriga exchange?
>
> A. Absolutely …

[32] Reyes and Cotton have both testified that the online wallets of each of the Depositors have been credited with QuadrigaCX Bucks in the amounts of their deposits to the Transaction Account. However, Reyes admitted on his cross-examination that he relied solely on information he received from Cotton to make this assertion.

[33] When Cotton was cross-examined he refused to confirm his evidence as follows:

> Q. Okay. So, there are some 388 depositors listed on this document.
>
> A. Yes.
>
> Q. And I take the position of Quadriga is that all of these deposits have been actually credited to the respective accounts in the form of QuadrigaCX bucks?
>
> Ms. Waddell: Well, don't answer that …

[34] In my view, this was a highly relevant question with respect to whether there is the foundation for an expectation that there will be competing claims to the Disputed Funds by the Depositors. Cotton's refusal to answer the question leads me to draw an adverse inference that Depositors have not been credited with QuadrigaCX bucks in their online wallets. There is, therefore, a real possibility that they will make claims with respect to the Disputed Funds.

[35] For these reasons I am satisfied that CIBC has met the onus of establishing that there is a real foundation for the expectation of competing claims with respect to the Disputed Funds.

[36] CIBC's application is therefore granted. CIBC is ordered to pay the Disputed Funds to the Accountant of the Superior Court to await the outcome of a proceeding in this court, on notice to the Depositors, to determine entitlement to the Disputed Funds.

[37] I agree with the Respondents' submissions that interpleader relief should not be used to extricate the applicant from its own possible liability. In *Canadian Imperial Bank of Commerce v. Bajaj*, 1982 CarswellAlta 354 the court stated as follows at para 8:

> Relief by way of interpleader cannot be granted to relieve a person of possible liability because of his own actions.

[38] The respondents allege that CIBC wrongfully froze the accounts. I am not in a position on this record to make any determination as to CIBC's possible liability for doing so. Accordingly, it would be inappropriate for me to extinguish any liability that CIBC may have for freezing the accounts in the absence of an evidentiary record that establishes that CIBC has no liability.

[39] I therefore decline to make the order requested in para. 2 of CIBC's draft order extinguishing CIBC's liability with respect to the Disputed Funds.

[40] With respect to the balance of CIBC's draft order concerning the procedure to determine entitlement to the Disputed Funds, costs of the application and sealing of the confidential brief, counsel shall schedule a 9:30 a.m. attendance with me to deal with these issues.

[41] I thank counsel for their helpful submissions.

HAINEY J.

Release Date: November 9, 2018

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steward v. Ferguson,*
2012 BCSC 279

Date: 20120126
Docket: E55240
Registry: Nanaimo

Between:

Julie Kirsten Steward
also known as Julie Kirsten Ferguson
also known as Julie Steward-Ferguson

Claimant

And:

Colin David Ferguson
also known as Colin Ferguson

Respondent

Before: The Honourable Mr. Justice Schultes
(appearing via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for Claimant:	S.G. McPhee, Q.C.
Counsel for Respondent:	J.C. Fiddes
Place and Date of Hearing:	Nanaimo, B.C. November 22, 2011
Place and Date of Judgment:	Nanaimo, B.C. January 26, 2012

Introduction

[1] This is an application by Ms. Steward to vary an existing child support order, including with retroactive effect, and for an order concerning the children's s. 7 expenses, which is also sought to operate retroactively.

Evidence and Positions of the Parties

The 2008 Order and the Separation Agreement

[2] The parties have three children, Dylan, Calyssa, and Kyle, who are now aged 13, 11, and eight respectively.

[3] The parties entered into a separation agreement in December of 2007 that dealt with such matters as child support, s. 7 expenses, and ongoing financial disclosure. Significant property issues were also dealt with.

[4] Some portions of that agreement that are relevant to the present application were contained or incorporated by reference in a consent order before Mr. Justice N. Smith of this court on January 22nd, 2008. In that order, Mr. Ferguson's Guideline income was found to be $203,666. This was the average of his preceding three years' income. He was ordered to pay $5,000 per month in child support.

[5] The parties were to exercise joint custody and joint guardianship and there was a very carefully-structured regime which carried on from the separation agreement, under which they essentially exercised shared parenting, as they continue to do.

[6] It was agreed that the child support order could be varied upon a material change in circumstances affecting the parties, their financial circumstances, and the children's needs, including any change in the amount of time that one or more of the children spent with either party.

[7] The separation agreement listed various activities of the children in which they were then engaged, which according to the agreement might or might not qualify as s. 7 expenses, then stated that the activities and expenses had been taken into account when arriving at that amount of child support. The exception was hockey for the children, an activity for which Mr. Ferguson assumed sole responsibility under the agreement.

[8] In the event that the parties could not agree on a potential s. 7 expense, the agreement provided that they were to resort to a dispute resolution mechanism that it set out.

[9] These s. 7 provisions were not included in the terms of the order, either explicitly or by reference.

[10] The order also provided for spousal support to Ms. Steward, first a lump sum payment and then payments of $5,000 per month, which would end and satisfy his obligations absolutely after 84 payments.

[11] The order provided that the parties were at liberty to request detailed financial disclosure from each other annually.

Financial Information

[12] The catalyst for the present application is that Ms. Steward, having received some disclosure of this nature in the more recent past, has identified what she submits is significant additional income that has been received by Mr. Ferguson over the intervening years. She submits that this is a situation that, had it been present or known at the time of the previous order, would have resulted in a different order, particularly with reference to the amount of child support payable.

[13] The evidence shows a series of requests for financial disclosure from Ms. Steward's former counsel to Mr. Ferguson's former counsel from 2008 to 2011.

[14] A great deal of the affidavit material in this application concerns parenting disputes, including significant disagreements about the involvement of the parenting coordinator. I infer that these events are relevant to the other matters in this litigation, which I understand are before Mr. Justice Harvey. Clearly the relationship between the parties is fraught with conflict on many issues.

[15] Mr. Ferguson was ordered in February of last year to produce a financial statement within 30 days. He has an explanation for why his compliance was delayed, which has to do with the willingness of Ms. Steward to agree not to disclose its contents, but for purposes of this application what matters is she did not receive it until July.

[16] The statement was sworn on April 18th, 2011. It lists Mr. Ferguson's income for child support purposes as $594,248. His line 150 tax return income for the years following the separation were:

- 2007 - $273,000;

- 2008 - $250,137.76 or $277,083, if one adds back in a rental loss capital cost allowance which is provided for under the Guidelines;
- 2009 - $594,249.48; and
- 2010 - $1,378,000.

[17] I will deal with the more recent information that is available concerning his income later in these reasons.

