

DATE: 2013/09/06

[1] Peter Clarke (“Peter”) and Loretta Clarke (“Loretta”) continue to be equal shareholders of Loretta Alice Clarke Holdings Inc. (“LAC”), an electrical contracting company which owns assets in excess of three million dollars. Peter and Loretta also separated after a lengthy

marriage. After three days of trial, the parties signed Minutes of Settlement and then consented to a Judgment, attached as Schedule "A" to this decision, which was signed on October 28, 2010 and subsequently entered by the Registrar.

[2] The Minutes of Settlement and Judgment did not address the capital gains taxes which would be payable by LAC when it transferred the Carp property to Peter for \$1,100,000 and the Moodie Drive lot to Loretta for \$650,000 pursuant to the terms of Settlement Agreement. The properties cannot be transferred to Peter and Loretta from LAC by way of rollover because they were divorced in 2008, two years before the Minutes of Settlement were signed. As a result, the properties must be conveyed to Peter and Loretta at their fair market value and capital gains tax and some recapture will have to be paid by LAC as a result of the properties being transferred.

[3] The parties have been unable to agree on how to implement the terms of the consent Judgment. As a result, the plaintiffs (which I will collectively refer to as "Loretta") have brought a motion seeking an order pursuant to Rule 59.06(2)(c) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*"), to carry the Judgment into operation by requiring LAC to pay all taxes incurred as a result of the transfer of two properties, as well as all creditors, before distributing all of the balance of LAC's assets to each shareholder. Loretta proposes that the Judgment be implemented by winding up LAC.

[4] The defendants (whom I will collectively refer to as "Peter") submit that I am *functus* and have no authority to amend or vary the consent Judgment dated October 28, 2010. Peter objects to having LAC pay the capital gains taxes and other debts owing to creditors before the balance of assets remaining in LAC are paid out to the two shareholders in equal shares.

[5] Peter proposes that the Judgment be implemented in accordance with his current Summary of Asset Distribution according to Judgment, attached as Schedule "B". He submits that I should order that one-half of LAC's assets remaining after paying shareholder loans and conveying the properties should be distributed to him before LAC pays the capital gains taxes, recapture, and possibly HST which will be owing after the Carp property is conveyed to Peter for \$1,100,000 and the Moodie Drive lot is conveyed to Loretta for \$650,000. Peter's distribution plan requires that LAC must pay any debts and taxes owing by LAC from Loretta's one-half share of the remaining assets. Peter submits that this is Loretta's problem and not his. He wants LAC to convey the Carp property to him and pay him his one-half of the remaining assets in LAC without regard to any taxes owing and without paying creditors.

[6] Peter acknowledges that the Minutes of Settlement and the consent Judgment are silent on whether income taxes must be paid and also they do not specify how Peter is to receive his one-half of the balance of LAC's assets, either by way of dividend or in return for the purchase or redemption of his shares.

[7] The Judgment does not address how the balance of the funds remaining in LAC, after the properties are conveyed and the shareholder loans are paid, are to be distributed to the shareholders. A corporation can pay money to shareholders in a number of ways; either as dividends, by redemption or purchase of shares, or through a wind up liquidation scenario. Mr. Mason, a Chartered Accountant with Deloitte, testified that in order to carry the Judgment into effect, in his opinion, all taxes must be paid resulting from the transfer of the two properties

plus all other income tax returns must be filed and paid up to date, and then the balance of funds remaining in LAC, should be equally divided to both Peter and Loretta.

[8] Loretta further submits that a number of statutes prevent shareholders of a company from distributing all of its assets without first paying the corporation's creditors. Section 38 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*") prohibits the payment of dividends if, after doing so, the corporation would be unable to pay its liabilities when they come due.

[9] Loretta submits that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, and the *Assignment and Preferences Act*, R.S.O. 1990, c. A-33, also make the paying out of all of the corporation's funds and assets to its shareholders, in priority to creditors of the corporation, unlawful regardless of any agreement between the shareholders. If shareholders receive a distribution of all of the assets of the corporation when creditors remain unpaid, the creditors may seek judgment against the shareholders to the extent of the value of the property they received.

