SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Ivey v. Ivey, 2014 NSSC 108

Date: 20140324
Docket: 1206-6192
Registry: Sydney

Between:

Judy Eileen Ivey

Applicant

v.

John Wilson Ivey

Respondent

Judge:	The Honourable Justice Theresa Forgeron
Heard:	March 3, 2014, in Sydney, Nova Scotia
Decision:	March 24, 2014
Counsel:	Alan Stanwick, for the applicant TJ McKeough, articled clerk, for the respondent

By the Court:

[1] **Introduction**

[2] Judy and John Ivey are former spouses. Consent orders for divorce and corollary relief issued on October 25, 2012. After the orders issued, counsel for Ms. Ivey noticed, what he perceived to be, a drafting error in the pension division provision of the order. Ms. Ivey therefor filed a motion to correct the perceived clerical mistake by amending the order. Mr. Ivey vigorously contested the motion.

[3] **Issues**

[4] The following issue will be determined in this decision:

> Should the court amend the corollary relief order to reflect an equal division of the pension held in the name of Mr. Ivey?

[5] **Background**

[6] The parties were married on October 9, 1981. They separated on August 14, 2010, after approximately 29 years of marriage. A divorce trial was scheduled to be heard on June 27 and 28, 2012 before Associate Chief Justice O'Neil. A pretrial conference was held on June 15, 2012, via telephone conference. Associate Chief Justice O'Neil, Mr. Stanwick, on behalf of Ms. Ivy, and Mr. Ivy, who was self-represented, participated in the conference.

[7] The telephone conference was recorded. The transcript of the conference was attached as an exhibit to Ms. Ivy's affidavit.

[8] During the course of the telephone conference, Mr. Stanwick confirmed that settlement had been reached. This is noted at page 1, lines 8 to 11:

> …**MR. STANWICK**: Yes, ah, yes, My Lord. Ah, Mr. Ivey and, ah, and his wife, my client, Mrs. Ivey, had, had some discussions, of course, any, any discussions they had she would, she would run any proposals by me. So at the end of the day, if I understand the, ah, the, the settlement between the parties is that, ah...

[9] Further, Mr. Stanwick confirmed that the parties had agreed to equally divide Mr. Ivy's pension from the date of marriage to the date of separation at page 1, lines 16 to 19, which provide as follows:

> ... Ah, the employment pension that Mr. Ivey has with the Cape Breton Regional Municipality will be divided equally, ah, from the date of marriage to date of separation. I don't believe the parties cohabited prior to marriage. Um, all, um...

[10] In response to the court's query, Mr. Ivey confirmed that he had no difficulty hearing Mr. Stanwick at page 3, lines 1 and 2; and at lines 8 to 10, which state as follows:

> ...**MR. IVEY**: Ah, I heard Mr. Stanwick, ah, very clear actually, um, however, you are a little staticky on the phone.
> ...
>
> ...**THE COURT:** I, I'm just going to ask him that. Mr. Ivey, you say you heard Mr. Stanwick clearly?
>
> **MR. IVEY**: I did, Your Honour.

[11] Mr. Ivy also confirmed that he agreed to the division of his employment pension at page 3, line 15:

> ...**MR. IVEY:** The pension of my employment, CBRM Pension, that's agreeable.

[12] After reviewing the settlement, Associate Chief Justice O'Neil released the court dates. Mr. Stanwick drafted the consent orders. The consent corollary relief order states the following in relation to pension division at clause 8 (a) (ii):

> The employment pension of the respondent through his employment with the Cape Breton Regional Municipality is to be divided such that one half of the pension benefits earned from October 9, 1981 (date of the marriage) to August 14, 2010 (date of separation) shall be divided equally between the parties.

[13] After the orders issued, Mr. Stanwick realized that the order, as currently drafted, only furnished Ms. Ivy with 25%, and not 50%, of Mr. Ivy's pension. Mr. Stanwick thereafter applied to correct this mistake on behalf of Ms. Ivy.