[18] Ms. Steward concedes that because some of this income was received in the form of dividends, Schedule 3 of the *Federal Child Support Guidelines* requires that the taxable amount of the dividend be reduced by 25 percent, to adjust for the gross-up of such dividends in the manner that they are reported, and also requires that the dividend tax credits be factored in. According to the calculations provided and the submissions of Ms. Steward, this would result in income for those same years 2007 - 2010 of $228,000, $231,583.50, $490,999.48, and $1,112,000 respectively.

[19] The dates on which the dividends were declared for tax purposes are later than when the funds were actually received. It is permissible under our tax regime for amounts that begin as shareholder loans but become dividends not to be declared in that latter capacity for a further 18 months, and that practice has been engaged in at various stages by Mr. Ferguson.

[20] Having acknowledged that these adjustments are required pursuant to Schedule 3, Ms. Steward's counsel nonetheless argues the relevance of s. 19(1)(h) of the *Guidelines,* which permits the imputation of income when a spouse receives income from sources, such as dividends, that are taxed at a lower rate or are exempt from tax. Counsel points out that by organizing his affairs so that he received significant income as dividends, which is of course a perfectly legitimate form of tax planning, Mr. Ferguson is retaining far more of these amounts than he would if they had been employment income. Counsel has done calculations which indicate that for the years 2008 to 2010 Mr. Ferguson paid taxes that amount to a range of nine to 30 percent of the income received. As employment income for the same years, the range would have gone from 33 to 42 percent of income received.

[21] Counsel argues that to achieve the objectives of the Guidelines, which include the assumption that all forms of income are treated similarly for tax purposes, I should gross up these amounts by the average tax rates that would have applied to them as employment income. This approach would result in amounts for child support purposes of $316,081 for 2008, $619,478 for 2009 and $1,348,974 for 2010.

[22] Mr. Ferguson, in submissions, did not take direct issue with Ms. Steward's submissions concerning his income since the separation. The opposition of Mr. Ferguson, rather, appears to focus firstly on the need to impute greater income to Ms. Steward herself. He argues that she worked in a jewellery store at the time of separation, has also run her own business and has had various other kinds of employment which, were she willing to pursue them again, could earn her a respectable income.

[23] Mr. Ferguson also emphasizes the nature of the settlement reached between the parties, which was meant to bring a significant degree of finality to their relationship and which included her receiving what he describes as all of the couple's liquid assets at that time, as well as lump sum and ongoing spousal support.

[24] The present application, Mr. Ferguson argues, is a thinly-veiled attempt to improve Ms. Steward's own personal financial position by varying, under the guise of child support increases, what was intended by all concerned to be a final and all-encompassing resolution of their property and spousal support issues. In light of that settlement, further significant payments to her amount to an impermissible form of double recovery.

[25] Counsel for Mr. Ferguson also points out that Ms. Steward is in a new relationship and has an infant child with her new partner, but that there is no reference to that significant development in her material and no indication of the type of support that she receives from that new partner, even though the means of the parties are directly relevant to the analysis in a shared parenting situation.

[26] Most fundamentally, there is no evidence, Mr. Ferguson argues, that the children are not already benefitting to an appropriate degree from his income.

Section 7 Expenses

[27] With respect to s. 7 expenses, Ms. Steward submits that the ones that have increased substantially are those for Calyssa's riding lessons. Calyssa, she submits, derives a very significant sense of her self-worth and sense of achievement from riding. She takes lessons through a highly-regarded school in Parksville. In support of that, Ms. Steward has bought her a pony. Calyssa rides twice a week and wishes to ride on a third day a week, but Mr. Ferguson is said not to be supportive of contributing to her riding on this additional day.

[28] The costs of riding have been borne by Ms. Steward and they exceed $1,000 per month, a significant portion of which covers the board and ongoing care for this pony. According to the material, as of 2010 Ms. Steward had expended in excess of $10,000 on this activity for Calyssa. More recent receipts that were included in the material indicate that the cost is ongoing.

[29] As in the case of her request for financial disclosure, Ms. Steward points to requests to Mr. Ferguson that he contribute to the cost of riding for Calyssa, beginning with emails in August and September of 2008 and followed up with by a letter from her counsel in 2010.

[30] Ms. Steward also refers to requests to share s. 7 expenses with respect to the cost of a joint expert and a parenting coordinator, but these were not really elaborated on in the material or raised in submissions.

[31] Mr. Ferguson argues that the cost of Calyssa's riding is something that has been made extraordinary within the meaning of the *Guidelines* (that is, beyond Ms. Steward's capacity to afford) by Ms. Steward's own unilateral decision to purchase the pony. He submits that in fact the increased costs for the children's activities are principally for those under his responsibility. In particular, this relates Dylan's baseball and hockey, the latter including quite expensive hockey camps that are apparently necessary for his development as a player.

Discussion

Issues

[32] The issues, as I understand them, are:

1. determining Mr. Ferguson's income for child support purposes;

2. determining the amount of child support payable from here on, in view of the shared parenting arrangement;

3. deciding whether child support payable should be paid on a retroactive basis and, if so, from what retroactive date; and

4. deciding whether any order in respect of s. 7 expenses should be made and, if so, whether it should have a retroactive effect.

Income for Child support

[33] I will say at the outset of the discussion of these issues that I am satisfied that the undisputed increases in Mr. Ferguson's income since the making of the original order in 2008 clearly constitute a material change in circumstances that permit me to review the provisions concerning it.

[34] Turning to a determination of Mr. Ferguson's income for child support purposes, the first question is whether the income provided to counsel for Ms. Steward by counsel for Mr. Ferguson most recently, which was listed as $332,750, should be relied on.

[35] In written submissions, counsel for Mr. Ferguson said that Mr. Ferguson anticipates that his 2012 income will be $388,000 or thereabouts. His income for child support purposes in his financial disclosure of April 2011 was listed as $594,248, but this was based on his line 150 income in his 2009 return.

[36] There is considerable evidence, in the form of records and handwritten notes from the chartered accountant for Mr. Ferguson's corporations, indicating dividends of $335,700 for his 2011 T5 form and of $378,000 as of January 31st, 2012.

[37] Considering all of these figures, I feel comfortable in adopting Mr. Ferguson's stated income in submissions of $388,000 for his current income for child support purposes.

[38] Where the line 150 figure differs materially from the high, low or average amount of previous earnings, that amount should be questioned for fairness, having regard to the historical patterns pursuant to s. 17: *Fuzi v. Fuzi*, 1999 CanLII 4073 (BC SC), [1999] B.C.J. No. 2263, (S.C.). The degree of permanence of any historical differences in income should be considered in determining whether to proceed by an averaging method under s. 17.

[39] Section 17 of the *Guidelines* provides:

> Pattern of income
>
> 17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[40] Mr. Ferguson has described the fiscal year of January 31st, 2009, the year that resulted in the income in excess of one million for the 2010 tax year, as an "extraordinary year", the like of which his companies have not had before or since. He submits that the economic slump hit the business hard in 2008, almost bringing it to an end, and resulting in a loss in excess of $228,000.