[10] The issues to be decided are as follows:

Issue #1 – Does the Court have jurisdiction to make an order to carry the terms of the consent Judgment into operation, by requiring LAC to pay all taxes and creditors, before distributing half of the remaining balance of the company's assets to each shareholder?

Issue #2 – If the answer to issue #1 is yes, how should the terms of the consent Judgment be carried into operation?

Analysis

Issue #1 – Does the Court have jurisdiction to make an order to carry the terms of the consent Judgment into operation, by requiring LAC to pay all taxes and creditors, before distributing half of the remaining balance of the company's assets to each shareholder?

[11] Rule 59.06(1) and (2) of the *Rules*, read as follows:

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

(2) a party who seeks to,

(a) ...

(b) ...

(c) carry an order into operation; or

(d) ...

may make a motion in the proceeding for the relief claimed.

[12] On October 28, 2010, after three days of trial, the parties signed Minutes of Settlement. The Minutes of Settlement were incorporated into an Order on the same date with the Endorsement reading as follows: "Final Order to go in accordance with minutes of settlement

filed in civil action # 07-CV-37560 and in family action # FC-07-998.” All parties were represented by counsel when the Minutes of Settlement were signed.

[13] A consent Judgment was approved as to form and content by the parties and signed and entered by the Registrar on March 4, 2011.

[14] Paragraph A) of the Judgment lists the assets of LAC which had a total estimated value of \$3,156,227.40. Included in these amounts was the amount of \$1.1 million for the Carp Road property and \$650,000 for the Moodie Drive property. The amounts for the assets were subject to actual determination.

[15] In paragraph B) of the Judgment, the parties agreed that the liabilities of LAC were the taxes since paid to the Province of Ontario in the amount of \$136,594.75. However, the Minutes of Settlement and the consent Judgment did not mention the capital gains taxes, recapture and potential HST that would become due and payable by LAC when it transferred the Carp Road property to Peter for \$1.1 million dollars and the Moodie Drive property to Loretta for \$650,000. In addition, there are LAC’s income taxes and the accounting fees to prepare the income tax returns for the years 2011, 2012 and 2013.

[16] Paragraph 2 of the Judgment provides that LAC was to pay shareholder loans of \$107,000 to both Peter and Loretta which has been completed. Paragraph 3 then states that LAC was to pay \$191,000 to Loretta as repayment of her shareholder loan.

[17] Paragraph 4 is the important paragraph in this the Judgment and reads as follows:

IT IS HEREBY FURTHER ORDERED AND ADJUDGED THAT Loretta Alice Clarke and Peter Clarke each receive one-half of the balance from Loretta Alice Clarke Holdings Inc., being \$1,382,000.00, for which Peter Clarke is to receive title to the Carp Road property and Loretta Alice Clarke is to receive title to the Moodie Drive property, as part payments of that amount, for their respective values.

[Emphasis Added]

[18] The parties agreed that the Carp Road property was valued at \$1.1 million and was to be transferred to Peter by LAC at that price. The Moodie Drive property was valued at \$650,000 and was to be transferred to Loretta by LAC at that price. The recent appraisal for the Carp Road property is \$1,085,000 and the recent appraisal for the Moodie Drive property is \$860,000.

[19] In August of 2006, Loretta had transferred Peter’s 50 percent shareholding interest in LAC to herself for \$1.00, had purported to fire Peter from any role he had in LAC and she remained as LAC’s sole director. During the course of the litigation, Loretta returned Peter’s shares in LAC but she remained as the sole director.

[20] During the litigation, Peter had sought an order winding up the company pursuant to s. 207 of the *OBCA*, together with an equalized distribution of its assets to Peter and Loretta. Paragraph 10 of the Judgment states “that all of the claims in the Civil Action are dismissed.” Peter submits that his claim to have the company wound up was dismissed by the Judgment without any ambiguity. Peter further submits that he believed that Loretta intended to continue to

carry on LAC as a business and that she did not intend to wind up the company. Loretta states that she had no intention to continue to operate LAC as a business. In any event, the wind up of the company was not a term of their Minutes of Settlement or the consent Judgment.

