

CANADA / JUDGMENT

Barnes-Morrison v. Koliass

2025 BCSC 1571

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1571 Barnes Morrison v. Koliass

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barnes-Morrison v. Koliass,

2025 BCSC 1571

Date: 20250814

Docket: E48799

Registry: Penticton

Between:

Clair Anita Barnes-Morrison

Claimant

And

Evangelos Koliass and Evangelos Koliass, Sam Koliass, Melissa Koliass,

Samantha Koliass-Gunn, Hugh Koliass, Vanessa Koliass, and

Isabella Koliass in their capacities as trustees of the

Sam and Van Koliass 2020 Family Trust

Respondents

Corrected Judgment: The text of the judgment was corrected on the face page;

in the page header; and at paragraph [29] on August 21, 2025

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

D.M. King

C.F. King

Counsel for the Respondent, Evangelos Kolias, in his personal capacity:

T.R. Bell

W. Fernandes

Counsel for the Trustee Respondents:

A. Yowart

M.D. Mysak

Place and Date of Hearing:

Kelowna, B.C.

June 6, 2025

Place and Date of Decision:

Kelowna, B.C.

August 12, 2025

Place and Date of Judgment:

Penticton, B.C.

August 14, 2025

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Introduction

- [1] This is the fourth set of reasons for judgment which I have authored in this family law action. The action remains at the disclosure stage due to its significant complexity. A 19-day trial is presently scheduled to commence on May 4, 2026. This is, even with the efficacies of case management since September of 2024, the second trial date.
- [2] Before the Court for determination on this occasion is the application filed by the claimant, Clair Barnes-Morrison, on May 1, 2025 for the joint appointment of a forensic auditor (the "Application") pursuant to the Supreme Court Family Law Rules [Rules].
- [3] The specific relief sought in the Application is as follows:
1. An order that Daniel F.D. Sturgess, CPA, CA, CBV, CFF, and Matthew Chow, CPA of Crowe MacKay LLP. or such other financial expert as the court may order (the "joint expert"). be jointly appointed as financial expert to conduct a forensic audit, which may include but not be limited to the following:
 - a. Alleged transactions between parties to the action, Evangelos and Sam Kolas and their respective holding companies, Boardwalk Properties Co. Ltd, and the Sam and Van Kolas 2020 Family Trust.
 - b. Transfers of millions of dollars in dividends, shareholder loans, earnings and other entitlements as well as the efficacy, consistency and legality of the documents relating to the alleged transactions.
 - c. Representations made to Canada Revenue Agency, Ontario Securities Commission, information provided to unitholders and media outlets, financial institutions and other individuals and agencies.
 - d. Records of the Boardwalk Group of companies from 2009 to the present for records relating to Evangelos Kolas and Sam Kolas' account of the 2009 transaction as well as the reconciliations in Vicki Parker's affidavit sworn September 11, 2024 and Monis Uddin's affidavit sworn September 11, 2004.

- e. Financial transactions between Evangelos Kolias, Sam Kolias and the Boardwalk Group of companies from 2009 to the present, including but not limited to documents dated December 31, 2002 where Evangelos Kolias purports to transfer controlling share to Sam Kolias and documents purportedly made in 2009 between Evangelos Kolias and Sam Kolias in February 2024 and documents relating to that alleged transaction.
 - f. Appendices to Relationship Agreements entered into between Clair Anita Barnes-Morrison and Evangelos Kolias.
 - g. Affidavits and Form F8 Financial Statements and attachments filed or disclosed in the action.
 - h. Communications made and received by parties to the action.
2. An order that the joint expert prepare an income calculation report for Evangelos Kolias.
 3. An order that once appointed, the joint expert may have input into the scope of the forensic audit and will provide a list of documents and information required.
 4. An order that the cost of the joint expert be "fronted" by Evangelos Kolias, Sam Kolias and or the Sam and Van Kolias 2020 Family Trust without prejudice as to the ultimate allocation of the cost on settlement at trial.
 5. Costs.
- [4] The personal respondent, Evangelos Kolias ("Van"), opposes the relief sought in the Application with the express caveat that he does not oppose the preparation of a report on the fair market values of shares issued to him both as at 2013 (the specific date to be agreed or determined), and currently, on a "joint retainer to be paid equally by the parties and on a without prejudice basis to his arguments at trial, including but not limited to matters relating to disposition(s), legal versus beneficial interests, and control".

