

Conspiracy in the Family Courts

Prior to the Covid-19 lockdown, I had been in Toronto and due to spend an extended period of time there. Whilst in Canada, I had hoped to gain experience of the Canadian, and particularly Ontario's, family justice system. Even though lockdown ultimately hampered my ability to do so, I was still lucky enough to observe a very unique, complex family law matter which came before the Ontario Court of Appeal in late February.

The appeal, in a nutshell, concerned the use of partial summary judgments in family law cases, as well as the novel idea of using the tort of conspiracy as a means through which damages could be claimed against both the opposing party to the finance proceedings alongside a third party 'co-conspirator', who was assisting in the non-disclosure and hiding of assets with a view to defeating a claim for maintenance.

Thank you to Epstein Cole LLP, who represented the Appellants, for their hospitality and kindly inviting me to observe this case.

Leitch v Novac [2020] ONCA 257 - The Facts

The parties had cohabited for 17 years, separating in 2012, and have 15-year-old twins together. The Appellant, Ms Leitch (W) filed an application for divorce and financial remedies from her husband, one of the Respondents, Mr Novac (H), in 2014.

From 2013, H had represented to W that he did not have adequate funds to provide child or spousal support, despite the fact that H is a successful entrepreneur in the casino and gaming industry.

Since 2009, H had been undertaking paid work for a group of companies which develop commercial real estate ('Sonco'), including casinos. These companies were incorporated by H's father and H held senior positions with Sonco and the related entities. Despite H's senior positions in these companies, he represented to W and the Court that he was now only receiving minimal income from them.

H's representations included that he did not receive any of the \$5.75 million in proceeds of a 2013 buyout deal involving Sonco and a contract they had held with a casino in Alberta. H stated that the entirety of these proceeds were kept by his father, as he had ultimate control of the project. W's position is that H was in fact entitled to 40% of the proceeds as he had been the project manager of the contract in question.

In 2016, W amended the pleadings to include a claim for conspiracy. Specifically, that H, his father and Sonco had conspired to temporarily divert H's share of these buyout proceeds so that she would receive less in maintenance payments.

The respondent bought a motion for summary judgment to dismiss these conspiracy claims. The summary judgment motion was heard over the course of 9 days, with 5 days being dedicated to cross-examination of H and his father. The motion Judge dismissed W's conspiracy claim by way of a *partial* summary judgment, finding that there was no unlawful conspiracy on the facts. It was also acknowledged that previous case law did not prohibit the use of the tort of conspiracy within family law matters, but that the statutory scheme was adequate redress for W, who would still be able to ask the Court to impute a higher income to H at trial.

W appealed on the grounds that the Judge made legal errors when addressing the conspiracy claims and had also erred in granting a partial summary judgment. This was because W's ability to bring an imputation claim at trial, which would rely upon much of the same evidence as the motion judge had now made findings on within the conspiracy claim, had now effectively been pre-determined.

Key Issues

Summary Judgment

This is not such a unique aspect of the case in the context of family litigation in Ontario, although obviously contrasts to the approach taken by the Family Courts in England and Wales in respect of the availability of summary judgments.

Radical amendments were made to the Ontario Family Law Rules in 2015, representing a culture shift in respect of summary judgments in Family Law cases. Judges at interim hearings now have increased fact-finding powers and the ability to make determinations as to credibility and draw inferences. Case law and the Family Law Rules provide guidance on what types of cases may be suitable for summary judgment and also set out a number of governing principles. The overriding principle is that of proportionality. Judges are to consider the aims of saving expense and time and dealing with cases justly and fairly, in a manner appropriate to a case's complexity and importance. If there is found to be a genuine issue for trial, the motion Judge is to determine if it would be in the interests of justice for them to use enhanced fact-finding powers to avoid a trial.

The use of summary judgments in family law is not without its critics, however, and particularly concerning is the level of risk involved with partial summary judgments, as in *Leitch v Novac*. There is a significant risk of pre-determining matters still to be heard at a final hearing and therefore such judgments do not necessarily lead to a reduction in the length or cost of the proceedings. The risk of duplicated proceedings and inconsistent findings puts partial summary judgments at odds with the very principles supporting the policy change in respect of summary judgments.

In England and Wales, the case of *Wyatt v Vince [2015] UKSC 14* confirmed that the Family Procedure Rules provide family courts with the power to strike out whole or part of a case, with certain exceptions, but do not contain provisions equivalent to

CPR 24.2 which would empower court to give summary judgment. Lord Wilson concluded that the omission of such a power from the FPR 2010 was deliberate. In respect of finance cases specifically, it was held that the court has a duty under the Matrimonial Causes Act 1973 s.25(1) to consider all the circumstances of the case, meaning that such cases are not apt for summary determination.