[21] Paragraph 4 of the consent Judgment states that Loretta and Peter shall each receive one-half of the balance remaining in LAC, being \$1,382,000. From the amount, Peter was to receive the Carp Road property and Loretta was to receive the Moodie Drive property as part of the distribution of their one-half share of the balance from LAC.

[22] From the language used by the parties in the Minutes of Settlement, I find that they intended that each would receive one-half of the balance of the assets remaining in LAC after paying the various shareholder loans stipulated in the Judgment, and the payment by Loretta for the equipment, and after receiving their respective properties valued at the amount they had agreed. The Carp and Moodie Drive properties were owned by LAC. Therefore, I find the parties intended that LAC would convey these properties at the prices agreed to each of Peter and Loretta respectively, 1.1 million for the Carp Road property and \$650,000 for the Moodie Drive property.

[23] In the Settlement Agreement, the parties did not address the fact that LAC would have to pay capital gains tax as a result of the transfers of both the Carp Road property and the Moodie Drive property, as well as possibly recapture on the Carp Road property and possibly HST as LAC had ceased to carry on active business and was renting the properties that it owned. I infer that both Loretta and Peter were aware that capital gains taxes would have to be paid when LAC transferred the two properties to them because both Loretta and Peter had been directors of LAC for many years. Both Peter and Loretta would have been aware that the Carp Road property had been purchased by LAC for \$700,000 which would trigger a \$400,000 capital gain on its sale to Peter for \$1.1 million, and also that the Moodie Drive lot was purchased for \$525,000 which would have created a capital gain of \$125,000 on its sale to Loretta.

[24] In the case of *Theofanous v. Commercial Union Assurance Co. of Canada* (1986), 11 C.P.C. (2d) 70, 1986 CarswellOnt 391, the Court held that where an agreement, upon which a consent judgment is based, contains a mutual mistake of the parties as to the basis and the effect of the settlement, the consent judgment that has been issued and entered may be varied or amended in order to rectify the said mutual mistake.

[25] In *Monarch Construction Ltd. v. Buildvco Ltd* (1988), 26 C.P.C. (2d) 164, [1988] O.J. No. 332, the Court of Appeal stated as follows:

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.

[26] In *Newcourt Credit Group Inc. v. Canair Cargo Ltd.*, 2000 CanLII 22474 (Ont. Sup. Ct.), the Court stated that a consent order is a contract and can be varied by further consent of the parties or on any ground that would otherwise enable a court to vary a contract. The Court will not imply a term, however, unless it is clear that the parties would have agreed on that point. In

addition, at para. 14, the Court stated "...an implied term must be necessary for the business efficacy of the agreement."

[27] I agree with the submissions of both parties that a Consent Judgment, based on Minutes of Settlement agreed to by the parties, is analogous to a contract. The parties have not argued or presented any evidence that there has been a mutual mistake, which would allow the Court to amend the terms of the contract consistent with a common intention. Loretta submitted that both parties were under the mutually mistaken belief that LAC could transfer the Carp Road and Moodie Drive properties to Peter and Loretta at the agreed prices to their respective holding companies without triggering capital gains taxes. It turns out that this option is not possible because the parties were divorced before they signed the Minutes of Settlement. Peter submits that there is no evidence before me on which I can find that there was a mutual mistake, and there is no evidence before me that the parties intended to transfer the Carp Road and Moodie Drive properties from LAC to themselves or holding companies by way of rollover. If the properties had been transferred to Peter and Loretta by way of a rollover, the obligation to pay capital gain taxes would have been deferred and assumed by Peter and Loretta through their respective holding companies.

[28] If the properties were transferred by way of rollover, Peter would have assumed \$400,000 worth of deferred capital gains and Loretta would have assumed \$125,000 of deferred capital gains. If a rollover had been available, Peter would have assumed a substantially greater share of the capital gain on the two properties owned by LAC. I agree with Peter's submission that there is no evidence of a mutual mistake with regards to transferring the properties by way of rollovers to holding companies.

[29] However, I find that Rule 59.06(2)(c), which permits the setting aside or varying of an order to carry an order into operation, is an independent source of jurisdiction to give directions or make an order to carry an order into operation. In addition, Rule 59.06(1) allows the Court to amend an order on any particular on which the Court did not adjudicate. In this case, there has been no agreement and no adjudication on how the balance remaining in LAC, after the transfer of the Carp Road property and Moodie Drive properties, would be distributed to the two shareholders.

