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— Franks & Zalev - This Week in Family Law

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Contents

That's a Pretty Nice (Corporate) Veil You're Not Wearing . . .

Jamieson v. Jamieson, 2020 CarswellOnt 16743 (S.C.J.) - Kurz J.

In the summer of 2020, Justice Kurz issued a decision in the uncontested trial of this matter. Although served, the husband never filed an Answer or a Financial Statement, and he never provided any financial disclosure.

In his initial reasons, his Honour found that the husband had full control over the assets of a corporation, Anexxa Tech. In summary, it was found that:

> • The husband had full control of the assets of the corporation, including two bank accounts, some investment accounts and some real properties.
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> • The husband had treated the assets of the corporation as his own, often running personal expenses through the company.
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> • The real properties were worth something in the range of $2.2 million, without encumbrances, and could earn over $100,000 a year in rental income.

Perhaps the husband thought that his corporate assets were "untouchable." He was wrong.

Justice Kurz requested further submissions on the issue of piercing the corporate veil of the corporation in order to allow the wife to enforce his Order through the seizure of the assets of the corporation. The wife answered his Honour's request.

In his additional reasons, Justice Kurz found that the husband treated the corporation not as a separate entity - but as an extension of himself, his "alter ego" - including by trying to shelter assets within the corporation and having the corporation pay his personal expenses.

Justice Kurz first considered whether the corporation had notice of the proceeding. In *Wildman v. Wildman* (2006), 33 R.F.L. (6th) 237 (Ont. C.A.), Justice MacPherson (for a unanimous Court of Appeal) held that separate service on a corporate alter ego was not necessary. As a reminder:

> [47] The appellant makes one other argument on the corporate veil issue. He contends that the trial judge erred by making orders against the appellant's companies because the companies were not named as parties and, therefore, had no notice of the matrimonial litigation.

> [48] I disagree. This is matrimonial litigation, not commercial litigation. Importantly, the record establishes that the appellant and his companies are one and the same. No third party has any interest in any of the companies. The appellant was given notice of the proceedings and thus, the companies, his alter ego, were also given notice.
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> [49] In the end, although a business person is entitled to create corporate structures and relationships for valid business, tax and other reasons, the law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law. In appropriate cases, piercing the corporate veil of one spouse's business enterprises may be an essential mechanism for ensuring that the other spouse and children of the marriage receive the financial support to which, by law, they are entitled. The trial judge was correct to recognize that this was such a case.

[See also *Lynch v. Segal* (2006), 33 R.F.L. (6th) 279 (Ont. C.A.)]

Justice Kurz found that the corporation had notice of the proceeding, as the husband had notice of the proceeding, and the corporation was the husband's "alter ego".

Justice Kurz then considered whether to pierce the corporate veil. In *Wildman*, the Court of Appeal found that, to successfully pierce the corporate veil, the claimant must establish:

> 1. The individual exercised complete control of finances, policy, and business practices of the company.
>
> 2. That control must have been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights.
>
> 3. The misconduct must be the reason for the third party's injury or loss.

In family cases, a more flexible approach is appropriate, particularly where, as in this case, the corporation in question is completely controlled by one spouse and where no third parties are involved. [That said, sometimes the presence of third parties also does not matter: *Aubin v. Petrone* (2020), 40 R.F.L. (8th) 26 (Alta. C.A.).]

On the facts before him, Justice Kurz had little trouble finding that the strictures of *Wildman* had been met. The husband exercised complete domination over the company, and had used that control to shield him from the wife's claims. If the corporate veil was maintained, the wife would continue to suffer losses because it would be impossible for her to enforce the Order.

Justice Kurz then considered his jurisdiction to grant a vesting order over corporate assets to enforce compliance with the Order, *even where that relief had not been specifically pleaded*. On considering the authorities, his Honour found that he had the jurisdiction to issue a vesting order and that he should do so in the facts of this case.

In Ontario, the jurisdiction to grant a vesting order starts with s. 100 of the *Courts of Justice Act*: A court may by order vest in any person an interest in real or personal property that the court has the authority to order be disposed of, encumbered or conveyed. Sections 9(1)(d) and 34(1)(c) of the *Family Law Act* then provide that the court can issue a vesting order to satisfy a property or support obligation.

In *Lynch*, the Court of Appeal explained the rationale for a vesting order and the very broad judicial power involved:

> [31] The rationale for the vesting power, therefore, is to permit the court to direct the parties to deal with property in accordance with the judgment of the court. The jurisdiction is quite elastic. Nothing in the language of either section 100 of the *Courts of Justice Act* or section 34(1)(c) of the *Family Law Act* operates to constrain the flexible discretionary nature of the power.

