

25-10-10

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN

Cause No: FAM 24/2010

6 BETWEEN:

MYRON GUSHLAK

PETITIONER

11 AND:

DEBBIE LYNN GUSHLAK

RESPONDENT

17 Appearances:

Mr. Martin Pointer Q.C. with Mr.
David McGrath and Mr. James
Kennedy of Samson and McGrath for
the Petitioner/Applicant

Mr. Anthony Akiwumi of Stuarts for
the Respondent

Mr. John Epp of Conyers Dill &
Pearman for Royal Bank of Canada
(Cayman) Ltd.

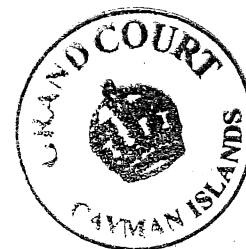
29 Before:

The Hon. Mr. Justice Charles Quin

30 Heard:

21st October 2010

32 RULING



34 Introduction

- 36
- 37 1. The Petitioner and the Respondent were married on the 28th April 1995 in British
- 38 Columbia, Canada.

1 2. On the 2nd February 2010 the Petitioner filed for the dissolution of the marriage
2 on the grounds that the marriage had broken down irretrievably and the
3 unreasonable behaviour of the Respondent.

4
5 3. On the 7th October 2010 the Respondent obtained an *ex parte* injunction from
6 Henderson J. which ordered:

7
8 *“The Petitioner must not (i) remove from the Cayman Islands or in any way*
9 *dispose of or deal with or diminish the value of any of his assets which are in*
10 *the Cayman Islands whether in his own name or not and whether solely or*
11 *jointly owned up to the value of CI\$80,000,000.00 or (ii) in any way dispose*
12 *of or deal with or diminish the value of any of his assets whether they are in*
13 *or outside the Cayman Islands whether in his own name or not and whether*
14 *solely or jointly owned up to the same value.”*
15

16 4. This prohibition included the Petitioner’s bank accounts and his shares in 32
17 companies, partnerships and other entities. Furthermore the prohibition included
18 the former matrimonial home known as Casa Coyaba Estate located at 222 Old
19 Prospect Road, Grand Cayman (“Casa Coyaba”) and Condo 602 at the Ritz
20 Carlton, Grand Cayman.

21
22 5. By a Summons dated the 15th October 2010 the Petitioner applies to have the said
23 *ex parte* injunctive order discharged or, in the alternative, varied to permit the
24 sale of Casa Coyaba. Should the Court reject the Petitioner’s application for a
25 discharge of the injunction, the Petitioner seeks a further variation to permit him
26 unfettered access to his personal bank accounts at the Royal Bank of Canada
27 (“RBC”). Further the Petitioner applies to have the Court file in this matter sealed
28 and not open for inspection without leave of the Court.

29

1 6. To support his application to discharge and or vary the injunction of the 7th
2 October 2010 the Petitioner relies on his Fifth Affidavit filed on the 14th October
3 2010, and on the affidavit of Mrs. Sheena Connolly, also filed on the 14th
4 October 2010 as well as the parties' previous affidavits on the Court file.

5
6 7. The Respondent, on the other hand, applies for the continuation of the injunction
7 in its entirety, and relies upon the evidence set out in her Third Affidavit, filed on
8 the 6th October 2010 and on her Fourth Affidavit, filed on the 20th October 2010.

9
10 8. Although the Petitioner seeks the discharge of the entire Order whilst the
11 Respondent seeks the continuation of the entire order, the submissions of both
12 counsel in writing and before the Court focused heavily on whether the sale of
13 Casa Coyaba, which is scheduled to take place by public auction on the 3rd
14 November 2010, should actually take place or be cancelled by order of the Court.

15
16 9. On the morning of this hearing, the 21st October 2010, the Respondent put before
17 the Court her own Summons, filed on the 19th October 2010, seeking to join
18 Sotheby's International Realty ("Sotheby's") and Concierge Auctions
19 ("Concierge") as parties and prohibiting them from advertising, marketing or
20 performing any other act designed to provide assistance in the sale of Casa
21 Coyaba.

22

23 **Discharge of *Ex parte* Injunction**

24

25 10. Having read the Affidavits on the Court file and heard the submissions of leading
26 counsel for the Petitioner, and counsel for the Respondent, I am not satisfied

1 from the material and the evidence before me that I should accede to paragraph 1
2 of the Petitioner's Summons and discharge Henderson J's order.