[30] Peter submits that the principle of finality is so important that it should be given priority over even the justice of an individual case as held in the *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. I agree with the principle that finality in litigation is very important and that where a Court has decided an issue after a hearing, the issue should not be reconsidered, amended or varied except in the very limited circumstances set out in Rule 59.06(2)(a) and (b).

[31] This principle of finality, however, does not apply in this case because the Settlement Agreement, on which the consent Judgment was based, did not address the issue of whether LAC had to pay the capital gains and other taxes as well as other creditors before distributing one-half of the balance remaining in LAC to each shareholder. The Judgment also did not state how the one-half balance of LAC's assets would be distributed to each shareholder, either as a dividend or as the purchase or redemption of shares.

[32] In *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254 at para. 24, the Court of Appeal set out the test for interpreting a contract. The Court of Appeal held that a commercial contract is to be interpreted, (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the “cardinal presumption” that they have intended what they have said; (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract), (d) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

[33] When considering the language used by the parties in the first four paragraphs and in particular paragraph 4 of the Minutes of Settlement and the Judgment, I find that the parties intended that each shareholder, that is, Peter and Loretta, would each receive one-half of the balance of LAC’s assets. In addition, the parties intended that, as part of their one-half share of LAC’s assets, which was estimated at \$1,382,000, they would each receive their respective properties – the Carp Road property for Peter and the Moodie Drive property for Loretta.

[34] I further find that, based on the language the parties used in paragraph 4, they intended to distribute the balance of LAC’s assets to them equally, including the conveyance of the two properties at the agreed-upon price. I further find that the parties intended to dispose of all of LAC’s assets by distributing them equally to themselves.

[35] However, in their Settlement Agreement, the parties failed to address whether or not LAC had to pay all taxes and all creditors before distributing all of LAC’s assets equally to themselves. I must determine if the parties intended that each would receive one-half of the net balance remaining in LAC after paying all taxes and creditors, or whether Peter could receive his one-half of LAC’s assets without LAC first paying all taxes and creditors.

[36] Section 38(3) of the *OBCA* reads as follows:

When dividend not to be declared

(3) The directors shall not declare and the corporation shall not pay a dividend if there are reasonable grounds for believing that,

- (a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or
- (b) the realizable value of the corporation’s assets would thereby be less than the aggregate of,
 - (i) its liabilities, and
 - (ii) its stated capital of all classes.

[Emphasis added]

[37] In this case, when the Carp Road property is transferred to Peter and the Moodie Drive property is transferred to Loretta at the agreed prices, capital gains, possibly HST, and possibly recapture will be incurred by LAC. The director of LAC could not pay a dividend of the balance of the funds remaining in LAC to each shareholder, as agreed in the Minutes of Settlement,

without first paying the capital gains and other taxes as well as the income taxes which will be due and owing for the previous years. If the director paid out all of the balance of LAC's assets equally to both shareholders, without paying all taxes and creditors, the value of the LAC's assets would be less than its liabilities. To pay out all of the balance of LAC's assets to the shareholders as dividends without paying taxes and creditors first, would breach both s. 38(3)(a) and (b) of the *OBCA*.

[38] Percy Ostroff filed an affidavit on this motion stating his opinion that there are four ways in which shareholders are able to receive monies from a corporation. They are: (1) repayment of a shareholder loan; (2) payment of dividends; (3) distribution of the assets on winding up; or (4) redemption of shares. The Minutes of Settlement and the consent Judgment are silent on how the balance of LAC's funds are to be distributed to the shareholders and do not specify which method is to be used other than specifying the repayment of the shareholder loans.

[39] The parties agreed to the repayment of their shareholder loans in priority to distributing the balance of LAC's assets to themselves. They also agreed on the conveyance by LAC of the two properties to each other at the agreed price as part of their respective one-half share of the remaining assets. The balance of their agreement cannot be implemented by way of payment of dividends without first paying LAC's taxes and creditors of based on s. 38 of the *OBCA*.