[14] The first motion that Mr. Stanwick filed to correct the perceived mistake was dismissed because the motion was not properly framed. Rule 78.08 had not been referenced in the pleadings or argument. No ruling was rendered on the merits. The decision dismissing the first motion is dated November 29, 2013.

[15] On December 4, 2013, Ms. Ivy filed a second motion seeking to correct the perceived error based upon Rule 78.08. Ms. Ivy's affidavit and brief were filed in support. The motion was scheduled for February 5, 2014 during chambers.

[16] The motion was adjourned on February 5 because Mr. Ivy, who was self-represented, had not filed any documents. The court adjourned the proceeding to February 18, 2014. Mr. Ivy was instructed to file an affidavit by February 11, 2014 and a legal memorandum by February 13, 2014.

[17] After the February 5 hearing, Mr. Ivy retained Kimball Brogan, and specifically Mr. McKeough, articled clerk. Mr. McKeough did not comply with the filing time lines. Mr. Ivy's affidavit was not filed until February 13, 2014, while Mr. Stanwick was not provided with a copy until February 14, 2014.

[18] Mr. Stanwick requested an adjournment on February 18, 2014, in the event the court admitted the affidavit of Mr. Ivy. Mr. Stanwick wanted time to prepare a response affidavit. The adjournment was granted. Costs were ordered payable by Mr. Ivy to Ms. Ivy in the amount of $400.

[19] The motion was rescheduled and heard on March 3, 2014. The parties relied on their affidavits. Written and oral submissions were provided to the court. The court adjourned to render a written decision.

[20] **Analysis**

[21] **Should the court amend the corollary relief order to reflect an equal division of the pension held in the name of Mr. Ivey?**

[22] ***Position of Ms. Ivey***

[23] In requesting the amendment, Ms. Ivey relies upon the agreement which was read into the court record during the recorded telephone conference held on June 15, 2012. The transcript confirms that the parties agreed to an equal division of Mr. Ivy's employment pension. Both parties confirmed this agreement before Associate Chief Justice O'Neil.

[24] Ms. Ivey states that this agreement was not renegotiated. At no point, did she agree to accept 25% of Mr. Ivy's employment pension. I accept this statement as true.

[25] Ms. Ivy indicates that clause 8 (a) (ii) of the order is an example of a drafting error. She urges the court to correct the clerical mistake by amending the court order to ensure that Mr. Ivy's pension is equally divided between the parties.

[26] ***Position of Mr. Ivey***

[27] Mr. Ivey vehemently opposes the application. His argument is based on a number of grounds, including the following:

- The amendment sought by Ms. Ivey is more than a correction of a technical mistake. Rule 78.08 is limited to technical mistakes.

- There is no ambiguity in the current order. The express intention of the parties is that which is stated in the unequivocal language of the current order. Ms. Ivy is only entitled to 25% of Mr. Ivy's employment pension.

- Rule 78.08 is not intended to rectify negligence. A solicitor is expected to perform his duties to the standard of a competent lawyer. If a lawyer falls below this standard, then the client may seek damages in negligence. The use of Rule 78.08 to rectify errors caused by solicitor negligence, would encourage poor draftsmanship.

- Ms. Ivey is barred from seeking further relief on the basis of *res judicata*.

- The order was not appealed. The order is binding. Public policy favours finality.

- Rule 78.08(a) imports an element of reasonableness. The error was discovered in April 2013, and the application was not filed until December 2013, a span of approximately eight months. The application should be barred on the basis of lapse of time to protect the finality of litigation principle.

- The release of court dates, as noted in the transcript, is not determinative of settlement.

[28] ***Law***

[29] Rule 78.08 is applicable. This rule states as follows:

> 78.08 A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated on;
>
> (c) extend the time for doing something required to be done by an order that provides a deadline;
>
> (d) set a deadline for complying with an order that does not set a deadline.

