COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Clancy v. Clancy,*
2018 BCCA 448

Date: 20181130
Docket: CA44625

Between:

Anne-Marie Clancy

Respondent
(Claimant)

And

John Richard Clancy

Appellant
(Respondent)

Before: The Honourable Madam Justice Garson
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated June 30, 2017 (*Clancy v. Clancy*, 2017 BCSC 1124, Vancouver Registry E123747).

Counsel for the Appellant:	S.L. Booth
Counsel for the Respondent:	L.A. Kahn, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia October 25, 2018
Place and Date of Judgment:	Vancouver, British Columbia November 30, 2018

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Savage

Summary:

The appellant purports to appeal from a summary judgment dismissing his application to strike out the respondent's action. In 2011, the parties entered into a separation agreement in which the appellant represented that he had no ownership or beneficial interest in a corporation legally owned by his new spouse. The respondent later brought a claim alleging that the representation was untrue and seeking relief including spousal support. The appellant applied to have her action struck out on a summary trial. The summary trial judge found the appellant not to be credible and dismissed the application. On appeal, the appellant says the issue of whether his representation was untrue was not suitable for disposition by summary trial and the application ought not to have been dismissed on that ground. Held: the appeal is quashed for want of jurisdiction because it is an appeal from the reasons for judgment, not the order.

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

[1] The appellant purports to appeal from a summary judgment dismissing his application, to strike out an action commenced by his former spouse, in which she alleged that he made intentional misrepresentations in a separation agreement. Notwithstanding that it was the appellant's own summary trial application, he now says that the issue was not suitable for disposition by summary trial and that the order should be set aside. His appeal is problematic because he does not ask this Court to reverse the decision below, that is the dismissal of his application, rather he asks that this Court maintain the dismissal but for different reasons than the ones given by the summary trial judge.

Background

[2] Anne-Marie and John Clancy, both represented by counsel, signed a Separation Agreement on March 9, 2011. In it, Mr. Clancy represented that he had no ownership or beneficial interest in J & S Engineering Solutions ("J & S"), a company owned by his new spouse, Serpil Clancy. On the basis of that representation and his representation as to his income, Ms. Clancy released her claims to compensatory and non-compensatory spousal support, including arrears.

[3] The Separation Agreement included the following recital:

> B. JOHN is a sales manager with J&S Engineering Solutions and has no ownership or beneficial interest in J&S Engineering Solutions.

[4] The Separation Agreement included the following clause waiving support and arrears:

> 3. (1) Based on John's assurance that he has no ownership or beneficial interest in J&S Engineering Solutions and notwithstanding any change of circumstances no matter how unforeseen or radical,
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> (a) neither party will claim interim or permanent support from the other, and
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> (b) each party gives up forever any claim for support against the other, including but not restricted to claims for retroactive spousal support, spousal support arrears and any claim for future spousal support.

[5] In her affidavit on the summary trial application, Ms. Clancy describes the basis of the waiver and the information she later learned about her former husband's position with J & S, that formed the basis of her Petition:

> 5. The most significant claim arising from our marriage and its breakdown was my claim for compensatory and/or non-compensatory spousal support. Following our separation, the Respondent left his long time employer Olympic International where he had been employed for over 15 years and, during that period, he had moved from being a sales person to a 5% shareholder and partner. He had firmly established himself as a mechanical engineer with established contacts in the HVAC industry. Despite having significant annual earnings prior to our separation, the Respondent took the position that he had experienced a drastic downward change to his income and was unable to support himself, let alone pay spousal support following our separation. In fact, he chronically defaulted on virtually the entirety of the monthly interim spousal support obligations that the Court ordered and the arrears quickly grew to a sum in excess of $130,000.00. At the same time, I was diagnosed with cancer in 2010 and was debilitated for over a year.
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> 6. As events unfolded, I eventually learned that the Respondent's reason for leaving our marriage related to his taking up a romantic relationship with his employee at Olympic International, Serpil (Eren) Karar ("Serpil"). Serpil is an Engineer in the same field as the Respondent. The Respondent deposed in his June 23, 2010 Affidavit and August 20, 2010 Affidavit that his "new life partner Serpil" had opened up a new business J & S Engineered Solutions ("J & S") in Calgary and that he was employed earning $70,000.00 per year. He denied having <u>any</u> ownership