[40] The third method of distributing assets of a company to shareholders is by a winding up or dissolution of the company. This process also contemplates payment of all creditors and all taxes owing or due up to the date the corporation is wound up before distributing the balance of a company's assets to the shareholders.

[41] The final method is redemption of shares. Again, the Minutes of Settlement are silent on whether the parties intended that the balance of LAC's assets, after the two properties were conveyed to Loretta and Peter, were to be the price at which their shares would be redeemed. This method would be difficult to implement because both Peter and Loretta have the same number of shares and Loretta must receive a greater share of the remaining assets to compensate for Peter having received a more valuable property.

[42] Section 243(1) of the *OBCA* states as follows:

Liability of shareholders to creditors

243. (1) Despite the dissolution of a corporation, each shareholder to whom any of its property has been distributed is liable to any person claiming under section 242 to the extent of the amount received by that shareholder upon the distribution, and an action to enforce such liability may be brought.

[43] A number of other statutes, including the *Bankruptcy and Insolvency Act*, *supra*, the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), the *Corporations Tax Act*, R.S.O. 1990, CHAPTER C.40, the *Assignment and Preferences Act*, *supra*, and the *Fraudulent Conveyances Act*, *supra*, are all intertwined and combine to prevent a corporation from liquidating or distributing all of its assets in order to make a payment to shareholders without first having paid its creditors.

[44] In the case of dissolution of the Corporation, the *OBCA* requires that the creditors be paid before the shareholders. I find the shareholders are liable to any creditor for the amount received by that shareholder in any civil, criminal or administration act brought against the Corporation either prior to or following dissolution.

[45] Paragraph 4 of the Minutes of Settlement and consent Judgment states that all of LAC's assets were to be divided equally between the two shareholders, after payment of shareholder loans and conveying the Carp Road property to Peter and the Moodie Drive property to Loretta. Under the sections of the *OBCA* referred to above, shareholders cannot distribute all of the Corporation's assets to themselves before paying creditors and ensuring that all taxes owing are paid.

[46] As a result, I find that it is impossible to distribute all of LAC's assets equally to the shareholders, Loretta and Peter, after each received their respective properties without first paying all creditors and all tax liabilities including the taxes generated by the transfer of the two properties. Therefore, I find that it is impossible to carry the order into effect in the manner that has been suggested by Peter without first paying LAC's taxes and creditors.

[47] The only way in which the Minutes of Settlement and the Consent Judgment could be carried into effect without first paying the taxes, incurred by the transfer of the properties to the shareholders, would be if Loretta did not receive her one-half of the balance of LAC's assets and used part of her one-half of the balance of the assets to pay LAC's taxes before the balance of LAC's assets were transferred to her. I find that this interpretation is inconsistent with the parties' intentions based on the language they used in para. 4 of the Minutes of Settlement. Paragraph 4 of the Judgment states that Loretta and Peter are each to receive one-half of the balance from LAC, after the properties are transferred. Based on the plain meaning of the language used, I find that the parties intended that each of them would receive one-half of the remaining balance of LAC's, assets after the two properties were conveyed to them.

[48] I further find that the parties intended that each would receive one-half of the (net) remaining balance of LAC's assets, namely, after payment of all creditors and any income taxes or other taxes incurred or owing by LAC, because it is impossible to implement the Judgment by distributing all of LAC's assets to Peter and Loretta without first paying LAC's taxes and creditors.

[49] This interpretation is also consistent with the objective evidence of the factual matrix underlying the negotiation of the Minutes of Settlement. Both Peter and Loretta were equal shareholders in LAC and Peter and Loretta had been married for a very lengthy period of time. The second part of the Minutes of Settlement and Judgment addressed the equalization of their net family property. The underlying factual matrix is consistent with an intention that both Peter and Loretta would be treated equally and receive an equalization net family property and one-half of the remaining balance of LAC's net assets after paying taxes and creditors. The interpretation being urged by Peter, namely, that Loretta would assume all liability for all LAC's taxes from her one-half share of the balance of LAC's remaining assets, while he did not have to pay any of LAC's taxes incurred as a result of the property transfers, is inconsistent with the underlying factual matrix and the intention of the parties that they would divide their assets equally.