3

4 11. Henderson J. exercised the Court's jurisdiction in accordance with s.20(d) of the
5 Matrimonial Causes Law (2005 Revision) as read with GCR O.29 r.1(i) and
6 r.1(ii). The learned Judge satisfied himself on the evidence before him at that
7 time that the Respondent was in a position to provide a cross undertaking in
8 damages. It is clear from the evidence before me that the Respondent provided a
9 good arguable case and demonstrated that there was a risk of dissipation of
10 assets. In fact, discovery is incomplete, and it would be fair to describe the
11 present picture of the Petitioner's and the Respondent's assets as opaque, as it
12 involves numerous companies and bank accounts in several offshore
13 jurisdictions. In order to provide full and proper discovery, both parties need to
14 file detailed Affidavits of Means which will necessitate the filing of substantial,
15 if not voluminous exhibits. Once full and proper disclosure is provided, then the
16 Court will be better placed to view the full nature and extent of the Petitioner's
17 assets.

18

19 12. When one considers the material put before Henderson J., and the nature of the
20 criminal proceedings against the Petitioner in the United States, as well as the
21 regulatory proceedings in Germany and Switzerland, it is my view that the Court
22 should continue the major part of the injunction to ensure that the status quo is
23 maintained. Accordingly, I find on the balance of convenience, that the
24 injunction should be continued and I so order.

25

26

1 **Proposed Sale of Casa Coyaba**

2
3 13. The parties moved from Canada to Grand Cayman in 2000. It is common ground
4 that in 2001 they purchased Casa Coyaba. The title to Casa Coyaba is held by a
5 company called Prodigious (Grand Cayman) Ltd. (“Prodigious”). According to
6 the Respondent, there is one share in trust at a local firm of attorneys, which is
7 owned 50:50 by the Petitioner and Respondent.

8
9 14. The Court understands that it is uncontroversial that the monies for the purchase
10 of the matrimonial home came from the sale of two of their homes in Canada –
11 one in West Vancouver and the other in Whistler B.C.

12
13 15. On the 1st March 2007 the parties jointly signed a loan document with RBC in the
14 amount of US\$2,400,000.00 as directors and owners of Prodigious. Prodigious
15 currently owes RBC approximately US\$1,600,000.00 on this loan. It is the
16 Petitioner’s evidence that RBC has allowed Prodigious to pay interest only on the
17 loan for a limited period of 90 days, thereby reducing the payments from
18 US\$32,000.00 to US\$6,000.00 per month. However, it was understood that this
19 allowance from RBC will expire at the end of November 2010, at which time the
20 monthly loan payments will revert to US\$32,000.00. In addition, the Court
21 understands that there is a further charge on Casa Coyaba in the sum of
22 US\$750,000.00 to International Fidelity. According to the Petitioner, Casa
23 Coyaba is an extremely expensive property to run, stating that it costs
24 approximately \$600,000.00 per annum to maintain even when it is unoccupied.

1 16. The Respondent is a guarantor on the loan with RBC. In her Third Affidavit the
2 Respondent claims that they had joint ownership in Prodigious, but that the
3 Petitioner, without the consent of the Respondent, had the one share cancelled
4 and a new share issued in his name only. This is a matter which will require
5 further examination at a later stage.

6
7 17. It is apparent from the Respondent's Third Affidavit that she spent most of her
8 time in Cayman renovating and improving the matrimonial home. This evidence
9 is unchallenged.

10
11 18. At the hearing before Henderson J. on the 7th October 2010 the Respondent
12 justified her urgent *ex parte* application on the basis that she mistakenly thought
13 that the auction for the sale of Casa Coyaba was to take place on the 8th October
14 2010. This Court understands from counsel to the Respondent that, at that
15 hearing, this was corrected and the Court understood that the auction was to take
16 place on the 3rd November 2010.

17
18 19. The Respondent relies upon the opinion, dated the 23rd April 2010, provided by
19 Charterland, which values the house at CI\$12,000,000.00 and therefore she was
20 and is concerned that there would be a real risk that the house would sell at a
21 significant undervalue.

22
23 20. The Respondent's resistance to the sale of this property is largely based on
24 Charterland's valuation of the property at CI\$12,000,000.00. However, the Court
25 notes that the Respondent's evidence confirms that she and the Petitioner have
26 listed the matrimonial home several times during their marriage at various and

1 markedly different sale prices. The Respondent states that the selling price of the
2 matrimonial home became a sore point during their divorce and her counsel
3 makes it patently clear that she resists the sale by auction on the 3rd November
4 2010.

