

Cyclone Sales & Service Ltd. v. Husson**Cyclone Sales and Service Ltd.**, Applicant v. Glynis Joan **Husson**, RespondentAlberta Court of **Queen's Bench**

Wilkins J.

Judgment: January 31, **1996**

Docket: Calgary 9501-03569

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Counsel: *G. Befus Esq.* for the Applicant.*D.P. Castle Ms.* for the Respondent.

Subject: Family; Property; Civil Practice and Procedure; Corporate and Commercial

Mr. Justice Wilkins:

1 THE COURT: Counsel have indicated to me that there were some authorities, which by analogy, are relevant to the consideration of the Court of the present application. However, there is no decision in Alberta of the Court of Queen's Bench or any superior court as exactly to the definition of the limits of Section 35 of the Matrimonial Property Act in any specific sense having application to the relationship that exists between the Respondent, a daughter-in-law of the Applicant, and the company owned by the Applicant and his wife as the sole shareholders, directors, officers and controlling minds.

2 I have agreed with the suggestion of counsel that it would be an appropriate case to provide written reasons for my judgment to establish a precedent or perhaps invite further consideration by other courts. It is my intention to do so.

3 However, I have decided upon the disposition that this Court will make of the present application and will provide you with some basic comments reserving the right to expand, enlarge and modify those comments in my subsequent reasons.

4 As I said, the facts between these parties as to the existence of an interest in property, being this warehouse, either claimed by the Respondent directly or claimed as a property in which her husband has an interest, are in dispute.

5 It is only a trial judge who has the ability, having considered all of the evidence, to resolve the evidentiary disputes that exist between the parties and to make those findings of fact which will allow that Court to determ-

ine whether any such "interest in property" has been established.

6 I have noted the arguments advanced by counsel for the Applicant which are aptly stated and of considerable use to the Court.

7 Facing those arguments is the Court's consideration of the "broad brush" powers that are given to a trial judge hearing a matrimonial property action in deciding the relative claims of two parties to a marriage. And all of the interests that those parties have in various assets.

8 It is my conclusion that it is possible that a trial judge, exercising authority under Section 35 of the Matrimonial Property Act, may conclude that the Respondent's claim against an interest in the warehouse property amounts to an interest in property that the trial judge is capable of ordering preserved in such a way as to permit an appropriate division of assets between parties.

9 It may be that in my further reasons I may accept the Applicant's position with respect to the distinction made by the English Courts between an "equity" and an "equitable interest" That may also be a distinction that a trial judge, hearing all of the evidence, would be prepared to uphold.

10 On a summary basis, hearing the application in front of me today with the disputed facts, I cannot make such a distinction. The result of which my granting the present application may be a disposition of this asset. The present application asks me to exercise a discretion somewhat akin to the discretion to be exercised in an application for summary judgment. Such a discretion cannot be exercised by the Court unless the matter is entirely clear or beyond doubt. Only a trial judge, in my opinion, is going to be capable of determining whether or not either the Respondent or her spouse has an interest in this property in the particular facts of this case.

11 It seems obvious that from the mere fact of the registered ownership of this land that such an interest is not a strictly legal one. There appear to be sufficient facts alleged to establish an interrelationship between not only the governing minds of this corporation and the two parties to the marriage but with the corporate entity itself and the Respondent and Respondent's spouse.

12 I particularly note that the Applicant, as one of the majority shareholders of the corporation Cyclone, testified in his affidavit that this particular property was transferred to his wife and the Respondent as tenants in common pursuant to a business plan; that that business plan did not work out and the property was retransferred.

13 The evidence appears undisputed that the transfer to the two women was for a consideration of \$225,000 and the transfer back to the corporation \$480,000. Nothing is stated in the face of the affidavits as to whether or not the corporation paid each of the two women one half of the difference in considerations. Certainly by placing itself in a direct relationship with the Respondent, the corporation loses its ability to say, you cannot look behind the corporate veil. In effect, the Applicant itself asserts a business relationship of some sort.

14 The matter is made further complicated by evidence adduced by the Respondent of considerable expenditures of family money and other resources such as labour in the direct development of this property. It seems clear to this Court that the assessment of the merits of any claim based on quantum meruit, based on unjust enrichment, based on constructive trust, that might arise from the expenditure of those assets is something that only a trial judge who hears all the evidence can resolve.

15 I am, therefore, not prepared to grant an order in response to the request of the Applicant which will dis-

charge the claim of an interest advanced by the Respondent in this warehouse property.

16 I am, however, prepared to order the removal of that *lis pendens* on certain trusts and conditions so that the disposition of this property on a bona fide arms length sale might be achieved to further the respective interests of the parties by realizing a price that is fair in today's market conditions.

17 The affidavit of the Applicant indicates that an offer of \$425,000 was received which the corporation could not accept in that it called for clear title and the corporation's title faced a registration of the certificate of *lis pendens*.

18 I am prepared to order that the *lis pendens* be discharged in completion of that offer or any bona fide arms length offer that reflects the market value of the property (and in making that comment I give leave to the parties to address this Court as to whether or not any such proposed offer is bona fide and for fair market value) by directing the removal of the certificate of *lis pendens* to complete the sale on the following basis:

- 1) that the expenses associated with the sale be paid out of the net sale price which would include a payment of any real estate commission or legal expenses associated with the conveyancing;
- 2) that out of the remaining sale proceeds there be paid to Cyclone the sum of \$225,000 which is the undisputed amount that was advanced by Cyclone or the parents of the Respondent's spouse on behalf of Cyclone to acquire the property;
- 3) that directs the remaining sale proceeds to be held in the trust account of the solicitors for the Applicant pending determination of the claim of interest by the Respondent.