[50] Finally, I find that an interpretation of the Minutes of Settlement and consent Judgment that all of LAC's taxes and creditors must be paid before all the company's assets are distributed to the shareholders, accords with sound commercial principles and good business sense and avoids the potential commercial absurdity of attempting to strip a company of its assets without paying the company's creditors and taxes, which is prohibited by the *OBCA* and a number of other statutes, as mentioned.

Disposition

[51] For the above reasons, I find that the Court has jurisdiction under Rule 59.06(2)(a) and (b) to give directions to carry an order into operation that is silent on the issue of payment of taxes and creditors and fails to mention how the remaining funds in LAC will be distributed to the shareholders. I further find that the shareholders of LAC intended to distribute the remaining assets of LAC equally to themselves, after paying shareholder loans and conveying the properties to themselves at prices agreed upon, and after paying all taxes and all creditors.

Issue #2 – How should the terms of the Consent Judgment be carried into operation?

[52] I have previously held that all of LAC's taxes and creditors must be paid before distributing the balance of LAC's assets equally to the two shareholders and have inferred that the parties intended to divide the remaining balance in LAC equally after paying taxes and creditors. I, therefore, order that the consent Judgment should be carried into operation in the following manner:

- 1) Firstly, LAC's shall transfer the Carp Road property to Peter for the agreed amount of \$1,100,000 within 30 days;
- 2) Secondly, LAC shall transfer the Moodie Drive property to Loretta for the agreed amount of \$650,000 within 30 days;
- 3) Thirdly, LAC shall pay the shareholder loan of \$191,000 to Loretta less the sum of \$157,000 she owes LAC for the purchase of equipment, for a net payment to Loretta of \$34,000 to be made within 30 days;
- 4) Fourthly, LAC shall complete its income tax returns up to date and pay all income taxes owing and any other creditors including reasonable accounting fees for preparing the income tax returns and obtain a Clearance Certificate. After obtaining a Clearance Certificate, the balance of the assets held in LAC shall be distributed equally to Peter and Loretta, adjusting for the differences in value of properties previously received by Peter and Loretta;
- 5) Fifthly, the parties may agree to a formal dissolution or winding up of LAC if they wish; however, as a winding up was not specifically agreed upon, it is not ordered;
- 6) Finally, the parties may seek further directions, if required.

Contempt Motion

[53] Peter has brought a motion seeking an order finding of contempt against Loretta for failing to implement the Judgment as he proposed. The test for a finding of contempt was set out

in *Les services aux enfants et aux adultes de Prescott-Russell c. G. (N.)*, 2006, 82 O.R. (3d) 669, CarswellOnt 3772 (Ont. C.A.).

[54] As I have not adopted Peter's proposal to carry the Judgment into operation, I am not satisfied that Loretta intentionally failed to follow a clear term of the Judgment. The Judgment did not contain a clear term let alone any term addressing the issue of whether LAC had to pay all taxes and creditors before distributing the funds equally to the two shareholders.

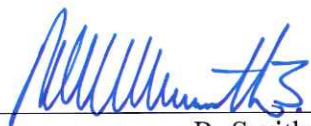
[55] As a result, I am satisfied that Peter has not established beyond a reasonable doubt that Loretta has deliberately and wilfully disobeyed the Judgment because the Judgment is silent on the issue of taxes and how the Judgment was to be implemented.

Disposition of Contempt

[56] Peter's motion for contempt is dismissed.

Costs

[57] The parties may make submissions on costs within 15 days, if they are unable to agree.



R. Smith J.

RELEASED: September 6, 2013

Schedule "A"

Court File No. 07-CV-37560

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
JUSTICE ROBERT SMITH)

THURSDAY, THE 28TH
DAY OF OCTOBER, 2010

B E T W E E N:

(Court Seal)

LORETTA ALICE CLARKE and
LORETTA ALICE CLARKE HOLDINGS INC.

Plaintiffs

and

PETER CLARKE, GREG CLARKE, LYNDA JOHNS CLARKE and
VALLEY UTILITIES LIMITED

Defendants

A N D B E T W E E N:

PETER CLARKE

Plaintiff by Counterclaim

and

LORETTA ALICE CLARKE, LAURIE WU
and LORETTA ALICE CLARKE HOLDINGS INC.