[41] His evidence, however, does not persuade me that this extraordinary year, despite his company's inability to replicate it, is a non-recurring amount analogous to a capital gain or some other windfall figure, such that it should be deducted from the calculation of his income. However, the reality is that whatever the possibilities for future income along these lines that may be available to him, his current financial information, the accuracy of which was not assailed, shows that the income has declined markedly over the following two years, albeit a slightly higher figure is predicted for 2012 than 2011. While I will have more to say about this extraordinary year when discussing retroactive support, I do not think that the application of the current income as I have indicated will be unfair, so an averaging under s. 17 of the preceding years' income is not needed.

[42] That current income is, therefore, the figure that I will use for consideration of future child support under s. 4 of the *Guidelines*, which provides:

> 4. Where the income of the spouse against whom [an] . . . order is sought is over $150,000, the amount of a child support order is
>
> (a) the amount determined under section 3; or
>
> (b) if the court considers that amount to be inappropriate,
>
> (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
>
> (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
>
> (iii) the amount, if any, determined under section 7.

[43] The table amount here for three children would be $2,668 per month plus 1.56 percent of the amount in excess of $150,000, or $3,712.80. This would result in a monthly payment of $6,380.80, about $1,380 in excess of the current payment.

[44] It is for the payor parent to rebut the presumption that the table amounts should apply: *Hollenbach v. Hollenbach*, 2000 BCCA 620.

[45] Mr. Ferguson argues that an increase in the children's support would really be nothing but a windfall for Ms. Steward. The children want for nothing materially, sharing completely in the fruits of his wealth.

[46] This assertion is not supported by a review of Ms. Steward's financial statements, in my view, which overall, despite the passing on of certain property to her in the original settlement, show quite a

modest existence. Her principal assets have only relatively small amounts of equity and she devotes large amounts of money to the children's activities, in the range of $1,800 per month.

[47] Therefore, I do not accept Mr. Ferguson's argument on this point and, subject to the application of s. 9 in relation to shared parenting, the amount payable would be the *Guidelines* amount that I have ordered.

Effect of Shared Parenting

[48] Section 9 deals with the situation of shared parenting. It provides:

> 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[49] With respect to the argument that an income should be imputed to Ms. Steward, Mr. Ferguson's material does not really support this assertion either. He deposes to her previous kinds of employment. She deposes to her attempts to return to the workforce, which have been unsuccessful. However, I am concerned by the absence in her material of any reference to the matter which likely inhibits her to the greatest extent from re-entering the workforce - the care of a young child that she has had with her new partner.

[50] Therefore, I think it would be reasonable to impute to her the sort of income that she could likely earn, which I am satisfied would certainly be on a part-time basis, were it not for these new care responsibilities, which Mr. Ferguson is of course not required to subsidize.

[51] I therefore, making the best of the evidence available, impute an income to her of $10,000 per year for the purposes of s. 9.

[52] The application of s. 9 is governed by the principles set out in the Supreme Court of Canada decision in *Contino v. Leonelli-Contino*, 2005 SCC 63. These principles were helpfully summarized by Mr. Justice Goepel in *B.R.T. v. J.L.T.T.* 2011 BCSC 250:

> [34] At para. 39 the Court noted that the discretion bestowed on courts to determine child support in shared custody arrangements calls for the acknowledgement of the overall situation of the parents and the needs of the children. The Court emphasized that there is neither a presumption in favour of awarding at least the *Guidelines* amount under s. 3, nor a presumption in favour of reducing the parent's support obligation downward from the *Guidelines* amount: *Contino* at para. 31.
>
> [35] In determining the appropriate level of support, the court must weigh each of the s. 9 factors and the weight of each factor will vary according to the particular facts of each case: *Contino* at para. 39. Under s. 9(a) the court must determine the amount set out in the applicable table for each of the spouses. It allows the court to focus on the fact that each parent has an obligation to contribute.
>
> [36] Under s. 9(b) the court must examine the increased costs of shared custody arrangements. Section 9(b) recognizes that the total costs of children in shared custody situations may be greater than in situations when there is sole custody: *Contino* at para. 52.
>
> [37] Under s. 9(c) the court must consider the conditions, means, needs and other circumstances. In assessing each parent's ability to bear the increased costs of shared custody, the court should look at the income levels of each parent, the disparity in incomes and the assets and liabilities of each. The child's standard of living in each household is also a matter to be considered. Children should not experience a significant variation in the standard of living as they move from one household to another. The broad discretion conferred by s. 9(c) also allows the court to consider claims for special or extraordinary expenses falling within s. 7 of the *Guidelines*: *Contino* at para. 71.

[53] The application of a straight set-off amount, with the income that I have imputed to Ms. Steward, would yield support payable by Mr. Ferguson of $6,313.80. This is a negligible change to his *Guidelines* obligation because of the relatively small amount that I am able to impute to Ms. Steward on the present evidence.

[54] I accept that Mr. Ferguson's manner of exercising access means that he experiences some increased costs associated with the sharing of custody, but these are not quantified in the material.

[55] As to the conditions, means, needs, and other circumstances of the parties, a comparison of their relative budgets suggests a significant disparity in the lifestyle that they can provide, which parallels the disparity in their incomes. For example, Mr. Ferguson's mortgage costs suggest a superior type of accommodation to that available to Ms. Steward.

[56] I am aware that providing for the comfort of children of one very wealthy parent in the home of the other parent, who is not so wealthy, may benefit the less wealthy parent incidentally. I am also aware that the capacity of children who are overall very well loved and well cared for as between the two households to absorb the benefits of parental wealth may hit a ceiling, after which the material benefits that would be provided by an additional amount of child support from the wealthier parent serve no useful purpose.

[57] Balancing all of these various factors, I conclude that the straight set-off amount does not exceed the amount of support that is required to ensure, above all else, that these children experience roughly the same lifestyle when spending time with each parent.

[58] Accordingly, I fix the monthly child support amount at $6,313.80, which takes effect on the date of the present application, which I understand was October 18th, 2011.

Retroactive Support and s.7 Expenses

[59] With respect to the claim for retroactive support, the principles set out by the Supreme Court of Canada in the quartet of cases known most frequently by its lead decision, *D.B.S. v. S.R.G.*, 2006 SCC 37, govern.

[60] An obligation to pay retroactive support arises when the payor parent receives effective notice, which is defined at para. 121 as "any indication by the recipient parent that child support . . . needs to be re-negotiated." Formal notice or the institution of legal proceedings is not required to trigger that obligation.

[61] Specific factors that should be taken into account in deciding whether an award of retroactive child support is appropriate are: (1) the circumstances surrounding any delay in seeking the support; (2) the conduct of the payor parent; (3) the child's circumstances; and (4) any hardship to the payor parent resulting from the retroactive award.

[62] Normally an award will not go back farther than three years to the date of effective notice. However, where the payor parent has engaged in blameworthy conduct, the date when the circumstances changed materially will be the presumptive start date of any award.