Tort Law in Family Law Matters

Tort claims raised within Ontario family law cases typically reach the extent of damages awarded in cases involving domestic abuse, as well as some instances of damages for fraudulent misrepresentation. For example, in the case of *McLean v Danicic* in 2009 (3289 Ont. SCJ), the family court awarded damages of \$15,000 for the infliction of mental suffering and emotional distress. In 2017, the judge in the divorce case of *Montgomery v Kenwell* (ONSC 3107) awarded general damages of \$75,000. This case concerned the infliction of serious physical injuries with lifelong consequences. The court held that the abuse of a spouse was a breach of the trust central to the marital relationships and there is no reason why the civil law should not keep step with criminal law in imposing sanctions that contribute to a just, peaceful and safe society.

Typically, an imputation claim would be made in finance cases where there is an allegation that the paying party is misrepresenting their income. Conspiracy claims have however been attempted previously in Canada. *Frame v Smith* (1987) 2 SCR 99 found conspiracy was not applicable in custody cases as it was not in the best interests of the children and the statutory scheme was a comprehensive code not enforceable by a civil action. However, it is not a blanket prohibition against applying conspiracy outside of a commercial context. Secondly, *Waters v Michie* (2011) BCCA 364, a child maintenance case in which H transferred property to his new partner to defeat W's claim for support, confirmed *Frame* did not prohibit the use of the tort of conspiracy in family law, although the claim was not successful here as it was found again that the tort did not add to the statutory scheme.

Whilst the tort of conspiracy has not made its way into UK family law cases to date, the UK Supreme Court in *JSC BTA Bank v Khrapunov* [2018] UKSC 19 did provide guidance and updated principles to be applied in respect of economic torts, which includes the tort of conspiracy.

Judgment of the Court of Appeal in *Leitch v Novac*

In respect of these cases' suitability for a partial summary judgment, it was clarified that partial summary judgments are appropriate only in cases where the determining of certain issues ahead of a final hearing will not create a material risk for inconsistent outcomes, and should the partial summary judgment allow for the case to be dealt with expeditiously and cost-effectively.

The lower court was held to have not considered the cases' suitability for summary judgment adequately and it was found that this case was not suitable for partial summary judgment. The findings the judge made in respect of W's conspiracy claim impacted her ability to bring an imputation claim at trial and created a material risk of inconsistent findings.

Regarding the tort of conspiracy, the Court of Appeal held that it *does* have an important place within the family courts when a third party assists in the hiding of income or non-disclosure of assets:

The Court of Appeal referred to previous case law which stated that "*nondisclosure is the cancer of family law*" (*Leskun v Leskun 2006 SCC 25 [2006] 1 SCR 920, 34*) and stated that "*nondisclosure is antithetical to the policy animating the family law regime and to the processes that have been carefully designed to achieve these policy goals*" [44].

Reference is made to "*invisible litigants*", specifically those family members and friends of litigants who "*insert themselves into litigation*" and can on occasion be willing to "*break both the spirit and letter of the family law legislation to achieve their desired result, including by facilitating the deliberate hiding of assets or income*" [45].

The Court of Appeal stated that there must be consequences for such invisible litigants who facilitate non-disclosure. If the tort of conspiracy is not available, then the co-conspirators "*have no skin in the game. Their participation in hiding income or assets is a no-risk proposition. If there is to be deterrence, there must be consequences for co-conspirators who are prepared to facilitate nondisclosure*" [46].

Further, considering practical implications, finding an individual to be a co-conspirator can assist with the recovery of the hidden assets by pulling that individual within the remit of the court in that case. Family law measures alone could not have adequately compensated W for her financial losses in this case.

Ultimately the Court of Appeal found the use of the tort of conspiracy (and damages payable should conspiracy be found) within family law to be "*a valuable tool in the judicial toolbox to ensure fairness in the process and achieve justice*" [46].

The Respondents are now seeking leave to appeal to the Supreme Court of Canada.

Concluding Thoughts:

Regarding summary judgment, one can see the value in introducing a mechanism which aims to reduce the length and cost of proceedings and ultimately avoid final hearings when in the interests of justice to do so. However, the risks of inconsistent findings and incomplete examination of crucial evidence cannot be overstated.

Concerning claims for damages through tort actions, the UK clearly does not have a damages 'culture' and one cannot imagine family courts here routinely awarding

significant damages awards alongside costs orders. However, it can be said that Canada, particularly when comparing to the US, also does not have a damages culture, especially when it comes to family law matters. Canadian family courts have clearly, though, found that there are some circumstances where the facts of the case dictate that damages should be paid in order to achieve justice in that matter.

In terms of providing a deterrent to parties and their family, friends or business partners to not 'co-conspire' to deliberately hide or dispose of assets, the use of civil actions such as the tort of conspiracy appears an approach with some force behind it. Such an approach recognises the havoc that third parties can inflict when interfering in family law cases and provides judges with another 'tool in the judicial toolbox' for addressing non-disclosure and assisting with the recovery of assets transferred to third parties.

The full Judgment of the Ontario Court of Appeal can be found here:

<https://www.ontariocourts.ca/decisions/2020/2020ONCA0257.htm>