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— Franks & Zalev - This Week in Family Law

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Contents

A Tale of Two Sales: It Was the Best of Times; It Was the Worst of Times

The matrimonial home is often seen as the "crown jewel" of the marital relationship, and both spouses will often jockey for position to be the ultimate owner of the home — or to make sure that the other spouse cannot be the ultimate owner. These two cases offer two such stories, but with different results.

***W.Z. v. L.K. et al* (2021), 55 R.F.L. (8th) 34 (Ont. S.C.J.) — MacPherson J.**

In *W.Z.*, the parties separated in January 2018, and the Respondent/wife moved out of the matrimonial home. The Applicant/husband and the child continued living in the home (and still lived there at the time of the motion).

At the return of a motion in March 2020, the parties entered into a Consent Order which included the following terms:

> 1. The matrimonial home would be listed for sale by a mutually agreed listing agent;
>
> 2. The list price would be as recommended by the agent; the listing period would be for 60 days; and the listing agreement would be executed by both parties;
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> 3. The listing agent would recommend a real estate lawyer;
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> 4. The net proceeds of the sale of the matrimonial home would be held in trust after satisfying the encumbrances, commissions and legal fees;
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> 5. Until closing the parties would continue to pay their equal share of the mortgage payments; and
>
> 6. **The parties were free to make an offer to purchase the other's interest in the home before it was listed for sale. If either party made an offer to purchase the other's interest *after* listing, there would be no right of first refusal.** [emphasis added]

Although the parties agreed on a listing agent, there were significant delays in listing the property as a result of COVID-19.

In October of 2020, the home was listed for $1,275,000.

On November 5, 2020, the parties received an offer to purchase the property from "Mr. K." The offer was for $1,180,000 and was conditional on financing and inspection. There were verbal indications that Mr. K would increase his offer to $1,280,000.

The husband said he wanted to accept the offer, but the wife did not. Through counsel, the wife verbally offered to match Mr. K's offer, but the parties could not reach an agreement.

On November 7, 2020, the parties received another offer. This offer was from 2782708 Ontario Inc., and was for $1,285,000 without any conditions.

The husband was suspicious. He had his lawyer run a corporate search, which identified the registered head office and the name of the owner of the company. The husband was satisfied that the results of the corporate search showed that the purchaser was an arm's length third party, and signed the Agreement of Purchase and Sale. The wife signed it as well. The closing date was March 16, 2021.

There were some errors on the executed Agreement of Purchase and Sale. Although all parties at the motion agreed that the errors were "honest mistakes", one of them, in particular, sure seems "fishy" to us.

- The purchase price was listed as $50,000 (which was to be the deposit);
- The deposit was listed as $1,285,000 (which was to be the purchase price); and
- The numbered company was listed as 278**0**708 (which should have been 278**2**708).

To remedy the errors all parties to the Agreement of Purchase and Sale executed an amendment. The amendment corrected the three errors:

- The purchase price was changed from $50,000 to $1,285,000;
- The deposit was changed from $1,285,000 to $50,000; and
- The numbered company was changed from 278**0**708 to 278**2**708.

On December 3, 2020, after the amendments to the Agreement of Purchase and Sale were initialed, the husband asked his lawyer to complete a new corporate search. If you cannot guess what the corporate search revealed, we commend your childlike innocence and your ability to never assume the worst.

This time, the corporate search revealed that 2782708 Ontario Inc. was owned by the wife's parents.

The husband argued that he was purposefully deceived and that the wife and 2782708 Ontario Inc. colluded and conspired in an orchestrated fraud. The husband refused to close on March 16, 2021, and he brought this motion for an Order that the Agreement of Purchase and Sale be set aside and for $10,000 in punitive damages.

The problem was that there was not really any legal basis to set aside the Agreement of Purchase and Sale. The husband relied on sections 21 and 23 of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 to suggest that he had not "joined in the instrument" (the Agreement of Purchase and Sale) or "consented" to the transaction. But he had signed both the Agreement of Purchase and Sale and the Amended Agreement of Purchase and Sale. He had, in fact, "joined in the instrument" and consented to the sale.

Justice MacPherson also noted that even if he had the jurisdiction or authority to set aside the Agreement of Purchase and Sale, he would not have done so.

