

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Buchhofer v Buchhofer*, 2015 NSSC 154

Date: 2015-05-22

Docket: *SFSND* No. 1206-006243

Registry: Sydney

Between:

Gudrun Buchhofer

Petitioner

v.

Werner Buchhofer

Respondent

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: May 11, 2015, in Sydney, Nova Scotia

Written Release: May 22, 2015

Counsel: Damien Barry for the Petitioner
Adam Rogers for the Respondent

By the Court:

[1] The parties are involved in divorce proceedings. Gudrun Buchhofer has advanced claims for spousal support under the *Divorce Act*, R.S.C. 1985, c. 3 and a division of assets and debts under the *Matrimonial Property Act*, R.S.N.S. 1989 c. 275.

[2] Ms. Buchhofer filed her first motion for disclosure on April 25, 2013. In it, she seeks court ordered disclosure of a number of documents requested at examination for discovery of Mr. Buchhofer held on October 18, 2012.

[3] Ms. Buchhofer filed a second motion for disclosure on July 16, 2014, seeking financial statements for and tax returns filed by Margaree Lodge Limited, a company operated by Mr. Buchhofer. Ms. Buchhofer's affidavit indicates this information is necessary for appraisal of the lodge owned by the company.

[4] The motions for disclosure were scheduled to be heard in Sydney on October 8, 2014. However, Mr. Buchhofer was not present, though his counsel appeared by phone on his behalf. Mr. Rogers advised he had not received the information requested from his client at discovery. He attributed some delays to Mr. Buchhofer's accountant, but did not have an explanation for the delay with other documents.

[5] The divorce trial had previously been scheduled for three days, commencing November 7, 2014. Due to lack of disclosure and adjournment of the disclosure hearing on October 8th, the November trial dates were released and the first day of the scheduled trial was converted to a disclosure hearing.

[6] Shortly before the November 7 hearing, Mr. Rogers wrote to request an adjournment. He advised he had a trial in another court, which precluded attendance at the hearing in Sydney on November 7, 2014. This was despite the fact that the November trial dates had been set several months prior, and Mr. Rogers did not raise the issue of conflicting dates when the disclosure hearing was rescheduled on October 8th.

[7] Justice Wilson granted a brief adjournment, but directed counsel to file written submissions in relation to the outstanding disclosure. The matter came back before me on November 28, 2014.

[8] At that time, counsel for Ms. Buchhofer advised that several requests for disclosure were withdrawn. I heard argument on the relevancy of the remaining requests. Ms. Buchhofer argued the disclosure is relevant to her support and property claims and should be produced. Mr. Buchhofer argued the documents are not relevant, and the cost and burden of producing the documents outweighs their probative value.

[9] In the divorce proceeding, Ms. Buchhofer seeks spousal support. Mr. Buchhofer's income, spending habits and asset position are therefore relevant to his ability to pay support.

[10] Ms. Buchhofer also seeks a division of assets and debts. She claims that Mr. Buchhofer removed monies from joint bank accounts which would be divisible under the *Matrimonial Property Act*. She also claims that some assets which Mr. Buchhofer classifies as business assets fall within the definition of matrimonial assets under the *Act*, or form the basis of an unequal division of assets.

[11] As Justice Jollimore noted in *Hum v. Hum* 2014 NSSC 428, business assets are defined under the *Matrimonial Property Act* in such a way that money in an account which is ordinarily used for shelter or transportation or for household, educational, recreational, social or esthetic purposes is a matrimonial asset. A review of Mr. Buchhofer's business bank accounts is relevant to determining whether the accounts are matrimonial assets.

[12] I determined on November 7, 2014 that Mr. Buchhofer's income and asset position are relevant to his means to pay spousal support to Ms. Buchhofer. I also found that a review of the business assets and transfers of monies between personal accounts and/or company accounts is relevant to the classification of assets and their division. I found that the financial and tax information requested for the Margaree Lodge Limited was also relevant. I therefore concluded that the documentation as requested must be disclosed.

[13] I gave direction with respect to particulars of the disclosure to be provided. Mr. Barry was directed to prepare a chart of bank accounts and dates for which information remained outstanding, and to forward that to Mr. Rogers. As his client resides in the Philippines, I also gave Mr. Rogers the option of having Mr. Buchhofer sign authorizations for Mr. Barry to obtain the documents. Failing disclosure of the 2013 tax return for Margaree Lodge Limited, Mr. Rogers was to file a status report from the accountant, indicating when it would be filed.

[14] The parties returned to court on January 19, 2015 to reschedule trial dates. Disclosure was again addressed. Counsel for Ms. Buchhofer had provided a chart of the bank accounts and dates for which disclosure remains outstanding. Mr. Rogers advised he received some of the requested documents, and would forward those to Mr. Barry by the end of that work week.

