IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***A v. A (costs),***
2007 BCSC 1445

Date: 20070928

Docket: E_____
Registry: Vancouver

Between:

L.A.

Plaintiff

And

J.A.

Defendant

Before: The Honourable Mr. Justice Bryan F. Ralph

Ruling re Costs

Counsel for the plaintiff	Penny Paul
Counsel for the defendant	John C. Fiddes
Date and Place of Hearing:	September 5, 2007 Vancouver, B.C.

[1] In Reasons for Judgment delivered July 31, 2007, (***A. v. A.***, 2007 BCSC 1148), and at the request of the parties, I granted leave to make submissions on costs. This ruling responds to those submissions.

[2] Ms. A. seeks her costs in the action and an order that the costs be assessed as special costs.

[3] Mr. and Ms. A. were married in August 2004 and separated in October 2005. Ms. A. is 50 years old and Mr. A. is 59. Prior to the marriage, Ms. A. worked and resided in Washington State for many years. Mr. A. has resided in Canada for many years.

[4] Mr. A. has been a successful businessman primarily engaged in the purchase, operation, and sale of hotels and trailer parks. He has carried out his businesses through a number of companies. Immediately prior to the marriage, Ms. A. was the supervisor of data processing work in a business in Washington State. She resigned from that employment and moved to British Columbia at the time of the marriage.

[5] The matters in dispute in the action primarily related to the determination and division of family assets and to Ms. A.'s claim for spousal support.

The Claim for Costs

[6] In ***Gold v. Gold*** (1993), 82 B.C.L.R. (2d) 180 at 185, 106 D.L.R. (4th) 452 (C.A.), McEachern C.J.B.C. stated that the rule which governs the award of costs in matrimonial proceedings should be the same as in other civil litigation; namely, that costs should follow the event unless the court otherwise orders. Costs should "follow the event" where a party has been "substantially successful" on the main issue at trial. When a court should "otherwise order" is a matter of judicial discretion, and Chief Justice McEachern set out examples of factors that may be taken into account.

[7] In ***Fotheringham v. Fotheringham*** (2001), 13 C.P.C. (5th) 302, 2001 BCSC 1321 [***Fotheringham***], Bouck J. set out a four step inquiry that may be made when awarding costs under Rule 57. It is set out at para. 46:

1. By focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.

2. By assessing the weight or importance of those "matters" to the parties.

3. By doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded, " overall and therefore won the event.

4. Where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

[8] At para. 49 of the Reasons for Judgment, I identified the following issues to be addressed:

(1) Was there an enforceable oral marriage agreement between the parties?

(2) What is the legal effect of the agreement made between the parties on November 7, 2005?

(3) What assets of the parties are family assets?

(4) What are the values of such assets?

(5) Should there be reapportionment?

(6) Is the plaintiff entitled to spousal support and, if so, in what amount and for what duration?

[9] Ms. A. did not succeed on the first issue, although witnesses were called to give evidence about oral promises of provisions Mr. A. would make for Ms. A. if she agreed to marry him. It was not an unimportant matter and Mr. A. must be regarded as having "succeeded" on this issue.

[10] Ms. A. conceded that the one-page, hand-written "Agreement" of November 7, 2005 was not "strictly enforceable". Mr. A. must be regarded as having "succeeded" on this issue, but I do not regard it as being of particular significance.

[11] The two most important matters in dispute are, in my view related to the treatment to be accorded to the substantial business assets acquired by Mr. A. over a number of years and to Ms. A.'s claim for spousal support.

[12] Ms. A. was found to have made both a direct and an indirect contribution to the acquisition of Mr. A.'s business assets. She was awarded five per cent of Mr. A.'s shares (5% of $1,649,000) and five per cent of the shareholder loans owed to Mr. A. (5% of $1,319,453). In addition to these interests, Ms. A. was awarded

a 25 percent interest in the matrimonial home, and a portion of the credit union account and Mr. A.'s RRSP.

[13] Ms. A. was also awarded lump sum spousal support in the amount of $50,000.

[14] In their submissions, both counsel referred to offers to settle made by their clients prior to trial. Given the judgment in this case, Rule 37 did not become engaged, but reference to the settlement offers was made in the submissions in costs. In ***Boonstra v. Boonstra***, [1995] B.C.W.L.D. 663, 54 A.C.W.S. (3d) 229 (S.C.), Clancy J. concluded that when considering "substantial success" no reference should be made to those offers because success should be measured against the positions taken by the parties at trial. I have not, therefore, taken the contents of the offers into account in making this ruling.

