COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Donaldson v. Sistrunk,*
2025 BCCA 123

Date: 20250408
Docket: CA50077

Between:

Troy Owen Donaldson

Appellant
(Defendant)

And

Gail Ann Sistrunk, Executor and Trustee under the Last Will and Testament of Philip Eric Peterson, Deceased

Respondent
(Plaintiff)

And

Philip Eric Donaldson, Barry John Page, and Raven Rock Retreats Inc.

Respondents
(Defendants)

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated July 23, 2024 (*Sistrunk v. Donaldson*, Victoria Docket S246241).

Oral Reasons for Judgment

Counsel for the Appellant:	H. Parsons A. Flipse
Counsel for the Respondent, Gail Ann Sistrunk, Executor and Trustee under the Last Will and Testament of Philip Eric Peterson, Deceased:	G.T. Rhone

Place and Date of Hearing:	Vancouver, British Columbia March 19, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 8, 2025

Summary:

This appeal arises from a Supreme Court judge's refusal to set aside a pre-judgment garnishing order. Among other things, the appellant challenged the order on grounds that the ex-parte applicant did not make full and frank disclosure. The judge held that the information not disclosed by the applicant was immaterial, and in any event, there was an "innocent" explanation for the non-disclosure. HELD: Appeal allowed. The finding of non-materiality reflects palpable and overriding error. On its face, the non-disclosed information was highly relevant to a central allegation advanced against the appellant in the notice of civil claim. Consequently, it might have impacted the Registrar's discretion to grant or decline the garnishing order and should have been disclosed. Given the degree of relevance, the judge's finding that the non-disclosure was innocent could not save the order. It must be set aside.

[1] **DEWITT-VAN OOSTEN J.A.**: This appeal challenges a judge's refusal to set aside a May 2024 pre-judgment garnishing order.

[2] The appellant, Troy Owen Donaldson, says the garnishing order was obtained in breach of the requirement to make full and frank disclosure. The respondent, Gail Ann Sistrunk, acknowledges that when she filed her application for garnishment under the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, she did not include documents the appellant says were highly relevant to an assessment of the merits. However, the judge reviewed those documents and decided they were not material. In any event, the judge found the non-disclosure was innocent and not intended to mislead. Ms. Sistrunk says the appeal should be dismissed.

Factual Background

[3] Ms. Sistrunk is the executor and trustee of the last will and testament of Philip Eric Peterson (the "Deceased"). Mr. Donaldson is a nephew of the Deceased.

[4] In April 2024, Ms. Sistrunk filed a notice of civil claim against various defendants, including Mr. Donaldson.

[5] Among other things, Ms. Sistrunk alleges that in October 2022, the Deceased transferred one hundred common shares to Mr. Donaldson in April Point Holdings Ltd. The transfer was made under the terms of a written agreement that was

executed in November 2020 and subsequently amended by three addendums in December 2020, February 2021, and October 2022, respectively. According to the notice of civil claim, Mr. Donaldson was obliged to pay $100,000 for the shares. However, in breach of the October 2022 addendum, he paid only half that amount, leaving $50,000 owing to the Deceased.

[6] On the strength of the alleged debt, Ms. Sistrunk applied for a pre-judgment garnishing order. In her application, she did not include: (a) a copy of the October 2022 addendum ("Contract Addendum 3"); (b) a photograph of the Deceased holding a $50,000 personal cheque from Mr. Donaldson dated October 21, 2022; and (c) a January 2024 email from a director of April Point Holdings Ltd. enclosing a copy of Contract Addendum 3 and stating he was aware the Deceased had purchased a "GIC with the final payment".

[7] In her affidavit in support of garnishment, Ms. Sistrunk said this about Contract Addendum 3:

> 5. As set out in the Notice of Civil Claim, and I believe to be true, the Deceased signed an agreement to sell one hundred common shares in the company April Point Holdings Ltd. to the defendant Troy Owen Donaldson for $100,000. I have reviewed a signed agreement titled "Contract Addendum 3" that sets out the above terms. However, I have searched the Deceased's records and have not found any prior iterations of this agreement, and so I do not know what earlier terms may have been agreed to.
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> 6. The Deceased passed away on May 17, 2023. Since his passing, I have obtained and reviewed the Deceased's bank statements, and have searched his records. I have only found record of payment from Mr. Donaldson in the amount of $50,000. I have also made several demands that Mr. Donaldson provide records of any further payments. Mr. Donaldson has neglected or refused to provide proof of any further payments to me or copies of any earlier agreements or addendums with respect to the sale of the shares.
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> 7. The amount that remains owing pursuant to the share purchase agreement by Mr. Donaldson is $50,000, after making all just discounts.
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> [Emphasis added.]

[8] In June 2024, Mr. Donaldson applied to set aside the garnishing order. Among other things, he said Ms. Sistrunk intentionally concealed or failed to disclose highly relevant documents in her possession that "seriously call[ed] into question" the debt claimed against him. Mr. Donaldson said the material provided in support of pre-judgment garnishment was misleading and fell "woefully short" of Ms. Sistrunk's duty to make full and frank disclosure. Mr. Donaldson also sought special costs.

