SUPREME COURT OF YUKON

Citation: *Snow v Sibbeston*, 2022 YKSC 72

Date: 20221219
S.C. No. 21-D5351
Registry: Whitehorse

BETWEEN:

MICHAEL JAMES SNOW

PLAINTIFF

AND

JANICE MARIE SIBBESTON

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff — Megan É. Whittle

Appearing on her own behalf — Janice Marie Sibbeston

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff, Michael Snow, and the defendant, Janice Sibbeston, were married on February 22, 2010, and stopped living together on August 10, 2020. They executed a separation agreement, (which they titled “Post-Nuptial Agreement”) on February 17, 2021, in which they divided up some of their assets and liabilities. Mr. Snow is now applying to court, requesting that the Agreement be set aside. Ms. Sibbeston also filed an application, asking the court to validate the Agreement. Both applications were heard at the same time.

[2] Mr. Snow says that the Agreement should be set aside because it is unconscionable or because of undue influence. Alternatively, he seeks that several provisions of the Agreement be set aside, that the parties be permitted to make a claim for equalization, and that he be able to retain one of the properties that was given to Ms. Sibbeston under the Agreement.

[3] Ms. Sibbeston says that the Agreement was discussed and agreed to by the parties, and that it is not unconscionable, nor did she unduly influence Mr. Snow.

[4] For the reasons below, I conclude that, for the most part, Ms. Sibbeston did not unduly influence Mr. Snow. However, I conclude there was some undue influence, and, as a result, the section of the Agreement providing Ms. Sibbeston additional equity in the family home should be set aside. I also conclude that the sections stating that the parties are to remain on several mortgages for four years should be set aside. Finally, I determine that there should be a declaration stating the Agreement does not bar a claim for equalization of assets not included in the Agreement.

LAW

[5] The law on the court's ability to review separation agreements is found both in legislation, under s. 2 of the *Family Property and Support Act*[1], and as developed through the decisions of *Miglin v Miglin*[2] and *Rick v Brandsema*[3]. Under the *FPSA*, the court may decline to give effect to a separation agreement when a party has used undue influence to secure the other party's agreement. Pursuant to *Miglin* and *Rick*, on the other hand, the test applied is a modified unconscionability test.[4]

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[1] RSY 2002, c 83 ("*FPSA*").
[2] 2003 SCC 24 ("*Miglin*").
[3] 2009 SCC 10 ("*Rick*").
[4] *Miglin* at para. 82; *Rick* at para. 43.

[6] As there is legislation in the Yukon that addresses the review of separation agreements, it is the legislation that applies. However, *Miglin* and *Rick* are still helpful, as they inform the analysis under the legislation.

[7] The concepts of "undue influence" and "unconscionability" are different but have the same purpose: to prevent a stronger party from taking unfair advantage of a weaker party, when coming to an agreement.[5] In some circumstances, the distinction between the concepts will be relevant,[6] however, on the facts of this case, the analysis is the same regardless of how the issue is characterized. Thus, although Mr. Snow primarily argued his case on the basis of unconscionability, his arguments apply equally to the question of undue influence. Moreover, I will use the phrase "undue influence", but will apply the legal principles of unconscionability almost in their entirety.

[8] Turning to the legal principles, when a party alleges undue influence regarding a separation agreement that concerns only property, the court will examine the agreement on both procedural and substantive grounds. Procedurally, it will examine whether there are concerns about the circumstances in which the agreement was negotiated and executed. Substantively, it will address whether the agreement is substantially consistent with the objectives of the governing legislation.[7]

ISSUES

[9] The issues are as follows:

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[5] *Uber Technologies Inc. v Heller*, 2020 SCC 16 at para. 155; *Geffen v Goodman Estate*, [1991] 2 SCR 353 at para. 23.
[6] For instance, under the undue influence test, a party may be able to establish that the presumption of undue influence applies.
[7] *Miglin* at paras. 80-81, 84.

a. Were the circumstances in which the Agreement was negotiated and executed proper?

b. If not, does the Agreement take into account the objectives of the legislation?

c. If the Agreement is not set aside, should the plaintiff be granted the alternative relief he is seeking?