Defendants by Counterclaim

JUDGMENT

THIS ACTION coming on for trial before the Honourable Justice McKinnon on the 25th, 26th, 27th and 28th days of October, 2010 which was interrupted for settlement discussions before me at the court house, 161 Elgin Street, Ottawa, Ontario, K2P 2K1, in the presence of the

lawyers for all parties, the action against Greg Clarke, Lynda Johns Clarke and Valley Utilities having been dismissed on consent;

ON READING THE PLEADINGS AND HEARING the submissions of the lawyers for the parties and upon the parties executing Minutes of Settlement on the 28th day of October, 2010 in Civil Action 07-CV-37560 and in Family Law Action FC-07-998.

A) THE PARTIES AGREE that the assets of Loretta Alice Clarke Holdings Inc. are as follows:

Carp Road property	\$1,100,000.00
Moodie Road property	\$ 650,000.00
Equipment receipts	\$ 157,000.00
TD Waterhouse account	\$ 800,000.00
TD Canada Trust account	\$ 60,000.00
Heenan, Blaikie trust account	\$ 189,227.40
Valley Utilities contribution	<u>\$ 200,000.00</u>
Total	\$3,156,227.40

All amounts subject to actual determination.

B) THE PARTIES AGREE that the liabilities of Loretta Alice Clarke Holdings Inc. are the taxes since paid to the Province of Ontario in the amount of \$136,594.75.

1. IT IS HEREBY ORDERED AND ADJUDGED THAT Loretta Alice Clarke do pay to Peter Clarke \$62,000.00 + \$12,000.00 from her own monies.

2. IT IS HEREBY FURTHER ORDERED AND ADJUDGED THAT before any adjustment for subsequent payments, Loretta Alice Clarke and Peter Clarke are each to receive \$107,000.00 from Loretta Alice Clarke Holdings Inc. as a repayment of their respective shareholder loans to be adjusted in accordance with Exhibit 28, David Jeffrey's report.
3. IT IS HEREBY FURTHER ORDERED AND ADJUDGED THAT Loretta Alice Clarke is entitled to receive \$191,000.00 from Loretta Alice Clarke Holdings Inc. as a repayment of her shareholder loan, to be adjusted in accordance with Exhibit 28, David Jeffrey's Report.
4. IT IS HEREBY FURTHER ORDERED AND ADJUDGED THAT Loretta Alice Clarke and Peter Clarke each receive one half of the balance from Loretta Alice Clarke Holdings Inc., being \$1,382,000.00, for which Peter Clarke is to receive title to the Carp Road Property and Loretta Alice Clarke is to receive title to the Moodie Drive Property, as part payments of that amount, for their respective values.
5. IT IS FURTHER ORDERED AND ADJUDGED THAT Loretta Alice Clarke pay to Peter Clarke an equalization of non real estate matrimonial assets of \$131,000.00.
6. IT IS FURTHER ORDERED THAT the Watson Street matrimonial home and the Wynford Road property are to be appraised by an appraiser to be agreed upon. Wynford Road is to be appraised at the valuation date, whereas Watson Street is to be appraised at the current value.

7. IT IS FURTHER ORDERED THAT the parties will equalize the values of these two properties when determined, with Loretta Alice Clarke being charged with the determined value of the Wynford Road property.
8. IT IS FURTHER ORDERED THAT Peter Clarke will have 15 days from the receipt of the appraisal of the Watson Street property to determine whether he wishes to accept title to the Watson Street property, and be charged 50% of the determined value or which will otherwise be listed for sale at that appraised value.
9. IT IS FURTHER ORDERED THAT all of the other claims in the Family Law Action, including occupation rent, are to be released.
10. IT IS FURTHER ORDERED THAT all of the claims in the Civil Action are dismissed.

(Signature of Judge)

LORETTA ALICE CLARKE et al.
Plaintiffs
PETER CLARKE
Plaintiff by Counterclaim

-and-
-and-

PETER CLARKE et al.
Defendants
LAURIE WU
Defendant to the Counterclaim
Court File No. 07-CV-37560

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT OTTAWA

JUDGMENT

SOLOWAY WRIGHT LLP
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File Number: 45087-1000
Box 379

Schedule "B"

Court File No. 07-CV-37560

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

LORETTA ALICE CLARKE and
LORETTA ALICE CLARKE HOLDINGS INC.