Chambers Judgment

[9] The set-aside application was heard in Supreme Court chambers in July 2024. Mr. Donaldson challenged the garnishing order on three bases. All three were rejected.

[10] First, the judge was satisfied the claim against Mr. Donaldson was a liquidated claim and appropriately the subject matter of a garnishing order. Second, she declined to set the order aside on grounds of improper service. Mr. Donaldson's third basis for challenging the order alleged intentional non-disclosure. Specific to that issue, the judge instructed herself that: (a) an *ex-parte* pre-judgment garnishing order is an extraordinary remedy; (b) applications for these orders must be brought in the utmost good faith; (c) the applicant must provide full and frank disclosure of all material facts; and (d) an order should be set aside where the facts in the supporting affidavit or notice of civil claim are misleading or otherwise fail to meet disclosure requirements. In support of these principles, the judge cited cases such as *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 342 at paras. 36–51 [*Rudjuk*] and *Politeknik Metal San ve Tic A.Ş. v. AAE Holdings Ltd.*, 2015 BCCA 318 at paras. 30–33.

[11] The judge went on to note that where non-disclosure results from an "innocent" mistake, the reviewing court retains a residual discretion to uphold the *ex-parte* order. She cited *Li v. Westside Preparatory Society*, 2021 BCCA 153 as authority for this principle. *Li* affirmed the obligation of an *ex-parte* applicant to make full and frank disclosure of all material facts that "may have affected the outcome of the application": at para. 12, citing *Politeknik* at paras. 31–33. However, the Court

also accepted that the "innocent nature" of a mistake by the applicant may justify upholding the order, notwithstanding a breach of the duty to make full and frank disclosure: at paras. 39–45.

[12] The judge reviewed the material Mr. Donaldson said should have been disclosed by Ms. Sistrunk. She also reviewed an affidavit filed by Ms. Sistrunk for the chambers hearing, in which she explained why she did not include the impugned information. The judge described that explanation in her reasons:

> [13] … her claim had already accounted for payments in the amounts of the cheques shown in the photograph and … the payment schedule in the Share Purchase Agreement Contract Addendum 3 did not align with photographs of other cheque payments. The statement made by [the director] in the January 5, 2024 email is ambiguous, since the "Last Payment" could be interpreted as meaning the last payment due and made or simply the last payment that was made.

[13] The judge proceeded to dismiss Mr. Donaldson's complaint about non-disclosure, stating:

> [14] I am not satisfied the Undisclosed Information was material, but even if it had been, I consider that the plaintiff's failure to provide the Undisclosed Information to have been innocent and not an effort to mislead. I therefore reject this as a basis for setting aside the garnishing order against [Mr. Donaldson].

[14] Because Mr. Donaldson was unsuccessful in challenging the garnishing order, his application for special costs was dismissed. However, the judge addressed a request for special costs made by other defendants who participated in the chambers hearing and for whom pre-judgment garnishing orders were set aside by consent. In that discussion, the judge stated that an applicant for an *ex-parte* order is not obliged "to disclose all possible defences": at para. 20, citing *Li* at para. 37. Moreover, specific to Ms. Sistrunk, the judge found she "… took the steps … she did in her role as executor in an effort to fulfill her fiduciary duties to the estate to determine the extent of the deceased's assets and liabilities": at para. 21.

Analysis

[15] On appeal, Mr. Donaldson alleges a number of errors. It is not necessary to address all of them. Instead, it is sufficient to focus on two. First, Mr. Donaldson says the judge erred in finding that the non-disclosed information was not material. Second, he says she erred in concluding that any breach of Ms. Sistrunk's disclosure obligation was innocent and not intended to mislead, and thereby justified upholding the garnishing order.

[16] The first of these errors raises a question of mixed fact and law and this Court may only interfere if persuaded the judge made a palpable and overriding error: *Li* at para. 29, citing *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at para. 55. The second error alleges the judge applied an incorrect legal test for innocent mistake, raises an extricable question of law, and attracts a correctness standard: *Li* at para. 30, citing *Housen* at para. 36.

[17] In seeking pre-judgment garnishment, Ms. Sistrunk deposed that Mr. Donaldson was obliged to pay $100,000 to the Deceased under the terms of a share purchase agreement but only paid half that amount. On its face, Contract Addendum 3 states that the Deceased agreed to sell 400 shares in April Point Holdings Ltd. to Grant Petersen (a named defendant). In turn, Mr. Petersen nominated Raven Rock Retreats Inc. (another defendant) and Mr. Donaldson to "complete the purchase" as "[j]oint [p]urchasers", with Mr. Donaldson purchasing 100 of the 400 shares. Contract Addendum 3 goes on to state that "[o]n final payment of the [p]urchase [p]rice …" for the shares, Mr. Donaldson would be deemed to have paid 25% of the purchase price and be "entitled to 100 of the [s]hares" (emphasis added). It also states that the "final amounts" on the purchase price, including $50,000 from Mr. Donaldson, were "due and payable upon execution of … Addendum 3" (emphasis added). Contract Addendum 3 is dated October 2022 and was executed. In addition, as noted, it was sent to Ms. Sistrunk with a photograph showing the Deceased holding a personal cheque from Mr. Donaldson in the amount of $50,000 dated October 21, 2022. Ms. Sistrunk also had a copy of

an email from Mr. Petersen saying “final payment” had been made under the “final addendum”.

