In the Court of Appeal of Alberta

Citation: Hicks v Gazley, 2020 ABCA 239

Date: 20200616
Docket: 2003-0084-AC
Registry: Edmonton

Between:

Philip Murray Hicks

Applicant

- and -

Ashley Michelle Gazley

Respondent

Reasons for Decision of
The Honourable Madam Justice Myra Bielby

Application for Security of Costs

Reasons for Decision of
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[1] Philip Hicks applies for an order that Ashley Gazley be required to deposit the sum of $25,025 as security for costs as a condition of being allowed to proceed with her appeal of a special chambers decision made March 20, 2020 declaring that their post-nuptial matrimonial property agreement is in compliance with the requirements of s. 38 of the *Family Property Act* (formerly the *Matrimonial Property Act*) RSA 2000 c F-4.7 [*FPA*], and is therefore not unenforceable by reason of failure to comply with those provisions. This decision was made on an interlocutory basis in a divorce and matrimonial property action that remains ongoing.

[2] In the written reasons for the decision under appeal, the chambers judge found that an agreement drafted by counsel for Mr. Hicks and signed by Ms. Gazley three months before their final separation was compliant with the requirements of s. 38 of the *FPA* and that statutory non-compliance was not, therefore, a bar to the enforcement of that agreement. He made that decision although Mr. Hicks had not provided full financial disclosure before the agreement was signed and although Ms. Gazley signed it after having received verbal and later written advice from a lawyer that the agreement did not meet the requirements of the *FPA* and was therefore not enforceable. That lawyer further advised her that the agreement was also defective because she had not received independent legal advice or adequate financial disclosure before it was signed. The lawyer witnessed Ms. Gazley's signing of the agreement but did not sign and attach a Certificate of Acknowledgement to it.

[3] Ms. Gazley told Mr. Hicks that the lawyer had advised her that the agreement was not enforceable before she signed it. She maintains that she signed the agreement at her husband's insistence. She contemporaneously signed a written acknowledgement that she was aware of the nature and effect of the agreement, that she intended to give up possible future claims to property she might have under the *FPA* and that she was executing the agreement freely and voluntarily without any compulsion from Mr. Hicks.

[4] The chambers judge concluded the agreement was not unenforceable for failure to meet the requirements of the *FPA* because it fell within the definition of agreement as found in s. 37 and 38 of that statute, because the written acknowledgement given by Ms. Gazley met the requirements of s. 38, and because that legislation does not impose requirements of full financial disclosure, independent legal advice or correct legal advice as prerequisites to enforceability.

[5] In written argument Mr. Hicks submitted that Ms. Gazley is liable for up to $61,000 in costs as a result of the decision under appeal but in oral submissions agreed that no bill of costs existed which set his entitlement to costs in any amount. The written reasons for the decision under appeal make no order in relation to entitlement to, or the size of, any costs award. Mr. Hicks advised that he calculated the $61,000 figure based on Column 5 of Schedule C of the *Alberta*

Rules of Court, Alta Reg 124/2010 because the value of his businesses which he had been saved from division with Ms. Gazley as a result of their postnuptial agreement is at least 1.5 million dollars.

[6] However, the decision under appeal resolves simply one of the issues between the parties in the ongoing litigation and does not determine the remaining issues in it, including the resolution of other potential challenges to the enforceability of the postnuptial agreement such as those arising from misrepresentation or undue influence. It does not resolve Ms. Gazley's claim for spousal support or divide whatever of the parties' matrimonial property is ultimately found divisible whether or not this appeal is dismissed. It is not now known which party will ultimately be successful after all these issues are addressed, and thus entitled to costs of the entire action , which is undoubtedly a reason why the chambers judge did not make a cost award.

[7] In any event, Mr. Hicks argues that Ms. Gazley will not be able to pay him further costs if same are ordered in the course of this appeal because she is impecunious, while inviting speculation that she has a hidden cache of funds that she is using to pay her ongoing legal fees. He relies on her affidavit evidence sworn November 12, 2019 in support of an application for interim spousal support in which she deposed to a shortfall of $3,460 per month after applying her net employment income to her expenses. He does not depose to the value of assets Ms. Gazley might own that might satisfy any costs orders made against her, including from the eventual distribution of matrimonial property to her. Ms. Gazley's counsel advises that Ms. Gazley's additional assets include her pension and her interest in the matrimonial home.