[63] In this case, I think the refusal of Mr. Ferguson to respond to multiple requests for financial disclosure by Ms. Steward, as he was explicitly required to do under the order, clearly amounts to blameworthy conduct and any retroactive award should go back to the material change in circumstances, which I find was Mr. Ferguson's income increasing beyond that which was stated in the order. Therefore, I order that Mr. Ferguson pay retroactive child support, effective as of the date of counsel for Ms. Steward's first demand for updated financial information, July 30th, 2008.

[64] From that date until the date of the present application, Mr. Ferguson will pay Ms. Steward the difference, if any, between the amount of child support that he actually paid for each year and the *Guidelines* amount for three children for the amounts set out below. I will rely on counsel to perform these calculations.

[65] I agree with Ms. Steward's counsel that the application of s. 19(1)(h) of the *Guidelines* to the favourable tax treatment of Mr. Ferguson's dividends requires that I apply the calculations and the results that claimant's counsel engaged in.

[66] Accordingly, the income figures for those years will be: 2008, $316,081; 2009, $619,478; 2010, $1,348,974. For 2011 up to the date of the present application, $332,750.

[67] I should say that I have explicitly considered each of these table amounts with regard to s. 4, and I do not consider any of them inappropriate, given that overall they reflect a failure to fully share the benefits of Mr. Ferguson's financial success with his children when they were not in his care.

[68] Given the amounts that I have awarded, I am satisfied that the riding expenses as a potential s. 7 expense exceed the amount that Ms. Steward can reasonably cover, taking into account the amount she will receive in support for the purposes of s. 7(1.1)(a). Balancing the factors under 7(1.1)(b), I conclude that riding is of crucial importance to this child and it falls well within the scope of activities available to children whose parents have the range of income at their disposal that is now provided by Mr. Ferguson. However, the evidence does not satisfy me that actually obtaining and keeping a horse necessarily falls within the scope of what is necessary for Calyssa to pursue this very beneficial activity, especially given that Ms. Steward made the decision to obtain the horse herself, as her emails indicate.

[69] In all the circumstances, I consider it appropriate that Mr. Ferguson contribute $400 per month towards this special expense.

[70] With respect to potential retroactivity, the *D.B.S.* criteria apply equally to s. 7 expenses.

[71] It appears from the material that there was an explicit request for a contribution as early as September 2008. However, I cannot ascribe any particularly blameworthy conduct to Mr. Ferguson in relation to this request, in contrast to what can only be described as stonewalling on the financial disclosure.

[72] Further, the separation agreement explicitly provided for a dispute resolution mechanism, followed by a court application, if attempts to agree on s. 7 expenses were unsuccessful and neither one has been pursued until recently.

[73] For these reasons, I decline to make the s. 7 award retroactive and rather it will take effect on the date of the present application.

Costs

[74] As Ms. Steward has had substantial success in this matter, prevailing on the matters of greatest significance to the parties, she will be entitled to her costs.

Addendum

[75] On February 9th, 2012, I received correspondence through Supreme Court Scheduling in Nanaimo from counsel for Ms. Steward, with a copy to Mr. Ferguson, who at that point was representing himself. Counsel for Ms. Steward pointed out that I had omitted any indication of whether the retroactive child support that I had ordered was subject to a s.9 set-off and if it was, what income should be attributed to Ms. Steward for that set-off.

[76] As my decision had been an oral one and no transcript of my reasons had yet been ordered, I provided a memorandum to the parties through Supreme Court Scheduling, stating the following:

> In response to Mr. McPhee's email of February 9th in this matter, I can confirm that my intention was that a set-off apply to all of the retroactive child support that I ordered to be paid to the claimant by the respondent for the years 2008 to 2011. The set off figures will be the amounts set out by the claimant at paragraph 45 of her written submissions. I apologize to Mr. McPhee and Mr. Ferguson for not making this aspect of the decision clear in my original reasons.

"Schultes J."

1972 CarswellOnt 1006
Ontario Supreme Court [High Court of Justice]

Clarkson Co. v. Hamilton (City)

1972 CarswellOnt 1006, [1972] 3 O.R. 762

Clarkson Co. Ltd. v. City of Hamilton et al.

Wells, C.J.H.C.

Judgment: April 11, 1972
Docket: None given.

Counsel: J.E. Eberle, Q.C., for Clarkson Co. Ltd., liquidator of James United Industries Ltd.
G.J. Smith, for defendant, City of Hamilton
Thomas J. Dunne, for defendant, S. McNally & Sons Limited

***Wells, C.J.H.C.*:**

1 This is an appeal from an order of Mr. S. M. McBride, Q.C., one of the Masters of this Court, made on March 6, 1972, in which he rejected an application for interpleader by one of the defendants in the action, the City of Hamilton.

2 The action arose out of a contract between the defendant, S. McNally & Sons Limited, and the City of Hamilton for the construction of what is called "The Claremont Hill Mountain Access Road Contract No. 1". I have read the pleadings in the action, both the amended statement of claim of the plaintiff and the statement of defence of both the City of Hamilton and S. McNally & Sons Ltd. Reading the statements of claim I find it very hard to find out how the amount ultimately claimed is reached.

3 In the claim made on behalf of James United Industries Ltd., there is elaborately set out the details of the claim of additional costs incurred by the plaintiff because of the City of Hamilton's delay in letting the work go forward at the time it was contemplated when they received their contract. Whether this has been paid or not is not clear.

4 The plaintiff alleges that out of the moneys owing to them there was held back by the defendants the sum of $59,051.99 and apparently claims it saying that it is in the hands of the defendant McNally. In addition to this it makes a claim for a total of $148,543.99 which it claims against both the defendants McNally and the City with interest at 9 $^{1}/_{2}$%. How the figure of $148,543.99 is reached is not clear to me. It may be a coincidence or it may be a fact that the two items, *i.e.*, $89,492.00, loss of money owing to the delay, and the sum of $59,051.99 which is broken down in the statement of claim, when added together, total $148,543.99. Whether this is so or not is not clear. From a reading of the statement of claim it is clear that the parties are not together on the amount owing to the plaintiff because the amount paid into Court by McNally was $53,014.40 and the amount further specifically claimed by the plaintiff is $59,051.99. The moneys which the City of Hamilton wishes to pay into Court by way of interpleader is $147,123.86 and the discrepancy between the two figures would indicate that there are claims against the City by the plaintiff which they have not admitted and which will have to be adjudicated. The mere setting down of figures as the plaintiff has done in its amended statement of claim with no specific claim attached to the totals is not necessarily a part of the claim. It may or may not be and in my opinion, from reading the statement of claim it is quite impossible to make out precisely how the plaintiff's claim against the City of Hamilton is arrived at.