At paras. 32 and 33 of *Lynch*, the Court of Appeal set out the test for granting a vesting order:

> 1. There must be a payment liability owed to the spouse seeking a vesting order by the spouse sought to be subject to that order.

2. The vesting order must be necessary to ensure compliance with the obligation.

3. There must be some reasonable relationship between the value of the asset to be transferred and the amount of the targeted spouse's liability; and

4. The interests of any competing execution creditors or encumbrancers with exigible claims against the specific property in question must not be an impediment to the granting of a vesting order.

Again, his Honour found that this test was clearly met on the facts before him.

And what of the fact that a vesting order had not been pleaded?

In *Frick v. Frick* (2016), 91 R.F.L. (7th) 129 (Ont. C.A.), Justice Benotto (for a unanimous Ontario Court of Appeal) clarified that the *Family Law Rules* for pleadings in family cases are different from those in the *Rules of Civil Procedure*. Unlike the *Rules of Civil Procedure*, the *Family Law Rules* do not require a concise statement of material facts - because parties often do *not* have full disclosure when pleadings are first drafted. Instead, the *Family Law Rules* include strict disclosure obligations.

A family law vesting order is not a substantive one; rather, it is more akin to an enforcement order. And this was not the first time a court had considered granting a vesting order even though that specific relief had not been pleaded. [See *Vetro v. Vetro*, 2013 CarswellOnt 5400 (C.A.), for example, where the Court of Appeal allowed for a vesting order that had been first requested at trial.] The real question seems to be whether or not any unfairness resulted from the request.

Here, having wholly abandoned his right to participate in the proceeding, the husband could hardly claim any "unfairness" in the wife actually getting what had been ordered. Here, it was clear that there was a solid basis for a vesting order and that there was no prejudice to the husband in the wife not originally pleading that relief. In fact, the only possible "prejudice" to the husband would be that the wife could actually enforce the order of the Court - and it would be a neat trick to suggest that was prejudicial to him.

As a result, Justice Kurz ordered the institutions where the corporate accounts were held to liquidate and transfer a total of $1.7 million to the wife. And, for good measure, his Honour ordered the husband to pay costs of $21,500 - to be enforced against the assets of the company. Boom. Mic drop. End of story.

Settlement Privilege Rides Again

Phoa v. Ley, 2020 CarswellAlta 894 (C.A.) - Martin, Strekaf and Antonio JJ.A.

Settlement privilege is important.

It protects from disclosure to the court not only formal settlement offers, but all settlement discussions and communications in furtherance of settlement or compromise when litigation exists or is within reasonable contemplation. Like solicitor-client privilege, it is a blanket privilege - if the communication was made in furtherance of settlement, the communication is privileged; there is no "weighing" of different interests involved (and there are only limited exceptions as noted below): *Middelkamp v. Fraser Valley Real Estate Board*, 1992 CarswellBC 267 (C.A.); *Brown v. Cape Breton (Regional Municipality)*, 2011 CarswellNS 186 (C.A.); *Inter-Leasing Inc. v. Ontario (Minister of Finance)*, 2009 CarswellOnt 6920 (Div. Ct.); *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 CarswellNS 428 (S.C.C.); *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 CarswellAlta 76 (C.A.); and *Bombardier inc. c. Union Carbide Canada inc.*, 2014 CarswellQue 3600 (S.C.C.).

The settlement privilege belongs to *both* parties. It cannot - **cannot** - be waived unilaterally. This means that not only is a party not free to disclose to the court an offer that a party received in court materials; but that party also cannot disclose their own settlement offers in court materials - as the other side may then feel unfairly compelled to put their own settlement offers or positions before the court.

And, while we're at it, let's be clear about this as well: there is no such thing as a "with prejudice" settlement offer. Just as marking something "without prejudice" does not mean that the communication is, in fact, without prejudice, marking a settlement offer "with prejudice" does not remove the jointly-held privilege. In fact, it is inappropriate to label a settlement proposal as being "with prejudice": *Leonardis v. Leonardis* (2003), 43 R.F.L. (5th) 144 (Alta. Q.B.); *1021018 Alberta Ltd. v. Bazinet*, 2015 CarswellAlta 439 (Q.B.). Who would ever engage in settlement discussions if those discussions could be freely presented in court (save, of course, for costs)?