[15] Mr. Barry wrote to the court on February 19, 2015 to request a further hearing on disclosure. He requested the following issues be addressed:

- Although the chart of outstanding bank account information had been provided to Mr. Buchhofer's counsel as directed, the documents were not received;
- Mr. Rogers failed to forward the documents referenced at the date assignment conference;
- A number of other requests remained outstanding, including:
 - (a) updated statements of income, expenses and property containing values as of the date of separation and currently, which Mr. Buchhofer was directed to file within thirty days of the November 28, 2014 hearing. Faxed, unsworn copies were received on January 5, 2015 but no originals were filed and no supporting documents were attached;
 - (b) income information for Mr. Buchhofer's common law spouse;
 - (c) the 2013 tax return for Margaree Lodge Limited, or if the tax return had not been filed with Revenue Canada, an update from Mr. Buchhofer's accountant on its status;
 - (d) tax returns for the numbered company from 2008 – 2013;
 - (e) signed authorizations for release of the documents requested at discovery

[16] The requests for disclosure were not made late. The majority of the requests were made at discovery in 2012. The request for financial and tax information relating to Margaree Lodge Limited was made in the motion filed July 16, 2014. Mr. Buchhofer had ample opportunity to address the requests before the matter returned to court.

[17] At the hearing on May 11, 2015, Mr. Rogers advised that his client had agreed to sign authorizations for Mr. Barry to obtain the information requested in

the first motion. Mr. Barry drafted and sent the authorizations to Mr. Rogers after the last court appearance. Although he agreed to sign them before the hearing, Mr. Buchhofer still had not signed the authorizations when he appeared in court on May 11, 2015.

[18] In relation to the other outstanding requests, Mr. Rogers advised:

- His client had filed an updated statement of income, statement of expenses and statement of property on January 5, 2015, and that combined with statements filed on October 6, 2011 met the requirement to provide asset and debt values as of the date of separation and currently.
- Mr. Buchhofer acknowledged that a request had been made for income information for his current partner. According to his statement of income, she works as a chamber maid. No records had been received as of May 11, 2015. However, Mr. Buchhofer advised that he brought to court a copy of his common-law partner's 2014 T4 slip, as well as a recent Record of Employment. He advised she had not yet filed a tax return for 2014.
- The 2013 tax return for Margaree Lodge Limited had not been disclosed, nor did the accountant provide a status report. Mr. Buchhofer advised he had brought the tax return with him to court.
- Tax returns for the numbered company for the period of 2008 – 2013 had been requested and as of May 11, 2015 had not been disclosed. Mr. Rogers advised that these documents had been provided to him in the fall of 2014; he thought they had been disclosed, but they were not. This was an oversight on his part.

[19] In the course of the hearing, Mr. Rogers raised allegations of non-disclosure by Ms. Buchhofer. Mr. Buchhofer did not file a motion seeking disclosure from her, nor was there an examination for discovery of Ms. Buchhofer. Mr. Rogers says that requests were made for:

- Information relating to Ms. Buchhofer's spousal support claim and efforts to pursue self-sufficiency; and
- Statements for an RBC account from which monies were withdrawn.

[20] I made no order with respect to these requests, as there was no motion before the court.

[21] After sifting through the arguments, it is apparent that most outstanding disclosure issues had been resolved by May 11, 2015. Mr. Buchhofer agreed to sign authorizations for disclosure of the bank account documents before coming to court, though he had not yet signed them. He brought the company tax return and his common law partner's income information to court. He provided the company tax returns to his counsel, though they had not been forwarded to Mr. Barry. I gave direction on disclosure of all these items at the hearing.

[22] The only issues remaining for the court to decide are:

- whether the statement of property, statement of income and statement of expenses filed by Mr. Buchhofer in 2011 and the updates in 2015 meet the requirements of the *Civil Procedure Rules*; and
- whether costs should be awarded to Ms. Buchhofer on the motion.

THE STATEMENTS

[23] Justice Jollimore in the recent case of *Hum v. Hum* 2014 NSSC 428 dealt with a motion for disclosure and costs. She reviewed the relevant case law and stated as follows:

Disclosure in family law - generally

5 The Supreme Court of Canada has spoken strongly in condemning non-disclosure. In *Leskun*, 2006 SCC 25 at paragraph 34, the court quoted the comments of Justice Fraser in *Cunha*, 1994 CanLII 3195 (BC SC), describing the **non-disclosure of assets as "the cancer of matrimonial property litigation"**: discouraging settlement, promoting inadequate settlement, increasing the time and expense of litigation, prolonging the stress of battle that may lead parties to capitulate "with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done." These remarks came in response to Mr. Leskun's objection that the chambers judge erred in calculating his net worth: the chambers judge had drawn adverse inferences against Mr. Leskun, based on apparent contradictions in the financial information Mr. Leskun had provided. On behalf of the Supreme Court, Justice Binnie described these circumstances as a "poor platform from which to launch an attack against the trial judge's conclusion regarding his assets and liabilities".

