

Date: 19990706
Docket: A982775
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CARLA M. COURTENAY LAW CORPORATION

PLAINTIFF

AND:

PI [REDACTED] L [REDACTED] a.k.a. P [REDACTED] L [REDACTED]

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE LAMPERSON

Counsel for the Plaintiff: A. E. Thiele

Counsel for the Defendant: S. J. Bacha

Place and Date of Hearing: Vancouver, B.C.
April 16 & June 11, 1999

[1] The plaintiff seeks to recover \$35,912.93 for legal fees and disbursements incurred in bringing a *Family Relations Act* action ("F. action") and a constructive trust action ("C. action") for the defendant's wife, Mrs. M [REDACTED] L [REDACTED]. The F. action was against Mrs. L [REDACTED]'s husband, the defendant Mr. P [REDACTED] L [REDACTED], while the C. action was against Mr. P [REDACTED] L [REDACTED] and his two brothers. The C. action pertained to:

1. A Vancouver home located on Angus Drive in which Mr. [REDACTED] and Mrs. L [REDACTED] lived before separating. It is registered in the names of Mr. L [REDACTED]'s brothers; and
2. A home in London, England, registered in the names of Mr. P [REDACTED] L [REDACTED] and his two brothers and in which the couple lived during an earlier time of their marriage.

[2] The F. action was uncontested. After a hearing on January 9, 1997, Boyd J. ordered Mr. L [REDACTED] to pay Mrs. L [REDACTED] \$250,500 in full satisfaction of the F. action. On June 17, 1997, a Consent Dismissal Order of Boyd J.'s Judgment was filed in the Court Registry without being signed by or spoken to before a judge. It reads as follows:

No. F960272
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

M [REDACTED] L [REDACTED]

Plaintiff

And:

P [REDACTED] L [REDACTED] a.k.a. P [REDACTED] L [REDACTED]

Defendant

CONSENT DISMISSAL ORDER

THE 16TH DAY OF JUNE, 1997.

WHEREAS:

- A. All Parties have consented to this Order, and
- B. No person involved is under any legal disability;

THIS COURT ORDERS that the Order of Her Honour Master Brandeth-Gibbs pronounced September 6, 1996, and the Order of the Honourable Madam Justice Boyd pronounced January 9, 1997, be set aside.

THIS COURT FURTHER ORDERS that the within proceeding be dismissed without costs as if the same had been tried on its merits.

BY THE COURT

"Signature"

DEPUTY DISTRICT REGISTRAR

APPROVED AND CONSENTED TO:

"M [REDACTED] L [REDACTED]"
The Plaintiff

"P. [REDACTED]"
The Defendant

[3] Two issues emerge:

1. Was the Consent Order a conveyance of property made without consideration, secretly, in order to prevent Mrs. L [REDACTED]'s creditors from collecting monies owing to them, and therefore contrary to the **Fraudulent Conveyance Act** R.S.B.C. 1996, c. 163?
2. Can a Judgment of this Court, granted after a hearing, be dismissed without the matter coming before a judge of this Court?

[4] Mr. and Mrs. L [REDACTED] were married in 1969. They separated in April 1996 when Mr. L [REDACTED] left Vancouver to live in Uganda. During much of their marriage, Mr. and Mrs. L [REDACTED] lived in London, England, in a house owned by Mr. L [REDACTED] and his two brothers. That house is now worth £400,000 to £500,000. Mr. L [REDACTED] testified that while living in London he operated a jewellery store and speculated in the gold future market. This speculation led to debts in the sum of £150,000 which were ultimately paid by his brothers. They secured that sum with a promissory note in their favour signed by Mr. L [REDACTED]. Mrs. L [REDACTED] did not sign it. Since then the brothers have obtained a default judgment for that amount against Mr. L [REDACTED]. He claims this to be a family debt.

[5] In May 1996 Mrs. L [REDACTED] retained the plaintiff Ms. Courtenay, to commence both the F. action and the C. action. Because Mr. L [REDACTED]'s whereabouts was unknown, Ms. Courtenay served the pleadings on Mr. L [REDACTED]'s brothers pursuant to an Order for substituted service. In September 1996 Mrs. Courtenay obtained a Default Judgment in the F. action subject to quantification. When Ms. Courtenay learned that the London house was for sale, she obtained legal counsel in England and had her client's claim registered against the defendant's interest in the house. Following a hearing on January 9, 1997, Boyd J. determined that the amount owing to Mrs. L [REDACTED] under the *Family Relations Act* R.S.B.C. 1996, chap. 128, was \$250,500.