5 In addition, whether there is a mechanics' lien action or not I do not know but notices were served by the plaintiff on the defendants claiming that any moneys which were in the hands of the defendants or either of them with respect to the construction

of the Claremont Hill Access Road and Bridge are impressed with a trust for the plaintiff under the *Mechanics' Lien Act*, R.S.O. 1970, c. 267.

6 When all this is taken into consideration it is apparent to me that the City of Hamilton is not a mere stakeholder but is a party to litigation in which they allege that all they owe is the money they now want to pay into Court.

7 It is also apparent from the issues raised by the plaintiff's statement of claim that there may be a lien action in which the City of Hamilton will be involved and it may very well involve further litigation dealing with the alleged delays. Rule 632 is the present Rule dealing with interpleader and if one looks at it it would seem that even if this was a partial payment that the City of Hamilton wants to pay it might be accepted but in the light of Rule 633 I would question that in this particular case. Rule 633 is as follows:

> 633. The applicant shall satisfy the court by affidavit or otherwise.
>
> (a) that he claims no interest in the subject-matter in dispute, other than in respect of a lien or for charges or costs;
>
> (b) that he does not collude with any of the claimants; and
>
> (c) that he is willing to pay or transfer the subject-matter into court, or to dispose of it as the court directs.

8 One of the cases cited as a result of this rule is the case of *Murdoch v. Guaranty Trust Co. of Canada*, [1948] O.W.N. 169. This was a decision of the late Mr. Master Lennox and was heard by my brother Wilson on appeal who sustained Mr. Lennox's findings for the reasons he himself had given and others which my brother Wilson adduced. The facts are not precisely similar. In giving his judgment Mr. Master Lennox, who was very experienced in this filed, at p. 169, observed:

> A part from the right of a sheriff to interplead, the right has been restricted to a mere stakeholder.

It is quite obvious if one reads his judgment and that of my brother Wilson that the person who wished to interplead in respect of some mortgage documents was by no means a stakeholder. In the course of his judgment Mr. Master McBride observes at p. 4 of his reasons which were given to me, as follows:

> The principle of interpleader is, that when two persons are concerned in a dispute, and the third person has that which is to be the fruit of the dispute, and has no part in it, but is willing to give it up according to the result of the dispute, if that third person is sued, he is not obliged to be at the expense or risk of defending the action, but on giving up what is sometimes called "the thing in medial he is relieved, and the Court directs that the persons between whom the dispute really exists, should fight it out at their expense": *Evans v. Wright* (1865), 5 New Rep. 331, *per* Willes, J., at p. 333.

Further on in his judgment he reaches certain conclusions which I do not think it necessary for me to comment on. I agree that from what I can make out of the rather vague pleadings that there is a real claim by the plaintiff against the City of Hamilton and the rights to the moneys which it admits owing may be substantially altered after a hearing of the evidence. I think Rule 633, which I have quoted, makes it clear that the applicant is not a stakeholder but is an interested party who may be liable to further and other claims and there is no suggestion that the sum of money which the city says it will has is the end of the matter. It may also be that the city will be a defendant in a lien action.

9 Under all these circumstances, in my opinion, the finding of the learned Master was substantially correct and I would dismiss the appeal.

10 I agree with the learned Master that the costs of this application in like manner as the original costs of the application before the Master, should be reserved for the consideration of the trial Judge after he has heard the evidence and after the rather mysterious figures in the proceedings are provided in some fashion.

11 I would, only like to add one word. This action started on August 19, 1971. It has proceeded with somewhat deliberate consideration by all parties and I think it desirable, if possible, that this case which has not yet been set down as far as I can

make out, should be set down and provision made to have it heard at an early time. It is unfair, I think, if the allegations of the City of Hamilton are correct, to keep them holding this money too long. I would think it is a matter without dismissing the action against the City of Hamilton in which it might be arranged that the moneys be paid into Court until trial which I presume at this state of the term would probably be early next autumn.

12 *Appeal dismissed*.

CITATION: Devry Smith Frank LLP v. Fingold, 2021 ONSC 2762
COURT FILE NO.: CV-19-633030
DATE: 20210507

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Devry Smith Frank LLP

Applicant

AND:

David Bruce Fingold and Metropolitan Toronto Condominium Corporation No. 1100

Respondents

AND:

Metropolitan Toronto Condominium Corporation No. 1100

Applicants

AND:

David Bruce Fingold

Respondent

AND:

Novex Insurance Company

Applicants

AND:

Chubb Insurance Company of Canada

Respondents

BEFORE: Pollak J.

COUNSEL: *Michelle Cook*, for the Applicant

Jake A. Fine, for the Respondent MTCC No. 1100

Nadia Condotta, for the Respondent David Bruce Fingold

HEARD: February 3, 2021

ENDORSEMENT

[1] There are two applications before the Court:

1. An Application by Devry Smith Frank LLP ("DSF") for an Order for the funds held in trust by DSF to be paid into court pursuant to Rule 43.04(1); and

2. An Application brought by Metropolitan Toronto Condominium Corporation 1100 ("1100"), to have the funds held in trust by DSF, be paid to the City of Toronto for alleged tax arrears and to provide a certificate of tax clearance.

[2] A fire destroyed a house unit at 3 Chedington Place, Toronto, Ontario in October of 2009. An indemnity agreement was entered into between several insurers and David Bruce Fingold ("Mr. Fingold") the house unit owner, which provided for the demolition of the burned-out shell of the house unit.

[3] Mr. Fingold paid all municipal property taxes on the house unit until the fire. When the fire destroyed the house unit, he applied to the City of Toronto for a reassessment of outstanding taxes from 2011-2012 (the "Reassessment").

[4] On February 20, 2013, Mr. Fingold, and the parties' respective insurers entered into a Standstill Agreement (the "Agreement"), which provided that Mr. Lorne Shapiro of Basman Smith LLP ("Basman") would hold $47,040.70 in escrow pending the resolution of the Reassessment (or arguably as submitted by Mr. Fingold, for a period of one year). The Agreement provided that upon resolution of the Appeal, **Mr. Shapiro would pay all taxes owing to the City of Toronto from the Escrow Amount and pay the remainder of the Escrow Amount, if any, to Mr. Fingold**. Mr. Shapiro move to DSF and transferred Mr. Fingold's file to DSF, with the Escrow Amount.