[30] The recent Ontario case of **Millwright Regional Counsel of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.**, 2013 ONSC 1502, provides an excellent summary of the appropriate application of the slip rule. Perell J. reviews the parameters of the rule at paras. 30 to 33, wherein it is stated as follows:

> 30 Rule 59.06 (1) is designed to amend judgments containing a slip or error, errors which are clerical, mathematical or due to misadventure or oversight. The rule is designed to amend judgments containing a slip, not to set aside judgments resulting from a slip in judicial reasoning: **Central Canada Travel Services v. Bank of Montreal,** [1986] O.J. No. 1249 (Ont. H.C.) at para. 21; **Dhaliwal v. Plantus**, [2007] O.J. No. 5450 (Ont. S.C.J.) at para. 4. Rule 59.06 (1) is not designed to be a disguised means to review errors in the making of the Reasons for Decision; rather, it is designed to correct errors in memorializing the Reasons into a formal order or judgment.
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> 31 Generally speaking the court's inherent and statutory jurisdiction to amend an order or judgment is limited to: (1) cases of fraud; (2) where there has been a slip in drawing up the order; and (3) where there has been an error in the order expressing the manifest intention of the court from its reasons for decision**: Paper Machinery Ltd. v. J.O. Ross Engineering Corp**., [1934] S.C.R. 186 (S.C.C.); **Wright, Re**, [1949] O.J. No. 3 (Ont. H.C.); **Millard v. North George Capital Management** Ltd., [1999] O.J. No. 3957 (Ont. S.C.J. [Commercial List]). The rule is only operative in exceptional circumstances given the public interest in the principle of finality to the litigation process: **Shaw Satellite G.P. v. Pieckenhagen**, 2011 ONSC 5968 (Ont. S.C.J.) at para. 20.
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> 32 Under rule 59.06(1), the Court has the power to amend an order where there has been an error in expressing the manifest intention of the Court: **Paper Machinery Ltd. v. J.O. Ross Engineering Corp**., [1934] S.C.R. 186 (S.C.C.); **Millard v. North George Capital Management Ltd.**, [1999] O.J. No. 3957 (Ont. S.C.J. [Commercial List]); **Convay v. Marsulex Inc**., [2004] O.J. No. 3645 (Ont. S.C.J.).
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> 33 The rule permits amendments where the order obviously or indubitably does not reflect what the court intended to do, either by error or oversight: **Johnston v. Johnston**, [2002] O.J. No. 1570 (Ont. Div. Ct.); **Saikely v. 519579 Ontario Ltd.**, [2002] O.J. No. 2863 (Ont. S.C.J.); **Kerr v. Danier Leather Inc**. (2005), 76 O.R. (3d) 354 (Ont. S.C.J.).

[31] In **Golden Forest Holdings Ltd. v. Bank of Nova Scotia**, [1990] N.S.J. No. 230 (C.A.), Hallett, J.A. held that consent orders can be amended based upon the test for the rectification of contracts. Hallett, J.A. states at paras. 10 and 11 as follows:

> 10 However, unlike the vast majority of actions for foreclosure and sale, this action was defended. Subsequently, the action was settled upon terms which included the unusual provision for 12 newspaper advertisements of the sale rather than the customary three. The consent order was presented to Madam Justice Roscoe, incorporating the advertising requirements agreed to by the parties. The fact that it was a consent order following a settlement is a very material fact that has led me to conclude that Mr. Justice Tidman did not have the power under the Court's inherent jurisdiction to vary the order of Roscoe J., as it gave effect to a settlement reached by the parties. The appellant was entitled to have the advertising agreed upon for the sale of this somewhat unique property. The Court does not have the power to vary a consent order that gives effect to a settlement unless the settlement agreement itself could be varied. This point was dealt with by the Ontario Court of Appeal in **Monarch Construction Ltd. v. Buildevco Ltd.** (1988), 26 C.P.C. (2d) 164. The Court stated at pp. 165-166:
>
> > A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the Local Judge on which she was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms.
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> 11 In **Chitel v. Rothbart** (1987), 19 C.P.C. (2d) 48 (Ont. Master), additional reasons at (1987), 19 C.P.C. (2d) 48 at 54 (Ont. Master), aff'd (1988), 28 C.P.C. (2d) 5 (Ont. Div. Ct.), a similar statement was made at p. 52 [of 19 C.P.C.]:
>
> > A consent order may only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract. None of these grounds are present in the within case.