[18] The judge concluded this information was not material to obtaining the pre-judgment garnishing order. However, she did not set out any basis for reaching that conclusion.

[19] Ms. Sistrunk says the judge’s reasons must be read as a whole. She correctly instructed herself on the principles that govern *ex-parte* orders, including the obligation to make full and frank disclosure. She understood the extraordinary nature of pre-judgment garnishment. She independently reviewed the whole of the material before her, including Contract Addendum 3, and decided the undisclosed information was not material. Ms. Sistrunk submits this assessment should be respected, especially in light of the fact that when she applied for the garnishing order, she: (a) disclosed the fact that Mr. Donaldson had made a $50,000 payment to the Deceased; (b) disclosed bank records that did not align with a payment schedule set out in Contract Addendum 3; and (c) Mr. Petersen’s email about “final payment” having been made was ambiguous. As she did in the court below, Ms. Sistrunk emphasizes that an applicant for an *ex-parte* order is not obliged to disclose all possible defences: *Li* at para. 37.

[20] I appreciate the deferential standard of review that governs a judge’s assessment of materiality. I accept that materiality is assessed case-by-case and informed by the particular context of the case. However, in the circumstances of this case, I consider the judge’s assessment of materiality to be clearly unreasonable and reflective of palpable and overriding error. I agree with the appellant that in its cumulative effect, the non-disclosed material could realistically support an inference that any indebtedness arising out of the share purchase agreement had been paid in full in October 2022, including all of the money owed by Mr. Donaldson. This inference stands in direct contrast to the position stated by Ms. Sistrunk in her affidavit in support of pre-judgment garnishment. She had a duty to make full and frank disclosure of all facts that “… might be expected to influence the granting

or rejection …" of her application: *Kriegman v. Dill*, 2018 BCCA 86 at para. 43, emphasis added. In my view, it is plain that the content of Contract Addendum 3, coupled with the other non-disclosed items, "might be expected" to have influenced the decision to grant pre-judgment garnishment. The undisclosed material spoke directly to a central issue underlying the notice of civil claim, namely, whether money owed by Mr. Donaldson under the share purchase agreement remained outstanding.

[21] That brings me to the judge's alternative basis for declining to interfere with the garnishing order, namely, that Ms. Sistrunk's failure to disclose was "… innocent and not an effort to mislead": at para. 14.

[22] Before us, the parties had different perspectives on what amounts to an innocent mistake for purposes of upholding pre-judgment garnishment in the face of non-disclosure: *Li* at paras. 39–45. Mr. Donaldson advocates for a narrow interpretation, restricted to inadvertence. Ms. Sistrunk says the concept of innocent mistake is broader than inadvertence, provides a reviewing court with considerable flexibility in upholding these orders, and critically, captures the explanation for non-disclosure provided by Ms. Sistrunk.

[23] For purposes of this appeal, I do not consider it necessary to analyze and define the proper scope of the legal construct of innocent mistake. That is because however it may be defined, the law is clear that the fact of innocent non-disclosure is not dispositive of the issue. The particular circumstances of the case may still require that the pre-judgment order be set aside given the extraordinary nature of the remedy and the high onus placed on *ex-parte* applicants to disclose all material facts: *Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar et al.*, 2001 BCCA 204 at para. 25; *Politeknik* at para. 39. In other words, the weight to be assigned to the explanation offered for non-disclosure will depend on the context of the case, including logically, the degree of materiality of the non-disclosed information.

[24] I am of the view that in this case, the judge's finding of innocent mistake could not properly overcome the fact of non-disclosure by Ms. Sistrunk given the obvious relevance of Contract Addendum 3 and the other material she failed to place before the Registrar.

Disposition

[25] For these reasons, I would allow the appeal and set aside that part of the judge's order dismissing Mr. Donaldson's application to set aside the pre-judgment garnishing order.

[26] I would further set the garnishing order aside and order that the related funds paid into the Supreme Court in the underlying action be paid to counsel for the appellant.

[27] Finally, I would order that Mr. Donaldson's costs for the set-aside hearing in the Supreme Court and for this appeal be paid out of the estate of the Deceased.

[28] **DICKSON J.A.**: I agree.

[29] **BUTLER J.A.**: I agree.

[30] **DICKSON J.A.**: The appeal is allowed and that part of the judge's order dismissing Mr. Donaldson's application to set aside the pre-judgment garnishing order is set aside. The garnishing order is set aside. The related funds paid into the Supreme Court in the underlying action are to be paid to counsel for the appellant, and Mr. Donaldson's costs for the set-aside hearing in the Supreme Court and for this appeal are to be paid out of the estate of the Deceased.

"The Honourable Madam Justice DeWitt-Van Oosten"