NOVA SCOTIA COURT OF APPEAL
Citation: Mabey v. Mabey, 2005 NSCA 35

Date: 20050222
Docket: CA 234252
Registry: Halifax

Between:

Susan Mabey

Appellant

v.

Stephen Mabey

Respondent

Judges:	Roscoe, Cromwell, Oland, JJ.A.
Appeal Heard:	February 11, 2005 in Halifax, Nova Scotia
Held:	Appeal is allowed with costs per reasons for judgment of Roscoe, J.A.; Cromwell and Oland, JJ.A. concurring.
Counsel:	Mark T. Knox, for the appellant Gordon R. Kelly, for the respondent

Reasons for judgment:

[1] This is an appeal from a decision of Justice Kevin Coady striking out Susan Mabey's application for spousal support and a retroactive variation of child support on the basis that it did not disclose a reasonable cause of action. The decision under appeal is reported as 2004 NSSF 92; [2004] N.S.J. No. 394 (Q.L.).

[2] The parties were married in 1976 and have three children born in 1977, 1979 and 1982. They were divorced in June, 1996 by a corollary relief judgment which incorporated minutes of settlement. The agreement provided that Mr. Mabey, the respondent, pay child support totalling $4,400 per month. At the time of the divorce, the oldest child, Melissa had completed her first year as a student at Boston College where the annual tuition was approximately $30,000. With respect to the payment towards tuition, the agreement provided:

> University Expenses
>
> 6 (o) As each Child enters post secondary education and periodically thereafter, the Father shall discuss with that Child his or her reasonable expenses based on attendance at a Canadian university, and shall negotiate with each such Child such financial support as he is in a position to contribute to that Child's post secondary education. Likewise, the Mother shall contribute financially or otherwise as she can, to assist each Child's post secondary education. Such financial support is contingent upon ability to pay, and on the assumption that such Child or Children are in continued and regular full-time attendance at a university, college or vocational institution and that such Child or Children maintains a passing average in each academic year."

[3] Ms. Mabey is an American citizen and as such was able to borrow funds through the U.S. Federal student loan program to assist Melissa. The first of these low interest parental loans was secured prior to the divorce and the minutes of settlement provided:

> 10. DEBTS AND OBLIGATIONS
>
> (a) The Husband shall be solely responsible for debts now in his name, and the Wife shall likewise be solely responsible for debts now in her name, save only as respects liability for a United States Federal Plus loan in the Wife's name. The United States Federal Plus loan in the Wife's name was obtained solely for purposes of education of Melissa Mabey. The principal amount of that loan as at June, 1996 is US $25,194.87. Its terms are set out in the Loan Agreement

> between the United States Government and the Wife. The Husband herein shall, as between the parties to this Agreement, be responsible for its repayment and his sole recourse shall be against Melissa Mabey.

[4] The agreement also provided that the provisions for custody, access and child support were final except for variation because of a material change in circumstances in the condition, means and circumstances of the husband, wife or children. As well, the parties agreed that there would be no spousal support, as follows:

> Neither the Husband nor the Wife shall pay any amount by way of maintenance and support for the other and each hereby releases his or her past, present and future claims, if any, to such maintenance pursuant to the Divorce Act and the Family Maintenance Act and any other similar legislation in Nova Scotia or any other jurisdiction. This clause shall apply regardless of changes in circumstances or any change in or new legislation in any way affecting the rights of either the Husband or the Wife to maintenance and support. In releasing each other from the obligation to pay maintenance and support, the parties understand that their respective financial circumstances may change by reason of their health, the cost of living, their employment and otherwise.

[5] The agreement provided that it could be amended, only by "further written instrument in writing signed by the Husband and the Wife and witnessed."

[6] The year following the divorce Ms. Mabey again borrowed from the U.S. loan program to assist her daughter with tuition expenses. Prior to negotiating the loan, Stephen Mabey prepared and signed a document entitled "Agreement" which is dated January 27, 1997. Ms. Mabey did not sign the document. This document notes that Melissa required additional loan funding, Susan Mabey qualified to apply for the loan, and Stephen Mabey was responsible for the first loan. It continued:

