6101-02637

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KIMBERLEY ANN SPARENBERG

Petitioner

- and -

BRENT GORDON EDGSON

Respondent

Applications for interim sale of assets and interim costs.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on July 18, 1996

Reasons filed: July 29, 1996

Counsel for the Petitioner: I. Thomas Colquhoun

Counsel for the Respondent: Lucy K. Austin

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REASONS FOR JUDGMENT

1 In this action for divorce and a division of matrimonial property, the petitioner seeks before trial (a) an order for sale of certain assets and (b) interim costs.

Interim Sale:

2 The assets in dispute are substantial. The parties hold shares in a business venture which in turn owns an interest in a highly valued piece of real estate. There are various items of specific personal property. There are also investments. The petitioner says that the assets in contention are worth in excess of $1 million. The parties disagree over what assets constitute "matrimonial" assets and the manner in which those assets are to be divided.

3 The specific asset in question on the sale application is a block of shares in a publicly traded company called Bre-X Minerals Ltd. In January, 1994, a joint trading account in the names of both parties was opened with Scotia McLeod Investments in

Edmonton. The respondent says that he and the petitioner agreed to open this joint account but it was understood that they would make their own investments and any profits or losses were not to be shared. The petitioner maintains that if the investments were meant to be separate then the respondent could have set the account up that way.

4 In January, 1994, the respondent, through the trading account, purchased 2000 shares of Bre-X at $1.38 per share. Since then they have increased in value spectacularly. The value of these shares now is approximately $477,000.00. There is no dispute that the initial investment was a purely speculative one. The increase in value is apparently due to rumours of a major gold development offshore by this company.

5 The petitioner wishes to sell one-half of these shares and have the funds held in trust pending the trial of this action. Her counsel submits that this investment is a highly speculative one that could drop in value just as dramatically as it increased in value. If the value drops then both parties will lose. The petitioner seeks to preserve at least one-half of this windfall profit until the appropriate division of assets is made at trial.

6 The respondent opposes the sale of any part of this fund. His counsel submits that there is no evidence that the stock value is at risk and any fluctuations in stock price are minor. The concern about an imminent drop in value is said to be purely speculative. It is argued that any disposition prior to trial is an exceptional step especially in a case such as this one where the petitioner's entitlement to any share in the asset is doubtful. Furthermore, there is a real concern that if the shares rise in value after an interim sale the

petitioner may be unable to compensate the respondent for the loss of such additional profit as well as for the tax liabilities incurred as a result of the sale.

7 Respondent's counsel points out that there is no statutory presumption of an equal division of matrimonial assets. It is therefore open to question what degree of entitlement the petitioner may eventually be found to have in this asset. It also raises the question of valuation since it may be found that the petitioner is only entitled to a share in the value of these assets as at the date of separation (August of 1994). These are valid points but I think counsel recognizes that, while the *Matrimonial Property Act*, R.S.N.W.T. 1988, c.M-6, does not mandate an equal division of assets as between spouses, there is a judicially recognized presumption that, absent special circumstances, equity calls for parity between spouses: *Bartolozzi v Bartolozzi*, [1992] N.W.T.R. 347 (S.C.).

8 I have no doubt that this court has the jurisdiction to order a sale of disputed matrimonial assets before the final disposition of the matrimonial property claims. I say so for a number of reasons.

9 First, as noted by Côté J.A. in *Katz v Katz* (Alta. C.A. No. 9303-0552; July 23, 1993), it is arguable that at common law and in equity people are entitled to realize their share of property in the absence of specific legislation prohibiting it or an injunction temporarily preventing it. Second, there is a wide discretion given to the judge under the *Matrimonial Property Act* to do that which is fair and equitable and this includes, as under similar legislation in British Columbia, the power to order an interim sale: *Reilly v Reilly* (1992), 44 R.F.L. (3d) 72 (B.C.C.A.). Finally, Rule 469 of the Supreme Court Rules

provides that the court may order a sale where there is a dispute respecting title to property. This procedural step is available with respect to disputed family property, as with any other property, and cloaks the judge with a wide discretion as well: *Re McNiven* (1989), 63 D.L.R. (4th) 444 (B.C.C.A.); and *Reilly* (supra).