19 I have been notified by counsel that there exists on the title a caveat filed by, I believe, the Royal Bank of Canada which is not reflected on the material in front of this Court but has subsequently been filed. I specifically direct that no amount of money will be paid to the Royal Bank of Canada claiming an interest pursuant to that caveat out of any proposed sale. Cyclone will have to make appropriate arrangements to clear that debt, if any, with the bank to permit the sale.

20 To the extent that no sale as ordered under these conditions is possible, the certificate of *lis pendens* will continue to reflect the claim of interest by the Respondent.

21 I make no direction at the present time relating to the commencement of an action or "*lis*" by the Respondent against Cyclone and/or its shareholders and directors.

22 The parties are at liberty to speak to me should they think a further application is necessary with respect to that matter or to proceed in front of any chambers judge.

23 It may be that the Applicant and his wife personally or Cyclone considers their interest in the disputed claims of the Respondent to be potentially at risk as a result of the matrimonial property dispute between the Respondent and her spouse. It may be that they feel their interest can only be protected if they have an opportunity to present their positions to a trial judge. To the extent that they wish to advance those interests they may need to be joined as parties to the matrimonial property action for that purpose. I do not specifically know of any precedent or rule that would allow that to happen, but I certainly think that the Court's general power to control its own operations would recognize that interest. On the other hand, it may be necessary for another action to be un-

dertaken to resolve those issues in dispute which would raise the questions of separation of the flow of the two actions or potential consolidation of them for trial.

24 I make no order with respect to any of those matters but, again, indicate that counsel are at leave to speak to this Court or any other to resolve the matters.

25 In the result, the Applicant has not been successful in the present application.

26 I will hear from counsel as to any submissions you have as to whether or not costs ought to follow the result or ought not to follow the result as the case may be and on what basis you think the Court should order costs.

27 MS. CASTLE: My Lord, I would respectfully submit to this court that this is a case that costs should follow the cause. I mean, should follow the decision.

28 It's been the Respondent's position that the CLP would be removed to allow the sale of the warehouse from the very beginning on similar terms. That money would be paid into court or paid into trust so that the sale could continue and all we wanted preserved would be the sum of \$174,000, and just based on your order alone that we would be securing approximately close to \$174,000 or maybe \$200,000 depends on what commissions or legal fees would be on those numbers.

29 That's been the proposal from the beginning; that proposal was put to Justice Forsyth. We ended up here. You've come up with the same proposal.

30 And I would submit that I just want to tell you that my client is in a hotly heated divorce and matrimonial property action, as well, I consider this a collateral attack. She has funded this. We've had cross-examination. There's been undertakings. There's been three court appearances and her legal fees on a solicitor/client basis are \$7,000. This woman's income is \$1,400 a month.

31 THE COURT: Are you saying that in relation to this present application?

32 MS. CASTLE: This action only. Her costs are substantial.

33 THE COURT: Thank you.

34 MS. CASTLE: The thing I would like to add is there is no clear case law but I have invited my friend to talk to practitioners; I have spoken to every family law practitioner on this point and they all felt I was within my entitlement to file a lis pendens on that property. I invited my friend on several occasions to convince me with case law, although I knew there wasn't any, that that position was a wrong position because my concern was a potential negligence action on my own part, and my client has ran with this lawsuit on my advice alone to leave the CLP on.

35 Her initial instructions to me were to remove it. Since then we have come to the tune of \$7,000 in legal fees, My Lord.

36 THE COURT: Thank you. Mr. Befus?

37 MR. BEFUS: Well, the fact of the matter is that there is no clear case law on this point. A lis pendens

comes out of the blue with no pleadings and I had invited my friend from the beginning, in fact, she advised me that she had drafted pleadings and done — but she wanted to have a ruling from the Court on this point of law. And I don't think it's — my client should be penalized because there's no clear law on this point and because my friend has wanted to have the point of law addressed by the Court.

38 On the other hand, my friend has been successful in this application so my submission an appropriate — would be leave costs in the cause.

39 THE COURT: Thank you, Mr. Befus.

40 I agree that the submission is that one cannot point to either party and say you ought not to be here.

41 I cannot direct my mind, in my view, to a consideration of penalty costs or costs on a solicitor/client basis. I do not feel that is appropriate in the circumstances.

42 The Respondent will have the costs of this application and all interim proceedings leading to it. In view of the success —

43 MS. CASTLE: What schedule, My Lord? What column, sorry?

44 THE COURT: That is exactly what I am thinking about. It used to be that matrimonial matters were considered to be Column 2. I do not think that is appropriate.

45 I am going to direct the costs be taxed on Column 4 of Schedule C plus all reasonable disbursements.

46 I am going to invite counsel to attempt to resolve those costs directly and invite you to consult with me in the event there is any dispute about the calculation of costs.

47 Thank you. My apologies to the Court Reporter and clerks for running on a little bit but it does free up the afternoon.

48 MS. CASTLE: Thank you, My Lord.

49 MR. BEFUS: Thank you, My Lord.

50 THE COURT: I further apologize. I did this beforehand in our private meeting, but I should have the record indicate my compliments to counsel on the briefs that you filed. It is an interesting point of law and I will submit further written reasons.

51 I would ask Madam Court Reporter to provide me with a copy of these reasons and I will arrange to have copies as well sent to counsel.

52 MR. BEFUS: Thank you, sir.

53 MS. CASTLE: Thank you, My Lord.

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