[8] An order for security for costs may be made in an appropriate case pursuant to the provisions of rule 4.22, which reads:

> **4.22** The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> > (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
> >
> > (b) the ability of the respondent to the application to pay the costs award;
> >
> > (c) the merits of the action in which the application is filed;
> >
> > (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
> >
> > (e) any other matter the Court considers appropriate.

[9] An assessment of each of these considerations leads to the conclusion that Mr. Hicks has failed to meet his onus of establishing that an order for security for costs should be granted.

[10] First, he has not established that he would be unable to enforce any ultimate order he receives in relation to the division of the parties' assets. He resides in the matrimonial home and controls his business assets. There is nothing to suggest that he will not be able to enforce the provisions of the order under appeal if the appeal is dismissed, in the context of the eventual resolution of all other issues between the parties at trial.

[11] Second, the evidence on this application falls short of that which would enable me to determine the value of the parties' assets, or the value of the share of those assets Ms. Gazley will ultimately receive. With the spousal support issue as yet unresolved, it is not possible to determine what future income she will have from which a costs order may be satisfied. I am unable to draw a negative inference from her failure to pay costs arising from the decision under appeal because Mr. Hicks has not established his entitlement to those costs, or that they will not ultimately be offset against other costs incurred as this action moves toward resolution. In any event, courts in Alberta have been very conservative in awarding costs to self-represented litigants; those costs are often limited to recovery of disbursements and GST; see ***Edmonton (Police Service) v Alberta (Information and Privacy Commissioner)***, 2019 ABQB 864 at paras 19, 23.

[12] Third, Ms. Gazley has an arguable case on appeal; her appeal has merit. The chambers judge heavily relied on the decision of this Court in ***Corbeil v Bebris*** (1993), 105 DLR (4th) 759, 141 AR 215 (CA) to support his conclusion that the parties' matrimonial property agreement is enforceable; from the reported reasons for that decision it does not appear it was a circulated reserve decision of this Court. In any event, the Court in that case ultimately concluded that whether or not a matrimonial property agreement is enforceable due to compliance with the mandatory requirements of the *FPA*, a judge must go on to direct himself or herself to consider what impact the agreement has on a just and equitable property division, a step this chambers judge was not in a position to take given the limited evidence before him. That assessment must await the findings made at trial.

[13] Fourth, an order to post security for the payment of a future costs award may well unduly prejudice Ms. Gazley's ability to continue this appeal. Her affidavit made in support of an application for spousal support shows she has limited funds at her disposal. While she will be entitled to a share of the matrimonial property when this matter comes to trial, that share will not become liquid until the ultimate resolution of this action and so may be unavailable to post as security for costs at this time.

[14] The fact that this application for security costs sought deposit of $25,025, which is far in excess of the anticipated costs award for an appeal of this type even where the applicant is represented by counsel, also raises access to justice concerns for Ms. Gazley. I must balance those concerns against Mr. Hick's right to enforce the order under appeal if ultimately successful; see ***Skolney v Nisha***, 2018 ABCA 78 at paras 16-21. Given the above observation that he solely

controls the assets against which the order under appeal would be enforced results in that balance ending in favour of Ms. Gazley being allowed to continue with this appeal without posting security for costs.

[15] Fifth, consideration may be given to "any other matter the Court considers appropriate"; see rule 4.22(e). That includes the context in which the issues before the Court arose. Context here includes the circumstances in which the matrimonial property agreement came into being, as recorded in the decision under appeal: in the face of a failing marriage, Mr. Hicks requested that Ms. Gazley sign a matrimonial property agreement giving up any claim she might have to a share of his business interests. At no time did he disclose the value of those assets. Three months after he obtained her signature, without her having received independent legal advice and in the face of a lawyer advising her the agreement was unenforceable, their cohabitation ended with him remaining in possession of the matrimonial home.

[16] Mr. Hicks brings this application for security for costs where success might well result in Ms. Gazley being blocked from proceeding with her appeal. This is so even though the decision under appeal addresses only one of many of the issues between the parties in this litigation. These issues, including the ultimate financial reckoning between these parties, have been left for resolution at trial. The suggestion that a party may be taking steps in litigation aimed at harassing or suppressing the other party is a consideration in addressing an application for security for costs; see: ***Henry v El***, 2010 ABCA 312, leave to appeal to SCC refused, 34172 (14 July 2011).

[17] For all of these reasons the application for security for costs is dismissed.

Application heard on June 10, 2020

Reasons filed at Edmonton, Alberta
this 16th day of June, 2020

Bielby J.A.

Appearances:

Applicant Philip Murray Hicks (via WebEx)

L.H. Bruyer
for the Respondent (via WebEx)