IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

BONNIE-LYNN SILVER	)	***T. P. Beley***
	)	*for the Appellants*
(Petitioner) Respondent	)	
	)	
- and -	)	***L. I. Z. Pinsky*** *and*
	)	***A. Nordal-Budinsky***
MICHAEL STEPHEN SILVER	)	*for the Respondent*
	)	
(Respondent)	)	
	)	***M. L. Knight***
- and -	)	*on a watching brief*
	)	*for M. S. Silver*
STERN PARTNERS INC., WHO INDUSTRIES INC., 2501538 MANITOBA LTD., 3669611 MANITOBA LTD., 3851401 CANADA INC., 4158997 CANADA INC., WESTLAND APPAREL GROUP INC. and WHITECOURT INVESTORS II INC.	)	*Chambers motions heard:* ***March 21, 2019***
	)	*Decision pronounced:* ***April 1, 2019***
Appellants	)	

SIMONSEN JA

[1] The appellants seek an extension of time to perfect their appeal by filing an appeal book and factum. They appeal an interim order (the order) regarding financial disclosure in this family proceeding, in which the motion judge:

- dismissed the motion of the appellant Stern Partners Inc. (Stern Partners) to expunge the affidavit of the petitioner affirmed June 18, 2018 (the petitioner's affidavit);

- dismissed Stern Partners' motion to dismiss the petitioner's financial disclosure motion on the basis that the court lacked territorial jurisdiction; and

- ordered the appellants, as third parties, to produce, under Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, r 30.10, financial disclosure to the petitioner (the disclosure order) to allow for valuation of the respondent's interest in some of the appellants as at the date of separation.

[2] If an extension of time to perfect the appeal is granted, the appellants seek a stay of the order pending appeal.

[3] My understanding is that the central grounds of appeal are that the motion judge erred by:

- dismissing Stern Partners' motion for expungement when all or much of the petitioner's affidavit was inadmissible, and then not allowing an opportunity for reply to the affidavit;

- summarily dismissing Stern Partners' motion to dismiss the disclosure motion, without a hearing;

- concluding that she had territorial jurisdiction to grant the disclosure order; and

- granting the disclosure order without properly addressing the issues of relevance, confidentiality and cost.

[4] The petitioner opposes both motions. The respondent takes no position (and also took no position before the motion judge).

Background

[5] The petitioner and the respondent separated in 2011 after being together for approximately 33 years and married for 30. At the time of separation, the respondent had a direct four per cent interest in a class of common shares in seven companies (the seven companies), namely all of the appellants other than Stern Partners. The seven companies are part of the Stern Group (the Stern Group) which consists of 250 affiliated entities directly or indirectly controlled by Ronald Stern, who is a resident of British Columbia. The role of Stern Partners is to provide professional advisory services for Mr. Stern and the Stern Group. There is no dispute that the respondent is employed by the Stern Group. The seven companies and Stern Partners are collectively the appellants in this proceeding.

[6] Four of the seven companies are federally incorporated and have their legal addresses in Vancouver, British Columbia; one of these four companies is registered in Manitoba. The three other companies are incorporated in Manitoba. Stern Partners is headquartered and carries on business in Vancouver.

[7] The petitioner has been seeking financial disclosure since the separation. Although the respondent provided information to her, three expert business valuators, one retained jointly and others retained by each of the petitioner and the respondent to provide valuations of the seven companies, indicate that they require additional documents from the appellants in order to complete their work.

[8] In furtherance of the petitioner's request for the additional disclosure, the petitioner and the respondent executed three confidentiality agreements dated July 18, 2013, December 13, 2013, and September 17, 2014 (the confidentiality agreements). The confidentiality agreements name Stern Partners and its affiliates as third-party beneficiaries. In addition, a consent order was pronounced on December 1, 2017, which prescribes that any disclosure pertaining to Stern Partners or its affiliates, or provided directly or indirectly by them to the petitioner, is to be treated as confidential and not form part of the public record of the court (the confidentiality order). The petitioner also signed an acknowledgement under r 30.1(3) of the *Queen's Bench Rules* in which she agreed that the implied undertaking rule applies with respect to all information and documents pertaining to Stern Partners or its affiliates that is provided to her.

[9] The documents identified by the experts were not forthcoming. Therefore, on February 28, 2018, the petitioner filed a motion for disclosure against Stern Partners and the respondent (although it did not ultimately proceed as against the respondent). On June 18, 2018, Stern Partners filed a motion to dismiss the disclosure motion on the basis that the Court lacked territorial jurisdiction, together with a supporting affidavit of its corporate counsel, Peter Crawford, affirmed June 8, 2018. On June 18, 2018, the petitioner filed a motion seeking a disclosure order against the seven companies, as well as her affidavit affirmed June 18, 2018. On June 22, 2018, Stern Partners filed a motion for expungement of the petitioner's affidavit.