[5] The relevant provision of the Agreement provides as follows:

> Mr. Fingold has appealed the property tax assessment of the subject property "Mr. Fingold's Appeal"). If Mr. Fingold's Appeal has not been settled by the time of this Closing, then Mr. Fingold shall direct Basman Smith LLP ("Escrow Agent") to hold in the sum of $47,040.70 representing outstanding taxes of $39,865.00 plus interest of $7,175.70 calculated at 1.5% per month for one year (the "Escrow Amount"). The Escrow Amount shall be held in escrow by the Escrow Agent until Mr. Fingold's Appeal has been resolved. This escrow shall dictate that at the resolution of Mr. Fingold's Appeal, the Escrow Agent shall pay from the Escrow Amount all taxes owing to the City of Toronto up to the Escrow Amount, so advise MTCC 1100 and Fine & Deo, provide a clear tax certificate from the City of Toronto with respect to such taxes and pay the remainder of the Escrow Amount, if any, to Mr. Fingold. In the event that upon the resolution of Mr. Fingold's Appeal no taxes are owing to the City of Toronto, the Escrow Amount shall to be paid to Mr. Fingold in full. In the event that Mr. Fingold's Appeal is resolved on the basis that monies owing to the City of Toronto exceed the Escrow Amount there shall be no liability upon the Escrow Agent to pay any funds in excess of the Escrow Amount. Any amounts payable to the City of Toronto in accordance with the resolution of Mr. Fingold's Appeal which are in excess of the Escrow Amount shall be the responsibility of Mr. Fingold.

[6] After the dismissal of Mr. Fingold's Appeal, no amounts were paid to the City of Toronto.

[7] The most recent property tax account statement from the City of Toronto issued September 13, 2019, stating that there was $53,114.98 outstanding for taxes. Mr. Fingold denies that he owes $53,114.98 for outstanding taxes.

[8] DSF, as the moving party for the payment into court and a discharge of its duties, submits that it takes no position in terms of who the monies shall be paid out to. This, however, is not accurate. Rather, it submits that the Agreement should be honoured, but submits that Mr. Fingold should be paid the monies held in trust by DSF.

[9] After DSF and Mr. Shapiro's refusal to pay the amount to the City of Toronto for the tax debt, 1100 brought this Application to require DSF to pay out the funds in accordance with the Agreement.

[10] 1100's states that this Application is to enforce the terms of the Settlement Agreement and not to collect tax arrears on behalf of the City of Toronto.

[11] Specifically, in its Application, 1100 seeks:

a. an order requiring DSF to fulfil the terms of the Settlement Agreement, the undertaking on closing and the irrevocable direction and to pay the escrow amount to the City of Toronto to satisfy all taxes owing up to the Escrow Amount and to provide a clear tax certificate to 1100.

[12] The order requested is:

i. leave to amend its Notice of Application;

ii. Basman Smith (now Devry Smith Frank LLP) pay to the City of Toronto with respect to the City of Toronto's Tax Account No. 19-08-08-1980-03700-0000-01, all moneys held in escrow pursuant to an agreement, dated February 20, 2013, plus interest, so advise Fine & Deo and provide a clear tax certificate for the City of Toronto up to the Escrow Amount.

iii. pursuant to the agreement, dated February 20, 2013, David Fingold, pay to the City of Toronto, any amounts owing to the City of Toronto over and above the amount to be paid pursuant to paragraph 1 above, with respect to the City of Toronto's Tax Account No. 19-08-08-1980-03700-0000-01, so advise Fine & Deo and provide Fine & Deo with a clear tax certificate from the City of Toronto.

iv. the application brought by Devry Smith Frank LLP, being court file No. CV-19-00633030-0000, be and is hereby dismissed.

a. in the alternative, if this Court orders that the tax arrears are statute barred and that 1100 has no liability for the September 13, 2019 Property Tax Account Statement or otherwise, an order for DSF to provide a clear tax certificate to 1100.

[13] The parties describe the issues on these two Applications as:

a. whether the terms of the Settlement Agreement were breached by not paying the Escrow Amount;

b. whether the claim for tax arrears is statute barred;

c. whether 1100 has standing to enforce the Settlement Agreement; and,

d. whether Mr. Shapiro and DSF breached their fiduciary duties as escrow agent.

[14] 1100 submits that the terms of the Agreement with respect to the moneys being held in escrow are clear. If Mr. Finfgold's Appeal was denied, DSF was obligated to pay from the Escrow Amount all taxes owing to the City of Toronto up to the Escrow Amount, to advise 1100 and Fine & Deo (lawyers for 1100), and to provide1100 with a clear tax certificate from the City of Toronto with respect to such taxes. By accepting the monies to be held in escrow, DSF was bound by the terms of the Agreement.

[15] Furthermore, on closing of the insurance settlement:

a. Mr. Shapiro undertook *personally*, on behalf of Basman to hold the Escrow Amount in escrow and to cause it to be dealt with in accordance with the Agreement; and,

b. Mr. Fingold executed an *irrevocable* direction directing Basman to pay out the Escrow Amount in accordance with the terms of the Settlement Agreement.

[16] Mr. Fingold's tax appeal was resolved and denied, however, Mr. Shapiro and DSF refused to pay the taxes owing to the City of Toronto or to advise 1100 and Fine & Deo, and did not provide 1100 with a clear tax certificate. Rather, as it is now Mr. Shapiro's opinion that the liability for taxes was remote and he acceded to Mr. Fingold's counsel, (Mr. Himelfarb), request not to pay out the amounts to the City of Toronto.

[17] 1100 argues that Mr. Shapiro should not have opined on the likelihood of liability for enforcement of the outstanding tax arrears, as it was not within the purview of his duties as Escrow Agent, and was contrary to the Agreement, the undertaking on closing and the irrevocable direction. He should have not have agreed to Mr. Himelfarb's request not to release the funds as he and DSF are bound by the Agreement, the undertaking on closing and the irrevocable direction.

[18] 1100 submits that the Escrow Amount should be paid to the City of Toronto to satisfy the outstanding tax bill and to obtain and provide a clear tax certificate to 1100.

[19] DSF seeks an interpleader order to pay the funds into court, submitting that:

a. Two or more other persons have made adverse claims in respect of the property; and
b. DSF

i. Claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and

ii. Is willing to deposit the property with the court or dispose of it as the court directs.

[20] Rule 43.04 (1) provides that upon an application for an interpleader order this court may:

a. Order that the applicant pay the money into court to await the outcome of a specified proceeding;
b. Declare that, on compliance with an order under clause (a), the liability of the applicant in respect of the proceeds is extinguished; and
c. Order that the costs of the applicant be paid out of the property or its proceeds.
d. Order the trial of an issue between the claimants, define the issue to be tried and direct which claimant is to be plaintiffs and which defendant;
e. Where the question is one of law and the facts are not in dispute, decide the question without directing the trial of an issue;
f. On the request of a claimant, determine the rights of the claimants in a summary manner, if, having regard to the value of the property and the nature of the issues in dispute, it seems desirable to do so; and
g. Make such other order as is just.

[21] DSF challenges 1100's standing in these Applications as 1100's interest does not include an authority to decide who the money held in escrow ought to be paid out to. Mr. Fingold's Reassessment did not involve 1100. DSF argues that the failure to pay out the Escrow Amount is a breach of contract and that Mr. Fingold is the only party who has suffered damages. I disagree. The Agreement does, at a minimum, provide an obligation to provide a clear tax certificate to 1100. 1100 is in receipt of a tax bill from the City of Toronto and is a party to the Agreement which provides benefits to 1100. I agree with these submissions of 1100 that DSF cannot use the interpleading rule in order to protect itself from the consequences of its own breach.