ANALYSIS

a. Were the circumstances in which the Agreement was negotiated and executed proper?

[10] I conclude that, in general, there were no problems with the circumstances in which the Agreement was negotiated, except on one issue. I find Ms. Sibbeston misled Mr. Snow about the ownership of a property, leading Mr. Snow to agree to a term that states $147,000 was transferred from Ms. Sibbeston for the purchase of the family home.

[11] In looking at the circumstances surrounding the negotiation and execution of the agreement, the court will ask whether one party was vulnerable and whether the other party took advantage of the vulnerability. If so, then the conclusion is that the exploitative party unduly influenced the other party, and the agreement should be set aside, in whole or in part.[8]

[12] Undue influence may also arise where one party withholds financial information from the other party or misleads them when providing them financial information.[9]

[8] *Miglin* at para. 82.
[9] *Rick* at paras. 46-48.

[13] In the case at bar, Mr. Snow argues that the Agreement should be set aside because Ms. Sibbeston took advantage of his vulnerability and misled him when providing him with her financial information.

Was Mr. Snow vulnerable?

[14] I conclude that Mr. Snow was vulnerable.

[15] The determination of whether a party was vulnerable is fact specific. The court will not presume vulnerability on the basis of the emotional stress of a divorce or separation, as this is a normal experience amongst separating couples. Rather, the moving party must provide evidence to warrant the conclusion that they were vulnerable during the negotiation and execution of the agreement.[10]

[16] Here, Mr. Snow's evidence is that he and Ms. Sibbeston began negotiating the Agreement shortly after he had returned from treatment for his alcohol addiction. He was adjusting to life without alcohol and he was also stressed both by his job and the separation. Moreover, Mr. Snow was dealing with considerable guilt over his role in the marriage's demise, as he had been unfaithful to Ms. Sibbeston during their relationship. The parties were also attempting to reconcile, and I accept that Mr. Snow felt that he had to do all he could to save the marriage. In addition, Mr. Snow did not receive legal advice on the Agreement. These circumstances made Mr. Snow vulnerable.

Did Ms. Sibbeston use Mr. Snow's vulnerability to her advantage?

[17] To prove undue influence, Mr. Snow must show not only that he was vulnerable, but also that Ms. Sibbeston took advantage of his vulnerability. While I have found that

[10] *Miglin* at para. 82.

Mr. Snow was vulnerable, I am not convinced that Ms. Sibbeston exploited his vulnerability.

[18] Mr. Snow argues that Ms. Sibbeston knew that he was anxious to reconcile and used this to get him to sign the Agreement. Mr. Snow attests that Ms. Sibbeston told him that signing the Agreement was necessary to reconcile. He says that the texts between the parties during the time they were negotiating their separation, which were filed as evidence, show that Mr. Snow was the passive party, trying to appease Ms. Sibbeston.

[19] In addition, Mr. Snow attests that shortly after the parties signed the Agreement, he saw a text on Ms. Sibbeston's phone from her to the person she had been dating before she and Mr. Snow decided to reconcile. In it, she notes that the parties' daughter likes the person and that the pieces of the puzzle were falling into place. This, he submits, shows that Ms. Sibbeston was not interested in reconciling and that she was using the reconciliation as a pretext to get a better agreement for herself.

[20] In my opinion, the evidence does not show that Ms. Sibbeston exploited Mr. Snow's vulnerability. In my reading of the texts, Ms. Sibbeston is ambivalent about reconciling with Mr. Snow. Although she expresses that she continues to have feelings for Mr. Snow, she is very sensitive to the possibility that Mr. Snow will betray her once more, and that, contrary to his professions, he has not changed his ways. I see no evidence in the texts that Ms. Sibbeston was feigning an interest in reconciling to get an agreement that favoured her interests.