> interest in J & S. He steadfastly maintained this position throughout our family litigation.
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> 7. I relied upon and trusted the truthfulness of the Respondent's representations that he was not an owner or rather strictly an employee. Confronted with my health difficulties, the respondent's chronic failure to provide support (despite court orders obligating him to do so) and a fast approaching trial date, the Respondent and I, with the assistance of our legal counsel, entered into a Separation Agreement dated March 9, 2011. I insisted that the Respondent enter into a Recital to the Agreement confirming that he has no ownership or beneficial interest in J & S. Based on that Recital and his assurance and representation of the nature and effect, I agreed to relinquish all of my Spousal Support rights and claims including agreeing to forego collecting on the arrears that [had] accumulated. I received my employment pension while the respondent kept his RRSP's and I received the remaining proceeds from the sale of our condominium of $60,000.00 and $50,000.00 representing a partial interest in the respondent's shareholdings in his former Company – which sums were used to pay debts that had accrued in the period when the Respondent refused to pay support or to pay the expenses for the condominium as he had agreed to do.

[6] In December 2012, Ms. Clancy commenced a Notice of Family Claim under the *Family Relations Act*, R.S.B.C. 1996, c. 128 [repealed] and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) ("the 2012 Proceeding"). She claimed child and spousal support, an unspecified interest in family assets, an order that the Separation Agreement be declared null and void or varied, and a variety of ancillary orders, all on the basis that Mr. Clancy had misrepresented his ownership and/or beneficial interest in J & S and his income arising from the company.

[7] Mr. Clancy filed a Response to Family Claim, denying the alleged misrepresentation. On June 20, 2013, Mr. Clancy filed an application seeking to dismiss the 2012 Proceeding. He said the issues arising in the action were *res judicata;* that Ms. Clancy was estopped from pursuing the issues; and that the filing of the action was an abuse of process. He sought the following orders:

> 1. that this action be dismissed pursuant to Rule 11-2(1) of the Supreme Court Family Rules.
> 2. special costs of this Application against the Claimant.
> 3. in the alternative, this action be dismissed on a summary trial application pursuant to Rule 11-3 of the Supreme Court Family Rules with costs of this application against the Claimant.

(Rule 11-2 of the *Supreme Court Family Rules* provides that the court may strike out a claim that is an abuse of process. Rule 11-3 is the summary trial rule.)

[8] On July 15, 2013, Ms. Clancy filed an Application Response. She denied that the doctrines of *res judicata* and estoppel applied to the 2012 Proceeding as the issue of Mr. Clancy's intentional misrepresentation had never been determined in a prior action.

[9] After some delays related to document disclosure the application proceeded before Justice Leask on November 8, 2016. On that day the parties made further submissions on the question of whether the application to dismiss the action was suitable for disposition by summary trial given the conflict in the evidence over whether Mr. Clancy was an owner of J & S at the time he signed the separation agreement. Both counsel urged the court to hear the application. Both said the matter was suitable to be decided at a summary trial.

[10] As to the question of whether the application would "result in litigating in slices," counsel for Mr. Clancy said:

> … this is an all or nothing thing … if [Ms. Clancy] is successful, we start relitigating a court action that was started seven and half years ago. That's what would happen.

[11] Counsel for Ms. Clancy said that he wanted the court to make two findings. Those findings were: the representation that was provided by Mr. Clancy in the Separation Agreement that he was not a legal or beneficial owner of J & S was untrue; and that Mr. Clancy withheld material facts and documents at the time the Separation Agreement was signed. Counsel for Mr. Clancy framed the issue as whether Ms. Clancy could discharge the onus of proving that Mr. Clancy's representation in the Separation Agreement was not true. The judge then decided to hear the matter as a summary trial, and did so on November 18, and December 9, 2016.