The property was listed at $1,275,000. The only offer the parties received was from Mr. K for $1,180,000, and it had been conditional on financing and an inspection. And there had been no indications that Mr. K would increase his offer to $1,285,000.

Therefore, the offer from 2782708 Ontario Inc. was better. It was for more money, and it was without conditions. The husband, by signing the Agreement of Purchase and Sale, was clearly content with the terms. And there were no better offers received. Therefore, Justice MacPherson was satisfied that the sale was for fair market value.

Justice MacPherson then considered if the Agreement of Purchase and Sale could be set aside for fraud or deceit.

In *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 CarswellOnt 642 (S.C.C.), the Supreme Court of Canada set out the elements of common law fraud:

- a false representation made by the defendant;
- some level of knowledge of the falsehood of the representation on the part of the defendant whether through knowledge or recklessness;
- the false representation caused the plaintiff to act; and
- the plaintiff's actions resulted in a loss.

However, here there was no false representation — or at least no overt false representation to induce the husband to act. Then, even considering that sometimes a misrepresentation can involve certain kinds of silence, including omissions and half-truths [*Midland Resources Holding Ltd. v. Shtaif*, 2017 CarswellOnt 5740 (C.A.)], there were no damages. And without damages, there was no cause of action: *Holley v. Northern Trust Co. Canada*, 2014 CarswellOnt 1571 (S.C.J.) at para. 118 and *Bruno Appliance* at para. 20.

The test for deceit is similar to that for fraud:

- A false statement made by the defendant;
- The defendant knew that the statement is false or being indifferent to its truth or falsity;
- The defendant having an intent to deceive the plaintiff;
- The false statement being material in that it induced the plaintiff to act; and
- The plaintiff suffered damages due to it so acting.

But, again, there was not really a false statement here. The husband never asked the wife if her parents were behind the corporate buyer, so she did not explicitly make a false statement or representation.

There was no condition in the Consent Order that precluded the wife's parents from purchasing the property. Therefore, Justice MacPherson was not satisfied that the identity of the purchaser was material in the circumstances.

It also could not be said that the wife's silence induced the husband to act. In fact, had the husband cared to look, he would have seen that the deposit cheque had been signed by the wife's parents.

In the end, Justice MacPherson suggested that the husband had "made much ado about precious little." The husband's motion was dismissed.

***Dosanjh v. Lalli* (2021), 56 R.F.L. (8th) 270 (B.C. C.A.) — Bauman C.J., Dickson and Hunter JJ.A.**

The situation in *Dosanjh* was the same — but different.

Dosanjh and Lalli married on August 30, 2003, and separated on January 3, 2020.

They had three children. After the separation, Dosanjh and the children continued living in the matrimonial home. However, Lalli's parents indicated a willingness to purchase the home.

Dosanjh and Lalli were embroiled in "decidedly acrimonious" family law proceedings.

In July 2020, Justice Masuhara ordered the sale of the matrimonial home. Pursuant to that Order, Lalli had sole conduct of the sale subject to various terms and court approval. One term was that each party would have a listing agent, but if the agents could not agree on a listing price, the default listing price would be the appraised value of the home, which was $1,425,000. Dosanjh was concerned that the $1,425,000 appraised value of the home was unreliable. However, Justice Masuhara stated he made his Order on the basis that "the market will determine whether [the appraised value is] too low or too high and that will be through the offers brought."

The listing agents could not agree on a listing price or the terms of the Listing Agreement. As a result, Lalli gave notice of his intention to list the property unilaterally, as he suggested he was allowed to do under the Order.

Dosanjh's real estate agent was concerned that the draft Listing Agreement was unnecessarily restrictive to potential buyers and would likely prejudice the marketability and sale of the home. For example, the draft Agreement required that all offers be accompanied with proof of funds or a letter of pre-approval — a fairly unusual term. It also included a no-assignment clause and provided that offers would be dealt with no earlier than July 23, 2020. She was also concerned that the draft Agreement did not allow for sufficient time to expose the home to the market.

Dosanjh did not sign the draft Listing Agreement as demanded by Lalli by 8:30 a.m. on July 17, 2020. Therefore, later that day, Lalli listed the home unilaterally at the default listing price of $1,425,000 on the terms proposed in the draft Listing Agreement.

