

1996 CarswellAlta 878, 195 A.R. 380 at 385, [1996] A.W.L.D. 1090, [1996] W.D.F.L. 2742

Cyclone Sales & Service Ltd. v. Husson

Cyclone Sales and Service Ltd., Applicant v. Glynis Joan Husson, Respondent

Alberta Court of Queen's Bench

Wilkins J.

Judgment: October 30, 1996

Docket: Calgary 9501-03569

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Proceedings: additional reasons to (January 31, 1996), Doc. Calgary 9501-03569 (Alta. Q.B.)

Counsel: *Mr. G. Befus*, for the Applicant.

Ms. D.P. Castle, for the Respondent.

Subject: Family; Property; Civil Practice and Procedure

Mr. Justice L.D. Wilkins:

1 Cyclone Sales and Service Ltd. ("applicant") is a registered owner of a warehouse property near Calgary, Alberta. Glynis Joan Husson ("respondent") caused a lis pendens to be filed against title to that property as an adjunct of a matrimonial property action she had commenced against her husband Larry Husson. The sole shareholders of the applicant are Leslie Husson and Geraldine Husson, the parents of Larry Husson.

2 In a special chambers motion the applicant sought an Order striking the lis pendens to permit the imminent sale of the warehouse property. It was agreed that the proposed sale was at fair market value.

3 At the conclusion of submissions by counsel for the applicant and respondent, the Court disposed of the application and provided oral Reasons which are attached to this memorandum. Counsel for the parties requested the Court to provide a written decision relating to the scope of the application of the *Matrimonial Property Act* generally and the powers given to preserve assets under Section 9(2)(c) and 9(3)(j) and Section 35 specifically, relative to claims against property owned to an entity outside the marriage.

4 It was the submission of the respondent that the provisions of the *Matrimonial Property Act* provide the Court with a power to order preservation of such a property through the means of a lis pendens in circumstances where it could not be established that either marriage partner had an "interest" capable of supporting a caveat under the *Land Titles Act*. It was argued that such an interest could include a claim to that property by virtue of either party to the marriage having an interest, estate or right in the property which might be found to exist by

virtue of a claim in partnership, constructive trust or unjust enrichment.

5 The applicant argued that neither Larry Husson or the respondent had any interest in the warehouse lands which were capable of protection by *lis pendens*. Neither Cyclone nor its shareholders were parties to any "*lis*" with the respondent or Larry Husson. It was submitted that neither party to the marriage could establish any interest in the property owned by Cyclone and the *lis pendens* should be struck from the title.

6 The applicant's motion was dismissed with costs for the reasons presented orally by this Court. In essence, those Reasons indicate that it was not "entirely clear" to the chambers court that the claim by the respondent to an interest in property in the particular circumstances alleged would be unsuccessful at trial. Accordingly, the determination of the issue between the parties was one that should be resolved by a trial judge who had the benefit of hearing and considering all of the evidence to be presented at a trial.

7 As both parties had agreed to the sale of the property at its fair market value, the disposition of the applicant's motion required directions to preserve any claim to an "interest" in the property until a determination at trial. Such directions were provided.

8 This Court has further considered a request by counsel for additional written Reasons which might establish a precedent or invite further consideration by a higher court of the matters at issue. It is the conclusion of this Court that it would be inappropriate for this Court sitting as a chambers judge to do so.

9 It is only a trial judge who is capable to determine if, on all of the evidence before the Court, a claim of either of these marriage partners to the property owned by Cyclone has been established and upon what basis on which any claim may rest. It would be inappropriate for this Court to opine as to the availability or otherwise of a *lis pendens* or other preservation directive under the *Matrimonial Property Act* in a situation other than that actually before this Court. It is to be hoped that the trial Court in this case or another will be able to provide the requested precedent for future reference of parties and practitioners in this area of the law.

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