[12] At the conclusion of the hearing on December 9, 2016, Justice Leask reserved his judgment. He pronounced judgment on June 30, 2017, for reasons indexed at 2017 BCSC 1124. He said in disposing of the application:

> [40] I grant the declarations sought by the claimant; dismiss the respondent's summary trial application; and award costs … to the claimant.

[13] The formal order provided:

> 1. The Respondent's application to dismiss the within action is dismissed.

[14] There was a dispute between the parties as to the terms of the formal order, and specifically whether the summary trial judge had granted declaratory relief. On December 12, 2017, the Registrar determined that the order was for dismissal of the summary trial application and that no declaratory relief had been granted. Ms. Clancy appealed the Registrar's decision. Her appeal was dismissed by Justice N. Smith.

Analysis

[15] I begin by reiterating that the formal order simply dismissed the application to strike the action. Although the summary trial judge stated in his reasons that he was granting the declarations sought, the only application before him was the application to strike the 2012 Proceeding. The Registrar and the Judge on appeal from the Registrar, presumably considered the nature of the relief sought in the application itself and settled the order by construing it on a narrow basis.

[16] Both parties are represented by new counsel on appeal.

[17] Mr. Clancy, for the first time on appeal, contends that the question of the truth of his representation in the Separation Agreement about the ownership of J & S, was unsuitable for a summary trial. He says that the determination of that issue did not assist in the efficient resolution of the case, as it was not dispositive of the issues, including entitlement to and quantum of spousal support, which remain to be determined at a subsequent trial. He says the result of the order under appeal is to return the case to the beginning, but potentially with some adverse judicial findings.

He says that this raises the risk of inconsistent findings as between the summary proceeding and a subsequent trial. Relying on *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited,* 2002 BCCA 138, and *Prevost v. Vetter*, 2002 BCCA 202, Mr. Clancy contends that this appeal clearly demonstrates the pitfalls of litigating in slices.

[18] In particular, Mr. Clancy says the summary trial judge erred in determining that the representation was untrue without adequately considering the prenuptial agreement entered into by Serpil Clancy and Mr. Clancy, which on its face said that Serpil Clancy owned J & S as separate property. He says that in the face of the conflicting evidence regarding Mr. Clancy's ownership, the summary trial judge ought to have decided that the issue was unsuitable for determination by summary trial. On appeal Mr. Clancy does not seek a reversal of the judge's finding that his evidence ought not to have been believed. He simply says that the judge couldn't decide the issue on a summary trial, and therefore this Court should in effect set aside the judge's findings about his credibility.

[19] Moreover, Mr. Clancy says it was unjust to decide the issue of whether the representation was untrue on a summary trial because Serpil Clancy was not a party below. Mr. Clancy says that findings that could be potentially adverse to her interests cannot be binding on her when she was not represented. For example, if Ms. Clancy asserts an interest in J & S in the subsequent trial, this might impact Serpil Clancy's interests. We are advised that Serpil Clancy is about to be added to the Supreme Court proceedings.

[20] Importantly, Mr. Clancy seeks the following relief in this Court: "That the order dismissing the appellant's summary trial application on the ground that the Assurance was untrue be set aside" (emphasis added). He does not appeal on the basis that the judge ought to have granted his application. Effectively he concedes that the judge ought not to have granted his application to strike the action. What he asks for is an order of this Court setting aside the order on the basis that it should

not have been dismissed on a particular ground because that ground was unsuitable for determination by a summary trial.

[21] During the hearing of the appeal, it was pointed out to counsel for Mr. Clancy that an appeal lies from an order, not from the reasons, and that the order did not contain a declaration regarding Mr. Clancy's ownership of J & S. Counsel replied that the reason for the appeal was the fact that the application was dismissed on the basis of the finding of Mr. Clancy's ownership interest.