[10] At the hearing on June 27, 2018, the motion judge dismissed Stern Partners' expungement and jurisdiction motions and ordered all of the appellants to make the requested financial disclosure. She also directed that

the matter proceed to trial in November 2019, and that a hearing for directions be scheduled so that a property reference, which had been ordered many years prior, could proceed.

[11] A notice of appeal was filed by the appellants, and the time for filing an appeal book and factum prescribed by the Manitoba, *Court of Appeal Rules*, Man Reg 555/88 R expired on October 26, 2018. The appellants' motion for an extension of time was filed on December 12, 2018 after the Court Registry wrote to their counsel advising that the appeal would be deemed abandoned on December 19, 2018, if proper steps were not taken.

[12] Counsel for the appellants provided the appeal book to counsel for the petitioner on November 27, 2018. Despite assurances that their factum would be provided forthwith, it was not produced to counsel for the petitioner until February 21, 2019.

[13] On December 14, 2018, the motion judge awarded double tariff costs on a Class IV basis against Stern Partners with respect to the matters addressed in the order, and dismissed the appellants' motion for a stay of the order pending appeal.

The Test for an Extension of Time

[14] The criteria for extending the time to perfect an appeal are the same as those for extending the time to appeal, being the well-known criteria set out in *Bohemier v Bohemier*, 2001 MBCA 161; and *Campbell v Campbell*, 2011 MBCA 23 at para 6. Those criteria are: (i) a continuous intention to appeal from a time before the expiration of the filing period; (ii) a reasonable explanation for the delay; and (iii) arguable grounds.

[15] In terms of the third criterion, arguable grounds of appeal, the Supreme Court of Canada stated in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (at para 74):

> The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270), at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

[16] The Court also has an overriding discretion to grant or refuse an extension if it is right and just in the circumstances (see *Singh v Pierpont*, 2015 MBCA 18 at para 41). That is, the overarching principle of the interests of justice may also be relevant (see also *Delichte v Rogers*, 2018 MBCA 79).

The Record

[17] On the motions before me, the appellants tendered two affidavits affirmed by Mr. Crawford as well as an affidavit of Nancy Ferreira, assistant to counsel for the appellants, and the petitioner affirmed two affidavits.

[18] Clearly, those parts of the affidavits that relate to the first two criteria for an extension of time are relevant and admissible. Mr. Crawford attests to taking steps consistent with a continuing intention to appeal and explains that the delay resulted from counsel for the appellants' busy personal and work schedule, most significantly, his being on vacation for approximately three weeks such that he was unable to file an appeal book and factum before the deadline. Mr. Crawford also notes that, on October 24, 2018, counsel for the appellants sought consent to an extension of time from counsel for the petitioner, which was not forthcoming.

[19] With respect to the balance of the affidavit material, the appellants take the position that most of the petitioner's initial affidavit is irrelevant to the motion for an extension of time, and the petitioner says that much of Mr. Crawford's second affidavit is irrelevant, argumentative and involves case splitting.

[20] My concern, which I raised during the hearing, is that with respect to the issue of whether there are arguable grounds of appeal, the parties rely on the affidavits filed in this Court which address the history of the matter and the factual underpinnings of the motion judge's decision rather than, as would have been proper, referencing the evidence that was before her. When asked about this, counsel for the petitioner indicated, without objection by counsel for the appellants, that the petitioner's affidavits constitute a summary of the evidence that was before the motion judge, together with some updated information. Counsel for the petitioner maintained, however, that Mr. Crawford's second affidavit contains evidence beyond what was before the motion judge and updates. Counsel for the appellants argued that Mr. Crawford's second affidavit is a response to the petitioner's affidavit, and

that it is essential that his affidavit be received to ensure that justice is done—because that evidence was not before the motion judge, as a result of the process she adopted. Despite my concerns about the approach taken by counsel, I will, for expediency and to allow both parties the opportunity to put their best case forward, consider all of the affidavits filed in this Court in making my decision.

Analysis and Decision

[21] Although the appellants' explanation for the delay is questionable at best, I will assume that an adequate explanation has been provided and that a continuing intention to appeal has been demonstrated.

Arguable Grounds of Appeal

The Petitioner's Affidavit

[22] The appellants contend that the motion judge made errors with respect to the petitioner's affidavit that resulted in unfairness. First, they say that she erred by dismissing Stern Partners' motion for expungement because the affidavit was improper reply, and certain parts were also irrelevant, unsourced hearsay and without prejudice communications. As well, they argue that the motion judge erred by not allowing them an opportunity to respond to the affidavit once admitted. The petitioner submits that her affidavit was properly before the Court because she was entitled to respond to both Mr. Crawford's affidavit affirmed June 8, 2018 and an affidavit that had been filed by the respondent.