[22] The Agreement appears to provide that Mr. Fingold's property tax appeal had not been settled by the time of closing (MTCC's absorption of the House Unit), then he shall direct Basman (the Escrow Agent, now DSF) to hold in the sum of $47,040.70 representing outstanding taxes of $39,865.00 plus interest of $7,175.70 calculated at 1.5% per month for one year (the Escrow Amount). On the resolution of his tax appeal, the Escrow Agent was to pay from the Escrow Amount all taxes owing to the City of Toronto up to the Escrow Amount and "to advise MTCC 1100 and Fine & Deo, provide a clear tax certificate from the City of Toronto with respect to such taxes and pay the remainder of the Escrow Amount, if any, to Mr. Fingold. Further, if no taxes were owing to the City of Toronto, the Escrow Amount would be released to Mr. Fingold, in full.

[23] Mr. Fingold submits that because the tax arrears are statute barred pursuant to the *Limitations Act, 2002*, there are no taxes owing to the City of Toronto.

[24] The two-year limitation period provided under section 4 of the *Limitations Act, 2002* (the "*Limitations Act*") should apply in respect of alleged outstanding property taxes owing to the City of Toronto.

[25] The courts can then determine which competing claimants has legal entitlement. The applicant is released from the proceedings.

[26] 1100 submits that for this court to rule on whether the tax arrears are statute barred and that 1100 has no liability as per the September 13, 2019 Property Tax Account Statement of the City of Toronto, (as DSF urges the court to do), notice of these Applications must be given to the City of Toronto and provide an opportunity to make submissions. I agree that if such were the case, notice would have been provided, which has not been the case.

[27] The purpose of an interpleader application is to prevent a multiplicity of suits and double vexation, to assist applicants who want to discharge their legal obligations but do not know to whom they should pay the amounts to.

[28] In order to constitute a "competing claims" for interpleader relief:

a. The claims must be claims pertaining to the same subject matter;
b. Such claims must be mutually exclusive. In other words, a determination of the interpleader proceedings will extinguish the unsuccessful conflicting claims; and
c. The claims must be such that the applicant must face an actual dilemma as to how he should act.

[29] DSF submits that:

a. Both David and 1100 claim entitlement (although 1100 claims it should be released from potential liability for payment of property taxes to the City of Toronto) to the Escrow Funds;
b. A determination in the within interpleader proceedings will conclusively extinguish the conflicting claims, and

c. DSF faces a real dilemma between following its former client's instructions and complying with the undertaking made as part of the settlement agreement.

[30] 1100 submits that the interpleader remedy was not intended to allow an escrow agent or trustee to absolve them of their contractual obligations.

[31] The court does not accept the argument of DSF or Mr. Fingold that the amounts do not have to be paid out in accordance with the undertaking because it is DSF's view that there is no obligation for Mr. Fingold to pay the taxes as they are all statue barred or alternatively because the undertaking can be interpreted to require that the funds only be held for a maximum period of one year. The wording of the undertaking does not support such interpretation

[32] Further, I do not accept Mr. Fingold's argument that the funds, now, ought to be paid from DSF to him, as the funds were only meant to be held for a period of one year after the parties entered into the standstill Agreement. I do not find that this is a reasonable interpretation of the Agreement. Rather, the reference to the one-year period was applicable only to the interest rate.

[33] The court cannot grant the interpleader order, as it does appear there may be an obligation of DSF to satisfy the undertaking. The fact that DSF believes it has an obligation to a former client does not override the fact that the undertaking was given and the former client gave an irrevocable direction for DSF to give and comply with the undertaking. The Court cannot award DSF the protection it seeks as the court finds, on the basis of the evidence before it, that it is possible that DSF may be in breach of its undertaking.

[34] However, the court asked 1100 to make submissions on the appropriateness of proceeding with this with this dispute by way of Application. The only submission made by 1100 was that there was not likely to be a material fact and dispute. Further, the court specifically requested that 1100 provide the legal basis for its desired remedy, a mandatory injunction forcing DSF to comply with its undertaking. 1100 did not address this issue in its factum or during its submissions. In response to the inquiry of the court with respect to the legal basis for the requested remedy, counsel referred to the fact that a party may request an injunction which is ancillary to the relief requested in an Application.

[35] I find that the Application of 1100 must be dismissed as 1100 has not demonstrated to the Court that it is entitled to the relief sought. The Court is of the view that it is not appropriate for the Claim of 1100 to proceed by way of Application, as there has been no proper legal submissions made to support the relief claimed. The Application is therefore dismissed, without prejudice to 1100 using the appropriate legal procedures to bring its claim.

[36] As a result, this court dismisses both the Applications before it. The parties have not taken the appropriate legal procedures in order to resolve this dispute.

Costs

[37] The parties have reached an agreement that the successful party will be given costs on a partial indemnity basis. However, as neither party was successful on these Applications, no costs are awarded.

Pollak J.

Date: May 7, 2021

CITATION: Devry Smith Frank LLP v. Fingold
COURT FILE NO.: CV-19-633030
CV-19-633016
DATE: 20210521

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Devry Smith Frank LLP

Applicant

AND:

David Bruce Fingold and Metropolitan Toronto Condominium Corporation No. 1100

Respondents

AND:

Metropolitan Toronto Condominium Corporation No. 1100

Applicants

AND:

David Bruce Fingold

Respondent

BEFORE: Pollak J.

COUNSEL: *Michelle Cook*, for the Applicant

Jake A. Fine, for the Respondent MTCC No. 1100

Nadia Condotta, for the Respondent David Bruce Fingold

HEARD: In-Writing

ADDENDUM

[38] An Endorsement was released in the above noted matters on May 7, 2021. The parties have requested Madam Justice Pollak to make the following corrections to the Endorsement.

[39] I agree that these corrections should be made to my Endorsement as follows:

1. Chubb Insurance Company of Canada and Novex Insurance Company be removed as parties to these Applications; and

2. The file number CV-19-633016 MTCC 1100 v. David Bruce Fingold be added to the citation.

-

Pollak J.

Date: May 21, 2021

COURT FILE NO.: 03-126
DATE: September 22, 2003

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BRIAN McARTHUR, MARTIN WAGENAAR, GRAYLO INVESTMENTS LTD., and WASHAGAMIS BAY COTTAGE OWNERS ASSOCIATION

v.