[22] Ms. Clancy seeks an order dismissing the appeal. She says that the underlying basis of the dismissal of the summary trial is a finding that there was an intentional misrepresentation. She says that Mr. Clancy made the strategic decision to try to win the whole case by bringing on the dismissal motion. She says a party cannot take a strategic decision in proceedings in one court and then resile from that position on appeal. He must be taken to have recognized that the risk of the application was that adverse findings could be made against him. She says it should not fall upon her to bear the burden of starting over again.

[23] While Mr. Clancy asserts that the summary trial judge made a finding that Mr. Clancy's representation as to his interest in J & S was untrue, it is not fully clear from the Reasons for Judgment that such a finding was made. However, that is not an issue before us. What the judge said is this:

> [33] I accept as a fact that the respondent's second wife, Serpil, is the legal owner of the company. This does not resolve the issue of whether the respondent has a "beneficial interest".
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> [34] He denies having a beneficial interest – how credible is that denial? First, his explanation that he intended to invest in the company but was unable to do so because he did not receive the proceeds of sale of his share in Olympic is not credible. There are a number of reasons why:
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> a) He was unable to say what the amount of his planned investment was;
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> b) The company seemed to enjoy positive cash flow from the beginning and didn't need his investment; and
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> c) He had $100,000 in RRSPs he could have used.
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> [35] I disbelieve his evidence on this issue.

> [36] Second, there are too many instances of him being held out as a principal of the company – to suppliers, to the landlord, and to the bank – not to mention his Linkedin profile. Any single instance he could have explained away. The sum of all the instances is simply too great compared with his relatively feeble explanation of each instance.
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> [37] Third, there is the evidence that in the period from September 2009 to May 2014, the respondent received a total of $28,000 in cheques drawn on the company bank account while Serpil, the legal owner of the company, received approximately $767,000 in cheques. I regard this pattern of payment as more consistent with an attempt to deceive than with an open and honest pattern of remuneration for husband and wife when the husband was responsible for bringing in business for the company. If these had been true arms' length transactions between unrelated parties, the "salesman" would have been entitled to far greater compensation.
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> [38] Fourth, there is the devastating evidence of both of his sons – detailed – corroborative but not identical accounts – met by him with a single denial. I believe the sons and disbelieve his denial.
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> [39] To sum up – in this proceeding, the respondent's credibility has been disproved on a balance of probabilities.

[24] It is trite law that an appeal must be from an order. Section 6 of the *Court of Appeal Act,* R.S.B.C. 1996, c. 77, sets out the jurisdiction of this Court:

> 6 (1) An appeal lies to the court
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> (a) from an order of the Supreme Court or an order of a judge of that court, and
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> (b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
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> (2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

[25] In *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287, the Court held that the applicants could not appeal decisions of a trial judge regarding expert evidence on the basis that the decisions were not orders. Justice Frankel, speaking for the Court on this issue, held that this Court has no jurisdiction to entertain an appeal from the reasons:

> [27] It is an unassailable proposition that all appeals are statutory: *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 at 69-70; *R. v. Smith*, 2004 SCC 14 at para. 21, [2014] 1 S.C.R. 385; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 2, 156, 181, [2015] 1 S.C.R. 401. Accordingly, the authority to appeal to this Court either as of right or with leave "must be found in the *Court of Appeal Act* or another enactment

> conferring jurisdiction": *Janis v. Janis*, 2016 BCCA 364 at para. 78, 404 D.L.R. (4th) 551 (*per* Garson J.A.).
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> [28] A further unassailable proposition is that appeals are brought from the formal order entered in the court appealed from, not from the reasons for judgment that gave rise to the order: *Moore v. Expansion Holdings Ltd.* (1994), 96 B.C.L.R. (2d) 178 at para. 7 (C.A.); *JJM Construction Ltd. v. Sandspit Harbour Society*, 2000 BCCA 208 at para. 3, 83 B.C.L.R. (3d) 293; *Janis* at paras. 78-80.

