IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: Section 29 of the *Court Order Enforcement Act* and the Registration of a Foreign Judgment Against John Tolman, Mrs. John Tolman, Bob Alpen and Mrs. Bob Alpen

Citation: ***Walters and Walters v. Tolman et al,***
2005 BCSC 1372

Date: 20050930
Docket: LO33156
Registry: Vancouver

Between:

Stanley C. Walters and Helen L. Walters

Plaintiffs
Judgment Creditors

And

John Tolman also known as John B. Tolman, Mrs. John Tolman, Bob Alpen also known as Robert Alpen and Mrs. Bob Alpen

Defendants
Judgment Debtors

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment Respecting Costs

Counsel for the Plaintiffs:	M. Ferbers
Counsel for the Defendant, Donnette Heinrich, also known as Mrs. John Tolman:	T.J. Delaney
Counsel for the Defendants, Mr. and Mrs. Alpen:	A. Sweezey
Written Submissions:	Vancouver, B.C.

[1] On June 8, 2005, I delivered reasons for judgment in this matter. I ordered costs on Scale 3 to the successful parties, including Donnette Heinrich ("Ms. Heinrich"). I subsequently gave leave for Ms. Heinrich to make submissions with respect to her entitlement to special costs.

[2] Ms. Heinrich suggests that she is deserving of an award of special costs because:

(1) Mr. and Mrs. Walters proceeded *ex parte* when other options were available;

(2) the Washington judgment was limited to the marital community property of Ms. Heinrich and her former husband Mr. Tolman which, in fact, should have been brought to the attention of the court;

(3) Mr. and Mrs. Walters misled the court to the effect that Ms. Heinrich had been personally served; and

(4) Mr. and Mrs. Walters persisted with their action after they received the affidavit of Ms. Heinrich denying that she had been served or that she attorned to the jurisdiction of the court in Washington State.

I. DISCUSSION

[3] The test for the award of special costs was laid out by Chief Justice Esson (as he then was) in ***Leung v. Leung*** (1993), 77 B.C.L.R. (2d) 314 at paras. 4 and 5, [1993] B.C.J. No. 2909 (S.C.):

> The concept of special costs was introduced to our rules in the 1990 amendments. It has been held that entitlement to special costs is to be determined on the same principles formerly applied to awarding solicitor-client costs. The test for awarding such costs was stated thus by Lambert J.A. in ***Stiles v. British Columbia (Workers' Compensation Board)*** (1989), 38 B.C.L.R. (2d) 307 (C.A.) at p. 311:
>
> > …solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used.
>
> … "[R]eprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It means simply "deserving of reproof or rebuke".

1. Proceeding *Ex-Parte*

[4] Counsel for Ms. Heinrich argues that she should receive special costs because it was not necessary for Mr. and Mrs. Walters to proceed without notice. Ms. Heinrich relies on ***Solex Developments Co. v. Taylor (District)*** (1998), 60 B.C.L.R. (3d) 53, [1998] B.C.J. No. 2589 (C.A.) and ***Leung*** for this proposition.

[5] In ***Solex***, the appellant had applied *ex parte* for an injunction restraining the respondent from subdividing its land. The application was made *ex parte* on the grounds that the situation was urgent. The appellant failed to inform the court of its economic interest in the land in question. The Court of Appeal disagreed that the situation was urgent and found that notice should have been afforded to the respondent.

[6] In ***Leung*** at para. 7, Chief Justice Esson commented on the situations where it is appropriate to bring an application *ex parte:*

> In general, the cases in which an ex parte application are justified fall into two categories. The first, [is] in the case of the Mareva injunction… The second is where the element of urgency is so great that it would be impracticable to give notice.

[7] The Chief Justice went on, at para. 9, to say:

> But it is important that parties who decide to apply for an injunction be encouraged in all reasonable ways to not proceed without notice where there is any reasonable alternative… Anyone considering whether to proceed ex parte should reflect that they do so at the risk, if they cannot later satisfy the court that the failure to give notice was justifiable, of special costs being awarded. [Emphasis added.]

[8] I am not persuaded that ***Solex*** and ***Leung*** are applicable to the case now before the Court. Neither ***Solex*** nor ***Leung,*** as pointed out by counsel for Mr. and Mrs. Walters, are situations where registration of a foreign judgment was being made pursuant to the ***Court Order Enforcement Act***, R.S.B.C. 1996, c. 78 (the "***Act***"). Although I agree with the general proposition that most *ex parte* applications should only be made in urgent situations, I am of the view that the requirement of urgency is specifically relevant to situations where applications are being made under the normal *Rules of Court* or at least where no other statutory provisions for an *ex parte* application exist.