WASHAGAMIS BAY INVESTMENT CORPORATION

BEFORE: The Honourable Mr. Justice E. W. Stach

COUNSEL: Barbara M. Shields, for the Applicants

ALSO APPEARING: Peter Ginakes (counsel)

Fabian Vaughn (lay spokesperson)

REASONS ON APPLICATION

[1] Washagamis Bay Investment Corporation (the respondent, hereinafter referred to as "the investment corporation") is a non-profit company incorporated under the laws of Canada. In return for the payment of annual fees, the investment corporation leases a number of plots of land situate on Rat Portage First Nation 38A (the First Nation) to individual cottagers. The leases are long-term. Pursuant to the leases, the corporation is obliged to provide garbage and refuse services and to maintain service roads and rights of way adjacent to the various leasehold properties. Although a separate entity, the investment corporation is governed by a board of directors consisting entirely of members of the First Nation.

[2] The applicants are individual lease holders (cottagers), and the cottage association formed by those individuals.

[3] In the material before the court, a number of matters appear not to be in dispute:

a) that in a meeting of the investment corporation held October 29, 2002 a new board of directors was elected (new board);

b) that the slate of directors in place just prior to the meeting of October 29, 2002 (the old board) still claim to be the only board of directors with legal authority to operate the investment corporation;

[4] The applicants allege that the internal conflict over governance of the investment corporation has given rise to:

a) uncertainty as to which of the opposing groups hold legal authority to operate the investment corporation and, where and to whom their annual fees are to be paid; and

b) the deterioration of services and fears that a continuing impasse will result in further deterioration and non-performance of the obligations owed by the investment corporation to individual cottagers.

[5] In an application originally returnable on July 30, 2003 the applicants sought:

a) an interpleader order permitting them to pay the annual fees into court; and

b) the appointment of a receiver/manager to administer the affairs of the investment corporation until the appropriate board of directors can be identified.

[6] At the hearing of July 30, 2003, an order of interpleader was granted permitting the applicants to pay into court monies (the annual fees) held by the cottagers association on behalf of its members. The question whether a receiver/manager is to be appointed, the costs of the interpleader proceeding and other collateral matters were left to be argued on September 5, 2003 when, it was anticipated, all interested parties or groups could be present, fully briefed and represented by counsel.

[7] On September 5, 2003, in addition to counsel for the applicants, two persons attended each claiming authority to speak for the investment corporation. Mr. Ginakes appears to have been retained by the "*new*" board. Fabian Vaughn, a lay person, also claimed to speak for the investment corporation. It was apparent, however, that Mr. Vaughn was a spokesperson for the "*old*" board of the investment corporation. Mr. Vaughn was allowed to participate at the hearing.

[8] Of primary concern to the (cottage owner) applicants are relatively narrow issues: where and to whom they can properly pay their annual fees, and ongoing performance by the investment corporation of its twin obligations relating to refuse and road services. Nevertheless, the request of the applicants for the appointment of a receiver/manager for the investment corporation is very broadly phrased. It seeks to empower the receiver/manager "*to administer the affairs of the corporation* until such time as the appropriate board of directors can be identified." I have little doubt that the affairs of the investment corporation embrace matters beyond the receipt of annual fees and the performance of lease obligations to the cottagers.

[9] Upon hearing the submissions of counsel and spokespersons, the court is persuaded that the appointment of a receiver/manager, albeit with more limited authority than sought, is appropriate. Deloitte and Touche Inc. has consented to its appointment as receiver/manager and has filed a written consent to that effect. Accordingly, this court appoints the firm of Deloitte and Touche Inc. to act as receiver/manager with specific power to receive the annual fees and to see to the discharge, on a reasonable basis, of the refuse and road obligations of the investment corporation. It is worth noting here that the receiver/manager is an officer of the court and not under the control either of the First Nation or the cottage owners. It seems sensible nevertheless to suggest that the receiver/manager consult with the band and cottage owners as to reasonable performance of the lease obligations.

[10] The court invites counsel for the applicant (cottagers) to submit a bill of costs together with affidavit or other supporting material in support of its claim for costs:

a) in respect of the initial hearing for an order of interpleader; and

b) the subsequent hearing for appointment of a receiver/manager.

[11] The court recommends that such accounts isolate the costs respecting the interpleader and receiver/manager proceedings respectively, and that counsel provide other interested parties and the court with copies. Once this has been accomplished, a hearing on costs can be arranged by way of a conference call to quantify the costs of the applicant respecting each branch of the proceeding. Although the applicant in such proceedings is frequently

awarded costs, the court will hold the costs issue in abeyance, subject to its ultimate discretion whether such costs are to be awarded here.

The Governance Issue

[12] In practical terms, the operations of the investment corporation and its wider objectives will remain stalemated until its governance issue is determined. The validity of the election process of October 29, 2002 lies at the heart of the matter.

[13] It occurs to the court that the governance issue may be determined by a variety of means, by third party mediation, by binding arbitration or by application to the court.

[14] If by application to the court, there are some threshold matters to consider.

[15] It is the investment corporation (as an entity) that is the party before the court in these proceedings, not individual members of either the new board or the old. The court has no direct jurisdiction over the individual members of these rival groups to governance. Yet, they are key players in its resolution.

[16] If the interested parties elect to have the matter determined by the court, the court recommends the trial of an issue within these proceedings and to that end also recommends that individual members of the new board (as plaintiffs) join individual members of the old board (as defendants); that the pleadings, at least initially, be defined by affidavits to be separately submitted on behalf of each slate of directors. If it should develop that resolution of the governance issue cannot be determined by affidavit material alone, resort may be had to directing that *viva voce* evidence be taken.

[17] It follows that if individual members of each rival slate of directors submit to the jurisdiction of the court, there may be cost consequences.

[18] The court may be spoken to by conference call to be arranged through the trial coordinator (807-468-2831).

_____
Justice E. W. Stach

DATE: September 22, 2003

COURT FILE NO.: 03-126
DATE: September 22, 2003

SUPERIOR COURT OF JUSTICE
- ONTARIO

RE: BRIAN McARTHUR, MARTIN WAGENAAR, GRAYLO INVESTMENTS LTD., and WASHAGAMIS BAY COTTAGE OWNERS ASSOCIATION

v.

WASHAGAMIS BAY INVESTMENT CORPORATION

BEFORE: Justice E. W. Stach

COUNSEL: Barbara M. Shields, for the Applicants

ALSO APPEARING:
Peter Ginakes (counsel)
Fabian Vaughn (lay spokesperson)

REASONS ON APPLICATION

The Honourable Mr. Justice E. W. Stach

DATE: September 22, 2003

BAO YING CAO et al.
Applicants

-and-

XIAODONG YANG et al.
Respondents

Court File No. 21-00672880-00CL

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SUPERIOR COURT OF JUSTICE
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TORONTO

BOOK OF AUTHORITIES

POLLEY FAITH LLP
TD North Tower
77 King St. W., Suite 2110
Toronto ON M5K 2A1

Andrew Faith (47795H)
afaith@polleyfaith.com

Diane Shnier (77811N)
dshnier@polleyfaith.com

Tel: 416.365.1600

Lawyers for the applicants