6 In *Rick v. Brandsema*, 2009 SCC 10 at paragraph 47, on behalf of the Supreme Court, Justice Abella described a "**duty to make full and honest disclosure of all relevant financial information**", saying that this is necessary to protect the integrity of agreements negotiated in the "uniquely vulnerable circumstances" following the breakdown of a family.

7 In addition to these authorities, Ms. Hum referred me to *Terry v. Francis*, 2004 NSCA 118 and *Cameron*, 2014 NSSC 224.

8 In the former, the Court of Appeal addressed an application to vary child support in December 2003 which was based on Mr. Francis's April 2003 Statement of Financial Information, which did not have attached any income tax information for 2002, or a statement of earnings or a statement from his employer, or documentation relating to his student loan. At paragraph 9, Justice Cromwell said that "only in rare circumstances should a party applying to reduce a child support obligation be heard absent that party making full disclosure." He noted that the absence of disclosure was unfair to Ms. Terry because it prevented her from responding fully to the variation application. Justice Cromwell adopted Justice Goodfellow's comment in *MacLean*, 2002 NSSC 5 at paragraph 9, that, "Failure of a party to [disclose] will, in most circumstances, result in adverse consequences."

9 In *Cameron*, 2014 NSSC 224 at paragraph 20, Justice Forgeron drew attention to the consequences of a party's failure to disclose: "deeming of income and assets, and significant cost awards".

10 In each of these decisions, and many others, **the failure to disclose carries significant consequences for the party who does not meet this obligation.**

The Civil Procedure Rules

11 In the Family Division, *Civil Procedure Rules* 59.19 to 59.28 speak specifically to disclosure. These *Rules* identify the particular documents that each party, and others, must disclose when particular claims are made. These *Rules* also explain the procedural options for obtaining disclosure from parties and non-parties, in response to a direction and an order.

12 *Rule* 59.28(1) provides that Part 5 -- Disclosure and Discovery applies to proceedings in the Supreme Court (Family Division), with certain exceptions. One such exception is found in *Rule* 59.28(1)(a), which repeats the explicit language of *Rule* 59.19(4): that is, *Rule* 15 - Disclosure of Documents and *Rule* 16 - Disclosure of Electronic Information do not apply, unless a judge orders otherwise. Excluding *Rules* 15 and 16 of Part 5, leaves me to consider *Rule* 14 - Disclosure and Discovery in General, *Rule* 17 -- Discovery of Other Things, *Rule* 18 -- Discovery, *Rule* 19 -- Interrogatories, *Rule* 20 -- Admission and *Rule* 21 -- Medical Examination and Testing.

13 The focus of the parties' submissions has been relevancy. Mr. Hum's primary argument is that the requests are for materials which are not relevant. In some cases, he challenges the form of the request, such as the request that he be ordered to advise the children that he doesn't object to any of them producing information requested by their mother.

The test of relevance

14 *Rule* 14.01(1)(a) and (b) require determination of the relevancy of the document, electronic information, other things or information by "assessing whether a judge presiding at the trial or hearing of the proceeding would find [it] relevant or irrelevant." In *Brown v. Cape Breton Regional Municipality*, 2011 NSCA 32, Justice Bryson affirmed the reasons of Justice Moir in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4 at paragraph 46, that the determination of relevancy "must be made according to the meaning of relevance in evidence law generally" saying "the determination is made on the pleadings and evidence known to the Judge when the ruling is made."

(emphasis added)

[24] As Justice Jollimore noted, the *Civil Procedure Rules* contain disclosure requirements in divorce proceedings. Under *Rule 59.21*, a party against whom a support claim is made must make disclosure as required by the *Divorce Act*, the *Guidelines* and *Rule 59*. The required disclosure includes a statement of income, statement of expenses and statement of property. Where a spousal support claim is advanced and the other party lives with a common-law partner for two years or more, the common-law partner must also file a statement of income, a statement of expenses and a statement of property.

[25] The forms are contained in the *Rules* and specify the information to be disclosed in them. The statement of property, for example, requires that the particulars of all of a party's property and debts (held individually or jointly) must be disclosed. There is no requirement to attach any supporting documents to the property or expenses statement when filing. Tax returns and proof of current income must be attached to the income statement.

[26] Mr. Buchhofer filed a statement of property in 2011 with supporting documents attached. They include statements for an RBC account, a PC bank account, a Scotiabank account, a Credit Union account, and a joint RBC bank account with balances as of the date of separation. There is also a CIBC Visa statement, RBC Visa statement and a Capital One MC statement for the date of

separation. He has also attached information with respect to a loan from his mother.