[21] Ms. Sibbeston also denies telling Mr. Snow that they could not reconcile unless he signed the Agreement. Ms. Sibbeston's statement that the pieces of the puzzle are

falling into place, while unexplained by her, could be about any number of things. As well, Ms. Sibbeston, like Mr. Snow, did not consult a lawyer. She therefore did not have an advantage on that basis.

[22] Finally, as Ms. Sibbeston points out, the parties continued to attempt to reconcile after they signed the Agreement on February 17, 2021, finally ending the relationship in mid-April. This suggests that Ms. Sibbeston was truly interested in reconciling and was not simply seeking a good agreement for herself.

[23] Thus, although Mr. Snow was vulnerable, I do not find that Ms. Sibbeston exploited Mr. Snow's vulnerability.

Did Ms. Sibbeston mislead Mr. Snow in the provision of financial information?

[24] Mr. Snow also alleges that Ms. Sibbeston unduly influenced him because she misled him about her ownership of a property, which caused him to agree to a term in the Agreement. Ms. Sibbeston says that Mr. Snow had all the correct information and she did not mislead him. I conclude that Ms. Sibbeston did mislead Mr. Snow.

[25] It is vital to provide full and honest disclosure of all relevant financial information during the negotiation of a separation agreement. Failure to do so can put the integrity of the negotiation process into question. As the Supreme Court of Canada stated:

> … An agreement based on full and honest disclosure is an agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.[11]

[26] However, not every defect in disclosure will serve to invalidate an agreement. The factors used to determine if an agreement should be set aside include: the extent of

[11] *Rick* at para. 48.

the problems in disclosure, the degree to which the lack of disclosure or misrepresentation was deliberate, and the extent to which the results depart from the goals of the relevant legislation.[12]

[27] An agreement will not be invalidated because of lack of financial disclosure if the party seeking invalidation failed to seek financial disclosure during the negotiation of the separation agreement. However, the party will not be held responsible for failing to question a deliberate material misrepresentation.[13]

[28] In the case at bar, neither party provided financial disclosure, and, for the most part, the assets are jointly owned by the parties. Thus, either party could have accessed the information about their properties at anytime. The lack of financial disclosure is not fatal to the Agreement.

[29] There, is, however, one exception. A term of the Agreement states:

> The family home […] shall be recognized as holding $147,000 of equity from the sale of 15 Dieppe Drive which was an asset of Janice Marie Sibbeston prior to the marriage of Michael Snow and Janice Sibbeston.

[30] As background, 15 Dieppe Drive was the house in which Ms. Sibbeston lived when she met Mr. Snow. It was sold in 2011. However, Janice Sibbeston never owned 15 Dieppe Drive, rather, her parents were on title. Ms. Sibbeston attests that, from the beginning of her relationship with Mr. Snow, she was open and candid that her parents always owned the property, but that the equity in the house was paid for by Ms. Sibbeston. An email from her father attached as an exhibit to Ms. Sibbeston's

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[12] *Rick* at para. 49.
[13] *Virc v Blair*, 2014 ONCA 392 at paras. 58, 62.

affidavit states that Mr. Snow "would have known" that he and Ms. Sibbeston's mother were title holders when they refinanced the house in 2010.

[31] Mr. Snow denies that Ms. Sibbeston told him that her parents were on title and says that he was not involved in refinancing the home. He attests that Ms. Sibbeston misrepresented to him that she owned 15 Dieppe Drive.

[32] Ms. Sibbeston had the obligation to ensure that the financial information she gave Mr. Snow was complete and accurate. Ms. Sibbeston's parents purchased the home before Ms. Sibbeston and Mr. Snow met, and was sold many years ago. Ms. Sibbeston's evidence, at best, is that the financial information was provided during conversations that may have occurred over a decade ago. This is not sufficient to meet Ms. Sibbeston's disclosure obligations.