In a letter to Lalli's lawyer, Dosanjh and her lawyer were clearly concerned that Lalli was purposefully looking to discourage buyers in an effort to buy the home himself for below market value (in fact, Lalli had suggested to the children that he would be buying the home):

> Of particular concern are the terms requiring a 10% non-refundable deposit to accompany all offers with the deposit to be paid within 24 hours of acceptance in the form of a bank draft. This term essentially precludes any buyers who are unable or unwilling to make a subject-free offer from purchasing the family home. While our initial concern was that your client was attempting to limit competition on the open market, **it has become clear that he wishes to be the only interested buyer.** We cannot imagine that Mr. Justice Masuhara intended this result when he ordered that your client have sole conduct of sale
>
> . . . In the meantime, Dr. Dosanjh is not agreeable to any showings, including on July 22, 2020, until we are able to address our concerns and your client's conduct with Justice Masuhara. To be clear, no further steps should be taken to sell the family home. [emphasis added]

The same day, Lalli's parents made an offer to purchase the residence for $1,425,000, subject to a 14-day completion date. The 14-day completion date, which was the only condition attached to the offer, was unexplained. As the Listing Agreement required, the offer was accompanied by proof of funds and a bank draft of $300,000.

Lalli accepted his parents' offer to purchase the home. Between July 17, 2020, when the home was listed, and July 23, 2020, when Lalli accepted his parents' offer, there were no showings. And the offer made by Lalli's parents was the only offer that was received.

Lalli sought court approval of the sale to his parents, and brought his application for approval under Rule 15-8 of the B.C. *Supreme Court Family Rules*, B.C. Reg. 169/2009, on the basis that the sale was "necessary and expedient" pursuant to Rule 15-8(1). Relying on the same Rule, Dosanjh opposed the application and sought an order varying Justice Masuhara's Order on the basis that Lalli frustrated the Order and failed to expose the property to the market properly. Dosanjh claimed that Lalli's conduct after the Order amounted to bad faith and a material change of circumstances. She sought an order varying Justice Masuhara's Order and granting her sole conduct of the sale.

It seems that everyone, at that point, lost their minds. The record before the Court on the motion included 29 affidavits.

The chambers judge allowed Lalli's application and dismissed Dosanjh's cross application. The reasons were brief:

. . . . .

> Although I would describe Mr. Lalli's conduct during the listing and sale process as being somewhat aggressive, in causing the order of Justice Masuhara to be implemented in the manner and time frame that it was, I do not find any substantive non-compliance with the order.
>
> I am allowing Mr. Lalli's application, except that the possession date is postponed from August 7 to August 31, with Dr. Dosanjh being entitled to remain at the property until then. Dr. Dosanjh's application, accordingly, is dismissed.
>
> Although there were two applications before me, in substance it was a single application, and I am awarding only a single set of costs to Mr. Lalli at the ordinary scale. Thank you.

Dosanjh appealed on the basis of insufficient reasons and on the basis that, to the extent the reasoning could be discerned, the Court erred by failing to apply the proper test under Rule 15-8, and failing to give proper consideration and weight to the non-arm's length nature of the sale. Further, given the evidence that Lalli did not expose the property to the market appropriately, the judge was clearly wrong in finding that there was no "substantive non-compliance" with Justice Masuhara's Order.

The starting point for the analysis was Rule 15-8, which was the basis for both Justice Masuhara's Order for sale and Lalli's application for approval of the sale to his parents. Rule 15-8 provides:

> (1) If in a family law case it appears **necessary or expedient** that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.
>
> (2) If an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner the person considers appropriate or as the court directs.
>
> (3) The court may give directions for the purpose of effecting a sale, including directions
>
> (a) appointing the person who is to have conduct of the sale,
>
> (b) fixing the manner of sale, whether by contract conditional on the approval of the court, private negotiation, public auction, sheriff's sale, tender or some other manner,
>
> (c) fixing a reserve or minimum price,
>
> (d) defining the rights of a person to bid, make offers or meet bids,
>
> (e) requiring payment of the purchase price into court or to trustees or to other persons,
>
> (f) settling the particulars or conditions of sale,
>
> (g) obtaining evidence of the value of the property,
>
> (h) fixing the remuneration to be paid to the person having conduct of the sale and any commission, costs or expenses resulting from the sale,
>
> (i) that any conveyance or other document necessary to complete the sale be executed on behalf of any person by a person designated by the court, and
>
> (j) authorizing a person to enter on any land or building.
>
> (4) A person having conduct of a sale may apply to the court for further directions.