Increasingly, we are seeing situations where parties put settlement discussions or offers before the court for purposes other than when dealing with costs, and courts should discourage the wanton breach of settlement privilege. There should be cost consequences.

We have company in our devotion to settlement privilege: the Alberta Court of Appeal.

Phoa v. Ley involved an allegation of trust over shares of a company in Singapore. There were allegations of breach of fiduciary duty, breach of trust, and fraud in relation to the shares allegedly held in trust.

The defendants challenged the jurisdiction of the Alberta Court, claiming that Singapore was the proper forum. In response, the plaintiff swore an affidavit referring to certain communications between the parties. Attached as exhibits to the affidavit were letters and email correspondence evidencing the communications.

The defendants applied to strike portions of the plaintiff's affidavit on the basis the communications were subject to settlement privilege and inadmissible. The Chambers Judge allowed the application and struck parts of the affidavit and the associated exhibits.

The plaintiff appealed.

The Court of Appeal affirmed that settlement privilege protects communications where: (1) there is a litigious dispute in existence or within contemplation; (2) the communication is made with the express or implied intention that it would not be disclosed to the court in the event negotiations fail; and (3) the purpose of the communication is an attempt to effect a settlement. And, the rationale underlying settlement privilege was explained in *Bellatrix*, at para. 21:

> Settlement privilege is premised on the public policy goal of encouraging the settlement of disputes without the need to resort to litigation. It allows parties to freely discuss and offer terms of settlement in an attempt to reach a compromise. Because an admission of liability is often implicit as part of settlement negotiations, the rule ensures that communications made in the course of settlement negotiations are generally not admitted into evidence. Otherwise, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes.

The plaintiff's main argument was that the documents in issue did not contain any element of compromise, but were really just "statements of position." However, considering the documents in context, the Court of Appeal agreed that the documents in question were "written in an effort to settle the dispute" and "containing settlement offers and positions."

The plaintiff also argued that the documents fell within the exceptions to settlement privilege. There are exceptions to the privilege when "a competing public interest outweighs the public interest in encouraging settlement": *Sable* at para. 19. The generally recognized exceptions to settlement privilege were identified in *Bellatrix* at para. 29:

1. To prevent double recovery;

2. Where the communications are unlawful, containing, for example, threats or fraud;

3. To prove that a settlement was reached, or to determine the exact terms of the settlement; and

4. In claiming costs.

All of the exceptions are to be construed narrowly.

Here, the Court of Appeal agreed with the Chambers Judge that the plaintiff's claim was not that "the communications themselves constitute a fraud or are an essential part of a larger fraud", but that "the existence of settlement offers can be proven in order to prove fraudulent acts" - and that did not fall within the fraud exception. Rather, the fraud exception applies to the communication itself - "where the communications are unlawful, containing for example, threats or fraud."

The Court of Appeal also emphasized that the privilege prevents disclosure of privileged documents not only to the trial judge, but also on interim motions.

Finally, where portions of a document are arguably not subject to settlement privilege, the court should not have to parse the documents into privileged and non-privileged portions. As the Alberta Court of Appeal noted in *Bellatrix* at para. 27:

> It is to be remembered that the rationale for the privilege is not limited to the notion that it would be unfair to subsequently prejudice one of the parties by admitting any admissions made during settlement negotiations. The rule is also intended to allow parties to freely and openly discuss the potential for a settlement, and while doing so, the parties should not have to carefully monitor the content of their discussions. As noted by Lord Walker in *Unilever Plc v. Procter & Gamble Co.* (1999), [2001] 1 All E.R. 783 (Eng. C.A.) at para 35, (1999), [2000] 1 W.L.R. 2436 (Eng. C.A.):
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> > the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties.

That is, the privilege is not meant only to be limited to the prejudice that an admission may have at trial - but on the potential impairment on settlement discussions as an important element of the litigation process. For the privilege to operate properly, not only must the ambit of the settlement privilege be broad, but the exceptions narrowly construed, and only given effect where another policy objective is more important - that of enforcing settlement, for example.

As a result, the appeal was dismissed.

Security for Judgment? Interesting . . .

Wiseau Studio, LLC v. Harper, 2021 CarswellOnt 377 (C.A.) - Thorburn J.A.

This is obviously not a family law decision; but it certainly may be of use to family law lawyers.

Everyone has "those cases." The ones where the responding party is difficult, recalcitrant, and impossible to deal with. They do all they can to obfuscate and delay. They set up roadblocks. They do not pay interlocutory costs orders against them. They just do not play by the rules.