[15] In making a "global determination" with respect to all the matters in dispute and determining which party "substantially succeeded" overall as suggested in ***Fotheringham,*** I consider it important to recognize that what "substantial success" is needs to be assessed in the context of the marriage. The marriage was of short duration and virtually all of the assets were brought to the marriage by Mr. A..

[16] The likelihood of a substantial reapportionment of family assets in such circumstances is demonstrated in the decision in ***A.C.C. v. S.L.C.***, (2003), 128 A.C.W.S. (3d) 325, 2003 BCSC 1912, cited at para. 63 of my Reasons for Judgment in this case. Ms. A. was nevertheless awarded more than a *de minimus* portion of the shares and shareholder loans in the businesses, the RRSP, the whole of the credit union account, and the matrimonial home. In addition, she received lump sum spousal support.

[17] Taking these considerations into account, I conclude that Ms. A. substantially succeeded overall and therefore won the event. The "fourth step" in ***Fotheringham,*** determining whether there are reasons to "otherwise order" that Ms. A. be deprived of her costs, does not arise in this case. There is therefore no basis to deprive Ms. A. of her costs.

The Claim for Special Costs

[18] Rule 57(1) provides that where costs are payable to a party they shall be assessed as party and party costs under Appendix B of the Rules "unless the court orders that they be assessed as special costs."

[19] In ***Garcia v. Crestbrook Forest Industries Ltd.*** (1994), 9 B.C.L.R. (3d) 242 at 249, 119 D.L.R. (4th) 740 (C.A.) the Court of Appeal considered the nature of the circumstances that give rise to an order for special costs as stated by Lambert J.A.:

> …It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[20] Counsel for Ms. A. identified a number of matters which were characterized as reprehensible conduct by Mr. A.. They include non-disclosure and inadequate disclosure of assets, non-disclosure of income, and being found in contempt of three court orders during the course of the litigation. While I do not find that all of the matters referred to by counsel for Ms. A. when fully explored support a finding that Mr. A.'s conduct in relation to them was reprehensible, I find the following matters to be significant in determining whether special costs should be ordered.

[21] On June 6, 2006, Master Scarth ordered Mr. A. to produce a number of documents and records including copies of bank records and credit card statements for which he was a signatory anywhere in the world from a date beginning two years prior to the date of the marriage. On October 30, 2006, Madam Justice Loo found Mr. A. in contempt of court for failing to produce such records.

[22] On October 30, 2006, Madam Justice Loo also ordered Mr. A. to produce documentation pertaining to a

$300,000 loan from Mr. Kim to Mr. A. to purchase the Angus Drive property. The document was not produced.

[23] Mr. A. did not disclose the Yaletown condominium in his property and financial statement. He was asked on his examination for discovery to produce documentation relating to its purchase. Other than producing a receipt from a law firm, the documentation was not produced.

[24] On February 1, 2006, Mr. A. was found in contempt of court for disobedience of the December 16, 2005 order of Master Taylor requiring Mr. A. to pay spousal support of $3,500 per month.

[25] On August 23, 2007, Mr. A. was again found in contempt of court for failing to pay spousal support. The arrears at that date were $14,000.

[26] Counsel for Mr. A. has submitted that Mr. A. has already been punished for the matters in which he has been found to be in contempt of court. It is argued that these matters should not therefore be counted as factors in determining whether special costs should be awarded in this action.

[27] Contempt of court, however, is reprehensible in itself and special costs were ordered in relation to those matters in which Mr. A. was found to be in contempt.

[28] In my view, the failure to produce documents and the failure to pay interim spousal support can be reprehensible, not only in the sense that such conduct is contemptuous, but also in its additional impact of being yet another impediment to advancing the plaintiff's lawsuit to its resolution.

[29] Documents not produced may well hide family assets that properly should be taken into account (see ***Cunha v. Cunha*** (1994), 99 B.C.L.R. (2d) 93, 51 A.C.W.S. (3d) 277 (S.C.C.)). In the present case, the documents were relevant to determining any interest of Mr. A. in the Angus Drive and Yaletown Park properties.

[30] The non-payment of spousal support was a particular concern in this case because Ms. A., as a new resident in Canada, was not permitted to seek employment in Canada until August 2006. The evidence does not suggest in any way that Mr. A. failed to pay spousal support because of any financial hardship he faced.

[31] I conclude in this action that the combination of Mr. A.'s failure to produce significant documents, and his deliberate cessation of interim spousal support payments on more than one occasion, is properly characterized as reprehensible and that as a result, it supports an order that Ms. A. is entitled to special costs.

Bryan F. Ralph J.