COURT OF APPEAL FOR ONTARIO

CITATION: Patton-Casse v. Casse, 2012 ONCA 709
DATE: 20121025
DOCKET: C55108-C55110

O'Connor A.C.J.O., Armstrong and Juriansz JJ.A.

BETWEEN

Kathleen Patton-Casse

Applicant (Appellant)

and

Mark Casse

Respondent (Respondent in appeal)

Sarah M. Boulby, for the applicant (appellant)

Gary S. Joseph and Kristy A. Maurina, for the respondent

Heard: October 9, 2012

On appeal from the order of Justice McDermot of the Superior Court of Justice, dated October 20, 2011.

By the Court:

[1] This case involves the appeal of an arbitration award settling matters of child and spousal support. The appeal decision was further appealed to this court. This is an unusual case in that the arbitration agreement between the parties left the door open for continuing litigation by agreeing that either party could appeal the award on a question of law, a question of fact or a question of

mixed law and fact. The appeal judge held that there were errors of mixed fact and law in the arbitrator's reasons. He proceeded to substitute his own conclusions for several of the arbitrator's.

[2] After nine years of marriage and the birth of three children, the parties separated and then divorced. They resolved financial and custody/access issues by way of a consent order dated October 15, 2001 issued by James J. (the "2001 order"). The 2001 order provided for Casse to pay fixed spousal support for four years and child support for five years.

[3] In 2003, the former wife ("Patton") brought a motion for financial disclosure before Perkins J. Her motion was denied. This order (the "2003 order") becomes significant in the context of later events.

[4] In November 2005, Patton brought a motion to vary the terms of the 2001 order. She sought retroactive child support and ongoing child and spousal support. She argued that there were two material changes in circumstances: her horse training business had failed and her eldest son was diagnosed with Asperger's Syndrome, which resulted in increased child care responsibilities.

[5] The matter proceeded by way of arbitration before the Honourable Dennis Lane, Q.C. The arbitrator heard five days of evidence and then awarded Patton retroactive and prospective child support in amounts greater than those provided in the 2001 order. He also awarded retroactive spousal support from the date of

the commencement of the motion and prospective spousal support until December 31, 2014 and subject to further extension if appropriate.

[6] The arbitration agreement provided that the parties may appeal the award of an arbitrator to a Superior Court judge on questions of law, mixed fact and law and fact. Casse appealed.

[7] McDermott J. (the "appeal judge") allowed the appeal in part. He set aside or varied several aspects of the arbitrator's award.

[8] Both parties sought and obtained leave to appeal parts of the appeal judge's order. By this endorsement, we dismiss both appeals.

STANDARD OF REVIEW

[9] The appeal judge correctly identified that the appeal was one of mixed fact and law and that the rights of appeal in the arbitration agreement were unlimited. That is, while the *Arbitration Act*, 1991, S.O. 1991, c. 17, significantly limits the appeals of arbitration awards, it does permit the parties to contract out of this limitation by specifically agreeing to more wide-ranging appeal rights. This is what happened here. In this case, the "Agreement to Arbitrate" dated June 25, 2009 stated that either party may appeal the award on a question of law, a question of fact or a question of mixed law and fact.

[10] The appeal judge then referred to the standard of review articulated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para.37 for questions of mixed fact

and law, where the "question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law". He also adverted to the deference owed to the fact-finder emphasized in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 10 to 12 inclusive.

[11] Finality is particularly important in family law cases and the benefits of a final resolution – imperfect as it may be - to the parties and their children cannot be overstated.

[12] In a case such as this, however, in which the parties must be presumed to have made a fully informed decision to agree to leave the door open to appeal the arbitrator's award, the appeal judge was not mistaken in his articulation of the applicable standard of review.

[13] In so far as the appeal judge found errors in the arbitrator's application of the law to the facts, we agree that these errors entitled the appeal judge to intervene. Having done so, the appeal judge's exercise of discretion is entitled to deference and we see no reason to further interfere.

RETROACTIVE CHILD SUPPORT

[14] The arbitrator awarded Patton retroactive child support in the amount of $55,473 for the period from 2002 to 2007. The appeal judge set this award

aside. We agree with the appeal judge that the arbitrator did not properly apply the analysis required by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, in making the award. In particular, the arbitrator's reasons make it unclear how the four factors set out by the majority in *D.B.S.* affected his decision. These are (1) the reason for the recipient parent's delay in seeking child support; (2) the conduct of the payer parent (blameworthy conduct); (3) the past and present circumstances of the child including the child's needs at the time the support should have been paid; and (4) whether the retroactive award might entail hardship to the payor.

[15] In the appeal judge's view, the arbitrator may have attached weight to Casse's failure to disclose his income in 2003 despite a court order supporting him in this.

[16] We agree with the appeal judge that it would have been incorrect for the arbitrator to have in any way considered Casse's failure to disclose in reliance on a court order as blameworthy. In his order, Perkins J. directed that:

> This court orders that the order of Justice James dated October 15, 2001 is fixed and invariable for five (5) years and that the income of the respondent [Casse] is irrelevant to his obligations No Order for disclosure of tax returns during that period.

[17] We recognize that this order may not have been effective by virtue of s. 25(8) of the *Child Support Guidelines*. However, we do not find it necessary to determine that issue. Patton did not appeal the order. In these circumstances,

we agree with the appeal judge who said "under the circumstances, I cannot find that Mr. Casse was guilty of blameworthy conduct in failing to disclose his income when the court ordered that he did not have to do so."