[27] His 2011 statement of expenses attaches no information with respect to the claimed expenses.

[28] His 2011 statement of income attaches his 2008, 2009 and 2010 Notices of Assessment, as well as a tax return for the numbered company for the years 2008, 2009 and 2010. He states in the document that he is self-employed and controls a corporation, and that he is attaching financial statements and tax returns, as well as a breakdown of all salaries, wages, management fees and other payments made to people with whom he or his company does not deal at arms' length (such as his new common-law partner). He did not attach that breakdown as required, nor proof of current income in the form of paystubs or cancelled cheques, for example. The statement is therefore deficient.

[29] Mr. Buchhofer's 2015 statements are also deficient. None of the original sworn statements was filed, and his income statement does not attach his tax returns or confirmation of his current sources and amounts of income.

[30] To the extent the bank documents obtained through Mr. Buchhofer's authorizations will provide supporting information for his 2015 statement of property and/or expenses, I am satisfied the information will be available at trial. However, to the extent those authorizations do not provide information on debts Mr. Buchhofer claims to be paying (such as the Wal-Mart Master Card), he must provide those statements, including current balance and balance as of the date of separation, if he wishes the court to consider them.

[31] Counsel for Ms. Buchhofer asks the court to make a negative inference about Mr. Buchhofer's level of debts and income, imputing a higher income and lower debt level to him for purposes of spousal support. All of those issues will be determined at trial. However, Mr. Buchhofer must recognize that such inferences may be drawn if he fails to make the appropriate disclosure.

CONCLUSION ON DISCLOSURE

[32] I direct as follows:

- the disclosure of all documents Mr. Buchhofer brought to the hearing on May 11, 2015 shall be provided within 14 days;

- the signed authorizations must be provided within 14 days;
- the tax returns for the numbered company for the tax years 2008 - 2013 shall be disclosed within 14 days;
- statements for current values of any assets or debts listed in Mr. Buchhofer's 2015 statement of property shall be disclosed within 14 days - excluding any accounts covered by the authorizations he has agreed to sign;
- Mr. Buchhofer shall file copies of his personal 2011, 2012, 2013 and 2014 income tax returns and with all schedules and attachments, within fourteen days;
- he shall file any Notices of Assessment and Reassessment received from Revenue Canada for the years 2011 – 2014 inclusive, within 14 days;
- he shall file current income information, identifying sources and amounts of income in 2015 within fourteen days;
- he shall file corporate tax returns and financial statements prepared for his companies for the years 2011, 2012, 2013 and 2014, along with a breakdown of all salaries, wages, management fees and other payments made to people with whom he or his companies do not deal at arms' length.

COSTS

[33] Ms. Buchhofer seeks costs of the motion in the amount of \$5,000.00. In his correspondence of February 19, 2015, Mr. Barry outlined the number of court appearances required to address the motion, and the documents filed by Ms. Buchhofer, including a substantial brief and the chart requested by the court. There has been considerable effort made to obtain disclosure.

[34] Mr. Buchhofer argues that he should not be required to pay costs, because:

- he agreed to sign authorizations to obtain information from the banks;
- he provided tax returns to his counsel which were inadvertently not disclosed;
- he brought other documents with him to court;
- he filed an updated statement of property, statement of income and statement of expenses in compliance with the court's direction;
- he has the expense of counsel appearing from Port Hawkesbury;

- the information requested is not relevant.

[35] I have addressed the first four of these arguments already. Mr. Buchhofer has incurred little cost on this motion and made little effort to disclose thus far. This litigation has been protracted, and Ms. Buchhofer has incurred unnecessary costs as a result.

[36] Further, Mr. Buchhofer's counsel has been permitted to participate in prior hearings and pre-trial conferences by phone. He made only one court appearance in person. It is Mr. Buchhofer's choice to retain counsel outside of Sydney, and if that means his legal costs are higher as a result, that again is his decision.

[37] And finally, Mr. Rogers reiterated his client's argument that the information requested is not relevant. That argument is moot. I concluded in November, 2014 the documents are relevant to the pleadings in the file. Their ultimate relevance and probative value will be weighed at trial.

[38] Given the extensive efforts demonstrated by Ms. Buchhofer to obtain this information, the delays attributable to Mr. Buchhofer and his counsel, and the lateness of the efforts to disclose, I award costs to Ms. Buchhofer in the amount of \$5,000.00 payable within thirty days of this decision. As these costs relate to a claim for spousal support, I direct that they be enforced through the Maintenance Enforcement Program. The costs will attract interest at 2% compounded monthly until paid in full.

MacLeod-Archer, J.