[32] The slip rule has been applied in the family law context. In **Andrews v. Andrews**, 2007 NSSC 35 (S.C.), Dellapinna, J. utilized the slip rule to equally divide the employment pension of the wife, where the division of the wife's pension had inadvertently been omitted in the court's earlier decision. Similarly, in **Wood v. Wood**, 1982 NSJ No. 31, (N.S.S.C.T.D.), Grant, J. applied the slip rule to correct an error in a consent court order, by amending the order to include a term

which had inadvertently been omitted, which term had formed part of the prior settlement.

[33] An opposite result was reached in **McDonald v. Trenchard**, 2011 NSSC 105 (S.C.). O'Neil, A.C.J. stated that the slip rule should not be applied where there was "nothing inherently erroneous or obviously deficient" about the contested clause: para. 40. Further, the slip rule was "not designed to be a back door to re-negotiating an agreement ...": para.40

[34] ***Decision***

[35] Ms. Ivey's motion is granted. The corollary relief order is amended as requested for the following reasons:

- The court order does not accurately reflect the intention of the parties. Clause 8 (a) (ii) does not reflect the agreement to equally divide the husband's employment pension. The court order was inadvertently drafted to furnish Ms. Ivy with only 25% of the employment pension, while Mr. Ivy would retain 75%. Such an outcome is contrary to the terms of settlement which were placed on the court record during the pretrial conference call of June 15, 2012. Such an outcome is contrary to the express intention of the parties.

- That there should be an equal division of the employment pension of a spouse after a long term marriage is no legal coup. An equal division of a pension after a long term marriage is standard practice because it represents the governing law. The order, as inadvertently drafted by Mr. Stanwick, does not reflect this law, and more importantly, does not reflect the parties' agreement. It would be inappropriate to penalize Ms. Ivey and award a windfall to Mr. Ivy because of an inadvertent slip on the part of Mr. Stanwick.

- The court rejects the submission that Ms. Ivey's remedy is to sue Mr. Stanwick for damages based upon a negligence claim. Implicit in this argument, is the concession that the order was improperly drafted because it does not divide Mr. Ivy's employment pension equally. Mr. Ivey must not benefit from an accidental and inadvertent drafting

error. Although drafting errors should be avoided, errors do, nonetheless, surface from time to time. Mr. Ivey's solution is inappropriate and at odds with principles of fairness and justice.

- Ms. Ivey is not attempting to renegotiate the terms of settlement. To the contrary, Ms. Ivey is seeking to enforce the terms of agreement which were placed on the record during the telephone conference before Associate Chief Justice O'Neil.

- At no point did Ms. Ivy agree to an unequal division of Mr. Ivy's employment pension. The agreement to effect an equal division remained constant and was never varied.

- The matter is not *res judicata* by virtue of the decision of November 29, 2013 because there was no ruling on the merits.

- The delay in having the motion processed was not inordinate. Mr. Ivy has not proven prejudice to support a denial of the claim based upon time delay.

[36] **Conclusion**

[37] The motion of Ms. Ivey to amend the corollary relief order to reflect the agreement reached between the parties is granted. Paragraph 8(a)(ii) must be amended to state as follows:

> 8(a)(ii) Employment Pension
>
> The employment pension of the respondent, John Wilson Ivey, through his employment with the Cape Breton Regional Municipality, is to be divided such that each party must receive one half of all pension benefits earned from October 9, 1981 (date of marriage) to August 14, 2010 (date of separation).

[38] Mr. Stanwick is to draft the amended order.

Forgeron, J.