[9] In the case at hand, Mr. and Mrs. Walters were not proceeding solely under the *Rules of Court;* section 29 of the ***Act*** provides for *ex parte* registration of foreign judgments if certain conditions are met. The relevant portion of the ***Act*** reads:

29 (1) If a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to the Supreme Court within 6 years after the date of the judgment to have the judgment registered in that court, and on application the court may order the judgment to be registered.

(2) An order for registration under this Part may be made without notice to any person in any case in which

(a) the judgment debtor

(i) was personally served with process in the original action, or

(ii) although not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court, and

(b) under the law in force in the state where the judgment was made,

(i) the time in which an appeal may be made against the judgment has expired and no appeal is pending, or

(ii) an appeal has been made and has been disposed of.

(3) In a case to which subsection (2) applies, the application must be accompanied by a certificate issued from the original court and under its seal and signed by a judge or the clerk of that court.

(4) The certificate must be in the form set out in Schedule 2, or to the same effect, and must set out the particulars as to the matters mentioned in it.

(5) In a case to which subsection (2) does not apply, notice of the application for the order as is required by the rules or as the judge considers sufficient must be given to the judgment debtor.

[10] The conditions prescribed by the ***Act*** were met by the certified certificate of the Superior Court of the State of Washington which was presented by Mr. and Mrs. Walters. The certified certificate read:

a) The summons and complaint for monies due and owing was issued on October 5, 2001, and proof was provided to this Court that it was served on the Defendants and leaving it with the Defendants;

b) A Defence was entered and Judgment was allowed at trial;

c) Joint and several Judgment was given on January 17, 2003; and

d) Time for Appeal has expired and no Appeal is pending.

[11] Paragraph 29(2)(a) of the ***Act*** requires either personal service *or* defense of the action for an application for registration to be brought *ex parte.* The certified certificate provides that both conditions had been satisfied. With reference to Chief Justice Esson's comment above, the failure to give notice was justifiable in the circumstances.

[12] Counsel for Ms. Heinrich argues that the ***Act*** does not require a party to proceed without notice and therefore unless the situation is urgent, notice should be given. I am not persuaded by this argument. There is no requirement in the ***Act*** that *ex parte* applications made under it need to be urgent. Section 29(2) sets out the provisions for *ex parte* applications in full and there is no mention of urgency. Further, section 29(5) provides for the circumstances when notice should be given. If the Legislature had intended that only urgent applications for registration should be made without notice, it would have said so.

[13] In the circumstances of this case, the requirements of section 29(2) were met by the certified certificate. It is fair that a judgment debtor who has attorned or been personally served in the original action need not receive notice of the registration of that judgment in another jurisdiction. I say this with the understanding that in the present case it was later discovered that Ms. Heinrich had done neither; however, as I will elaborate upon later, I am of the opinion that Mr. and Mrs. Walters were not aware of this and it was reasonable for them to rely on the certified certificate.

[14] Mr. and Mrs. Walters' decision to proceed without notice was in compliance with the ***Act*** and was therefore neither "scandalous", "outrageous" nor "reprehensible" and is not deserving of special costs.

2. <u>Was the Court Misled?</u>

[15] Counsel for Ms. Heinrich alleges that Mr. and Mrs. Walters must have known that Ms. Heinrich had not been personally served and had not attorned in the Washington action. He argues that as a result, Mr. and Mrs. Walters misled the Court when they applied for registration of the Washington judgment. He further argues that their reliance on the certified certificate as proof of service and attornment was careless and deserving of censure.

[16] Although I agree that misleading the court in an *ex parte* application may be grounds for an award of special costs, I am not convinced that Mr. and Mrs. Walters misled the Court in the circumstances of the present case. The Washington judgment was assigned to Mr. and Mrs. Walters after it had been obtained from the Washington court; Mr. and Mrs. Walters, although one or both of whom were parties to the Washington action, were not the plaintiffs in the Washington action. With this in mind, it is difficult for me to conclude, without any evidence, that they knew that Ms. Heinrich had not been served or had not attorned to the jurisdiction of the Washington court.