And the conduct does not stop after trial. Then come the appeals, the motions to reconsider, the motions to change, and the variation applications. Again - one of "those" cases.

Sure, one can bring a motion for security for costs for any appeal(s). But what about the actual money judgment that has been stayed on account of the appeal(s)? Wouldn't it be nice for the difficult, recalcitrant and rule-bending party to have to actually secure the actual judgment owing before proceeding with these other steps?

This is an extraordinary remedy that has been used sparingly in British Columbia and Alberta, but only very rarely in family cases [see *Hamza v. Hamza* (1997), 29 R.F.L. (4th) 460 (Alta. C.A.)].

On this motion before Justice Thorburn of the Ontario Court of Appeal, the moving parties ("Harper") brought a motion for security for the trial judgment ($775,000) and for the costs of the trial judgment ($480,000). (The motion was also for security for costs of the appeal, but we are focussing on the motion for security for the trial judgement.)

The facts and recounts of inappropriate litigation behaviour are lengthy but entertaining (see footnote 2 below). Briefly summarized, in 2003, the responding party ("Wiseau") released a feature motion picture called "The Room." The movie is widely considered to have been the worst movie ever made in the history of film. It was so bad, in fact, that it acquired a cult following. Think "Rocky Horror Picture Show." The making of The Room was also made into a very funny movie called "The Disaster Artist".

Harper et al. were documentary filmmakers. In 2016, they finished a documentary called "Room Full of Spoons" [1] about the cult-phenomenon of The Room.

Wiseau brought a claim against Harper in 2017 in an effort to prevent the release of the documentary, and was successful in getting an *ex parte* injunction restraining the release of the documentary. [2]

When the injunction was dissolved, Harper was awarded substantial indemnity costs of $97,000.

Wiseau only paid the costs order (almost a year after it was made) after the Court warned that his claim would be dismissed if the costs were not paid.

Wiseau then delayed and set up roadblock-after-roadblock to actually getting the case to trial. The Case Management Judge specifically found that Wiseau had set up "roadblocks to scheduling at almost every attendance" and other improper acts. It was also determined that Wiseau had engaged in other outrageous conduct in getting the matter to trial. Wiseau's claims were dismissed at trial. Harper was awarded $200,000 in punitive damages (largely for litigation misconduct); $550,000 USD in damages (on account of the improper *ex parte* injunction); about $25,000 USD in pre-judgment interest, and $480,000 in costs.

Wiseau then tried to vary the judgment, suggesting that the reasons were based on "misleading evidence." This was found to be further evidence of the fact that Wiseau would do anything to delay. Wiseau also raised public complaints about the Ontario justice system, suggesting that he did not get "justice" as a foreign litigant in Ontario (the jurisdiction where he chose to commence his claim).

Wiseau then refused to attend an examination in aid of execution and he ignored court orders compelling his attendance to provide information about his assets.

Wiseau, through counsel, also suggested that as the bulk of his assets were located in the United States, Harper would have to convince a U.S. court to patriate the Ontario judgment. This "taunt" was probably not such a good idea.

Wiseau appealed the trial judgement, using a Notice of Appeal that was wholly bereft of meaningful grounds of appeal.

On the motion for security, Harper argued that Wiseau had made it abundantly clear, by his own conduct, that he would not voluntarily pay any order of the Ontario courts.

Wiseau claimed that he was entitled to appeal the judgment below, to "due process", and to all the usual protections afforded to a judgment debtor. Wiseau argued that, to allow Harper to obtain information about his assets would constitute execution before final judgment, and that there was a reason that an order for security for judgment had never been granted in Ontario.

Considering the issue of security for costs of the trial judgment, Justice Thorburn looked to s. 134(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43: "On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal." Rule 1.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, then provides that, "[w]hen making an order under these rules the court may impose such terms and give such directions as are just." Those provisions are clearly very broad.

Based on the broad jurisdiction provided in the *Courts of Justice Act* and the *Rules of Civil Procedure*, Justice Thorburn concluded that the requested relief was, indeed, permissible. However, following the lead of other jurisdictions that have a history of granting such relief, she found that security for judgment is an extraordinary remedy that should only be granted in exceptional circumstances: *Vaillancourt v. Carter*, 2017 CarswellAlta 2570 (C.A.) at para. 20; and *Hamza*, at para. 24.