Overview

- [5] Van is closely involved with a very successful commercial enterprise which can be very broadly defined as "Boardwalk" or the "Boardwalk Property Group".
- [6] In reasons for judgment released on November 6, 2024 and indexed at 2024 BCSC 2033, I addressed the claimant's application for interim spousal support from Van (the "Interim Support Reasons"). The Interim Support Reasons include a high-level corporate overview of Boardwalk: see paras. 64 to 75.
- [7] Of some importance, I made specific reference in the Interim Support Reasons to the fact that the claimant "cannot produce documents she does not possess or control and she cannot tender, what I consider close to necessary, expert evidence to the Court without those documents": see para. 104.

- [8] In reasons for judgment released on April 16, 2025 and indexed as 2025 BCSC 715, I addressed the claimant's application to add additional parties to this proceeding and to amend the notice of family claim, including to plead the tort of conspiracy (the "Conspiracy Amendment Reasons"). The Conspiracy Amendment Reasons also include some commentary on the corporate organization of Boardwalk and the alleged agreements between Van and his brother, Sam Kolas ("Sam"): see paras. 14-19.
- [9] For the purposes of these reasons, I am going to consolidate and condense my judicial summary of the Boardwalk organization. However, in so doing, I am going to reiterate my comment from paragraph 76 of the Interim Support Reasons that "to say that the corporate structure and related dealings between the parties are complicated to dissect is a gross understatement. That [is], even for a member of this Court that has prior experience dealing with complicated financial arrangements in family law disputes".

Factual Summary

- [10] Boardwalk was established by Van and Sam in 1984 and subsequently went public in 1994.
- [11] There has, over the course of time, been a clear division of responsibilities as between Van and Sam regarding Boardwalk.
- [12] Van's responsibilities primarily involve maintaining the upkeep of Boardwalk's vast assembly of real properties, including visits with on-site management and relevant service providers, generating necessary reports, and the like. This is primarily "feet on the ground" work requiring travel to communities in this province, Alberta, Saskatchewan, Ontario and Quebec.
- [13] Sam is in charge of the business side of Boardwalk-- namely overseeing the accounting, legal, acquisitions/dispositions, financing, and other similar tasks associated with being the Chairman and Chief Executive Officer of an operation of this magnitude.
- [14] In 2006, Boardwalk was converted to a Real Estate Investment Trust (the "Boardwalk REIT") which it continues to be today.
- [15] Boardwalk REIT is a publicly traded entity currently listed on the Toronto Stock Exchange. Units of a publicly traded investment trust are functionally the equivalent of the shares of a publicly traded corporation.
- [16] After material reorganizations in May 2018 and May 2020, appropriately referred to as estate freezes, the corporate structure of the Broadway Properties group in April 2023, the date of separation between the claimant and Van, can be summarized as follows:
- a) The Boardwalk Group of companies includes various entities included but not limited to:
 - i. Park Place Holdings ("PPHL");
 - ii. Boardwalk Properties Company Limited ("BPCL");