> The Husband herein shall as between the parties to this Agreement, be responsible for its repayment and his sole recourse shall be against Melissa Mabey.
>
> And whereas Susan Mabey desires the same undertaking in consideration for her obtaining additional United States Federal Plus Loans for the sole purpose of Melissa Mabey completing her undergraduate education at Boston College;
>
> And whereas Melissa Mabey has acknowledged that the initial and subsequent United States Federal Plus Loans are her responsibility and given her personal undertaking to Stephen Mabey that she is responsible for the repayment of these loans;

> And whereas Stephen Mabey has agreed to service these loans on behalf of Melissa Mabey while she is attending university (both undergraduate and graduate);
>
> I, Stephen Mabey, agree to be responsible for the repayment of the additional United States Federal Plus Loans made to Susan Mabey for the purposes of Melissa Mabey completing her undergraduate education at Boston College and that my sole recourse shall be against Melissa Mabey.

[7] On the basis of this document, the appellant secured several additional loans, which by the time of making her application to vary had an outstanding balance of US $36,000.

[8] While Melissa continued her studies and for some time after, the respondent made payments on the 1995 loan that was mentioned in the minutes of settlement and eventually paid it off in full. Melissa graduated in 1999 and is now married. She has not paid the balance of the student loans. Mr. Mabey denies any responsibility to pay the loans. The lender is attempting to collect the balance from the appellant.

[9] Ms. Mabey brought an application in the Family Division for a variation of spousal support and retroactive child support and a declaration that Mr. Mabey had breached both the Corollary Relief Judgment and the January 1997 indemnification agreement. In the alternative she sought a judgment against the respondent in the amount of $36,000.

[10] In response to the application, Mr. Mabey brought an application pursuant to **Rule** 14.25 to strike out the application on the basis that it did not disclose a reasonable cause of action. That **Rule** provides:

> 14.25. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
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> ...
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

[11] Apparently leave to file affidavits was granted, since each party filed one and Mr. Mabey was cross examined on the contents of his.

[12] Justice Coady allowed the application and struck out the application on the basis that it did not disclose a reasonable cause of action. With respect, in my view he erred in granting the application.

[13] It is well settled that the test pursuant to **Rule** 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323. An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959.

[14] In reaching the conclusion that the appellant's application to vary should be struck, Justice Coady made several findings of fact and drew legal conclusions from them. For example, with respect to the waiver in the minutes of settlement, he said:

> ¶ 4 The spousal support waiver in this couple's corollary relief judgment and the lack of any material change in circumstances takes spousal support out of the picture.

and, after referring to the "agreement" prepared by the respondent, he concluded:

> ¶ 17 Ms. Mabey takes the position that this document amounts to an amendment to the corollary relief judgment. Paragraph 13(c) requires any amendment to be signed by both parties. I therefore find that this document does not alter the original agreement. No agreement can be unilaterally changed. Mr. Mabey's document may be amenable to an argument in contract. Given this conclusion, I find that Mr. Mabey has complied with his child support obligation as set out in the corollary relief judgment and there is nothing to enforce.

[15] When considering whether there has been a material change in circumstances, necessary before a court can vary child support, the judge posed the question as:

> ¶ 22 In the Mabey's case, the question for the Court is whether the additional loan payments were known or anticipated at the time of the corollary relief judgment.

[16] He then listed several possible changes in circumstances, such as the fact that Melissa has graduated and is employed, and that additional loans were secured since the initial agreement, and concluded:

> ¶25 ...The evidence does not disclose any development that was not known or anticipated in 1996.
>
> ...
>
> ¶ 27 I am unable to determine that there has been a material change in circumstances since the signing of the separation agreement. The only factor advanced in support is Melissa's loan payments for educational purposes. The need for additional educational funding was within the parties contemplation in 1996 and was provided for in their agreement. I find that Ms. Mabey cannot meet this critical requirement of Section 17 of the **Divorce Act**.
>
> ...
>
> ¶ 34 I find that the application to vary discloses no reasonable cause of action. The total lack of any material change in circumstances is a "radical defect" to proceeding to assess the matter on the so-called merits. I would not describe the application as scandalous or vexatious, but in light of my earlier findings, it can be described as frivolous.

[17] In summary, Ms. Mabey’s application to review spousal and child support based on the outstanding debt of US $36,000 that had been advanced to pay university tuition for a child of the marriage was struck out because it disclosed no reasonable cause of action.

[18] In my view, the chambers judge erred in delving too far into the merits of Ms. Mabey’s application, and in so doing did not properly apply the established test under **Rule** 14.25. The inquiry should have been limited to answering the question: is the application obviously unsustainable?