[17] Counsel for Ms. Heinrich also argues that the material non-disclosure need not be wilful; he argues that carelessness that leads to a material non-disclosure is grounds for the award of special costs. He relies on ***Bank of Credit and Commerce International (Overseas) Ltd. (Liquidators of) v. Akbar*** (2001), 86 B.C.L.R. (3d) 312, [2001] B.C.J. No. 500 (C.A.) for the proposition that carelessness may be "conduct deserving of censure by the court" (***Bank of Credit*** at para. 19). In that case, the material prepared in support of an application for a Mareva injunction included in the view of the trial judge, "significant, careless misstatements of fact and… undisclosed factual matters that should have been within the foresight of an experienced forensic accountant and his solicitor as relevant to the court" (***Bank of Credit*** at para. 15).

[18] However, the situation in ***Bank of Credit*** is distinguishable from the case at bar. In ***Bank of Credit***, the applicants were careless in the reliance on documents that were in their control. In the present circumstances, I am of the opinion that it was reasonable, and not careless, for Mr. and Mrs. Walters, who had been assigned the Washington judgment by another party, to rely on the certified certificate of the Washington court which stated, among other things, that Ms. Heinrich had been served and had defended the action (and, therefore, attorned to the jurisdiction of that court).

3. Was the Washington judgment limited to marital community property?

[19] The Washington judgment provided for:

> "Joint and Several Judgment in favour of Plaintiff and against Defendants John Tolman and Mrs. John Tolman, and their marital community". [Emphasis added.]

[20] Whether, in the circumstances, the judgment should have been limited to marital community property given the pleadings in the Washington action is a good question. However, that is not for me to decide. The judgment was not limited to "marital community". Thus, Mr. and Mrs. Walters did not mislead the court with respect to the nature of the Washington judgment.

4. Continuing the Action After Receiving Ms. Heinrich's Affidavit

[21] Counsel for Ms. Heinrich argues that the Court can use its discretion to award special costs in the present case because the decision of Mr. and Mrs. Walters to proceed with the action, after having received Ms. Heinrich's affidavit denying service and attornment, is conduct deserving of censure. The British Columbia Court of Appeal decision in ***Solex*** is cited as authority for the award of special costs in the situation where a plaintiff persists with an unfounded action.

[22] In ***Solex***, the appellant's *ex parte* application for an injunction prohibiting the subdivision of the defendant's land was based upon the failure of the official who had approved the subdivision to comply with s. 85.1 of the ***Land Title Act***, R.S.B.C. 1996, c. 250 which required confirmation of compliance with certain provisions of the ***Waste Management Act,*** R.S.B.C. 1996, c. 482. The appellants were subsequently made aware that, although the approval was not done properly, the respondents were doing all that was required under the ***Waste Management Act***. Madam Justice Southin upheld the award of special costs and concluded at para. 27:

> It can, in my opinion, be misconduct in litigation, as that phrase is used in the authorities, to persist with a claim… when it is plain that, in the circumstances, the claim is bound to fail. Once the

> appellant knew from the affidavit… that, in fact, the spirit of the *Waste Management Act* was being observed by the respondent, it ought to have accepted that it could not succeed.

[23] The circumstances of the present case are different. I am of the view that the receipt of Ms. Heinrich's affidavit denying knowledge of the proceedings in Washington should not have necessarily led Mr. and Mrs. Walters to conclude that their application for registration was "bound to fail". For them to conclude that their claim was bound to fail, they would have had to accept the affidavit of Ms. Heinrich as true. In fact, the affidavit of Ms. Heinrich was later found to be true, but at the time it was received, Mr. and Mrs. Walters had the certified certificate in hand which directly contradicted what Ms. Heinrich asserted. In those circumstances, it was reasonable for them to wait for Ms. Heinrich to bring a motion for the registration of the judgment to be set aside and allow the court to decide if the assertions of Ms. Heinrich were true. It was not reprehensible nor was it conduct deserving of rebuke when they did not withdraw the registration of the Washington judgment, and therefore, an award of special costs is not warranted.

II. CONCLUSION

[24] For reasons noted above, I would not award special costs to Ms. Heinrich. I do, however, confirm my original award of costs to her on Scale 3. Mr. and Mrs. Walters are entitled to their costs of this application concerning costs on Scale 3.

"T.J. Melnick, J."
The Honourable Mr. Justice T.J. Melnick