- iii. BPCL Holdings Limited ("BPCL Holdings"); and
- iv. 1103891 AB Ltd. ("1103").
- b) PPHL, BPCL, BPCL Holdings and 1103 are privately held companies;
- c) BPCL and 1103, in turn, own units in Boardwalk REIT. Specifically, BPCL owns 8,675,000 class A units of Boardwalk REIT and 1103 owns 4,475,000 class B units. The value of the class A and class B units are the same;
- d) The Boardwalk Properties group are ultimately owned by two entities--PPHL and Boardwalk Investment Ltd. ("BIL");
- e) Each of Van and Sam presently hold an equal number of preferred shares in their respective companies, PPHL and BIL. Their respective 103,563 shares have a redemption value of \$1,000 per share. Thus, Van and Sam are each registered owners of preferred shares worth \$103,563,000 for a total of \$207,126,000. At the time of the second estate freeze in May 2020 the combined value of Van and Sam's preferred shares was \$480,000,000 but those shares were re-frozen at a lower value due to a drop in the share price following the onset of the COVID-19 pandemic;
- f) In the Interim Support Reasons, at para. 71(f), I observed that the evidence about what "agreements" exist between the Van and Sam regarding these preferred shares "is murky at best";
- g) In reasons for judgment allowing Van's appeal of an order of Associate Judge Schwartz which subsequently lead to the Conspiracy Amendment Reasons, I elaborated on the above comment and stated that paragraph 71(f) of the Interim Support Reasons was not exhaustive. What I did not specifically detail in the Interim Support Reasons is that there are two handwritten "agreements" as between Van and Sam from February 12, 2024 which are written on what appear to be "generously described as large lined post-it notes": see Barnes-Morrison v. Kolas, 2025 BCSC 166 at para. 57;
- h) On May 15, 2020 a Trust Deed was executed establishing the Sam and Van Kolas 2020 Family Trust (the "Trust"). The settlor of the Trust is a third party and the trustees are now respondents to this action, solely in their capacity as trustees, pursuant to my order made April 16, 2025: see para. 110(e) of the Conspiracy Amendment Reasons; and
- i) Finally, excluding the above-mentioned preferred shares, the remaining value is in the common shares of PPHL and BIL. These common shares are owned by the Trust.

Relevant Provisions of the Rules

[17] The provisions of the Rules engaged by the Application are Rules 13-3 and 13-4. Specifically, the relevant portions of Rules 13-3 and 13-4 provide as follows:

Rule 13-3 -- Appointing Joint Expert Witnesses

Definition

- (1) In this rule, "financial issue" means
- (a) an issue arising out of a claim under Part 5 or 6 of the Family Law Act or out of an application for a FHRMIRA order,
 - (b) a claim for an interest in property based on unjust enrichment or other trust claims, or
 - (c) a claim for compensation based on unjust enrichment.

Joint appointment on financial issues

- (2) If any party wishes to present to the court expert opinion evidence on a financial issue,
- (a) that evidence must be presented to the court by means of a jointly appointed expert unless the court otherwise orders or the parties otherwise agree, and
 - (b) Rule 13-4 applies.

Other appointments on non-financial issues

- (3) If a party wishes to present to the court expert opinion evidence on an issue other than a financial issue,
- (a) the parties may present that evidence by means of a jointly appointed expert under Rule 13-4, or
 - (b) any one or more of the parties may appoint the party's own expert.

Rule 13-4 -- Jointly Appointed Experts

Matters to be settled prior to appointment

- (1) When an expert is to be jointly appointed by 2 or more parties under Rule 13-3 (2) or (3) (a), the following must be settled before the expert is appointed:
- (a) the identity of the expert;
 - (b) the issue in the family law case the expert opinion evidence may help to resolve;
 - (c) any facts or assumptions of fact agreed to by the parties;
 - (d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;
 - (e) the questions to be considered by the expert;
 - (f) when the report must be prepared by the expert and given to the parties;
 - (g) responsibility for fees and expenses payable to the expert.

...

Application to court

- (3) If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with Rule 10-5 for an order
 - (a) appointing a joint expert, and
 - (b) settling any matter relating to the appointment of the joint expert.