5
6 21. However, the Respondent, in her Third Affidavit, states that she is, “...*very*
7 *supportive of a quick sale of the matrimonial home and would agree to a selling*
8 *price in the range of US\$12,000,000.00 to US\$14,000,000.00,*” which she says
9 she thinks would be more interesting for a potential buyer and for the purposes of
10 a quick sale. She also adds that it is her opinion that, “...*due to the value and*
11 *nature of the property, that proper marketing be used and that the house be*
12 *marketed in an international setting with advertisements in world known*
13 *magazines and agencies.*”

14
15 22. I note from the evidence that the Respondent is content for the house to be sold
16 by Mrs. Sheena Conolly of Sotheby’s. As far back as the 12th October 2009 Mrs.
17 Conolly asks the Respondent whether she can offer the house for sale at
18 US\$20,000,000.00 including Sotheby’s fees. Mrs. Conolly accepts that the figure
19 sounds a bit high, but she hoping to get the right buyer. In response to Mrs.
20 Conolly’s query the Respondent confirms with, “*yes absolutely... we put in*
21 *alot(sic) of extras since you saw it .. come by at the end of the month when i(sic)*
22 *am back ...*”

23
24 23. Indeed, during the hearing of this matter the Respondent’s attorneys produced an
25 email, dated the 21st September 2010, sent by the Respondent to Mrs. Sheena
26 Conolly in which she states, “*Sheena, can you please tell me if you are still the*

1 *lead on our listing of 222 Old Prospect Road (our matrimonial home), and if so,*
2 *can you please give me an update as to the number of offers, showings and*
3 *potential buyers. I am of the view that the house is grossly overpriced and would*
4 *be interested to hear the feedback on the respective potential buyers. Thanks so*
5 *much!...*"

6

7 24. Mrs. Conolly's Affidavit evidence is that she has made extensive efforts to sell
8 the property, both on the local market and the international market. Her efforts
9 would seem to accord with the Respondent's own desire and recommendations,
10 in that Mrs. Conolly has marketed the property in international publications,
11 through Sotheby's and in the New York Times, International Herald Tribune and
12 Wall Street Journal. In addition, Mrs. Conolly said that the property was listed at
13 US\$19,800,000.00, which, in late 2009 was the sale price agreed by the
14 Respondent and the Petitioner. Then, in April 2010, Mrs. Conolly entered Casa
15 Coyaba into the standard CIREBA listing agreement for a period of 12 months to
16 market the property for sale on the Multiple Listing Service.

17

18 25. The Court notes that although Mrs. Conolly is not a chartered surveyor, she is the
19 owner of Cayman Islands Sotheby's International Realty and a broker of the
20 firm. In addition, Mrs. Conolly has 15 years experience in the Real Estate field in
21 the Cayman Islands and regularly works with high-value properties.

22

23 26. Mrs. Conolly's evidence is that over the entire marketing period, they had only
24 five or six leads from overseas, and no offers. The Court has no reason to
25 question Mrs. Conolly's statement that she stands over all her efforts to market
26 and sell the property in a highly professional manner.

1 27. Mrs. Conolly has, with the approval of the Petitioner, engaged Concierge, which
2 is a firm of New York auctioneers specializing in high-value residential homes to
3 assist her in selling Casa Coyaba. Prodigious entered into a contract with
4 Concierge on the 20th August 2010. The terms of the contract are that Prodigious
5 pay the sum of US\$185,000.00 for Concierge's services in marketing and
6 auctioning the property. Furthermore, the Petitioner has, through Prodigious, the
7 right to cancel the auction, if no pre-auction bids in excess of US\$8,500,000.00
8 are obtained within three days of the auction date.

9
10 28. It is clear that both Sotheby's and Concierge have now spent a considerable
11 amount of time and effort in marketing this property for sale by auction on the 3rd
12 November 2010. Additionally, Mrs. Conolly professes to be extremely excited by
13 the interest in the property leading up to the auction.

14
15 29. There is also evidence from Concierge that there is an increased interest in the
16 sale of Casa Coyaba. The project manager, Mr. Stuart Mattison ("Mr. Mattison"),
17 confirms in his letter to Prodigious dated the 13th October 2010, that 52 interested
18 prospects have been identified and there have already been 6 showings to
19 legitimately qualified buyers. In addition, Mr. Mattison confirms that by the 13th
20 October 2010, two prospects have been back a second time, and there have been
21 several tours with brokers instructed to review Casa Coyaba.