As such an order would require an appellant to post security for judgment before continuing with the appeal, it functions somewhat like a *Mareva* injunction, restraining the appellant from disposing of assets so as to ensure they are available to satisfy the judgment should the appeal be dismissed. If the security is ordered and not posted, the appeal is dismissed: *Vaillancourt* at para. 20.

Notably, security for judgment has been granted in other jurisdictions for varying reasons, all of which appear to be relevant to family cases in some situations:

1. Where there are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit (*Vaccaro v. Twin Cities Power-Canada, U.L.C.*, 2013 CarswellAlta 1177 (C.A.) at para. 11; *Creative Salmon Co. v. Staniford*, 2007 CarswellBC 1062 (C.A. [In Chambers]) at paras. 12 and 14; *Richland Construction Inc. v. Manningwa Developments Inc.*, 1996 CarswellBC 1767 (C.A. [In Chambers]) at paras. 13-14);

2. To preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute: *Aetna Financial Services Ltd. v. Feigelman*, 1985 CarswellMan 19 (S.C.C.) at p. 12); and

3. To encourage respect for the judicial process and avoid abuse of process (*Hamza* at para. 23, citing *Mooney v. Orr*, 1994 CarswellBC 26 (S.C.) at para. 50; *Vaccaro* at paras. 12-14; and in respect of *Mareva* injunctions, *Aetna Financial* at pp. 13-14).

Sound familiar?

In *First Majestic Silver Corp. v. Santos*, 2013 CarswellBC 1947 (C.A.), the Court invoked s. 10(2)(b) of the British Columbia *Court of Appeal Act*, R.S.B.C. 1996, c. 77, a provision with similar wording to that of s. 134 of the Ontario *Courts of Justice Act*, and set out the following principles governing the exercise of discretion in ordering security for a trial judgment:

1. The onus is on the applicant to show that it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs.

2. The applicant must show prejudice if the order is not made.

3. In determining the interests of justice, the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.

The interests of justice may include a consideration of the *ex juris* residence of an appellant and therefore the effective immunity of an appellant from enforcement of the judgment. They may also include a consideration of the ability to enforce the judgment in the appellant's *ex juris* jurisdiction and/or the absence of assets in the jurisdiction in which the judgment was rendered.

The interests of justice may *not* be relied upon by a successful plaintiff where the effect of requiring the posting of security for a trial judgment would be to preclude a party from pursuing the appeal: *Shandro Dixon Edgson v. Kedia*, 2007 CarswellBC 1253 (C.A. [In Chambers]). However, adverse financial circumstances will generally not defeat an application for security where an appeal is virtually without merit. A finding that an appeal has no reasonable prospect of success may be a factor, and a successful plaintiff should not be required to respond to an unmeritorious appeal when there is no real prospect of recovery.

Her Honour determined this to be one of those rare and exceptional circumstances where an order for security for judgment is warranted.

Wiseau was resident in the United States, and there had been some suggestion that the claim had been started in Ontario for the specific purpose of making execution difficult. He had repeatedly failed to provide any information on his assets, and the reasonable inference was that Wiseau had no assets in Canada. Furthermore, he had sufficient assets to post security without jeopardizing his ability to pursue the appeal. Therefore, the interest of justice requirement was met.

There was also sufficient evidence of prejudice to Harper if the award was not granted. Justice Thorburn was satisfied that absent this order, Harper may never actually recover on the judgment. The fact that Wiseau had a history of ignoring the *Rules of Civil Procedure* and previous orders (like the previous costs order) supported this.

Finally, her Honour found the Notice of Appeal, as drafted, to be frivolous, and articulated no significant errors of fact or law.

As a result, the Court of Appeal ordered that Wiseau post security for the trial judgment of $200,000 and sufficient Canadian currency to purchase $575,488.36 USD.

It is easy to see how this sort of rare security award may be of use in certain family cases across Canada, especially those with a multi-jurisdictional element. Again, it is not for every case or for every appeal; in fact it is not for every "hard" case or hard appeal. But it is certainly nice to know that another Canadian appellate court has now adopted the idea of security for judgment for when it is actually needed.

Footnotes

1 Named for a scene in the movie in which a room is decorated with store-bought framed pictures of spoons - thought to be the stock photos included with the frames that were simply never replaced before shooting.

2 Justice Koehnen's judgment setting aside the *ex parte* order for failing to make full disclosure recants much of the entertaining back story and offers a good lesson in how to ***not*** move for an *ex parte* injunction: *Wiseau Studio, LLC v. Harper*, 2021 CarswellOnt 377 (C.A.).