Overview of Governing Authorities

- [18] The leading case regarding the appointment of a joint expert in respect of a "financial issue" under the Rules continues to be *Aquilini v. Aquilini*, 2012 BCSC 1616. Although the specific definition of a "financial issue" in the Rules was different at the time *Aquilini* was decided, the principles that decision stands for continue to govern.
- [19] As a starting point, after reviewing the relevant provisions of the Rules which I have already done above, Justice N. Smith commented as follows regarding the role of joint experts in family law proceedings at para. 9 and 10:
 - [9] Jointly appointed experts are now referred to in both the Family Rules and the Supreme Court Civil Rules [Civil Rules], but with a significant difference between those two sets of rules. Under the Civil Rules, a joint expert may be appointed by agreement or by order of the court at a case planning conference (R. 11-3). In the absence of such an agreement or order, the parties are free to each appoint their own experts in the traditional way. Under the Family Rules, the procedure is reversed in respect of financial experts. Opinion evidence can only come from jointly appointed experts unless there is an agreement or court order authorizing a departure from that procedure.
 - [10] In making those Family Rules, the Lieutenant Governor in Council has stated a strong policy preference for the use of jointly appointed financial experts in family cases. That policy decision responds to common features of family cases that are not necessarily present in other kinds of litigation. These include:
 - a) The central importance of the division of family assets and the corresponding need for valuation or accounting evidence;
 - b) The cost of obtaining such expert evidence in many cases;
 - c) The fact that the parties frequently do not have equal ability and resources to retain experts;
 - d) The fact that while separately appointed valuation or accounting experts may disagree on some matters, they frequently find a great deal of common ground, resulting in needless duplication of costs (this, of course, assumes that all experts, whether jointly or separately appointed, have proper regard to their duty to assist the court and not act as advocates for either party); and

- e) The overly adversarial nature of some family cases, which can put in issue matters on which the parties should be able to agree.
- [20] At para. 29 in Aquilini, Justice N. Smith articulated the three-step analysis required:
- 1) Have the parties agreed to each appoint their own experts on the relevant financial issue pursuant to R. 13-3(2)?
 - 2) If there is no such agreement, should there be an order under R. 13-3(2) that they each appoint their own experts?
 - 3) If there is no agreement or order for separate experts and no agreement on the appointment of a joint expert, should the court appoint a joint expert under R. 13-4(3)?
- [21] The Application does not engage factors 1 or 2 of the Aquilini test. This leads to the question set out by Justice N. Smith in respect of factor 3, namely, "should the court appoint a joint expert under R. 13-4(3)?" In this regard, Justice N. Smith has set out a non-exhaustive list of principles which apply when deciding this question at paras. 42- 43:
- [42] The decision that I have made on R. 13-3(2) means that there can be no expert evidence on the question of overall valuation unless a joint expert is appointed. The question of whether the court should exercise its jurisdiction under R. 13-4(3) must be considered in that context.
- [43] The matters that will likely have to be considered in most cases where the issue arises are:
- 1) Is the financial issue one on which the court is likely to require expert evidence?
 - 2) If so, is there evidence of a properly qualified expert who is available and who the parties, or either of them, can afford to retain?
 - 3) Is appointment of a joint expert consistent with the purpose and intent of the Family Rules?
- [22] Also instructive is the decision in *Stober v. Stober*, 2015 BCSC 2505. In *Stober*, Justice Skolrood (as he was then) considered Aquilini and made an order appointing a joint expert to prepare report as to the fair market value of the parties' beneficial interests in a specified family trust: see para. 46. Whilst appointing the joint expert, Justice Skolrood declined to dictate the factual assumptions to be put to the expert because "that would engage the court in essentially directing the expert in the performance of his role which is not the function of the court": see para. 47.

Issues To Be Determined

- [23] The issues to be determined pursuant to the Application are thus as follows:
- a) Is the scope of work as set out in the Application sufficiently clear to form the basis of an order under R. 13-4?

- b) Is the scope of work set out in the Application in respect of a "financial issue" as defined in the R. 13-3(1)?
- c) If the scope of work sought in the Application is not related to a "financial issue", does this Court have jurisdiction to appoint a joint forensic accountant to conduct the work?
- d) If this Court has jurisdiction to appoint a joint forensic accountant to conduct the work set out in the Application, should one be appointed?