[33] Moreover, Ms. Sibbeston does not explain why the Agreement states that 15 Dieppe Drive was her asset, when it was owned by her parents.

[34] I find that Ms. Sibbeston did not meet her disclosure obligations and it played a role in Mr. Snow's decision to agree to a term of the Agreement.

[35] The term is also inconsistent with the objectives of the *FPSA*. The objective of the legislation is to divide parties' assets in a fair manner. The legislation recognizes that, in marriage, spouses make joint contributions to the family. Those contributions encompass labour and sacrifices parties make, as well as financial contributions. Because marriage is a joint endeavour, where each party contributes to the relationship, the presumption is that an equal division of the assets is what is fair.[14]

[14] *FPSA* s. 6(1).

[36] The impugned term deals with only one asset, but it is a significant asset, and does not meet the objective of dividing assets equally. Given this and given that Mr. Snow was misled about the ownership of 15 Dieppe Drive, I conclude this term should be set aside.

[37] Other than that term, however, I find that Ms. Sibbeston did not unduly influence Mr. Snow. The circumstances of negotiation were not ideal: the parties did not consult with legal counsel, nor did they have complete financial information. However, both parties made that choice. While Mr. Snow was vulnerable for other reasons, Ms. Sibbeston did not take advantage of his vulnerability. The circumstances of the negotiation and execution of the Agreement are adequate.

b. Does the Agreement comply with the objectives of the legislation?

[38] I conclude that, once the term about the family home is removed, the Agreement mostly complies with the objectives of the legislation. However, one term which requires both parties to remain on several mortgages for up to four years, should be set aside.

[39] The Agreement covers some of the parties' assets and liabilities. It does not address spousal support, child support, or the division of all assets and liabilities. Because the Agreement is about the transfer of property and debts, the *FPSA* applies. The objectives stated above, that is, that the assets should be divided fairly, and that presumptively they should be divided equally, is at play. In addition, there are other legislative objectives that apply. The *FPSA* stipulates that, where an issue is dealt with both in the *FPSA* and in a separation agreement, absent undue influence, the separation agreement prevails.[15] One of the *FPSA*'s objectives, therefore, is to

[15]s. 2(1).

encourage parties to settle their affairs and to grant them the autonomy to settle them as they see fit. Finally, the *FPSA*'s overarching objective is to achieve finality in the distribution of property between separating couples.

[40] A separation agreement will be upheld if it is in substantial compliance with the objectives of the legislation. The separation agreement is not required to mirror the results that would be achieved in court: an agreement may respond to the needs of the parties that are outside the narrow factors a court can consider. It will only be set aside if the agreement departs significantly from the objectives of the legislation.[16]

[41] The properties included in the Agreement are six properties the parties owned as part of their business, most of which are used to generate rental income, as well as some liabilities. Under the Agreement, each party retains three properties and is responsible for payment of the mortgages on those properties. However, the parties are also required to remain on the mortgages of the properties for up to four years, and in that time the other party is to refinance their retained properties in their own names. I will consider both whether the terms addressing division of the properties and the term requiring the parties to remain on the mortgages for up to four years, are consistent with the legislation.

Are the provisions for division of the properties and liabilities consistent with the legislation?

[42] Mr. Snow obtained a valuation of all the properties. He calculates that, if the Agreement is upheld, with the properties and debts divided, he would receive 37% and Ms. Snow would receive 63% of the net property covered by the Agreement. In addition,

[16] *Miglin* at paras. 84-86.

he would receive an equalization payment of $75,628.39. He says that this division of assets does not correspond to the objectives of the legislation.

[43] Ms. Sibbeston says that parties considered the cashflow from the properties when dividing them. Ms. Sibbeston would have two units she could rent out, while Mr. Snow would have five units he could rent. Mr. Snow disputes that he is in a better position on the issue of cashflow.