[23] No arguable ground of appeal has been established with respect to the motion judge's discretionary decisions regarding the petitioner's affidavit. The motion judge was not concerned about prejudice arising from the material objected to remaining before the Court, but was understandably concerned about proportionality and delay. In any event, in submissions before me, counsel for the appellants was unable to identify any parts of the petitioner's affidavit that were relied upon by the motion judge which were not otherwise in evidence before her. In addition, the appellants have filed a comprehensive affidavit on these motions.

Territorial Jurisdiction

[24] The appellants allege both procedural and substantive errors regarding the issue of territorial jurisdiction.

[25] First, they submit that the motion judge erred by summarily dismissing Stern Partners' motion for dismissal of the disclosure motion for lack of territorial jurisdiction. They say that she decided to dismiss Stern Partners' motion without a hearing because, at the outset, she raised and then misconstrued and relied upon the Master's disposition sheet from an appearance on June 5, 2018, which indicated that the motion regarding jurisdiction was not to be "piggy-backed" onto the petitioner's motion for financial disclosure. The appellants contend that the motion judge misunderstood the disposition sheet when she found that it precluded the hearing of the jurisdictional motion on June 27, 2018, because the disposition sheet also contemplated Stern Partners filing an affidavit which was always intended to be in support of its motion challenging jurisdiction. In any event, the appellants argue that there was a subsequent agreement between counsel

that Stern Partners' two motions would be heard at the same time as the petitioner's financial disclosure motion.

[26] Regardless of whether the motion judge misunderstood the direction of the Master or any agreement between counsel, the record shows that she did in fact hear substantive argument regarding the issue of territorial jurisdiction as it relates to all appellants. Furthermore, there is no arguable ground of appeal with respect to the procedure adopted on the substantive hearing, given the deferential standard of review applicable to decisions about process and management of hearings. She was entitled to reject Stern Partners' motion brief on the jurisdictional issue, given that it was filed late on the afternoon before the hearing and the motion judge had advised counsel several days prior that material should be filed on a timely basis. As for the hearing itself, the motion judge extended it beyond what had been scheduled. Although she initially indicated that submissions would be limited to 10 minutes for each counsel given their choice to set all of the motions for only a one-hour hearing, she ultimately extended the hearing to approximately two hours.

[27] While the thrust of the appellants' submissions regarding territorial jurisdiction relates to procedural matters, I will, for completeness, address the substance of the motion judge's decision on that issue. She concluded that there was no merit to Stern Partners' motion for dismissal of the petitioner's disclosure motion on the basis of lack of territorial jurisdiction, and that she had jurisdiction to order disclosure from all of the appellants. She noted that three of the seven companies were incorporated in Manitoba and that one of the four federally incorporated companies had a registered office in Manitoba. She also concluded that Stern Partners had, as a result of its participation in

the negotiation of the confidentiality agreements, not only attorned to this jurisdiction, but agreed that it had the capacity to and would produce the disclosure that was sought, once the confidentiality agreements were in place.

[28] The appellants assert that the motion judge erred in her conclusion about territorial jurisdiction because she failed to properly apply the law as enunciated in *Henry v Henry Estate et al*, 2014 MBQB 10, aff'd 2014 MBCA 84. In *Henry*, the Court restated the fundamental principles that a court generally has territorial jurisdiction over a matter where: the defendant is ordinarily resident in the jurisdiction; the parties have consented or attorned to the jurisdiction of the court; or there is a real and substantial connection between the matter and the forum (see para 12).

[29] During submissions on these motions, counsel for the appellants conceded that there is no jurisdictional issue with respect to the three companies incorporated in Manitoba. Presumably, there is also no real contest with respect to the federally incorporated company that has a registered office in this province. As for the three federally incorporated companies without registered offices in Manitoba, the appellants made no submission nor referred to any legislation or jurisprudence (other than the general principles outlined in *Henry*) to support the assertion that a court in this province does not have jurisdiction over such companies.

[30] With respect to Stern Partners, although its head office is in Vancouver, counsel have indicated that there was no evidence before the motion judge, nor are they able to advise me, as to the jurisdiction in which it was incorporated. Furthermore, no case law has been submitted in support of

the contention that the motion judge erred in her conclusion that Stern Partners attorned to this jurisdiction.

[31] On the question of attornment, the appellants assert that they had no involvement in this litigation until the petitioner filed her motion for disclosure against Stern Partners in February 2018. However, the motion judge had before her evidence that Stern Partners had been involved by: participating in the negotiation of the confidentiality agreements; settling the terms of the confidentiality order (its counsel was outside the courtroom during the case conference when the confidentiality order was made and was consulted with respect to its terms); appearing before the Master on June 5, 2018; and filing a motion to expunge.

[32] In all, the appellants have not established that there is an arguable ground of appeal on the issue of territorial jurisdiction.