10 While the court has the power to order an interim sale it must be exercised cautiously. Where the asset in question is the sole asset in dispute or one of the spouses is dependant on it, such as the matrimonial home, or if there is an arguable case that sale would not be ordered at trial, then it would be most extraordinary to order an interim sale: see, for example, *Binkley v Binkley*, [1988] O.J. No. 414 (C.A.). An interim sale should not be ordered where it would prejudice the rights of either spouse under the applicable matrimonial property legislation: *Silva v Silva* (1990), 1 O.R. (3d) 436 (C.A.)

11 In this case the petitioner has arguably a *prima facie* entitlement to a division of the joint trading account on the basis that it is in their joint names. The account and all other matrimonial assets are frozen by virtue of a previous order. The petitioner, in my opinion, has a legitimate concern that the value of these shares may decline considering the inherent volatility and speculative nature of these shares. There is authority for ordering a pre-trial sale of assets that may fluctuate or deteriorate in value over time: see, for example, the annotations in Stevenson & Côté, Civil Procedure Guide (1996), pp. 1521 - 1524. In this way value can be realized now as opposed to gambling on future market swings. In this case, as well, there are sufficient other assets so that, if the petitioner's entitlement is less than half or none at all, or if the shares increase in value, adequate

adjustments could be made at trial to the final division of all assets so as to compensate the respondent.

12 The pool of funds represented by these shares is a true windfall. It was gained without effort and represents a sizeable potential benefit to both parties. I think it makes good sense to secure at least part of this fund now so that it will be available at the time of trial. The other half will still be in play on the market.

13 I will therefore order that all necessary steps be taken to sell 1000 shares of the Bre-X holding from the Scotia McLeod joint trading account. The amount received, less commissions, will be held in an interest-bearing trust account, either with Scotia McLeod or otherwise as counsel may agree, until trial. There shall be no withdrawals from that account without the consent of both parties or an order of this court.

Interim Costs:

14 The petitioner seeks interim costs of $10,000.00 to help cover expenses incurred to date in this litigation and anticipated expenses to trial. The petitioner now lives in Ontario with her parents. She receives no support from the respondent. She is unemployed and her sole source of funds is an R.R.S.P. fund which she cashed in (and which was exempted from the earlier order freezing all assets). The respondent meanwhile draws a regular salary from the business.

15 This court has jurisdiction to order the payment of interim costs through the general discretion granted by Rule 643 to award costs at any stage of an action or proceeding. Generally in matrimonial cases, interim costs will be ordered where one party would not otherwise be able to carry on with the litigation (especially if that party is not receiving some amount by way of interim support). It is an order made only in exceptional cases: *Hill v Hill* (1988), 63 O.R. (2d) 618 (H.C.J.).

16 I am satisfied that this is an exceptional case. There is a large pool of assets potentially available for division. Justice requires that both parties have sufficient resources to properly put their case before the court. Those resources are readily available without significantly diminishing the pool of assets available for distribution. The principle of parity, however, applies here as well. All of the assets, save the petitioner's R.R.S.P. fund, are frozen. The respondent cannot access them. Therefore it seems to me that if some funds are to be released to finance the litigation for one, a like amount should be released to assist the other. Again, I am satisfied that the total value of the assets to be divided at trial is sufficient to provide the means to make any compensatory orders necessary once a final judgment is rendered.

17 I therefore order as well that, from the funds placed in trust as a result of the interim sale ordered herein, the sum of $10,000.00 be released in trust to the solicitor for the petitioner and a like sum be released in trust to the solicitor for the respondent. These funds may be used by the parties for expenses incurred in this litigation. Both advances shall be labelled as interim costs to be adjusted if necessary by the trial judge.

18 Costs of these applications will be left to the discretion of the trial judge.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 29th day of July, 1996

Counsel for the Petitioner: I. Thomas Colquhoun

Counsel for the Respondent: Lucy K. Austin

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