[44] Overall, a 63/37 partial division of assets, even without equalization, does not depart significantly from the objective of the legislation. It is not exactly equal, but it is not required that parties reach absolute parity in an agreement. Moreover, while Mr. Snow does not agree that the cashflow benefits him, it is a factor Ms. Sibbeston took into account in the negotiations and is a factor that parties can consider, even if courts do not. The agreement is in substantial compliance with the legislation on this issue.

Are the provisions for remaining on the mortgages consistent with the legislation?

[45] Mr. Snow also argues that it would not be in accordance with the objectives of the legislation that he remain on several mortgages. He may become liable for mortgages of properties over which he does not own or control if Ms. Sibbeston stops paying the mortgages. In addition, as he has his name on five mortgages, he cannot buy a home for himself. Ms. Sibbeston says that keeping both parties' names on the mortgages allows her to pay off the line of credit before refinancing the mortgages, thus putting her in a better position for refinancing.

[46] In my opinion, this term runs counter to the objectives of the legislation. It prevents the parties from becoming autonomous from each other, puts off a final

separation of the parties' finances, and creates a potential for further conflict and litigation. While Ms. Sibbeston attests that it would be more favourable to her to keep the term in place, it does not appear to be a linchpin without which the Agreement will fall apart. While the rest of the Agreement substantially complies with the objectives of the legislation, this term departs significantly from the legislation's objectives. It should be set aside.

c. Should the plaintiff be granted the alternative relief he is seeking?

[47] The plaintiff seeks that if the Agreement is not set aside, that he be granted the following relief:

- a declaration that the Agreement does not bar a claim for an equalization payment under the *FPSA*;
- the sections requiring the parties to remain on the mortgages for four years be struck;
- the provision providing the defendant $147,000 of additional equity in the family home be struck; and
- that the plaintiff be entitled to retain one of the real properties located in the Yukon.

[48] I have found that the terms requiring the parties remain on the mortgages for four years and providing the defendant with $147,000 additional equity in the family home should be set aside. Because I have concluded that the Agreement substantially complies with the objectives of the legislation, I decline to permit Mr. Snow to retain one of the real properties located in the Yukon. The question remaining is whether I should grant a declaration that the Agreement does not bar a claim for an equalization payment

under the *FPSA*. I find that the Agreement implicitly bars a claim for equalization of the value of the properties and liabilities covered in the Agreement. I find that it does not bar a claim for equalization of the remaining assets.

[49] As there are still assets and liabilities left to be divided, part of the answer to the plaintiff's request is clear: both parties are entitled to make a claim for an equalization payment on the assets that are not part of the Agreement.

[50] The more difficult issue is whether the parties intended there should be no equalization claim on the properties in the Agreement. It seems to me that, reading the contract as a whole, the parties intended for the Agreement to be the complete agreement on the assets and liabilities enumerated within it, aside from the term concerning the family home. This is suggested by the statement at the beginning of the Agreement, which states: "The above parties agree to divide the assets of their partnership company called "Snow Den Properties" in a manner as follows …" As the rest of the contract describes who the properties will belong to, that they are responsible for the associated liabilities, and when transfer of responsibility of the property is to occur, it is meant be a final determination of the rights of the parties to the properties. Thus, the parties did not intend for equalization to follow the exchange of properties, and I decline to make the declaration on the properties included in the Agreement.

CONCLUSION

[51] I therefore order that the provisions of the Agreement requiring the parties to remain on the mortgages for four years shall be set aside; and that the provision providing the defendant with $147,000 of additional equity in the family home, shall be

set aside. I also declare that the Agreement does not bar a claim for an equalization payment of assets not included in the Agreement.

[52] The defendant seeks, essentially, that I declare the Agreement to be valid. This is unnecessary. The Agreement, other than as identified above, is enforceable.

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WENCKEBACH J.