The Disclosure Order

[33] The standard of review on the appeal of interim orders in family matters generally is well settled. An appellate court will not interfere with an interim family order absent a serious error in principle, a complete misapprehension of the evidence or the order being so clearly wrong that it amounts to an injustice (see *Gale v Gale*, 2007 MBCA 162; and *Cherewyk v Cherewyk*, 2018 MBCA 13 at para 13).

[34] The appellants take the position that the motion judge erred procedurally by not acceding to their request that, once she had decided the jurisdictional issue, she adjourn the balance of the hearing so that they could provide further evidence and submissions on the issues of relevance,

confidentiality and cost in connection with the disclosure sought. However, Stern Partners had been given an opportunity to respond after the motion for disclosure (with a supporting affidavit) was filed in February 2018, but chose not to do so. In fact, on June 5, 2018, the Master assessed costs against it for failing to file an affidavit within the prescribed timeline. In the circumstances, there is no arguable basis for appellate intervention with respect to the motion judge's discretionary decision to deny an adjournment, particularly because the issue of disclosure had been outstanding for many years.

[35] In terms of the relevance of the documents that are the subject of the disclosure order, the motion judge had evidence before her, namely the opinions of the experts, that allowed her to conclude that the disclosure was relevant and necessary. The appellants raised no specific issue before me about the type or scope of documents ordered produced.

[36] The appellants do, however, assert that the motion judge erred by requiring them to cover the cost of producing the documents; they question the exercise of her discretion and say that the order is unjust. The motion judge was not convinced by the appellants' submission that production of the documents would cost $20,000-$30,000, particularly in salaries associated with the time required to do so. She noted that the petitioner was prepared to accept the documents electronically rather than in paper form, and that Stern Partners had not raised the issue of cost at any earlier stage. She also observed that cost could not be a significant issue for Stern Partners, given the amount of legal costs it had already incurred on the issue of disclosure. There was also evidence that Stern Partners held itself out on its website as being a company "generating total revenues of over $1.75 billion". On a review of the record, I am not persuaded that there is an arguable ground of appeal with

respect to cost associated with disclosure; rather, it was open to the motion judge to make the discretionary order she did, for the reasons she provided.

[37] Finally, the appellants take the position that the motion judge erred by granting the disclosure order without adequately considering their ongoing confidentiality concerns, namely the requirement for permanency of confidentiality and the fact that the confidentiality order was granted under *The Family Maintenance Act*, CCSM c F20, while disclosure was ordered pursuant to *The Family Property Act*, CCSM c F25. However, the confidentiality agreements stipulate that the obligations prescribed are of indefinite duration. Furthermore, the petitioner takes the position that, despite the confidentiality order being made under *The Family Maintenance Act*, it applies to the documents ordered produced. In addition, she has given assurances that she will provide whatever further undertakings or documents are required to address confidentiality.

[38] To summarise, I am not satisfied that there is an arguable ground of appeal that the disclosure order is so clearly wrong that it amounts to an injustice.

Interests of Justice

[39] There are also compelling reasons, in the interests of justice, not to grant an extension of time to perfect the appeal. The motion judge noted that the petitioner has been attempting to obtain financial disclosure for seven years, and that she has been met with nothing but delay. I share the motion judge's serious concerns about delay, cost and proportionality. This matter simply must move forward, and it cannot without the disclosure. A trial is only approximately seven to eight months away, and prior to that, a full

property reference must be conducted by the Master which can only proceed with the disclosure.

Conclusion

[40] For the foregoing reasons, the appellants' motion to extend the time to file an appeal book and factum is dismissed.

[41] As a consequence, I need not deal with their motion for a stay of the order pending appeal. However, had it been necessary, I would, for essentially the reasons outlined, have concluded that the test for a stay has not been met (see *Gateway Packers Ltd v Greyhound Canada Transportation Corp*, 2004 MBCA 38 at para 5). There is no arguable case on appeal; the appellants would not suffer irreparable harm if a stay were not granted; and the balance of convenience weighs in favour of not granting the stay.

[42] The petitioner seeks solicitor-client costs related to these motions, estimated to be at least $10,000. In *Young v Young*, [1993] 4 SCR 3, the Supreme Court of Canada held that solicitor-client costs are generally to be awarded only where there has been "reprehensible, scandalous or outrageous conduct" (at p 17). Solicitor-client costs will be awarded where a party's conduct in the course of the litigation is seen as sufficiently blameworthy to meet this test. I am not satisfied that the conduct of the appellants on these motions rises to the level outlined in *Young*. That said, their unsuccessful motions required the petitioner to incur significant cost associated with filing material (including two briefs), preparation for court, and two appearances (including a half-day hearing). In the circumstances, a substantial costs award

is called for. I order that the appellants pay to the petitioner elevated costs of $5,000 all-inclusive of disbursements and applicable taxes.

Simonsen JA