[19] The chambers judge focussed on three potential weaknesses in the appellant’s application: the existence of the waiver in the minutes of settlement, the fact that the indemnity “agreement” was not signed by the appellant, and the lack of a material change in circumstances. In my view each of these are, at the most, elements of proof in her case or hurdles she will have to overcome in the presentation of her case. The hurdles are not

insurmountable though. If ultimately, after trial, she is unable to meet these challenges to her application, it likely will not succeed. However, the law does not perfunctorily preclude her success on these issues.

[20] With respect to the waiver and the change of circumstances, the Supreme Court of Canada, in **Miglin v. Miglin**, [2003] 1 S.C.R 303, recently examined the issues arising when a party who has waived all rights to spousal support in a separation agreement later makes an application for support. In that case the waiver was similar to that in this case. At trial and on appeal Mrs. Miglin was successful in having support ordered.

[21] Although the Supreme Court allowed the appeal, the application for spousal support was not merely automatically declined because the agreement contained a waiver of support. Examination of several other factors was required. Justices Bastarache and Arbour, for the majority, began their analysis by reviewing case law pursuant to the **Divorce Act** prior to the 1985 amendments, specifically the **Pelech**, **Caron** and **Richardson,** [1987] 1 S.C.R. 801 et seq. trilogy. The trilogy established a test requiring an applicant to prove a radical and unforseen change in circumstances that is causally connected to the marriage in order to vary the terms of a previous agreement. In **Miglin** the Court concluded that the narrow test enunciated in the trilogy for interfering with a pre-existing agreement is not appropriate in the current statutory context (at ¶ 47).

[22] Therefore the trial judge in **Miglin** was correct in finding that the presence of a pre-existing agreement between the parties did not oust the jurisdiction of the court to make an order for spousal support. He was also correct in proceeding under s. 15.2 of the **Divorce Act** and not incorporating the "material change" requirement of s. 17 into the application for an initial spousal support order. (¶ 48)

[23] Justices Bastarache and Arbour concluded their analysis of the past case law and the judgements below at ¶ 63:

> 63 As we shall discuss more fully, however, changes to the parties' circumstances after completion of a separation agreement are obviously not wholly irrelevant considerations in assessing the weight to be given to a pre-existing agreement at the time of the application. In our view, the court should focus not on change as a threshold matter, leading to the total setting aside of an agreement, but rather on the totality of the circumstances, of which a change in the parties' circumstances will likely be an element. Put another way, it is not the existence of change *per se* that matters but whether, at the time of the

> application, all the circumstances render continued reliance on the pre-existing agreement unacceptable.

[24] The majority went on to discuss at length the proper approach in the **Miglin** type of case, and developed a two stage investigation: first an examination of the circumstances surrounding the negotiation and execution of the agreement to determine whether there is any reason to discount it (¶ 80) and second, a consideration of whether the situation in which the parties are at the time of the application for support makes it no longer appropriate to accord the agreement significant weight (¶ 87- 88). At the second stage:

> ¶88 ...the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the **Act**. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

[25] Based on **Miglin,** Ms. Mabey's application was not obviously unsustainable. She was entitled to proceed to trial to have the court inquire into the merits of her claims based on this two phase approach. Mr. Mabey promised, in writing, that he would "be responsible for the repayment of the additional United States Federal Plus Loans ... and that [his] sole recourse shall be against Melissa Mabey." He referred to this as being the same undertaking he had given in the separation agreement with respect to the 1995 - 96 loan. According to Ms. Mabey's affidavit, relying on that promise she agreed to obtain the loans. He unilaterally stopped paying and his former wife is now exposed on the loans - the very thing Mr. Mabey promised would not happen. At the trial, in addition to all of the factors discussed in **Miglin**, the significance of the indemnity agreement, despite being signed only by the party who now wishes to denounce it, and its impact on the original agreement, can be canvassed in full based on all of the evidence. As well, the foreseeability of both Mr. Mabey's and Melissa's refusal and/or inability to pay the student loans can be assessed taking into account the understanding of the parties at both the time of the original agreement and the time of the indemnity agreement.

[26] The appeal should be allowed. The order of the chambers judge is set aside. The costs of the application paid by the appellant to the respondent shall be returned to her and the respondent shall pay costs of the application and the appeal to the appellant in the amount of $2000 plus disbursements.

Roscoe, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.