22
23 30. The Court does not accept, nor is there evidence to support, the Respondent's
24 contention that the Petitioner wishes to dispose of the property on an improvident
25 basis, to her detriment. This just does not make any sense and would be
26 prejudicial to the Petitioner as much as it would be to the Respondent.

1 31. The Court is satisfied that it is in the best interest of both parties for this sale by
2 public auction to continue. There is no evidence to suggest that the Petitioner,
3 Mrs. Sheena Conolly, Sotheby's and Concierge are doing anything but their best
4 to obtain the best possible price for Casa Coyaba.

5

6 32. The Court takes note of the fact that if there are no pre-auction bids in excess of
7 \$8,500,000.00 received up to 3 days before the auction date the Petitioner has
8 undertaken to the Court that he will cancel the auction.

9

10 33. The Court is prepared to make a direction that the Petitioner must cancel the
11 auction if there is no pre-auction bid above US\$8,500,000.00, thereby allaying
12 the Petitioner's worst fears and protecting the property from a fireside sale.

13

14 34. The Court also notes that RBC's interest-only relief on the mortgage expires after
15 90 days. The Petitioner's evidence is that if the sale does not go through, the
16 mortgage will go into substantial arrears, which may well force a potential
17 foreclosure on Casa Coyaba. In that case, there is evidence to suggest that the
18 market price might fall even further.

19

20 35. From all the evidence before this Court, I find that it is in the best interest of both
21 parties for this auction to go ahead. If it is cancelled, there is considerable force
22 in the Petitioner's leading counsel's argument that the property could become
23 blighted and never realise its proper value. I agree with and apply Henderson J.'s
24 dicta in *Scotia Bank (Cayman Islands) Ltd. v. Rankine* (7th July 2004) when he
25 stated:

26

1 40. The Petitioner seeks the variation to remove the part which orders him to tell the
2 Respondent's attorneys, and therefore allow him unfettered access to his personal
3 bank accounts at RBC in the Cayman Islands.

4
5 41. The Petitioner complains through his leading counsel that the formulation of the
6 injunction concerning his spending limit has proved to be most unfortunate.
7 Moreover, the Petitioner complains that it is not practicable, and argues it is
8 unnecessary.

9
10 42. At the beginning of the hearing, Mr. John Epp, counsel on behalf of RBC,
11 submitted that RBC have also found the formulation of the injunction to be quite
12 awkward and said that although the Bank would continue to abide by any order,
13 it was proving "*not workable.*"

14
15 43. It is this Court's view that the first part of paragraph 3.1 of Henderson J.'s order
16 provides the Respondent with the protection she and her attorneys sought at the
17 hearing before Henderson J. on the 7th October 2010. It is clear that it is
18 extremely awkward and possibly unworkable, and therefore, I see no useful
19 purpose in allowing it to continue.

20
21 44. Accordingly, I accede to this paragraph of the Petitioner's Summons and delete
22 the wording "*But before spending any money the Petitioner must tell the*
23 *Respondent's attorneys where the money is to come from*" in paragraph 3(1) in
24 the injunction order forthwith.

25
26

1 **Sealing of Court File**

2
3 45. The final and fourth relief that the Petitioner seeks in his Summons is for the file
4 in this matter to be sealed and not opened to inspection, except with the prior
5 leave of this Court.
6

7 46. At the close of the hearing on the 21st October 2010 leading counsel for the
8 Petitioner submitted that there is no principle in law pursuant to which a third
9 party affected by an order obtained without notice was entitled to be supplied
10 with the evidence relied upon by the Court in granting that Order. Counsel for the
11 Respondent submitted to the contrary.
12

13 47. After the hearing was closed, and on the 22nd October 2010, the Court received
14 an undated letter from the Respondent's attorneys, with a copy of the English
15 High Court decision in the Family Division of *C v. C (WITHOUT NOTICE*
16 *ORDERS)* [2006] 1 FLR 936 and the decision of Munby J. which stated:
17

18 *“When orders were made without notice, the obligation on the applicant’s*
19 *legal representatives to respond forthwith to any reasonable request from the*
20 *party enjoined or from his legal representatives, either for copies of the*
21 *materials read by the judge or for information about what took place,*
22 *extended to any person served with or given notice of the injunction, and was*
23 *not restricted to parties in the proceedings.”*
24