[26] An appeal lies only from the operative terms of the order, in which the court disposes of the matter before it: *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para. 67. This principle was illustrated in *Law v. Cheng,* 2016 BCCA 120, in which the appellant appealed from a finding of fact included in a recital to an order. The Court quashed the notice of appeal for want of jurisdiction, stating:

> [19] It is settled law that this Court is a creature of statute. It has no inherent jurisdiction to hear appeals. There must be a statutory basis for appellate review: *R. v. Louis*, 2014 BCCA 436 at paras. 25 and 28; *D.(B.) v. British Columbia* (1997), 30 B.C.L.R. (3d) 201 (C.A.) at paras. 60-61. This Court finds its general appellate jurisdiction in [sections 6 and 7] of the *Court of Appeal Act*:
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> …
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> [20] Section 6 of the *Court of Appeal Act* confers jurisdiction to hear an appeal from an order of the Supreme Court or an order of a judge of that court. Since the recital in question did not form part of the operative order, it cannot form the basis for a viable appeal. This Court has no jurisdiction to hear an appeal from a recital just as we have no jurisdiction to entertain an appeal from a finding in reasons for judgment.
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> [Emphasis in original.]

[27] An appeal cannot be brought from passages in the reasons for judgment if the order itself is not challenged: *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591,* 2018 BCCA 187 at paras. 7-8.

[28] Regardless of the merit of Mr. Clancy's arguments about the unsuitability of the case for summary trial, this Court cannot confer jurisdiction on itself to allow an appeal from reasons. Relief is only available to Mr. Clancy if his appeal is from the order.

[29] As I have stated, Mr. Clancy does not argue that his application should not have been dismissed, but that it should have been dismissed because the issue of the truth of the representation was unsuitable for summary trial, or because the claims of *res judicata*, estoppel, and abuse of process were not made out. His objection is not to the order, but to the finding (if one was in fact made) that the representation as to his interest in J & S was untrue. In other words, he is saying that the same order should have been made, but for different reasons. This is therefore an appeal from the reasons of the summary trial judge which the Court has no jurisdiction to hear.

[30] Furthermore, Mr. Clancy's argument on appeal directly contradicts his argument before the summary trial judge. Ms. Clancy argues with considerable merit that Mr. Clancy made a strategic decision to apply to strike her claim and should not be permitted to resile from that position on appeal. In *Killam v. Killam,* 2018 BCCA 64, Justice Savage speaking for the Court said:

> [47] In general, a party cannot choose to take a strategic decision in proceedings in one court and then resile from that position for the first time on appeal: *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157, citing *Protection Mutual Insurance Co. v. Beaumont* (1991), 58 B.C.L.R. (2d) 290 (C.A.); *Armstrong v. North West Life Insurance Co. of Canada* (1990), 48 B.C.L.R. (2d) 131 (C.A.). That is especially so in circumstances where the effect of a procedural agreement, is to remove from consideration evidence before the court. As this Court noted in *Sahlin*:
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> > [38] Although the practice is not immutable, this Court has, in the past, refused to allow a party that has deliberately adopted a position in the trial court to resile from that position on appeal: [citations omitted].

[31] Mr. Clancy took the risk that, should the application be dismissed, the matter would start over again, but potentially burdened by a finding that he had misrepresented his interest in and earnings from J & S. It is not for us to decide whether or not the summary trial judge made a finding, binding on the subsequent trial judge, that Mr. Clancy is a beneficial owner of J & S. That question will have to be determined in the subsequent trial.

Disposition

[32] I would quash the notice of appeal for want of jurisdiction.

[33] Ms. Clancy is entitled to her costs of the appeal.

"The Honourable Madam Justice Garson"

I Agree:

"The Honourable Mr. Justice Harris"

I Agree:

"The Honourable Mr. Justice Savage"