[18] While it is not necessary in every case in which a court makes an order for retroactive child support pursuant to a *DBS* analysis that some element of wrongdoing or blameworthiness be shown on the part of the payor, we see no basis to interfere with the appeal judge's decision to set aside the retroactive child support award in the circumstances of this case.

SPOUSAL SUPPORT

[19] The arbitrator ordered that spousal support should be restored from November 1, 2005 – the date on which the support ordered in 2001 expired, until December 31, 2014, at which point it could be reviewed, as follows: lump sum for the period ending December 31, 2007 fixed at $151,000 representing 12 months at $5,000 and 13 months at $7,000 and periodic support payable from January 1, 2008 forward fixed at $9,000/month.

[20] The appeal judge upheld the arbitrator's decision to award spousal support after the expiration of the 2001 order. Casse does not challenge this finding.

[21] As to the amount of retroactive spousal support awarded, the appeal judge concluded that the arbitrator had misunderstood the tax implications to the parties of awarding a retroactive lump sum spousal support payment. In

particular, the arbitrator stated in his reasons that the tax laws had changed with effect from January 2008 so that spousal support payments were now tax deductible to the payor and taxable in the hands of the payee. This statement of the law is incorrect. There was no such change in the taxation of spousal support. The parties agree. Accordingly, since neither of the parties asked that the matter be returned to the arbitrator, and it was not apparent from the arbitrator's reasons how his misunderstanding of the applicable tax laws figured into his calculation of the amount of support owing, it was open to the appeal judge to approach the issue afresh.

[22] The appeal judge reasoned that since the retroactive lump sum payment ordered was not deductible for Casse, he would in effect pay more now than he would have had the amounts been paid on a periodic basis such that he could benefit from the tax deduction. The difficulty the appeal judge faced, however, is that due to Patton's lower marginal tax rate, the value of Casse's lost deduction exceeded that of Patton's tax saving. In this way, no adjustment to the lump sum retroactive award could place both parties in the position they would have been in had the payment been deductible and taxable.

[23] In these circumstances, the appeal judge decided to award an amount of $177,000. That amount was approximately midway between the positions of the parties. In doing so, he considered all of the surrounding circumstances,

including Patton's needs and Casse's ability to pay. On this appeal, both parties take issue with the appeal judge's approach.

[24] In our view, it was within the appeal judge's discretion to adopt the approach he did. We see no basis to interfere.

[25] As to the prospective spousal support, the appeal judge reduced the amounts awarded by the arbitrator and reduced the duration of the award such that no spousal support would be payable after June 30, 2011.

[26] In our view, it was open to the appeal judge to intervene. As he pointed out, in spite of evidence before him that Casse's post-separation income was attributable to effectively new employment, the arbitrator failed to consider, as he should have, the question of what part of Casse's post-2005 period was disconnected from Patton's efforts during the marriage. The appeal judge put it this way: "His failure to do so is a reviewable error, as post-separation increases in income have to at least be analyzed in order to determine whether they are related to the marriage: see the annotation by James G. MacLeod to *Rozen v. Rozen*, 2003 Carswell B.C. 1564 (C.A.) where in the author states":

> Automatically sharing post-separation increases in income as akin to treating a job as if it were a family asset, shareable in specie. Rather than doing so as a matter of course, courts should investigate whether there is sufficient relationship between the increased income and the payee's efforts during marriage to justify allowing him or her to share in the increase.

[27] Given this conclusion, we are satisfied it was open to the appeal judge to consider anew the issue of the amount of prospective spousal support and the duration of that support. We see no error in his reasoning with respect to the conclusions that he reached.

THE $21,600 OVERPAYMENT

[28] The arbitrator concluded that while Casse had inadvertently continued to pay $1,000/month for daycare for two years longer than required, he was not entitled to the reimbursement of $21,600. This conclusion was based on the parties' agreement in the "Joint Statement of Issues for Trial" in which they restricted claims with respect to s. 7 expenses to those incurred after May 1, 2009.

[29] The appeal judge, on the other hand, interpreted the "Joint Statement of Issues for Trial" as permitting Casse's claim for overpayment under James J.'s order. The appeal judge held that Casse was entitled to credit for the overpayment in the amount of $21,600 assuming proof of payment.

[30] We do not see any reason to interfere with the appeal judge's conclusion on this point either.

COSTS

[31] Having made significant changes to the arbitrator's award, the appeal judge reduced the arbitrator's award of costs of the arbitration from $292,229.45 ($194,056 in costs and $108,173 for forensic accounting fees) to $179,377.20.

[32] Guided by Rules 18 and 24 of the *Family Law Rules*, O. Reg. 114/99 and considering that Casse claimed costs of the appeal in the amount of $25,000 and that he had some success on the appeal, he found that Patton's costs of the appeal should be set off against her costs of the arbitration of $179,377.20 for a total of $157,202.20.

[33] Significantly, Rule 49 offers played an important role in the arbitrator's award of costs for the arbitration. Those offers were no longer a factor after the appeal judge's order.

[34] We are of the view that the appeal judge properly exercised his discretion in making the costs award for the arbitration.

COSTS OF THE APPEAL

[35] The parties agreed that if one side or the other was totally successful, the appeal costs should be fixed in the amount of $20,000.

[36] Both appeals are dismissed. The grounds raised in Patton's appeal were far more substantial than those in Casse's appeal. We order the costs of the

appeals, including the leave to appeal motions, to be fixed in the amount of $15,000 in favour of Casse, inclusive of disbursements and HST.

Released: "OCT 25 2012"
"DOC"

"D. O'Connor A.C.J.O."
"Robert P. Armstrong J.A."
"R.G. Juriansz J.A."