> (5) The result of a sale by order of the court must be certified in Form F70 by the person having conduct of the sale and that certificate must be filed promptly after completion of the sale.
>
> (6) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser. [emphasis added]

Rule 15-8 thus engaged the exercise of judicial discretion. Whether it is "necessary or expedient" for property to be sold will depend on the circumstances of each case. In the family law context, when the court decides whether to order the sale of family property, relevant factors for consideration under Rule 15-8 include, among others, the needs of children, the availability of alternative accommodation and external economic factors. Where necessity is not in issue, to be "expedient" a court-ordered sale of property must be advantageous to both parties: *Anderson v. Anderson*, 2002 CarswellBC 1910 (S.C. [In Chambers]) at paras. 14-16, citing *Bodo v. Bodo* (1990), 25 R.F.L. (3d) 295 (B.C. S.C.), and *Reilly v. Reilly* (1992), 44 R.F.L. (3d) 72 (B.C. C.A.).

As noted by the Court of Appeal, there is a surprising dearth of authority in the family law context on the factors the court should consider when deciding an application to approve a proposed sale where the initial order for sale requires court approval. The Court of Appeal concluded that, "as in other contexts involving a court-ordered sale, if a spouse has been granted sole conduct of the sale of property that spouse 'must go about finding a buyer in a businesslike manner and the court must be satisfied that the proposed sale is provident in all the circumstances'."

The relevant circumstances on an approval application include the terms of the initial order for sale and the manner in which the sale process was conducted, which may well inform the court's assessment of whether a particular proposed sale is provident. In other words, where an order for sale made under Rule 15-8 includes a term that any sale is subject to court approval, the "necessary or expedient" criterion applies to both the initial order for sale and any subsequent order approving a proposed sale.

The Court of Appeal set out the following rule (applicable not just to British Columbia):

> [35] When deciding whether to approve a proposed sale of property, in the absence of exceptional circumstances, **the court should ensure that the property has been exposed to the market.** As Justice Southin stated in [*Fright v. Fright* (1996), 22 R.F.L. (4th) 187 (B.C. C.A.)], "[o]nly then can there be any confidence that a proposed sale is prudent": at para. 13. Nevertheless, in some cases, market exposure may not be necessary for a proposed sale to be demonstrably provident. For example, in *Olson v. Miller*, 2019 BCCA 274, in a non-family law context where foreclosure was imminent and the value of the subject property was not in dispute, this Court accepted that exposure to the market would have served no purpose and that it was thus unnecessary. As Justice Frankel explained, circumstances such as those at issue in *Olson* were exceptional in the sense contemplated in *Fright*: at para. 77. [emphasis added]

Taking these principles into account, it was the Court's view that the judge below erred by failing to give any or sufficient weight to the non-arm's length nature of the proposed sale in the overall factual context revealed by the evidence.

Justice Masuhara had granted Lalli sole conduct of sale when the value of the property was contentious. While he set a default listing price in the order for sale, the order *also* contemplated a co-listing involving realtors representing *both* parties, a market-based determination of value, and court approval. However, in the short time between Justice Masuhara's Order and Lalli accepting his parents' offer (at the default listing price), there had been no co-listing, no market exposure, and no other offers.

It was incumbent on the chambers judge to scrutinize the proposed sale to Lalli's parents closely with a view to determining whether it was prudent — not simply to ask whether Lalli had engaged in any substantive non-compliance with Justice Masuhara's Order. When applying the "necessary or expedient" criteria, the Court was obliged to examine and consider the non-arm's length nature of the proposed sale and the manner in which the property was exposed (or not exposed) to the market before approving the sale. Nothing in the reasons suggested that the judge did that. And that was a reversible error.

The Court of Appeal was satisfied it had a sufficient record to form its own conclusions and dispose of the application and cross-application. The Court of Appeal set aside the Order below approving the proposed sale to Lalli's parents, and varied the Order of Justice Masuhara such that both parties were to jointly conduct the sale — which is where the whole problem started.

And there you have it; a tale of two sales. One allowed. One not.

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