Plaintiffs

and

PETER CLARKE, GREG CLARKE, LYNDA JOHNS CLARKE and
VALLEY UTILITIES LIMITED

Defendants

A N D B E T W E E N:

PETER CLARKE

Plaintiff by Counterclaim

and

LORETTA ALICE CLARKE, LAURIE WU
and LORETTA ALICE CLARKE HOLDINGS INC.

Defendants by Counterclaim

**CURRENT SUMMARY OF ASSET DISTRIBUTION ACCORDING TO
JUDGMENT**

CURRENT VALUE OF COURT JUDGMENT DATED OCTOBER 28, 2010

1. The Carp Road property - \$1,085,000.00 according to the latest appraisal. Peter is to be charged \$1,100,000.00 for it as he offered. Title is to be conveyed to him forthwith.
2. The Moodie Road property - \$860,000.00 according to the latest appraisal. Loretta is to be charged \$650,000.00 for it as she offered. Title is to be conveyed to her forthwith.

3. LAC equipment sale - \$157,000.00 as purchased by Loretta.
4. TD Waterhouse/Valley Utilities - \$597,434.93 is in the hands of the Sheriff and there is cash of \$518,933.00 for a total of \$1,116,367.93. The sum of \$51,691.86 is to be paid to Deloitte LLP and the Regional Group of Companies Inc. from this money, for their respective reports, which we ask the Court to deal with as costs of the Plaintiffs' Motion.
5. Heenan Blaikie now has no money. It paid the Provincial Tax liability and the balance was paid out equally to Peter and Loretta.
6. Valley Utilities - \$200,000.00 was paid to the Sheriff and is included in paragraph 4 *supra*.
7. LAC's only liability, i.e. the taxes owing to the Provincial Government, previously estimated to be \$150,000.00, has been paid by Heenan Blaikie. The Judgment reads, at paragraph B, "The Parties agree that the liabilities of Loretta Alice Clarke Holdings Inc. are the taxes since paid to the Province of Ontario in the amount of \$136,594.75."
8. The asset amount available for distribution is \$3,218,367.93, for what was previously valued at \$3,156,227.40 in the Settlement and the Judgment.
9. Loretta is entitled to repayment of her shareholder loan at \$191,000.00, less the \$157,000.00 she owes for the equipment purchased, being a payment to her of \$34,000.00.
10. Peter and Loretta have each received their \$107,000.00 for their shareholder loans.

11. The \$3,218,367.93, less \$34,000.00, leaves \$3,184,667.93, to be divided equally, i.e.
\$1,592,333.97.

12. In addition to the Carp Road property, Peter gets \$1,592,333.97, less \$1,100,000.00,
being \$492,333.96.

13. In addition to the Moodie Road property, Loretta gets \$1,592,333.97, less \$650,000.00,
being \$942,333.97, plus \$34,000.00, for an amount of \$976,333.97.

July 2, 2013

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Loretta Alice Clarke

LORETTA ALICE CLARKE et al.
Plaintiffs
PETER CLARKE
Plaintiff by Counterclaim

-and-
-and-

PETER CLARKE et al.
Defendants
LAURIE WU
Defendant to the Counterclaim
Court File No. 07-CV-37560

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT OTTAWA

**CURRENT SUMMARY OF DISTRIBUTION
ACCORDING TO JUDGMENT**

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CITATION: Clarke v. Clarke, 2013 ONSC 5352

COURT FILE NO.: 07-CV-37560

DATE: 2013/09/06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Loretta Alice Clarke and Loretta Alice Clarke
Holdings Inc.

Plaintiffs

– and –

Peter Clarke, Greg Clarke, Lynda Johns Clarke and
Valley Utilities Limited

Defendants

A N D B E T W E E N:

Peter Clarke

Plaintiff by Counterclaim

– and –

Loretta Alice Clarke and Laurie Wu and Loretta
Alice Clarke Holdings Inc.

Defendants by Counterclaim

REASONS FOR JUDGMENT

R. Smith J.