25 Mr. Justice Munby went on to add:
26

27 *“The disclosure rule was not a technical one, but a broad principle of*
28 *fairness and natural justice which applied for the benefit of all those*
29 *‘affected’ or ‘bound’ by the order, whether or not they were party to the*
30 *proceedings and whether or not they had been enjoined by it.”*
31

1 48. It is clear in this case for example, that RBC was an entity clearly “affected” and
2 “bound” by Henderson J.’s *ex parte* injunction of the 7th October 2010. On the
3 principles set out by Munby J. in *C v. C*, RBC would be entitled to see the
4 application for the injunction, the evidence filed in support of the application, a
5 note of the submissions and a note of the hearing, as well as the Injunctive Order
6 itself. This allows the bank to comply with the Order and also, should it wish to
7 challenge the Order or any part thereof, it gives the bank the full picture which
8 will facilitate the making of whatever application they deem appropriate to the
9 Court. It also allows RBC as a party “affected” and, indeed in their case, “bound”
10 by the Order, to ensure that they do not commit any contempt of Court. So far as
11 RBC is concerned it would appear, by virtue of the fact that their counsel
12 appeared on the 21st October 2010, RBC is aware of its position, and indeed were
13 able to make some salient submissions regarding the working of the Injunctive
14 Order.

15
16 49. However, the Petitioner may well have a justifiable concern that other
17 information and evidence contained as of today in no less than 10 Affidavits on
18 the Court file, are of no relevance to the injunction and, to use Munby J.’s words
19 in *C v. C*, would be “*undesirable that a third party should see.*” Accordingly, in
20 my view, the Court file can be properly sealed to prevent third parties from
21 inspecting the file and seeing evidence which is of no relevance to the injunction
22 of the 7th October 2010 and which would be undesirable to allow third parties to
23 see.

24
25 50. At present, the practice in the Grand Court of the Cayman Islands for
26 applications in the Family Division is for such hearings to take place in

1 chambers, thereby excluding the participation or attendance of any third parties
2 without leave of the Court. Indeed, in this case, RBC was granted leave to appear
3 and Mr. John Epp was given leave to make certain submissions at the beginning
4 of this hearing. However, having made these submissions, Mr. Epp absented
5 himself in the usual manner.

6

7 51. Rule 23 of the Matrimonial Causes Rules (2003 Revision) states:

8

9 *“Unless these rules otherwise provide, applications in matrimonial*
10 *proceedings shall be made to a Judge of the Court in Chambers by Summons*
11 *filed in the Registry.”*
12

13 52. It is obviously open to both parties and their attorneys to agree to provide a third
14 party with evidence and information from the Affidavits and material filed in
15 these proceedings. Should the parties not consent, then, subject to the *C v. C*
16 authority exception regarding injunction orders without notice, it is up to the
17 third party to file an application to this Court and set out its reasons for seeking
18 inspection of any of the documents on the Court file.

19

20 53. Accordingly, and for the reasons set out above, this Court accedes to the
21 Petitioner’s application for the file in this matter to be sealed and not opened to
22 inspection except with the consent of both parties, or with the prior leave of the
23 Court.

24

25 54. The Respondent filed a Summons on the 19th October 2010 seeking to join the
26 Sotheby’s and Concierge as Second and Third Respondents to this action. The

1 purpose of the Summons was to prohibit Sotheby's and Concierge from
2 continuing the advertising and marketing for the sale of Casa Coyaba.

3
4 55. The Court has acceded to the relief sought in paragraph 2 of the Petitioner's
5 Summons and consequently the Court rejects the Respondent's application to
6 join Sotheby's and Concierge as Second and Third Respondents.

7
8 56. In light of the fact that both parties have been partially successful, I would be
9 inclined to order that costs be costs in cause. However, before finalizing the
10 Order consequential to this Ruling, I will make myself available, should the
11 parties wish to be heard on the wording of the Order and on the question of costs.
12 Such a hearing can be set down at the convenience of both parties' attorneys and
13 as soon as reasonably practicable.

14
15 57. Finally I give both parties general liberty to apply upon 7 days' notice.

16
17

18 **Dated this the 25th October 2010**

19
20
21

22 **Quin J.**
23 **Judge of the Grand Court**