[6] Mr. L [REDACTED] filed an Appearance to the F. action on January 26th. Between January and May 1997, Ms. Courtenay tried to register the Judgment in England. This proved to be difficult because there were problems meeting the English Court's requirement to have Mr. L [REDACTED] served personally. Eventually substituted service was effected, and Boyd J.'s Order was registered as an Order of the English Court.

[7] Between May 7th and May 15th questions arose about Ms. Courtenay's retainer. She was instructed not to obtain a charging Order on Mr. L [REDACTED]'s interest in the London property and was told that her services were terminated. On June 17th Mrs. L [REDACTED]'s Notice of Intention to Act in Person, her

Affidavit, and the Consent Dismissal Order of Boyd J.'s Judgment was filed in the Court Registry.

[8] Ms. Courtenay rendered her account on June 10th and in July 1997 commenced an action against Mrs. L [REDACTED] for her fees. Ms. L [REDACTED] challenged Ms. Courtenay's account. However, the Registrar's hearing on the question of legal fees was adjourned at Mrs. L [REDACTED]'s request and never resumed. Ms. Courtenay continued trying to collect the monies owing to her. On June 10, 1998, Ms. L [REDACTED] made an assignment into bankruptcy. Her statement of affairs shows that she has no assets, receives no spousal maintenance, and is on social assistance. No reference is made to the fact that she had a Judgment in the sum of \$250,500. Ms. Courtenay, who is Mrs. L [REDACTED]'s only proven creditor, has been authorized to bring this action under s.38 of the *Bankruptcy Act and Insolvency Act* R.S.C. 1985, c. B-3.

[9] Apart from the foregoing chronology of events, the following factors cause concern. Mrs. L [REDACTED] had severe bouts of depression and was suicidal in the spring of 1997. Mr. L [REDACTED] visited Canada shortly after he learned of Boyd J.'s Order. According to him, Mrs. L [REDACTED] said that she was tired and wanted to end the litigation. Consequently, they agreed to a Consent Dismissal of the F. action and the discontinuance of the C. action. In return, Mr. L [REDACTED] promised to hold Mrs. L [REDACTED] harmless from her share of the £150,000 debt owing to

his brothers. It should be noted that she is not a signatory to the promissory note or named in the resulting judgment. Thus she may have no legal liability to her brothers-in-law.

[10] The London house is listed for sale at \$1.3 million Canadian. Mr. L [REDACTED] has a one-third interest in that house. Even though his interest in the house appears to exceed \$300,000 Canadian, she appears to be receiving nothing under the present arrangement.

[11] Mrs. L [REDACTED] did not testify. The circumstances of this case give rise to cause for concern that Mrs. L [REDACTED] may have been subjected to undue influence. There is no evidence that she obtained independent legal advice before she signed the Consent Dismissal Order and dismissed Ms. Courtenay who had represented her very effectively. There is also a serious question as to whether Mrs. L [REDACTED] received valid consideration for signing the Consent Dismissal. Furthermore, it is difficult to accept Mr. L [REDACTED]'s evidence that he knew nothing of Mrs. L [REDACTED]'s debt to the plaintiff. The circumstances are suspect. There are problems with Mr. L [REDACTED]'s credibility with respect to the central issues in this case because some of his evidence does not seem plausible. However, this Court cannot say that the agreement between Mr. and Mrs. L [REDACTED] was made to defeat the plaintiff's claim.

[12] Parties can agree to a consent dismissal of an action before a judgment is granted. However, once a judgment has been granted, the action is concluded. In order to set aside or vary a judgment, it is necessary to file a notice of motion and supporting affidavits which must be considered and ruled upon by a judge of this Court. This did not occur. Accordingly, the \$250,000 Judgment granted by Boyd J. still exists and is an asset of the bankrupt's estate. The plaintiff is to have the costs of this action.

"Lamperson J."

LAMPERSON J.