Scope of Work Proposed in the Application

[24] The critical, and ultimately fatal, difficulty that this Court faces in considering the relief sought by the claimant is that the Application lacks sufficient clarity and certainty to form the basis of an appointment order pursuant to the Rules.

[25] I highlight paragraph 1(b) of the Application as a representative example in this regard. Read as a standalone order, it would, if granted, appoint the named experts (or such other expert as might be appointed) to:

Conduct a forensic audit which may include transfers of millions of dollars of dividends, shareholder loans, earnings and other entitlements as well as the efficacy, consistency and legality of the documents relating to the alleged transactions.

[26] Even with my previously acknowledged appreciation of the difficulties faced by claimant's counsel due to the complexity of this action, court orders must still be clear and unambiguous. That is a trite proposition. The above would be neither.

[27] Moreover, the court's concerns are not addressed by simply excising paragraph 1(b) of the Application as the same issue arises with paragraph 1(c) of the Application. Again, read as a standalone order, it would, if granted, appoint the named experts (or such other expert as might be appointed) to:

Conduct a forensic audit which may include representations made to Canada Revenue Agency, Ontario Securities Commission, information provided to unitholders and media outlets, financial institutions and other individuals and agencies.

[28] Another order that would be neither clear nor unambiguous.

[29] While I was directed to various cases by the claimant in which the court addresses the appointment of forensic experts in some fashion, none of those decisions, with the exception of *Brody v. Brody*, 2020 BCSC 1772 and the possible exception of *Fan v. Zhang*, 2015 BCSC 2352, actually articulate the terms upon which the forensic expert was appointed by this Court. I will review those authorities briefly and provide my comments thereon:

- a) *Tait v. van Wollen*, 2022 BCSC 1509: Tait involved an interim application within a family law dispute where there were issues raised regarding the relationship between the claimant and the claimant's parents' companies. The particular application before the court sought to

jointly retain one of two qualified firms as a forensic expert to "investigate the accuracy and completeness of the financial disclosure of the claimant, as well as the income and assets of the claimant and his company for the period from 2016 to present": see para. 1. Then Master Muir concluded it was not a case "where a joint forensic review [was] warranted or proportional": see para. 54. Instead, the parties were directed to proceed with the court-ordered business valuation of the primary corporation with leave to seek further document production upon request by the valuator and invited to pursue further questioning through the examination for discovery process: see paras. 55 and 56;

- b) *Fan v. Zhang*: In *Fan*, Justice G.C. Weatherill references a prior order made that a "joint forensic accountant having offices in both Vancouver, B.C. and China be appointed pursuant to Rules 13-3 and 13-4 for the purposes of auditing and determining the extent and details of the respondent's respective worldwide financial assets": see para. 3. Justice G.C. Weatherill made this order on the basis that it was abundantly apparent that the respondent had "failed to provide full and frank disclosure and further [has], likely deliberately, engaged in a practice of failing to report income and assets": see para. 4;
- c) *Berthin v. Berthin*, 2015 BCSC 78: *Berthin* is a trial decision primarily concerning the validity of a separation agreement. One of two expert reports permitted into evidence by Justice Steeves was a report of a "forensic accountant": see para. 35. That report, according to the summary in the reasons for judgment, identified expenses which were not proper corporate expenses and identified the extent to which the respondent received benefits, income or other funds from the respondent's corporations (there were eight including certain international companies) which were not reported as income for tax purposes: see paras. 37 and 38. But for the international component to the respondent's corporate holdings, what is described as a forensic accounting in *Berthin* seems strikingly similar to what this Court regularly receives in the form of Guideline income reports;
- d) *Saric v. Banden*, 2017 BCSC 1508: *Saric* is a trial decision concerning the division of family property and spousal support. In Justice Verhooeven's reasons for judgment, he refers to an earlier order made in 2015 by Madam Justice Bruce in which the claimant was ordered to retain a "forensic accountant to evaluate [the respondent's] income and assets, at a cost of \$25,000 to be paid out of [the respondent's] share of the monies held in trust" and wherein the respondent was ordered to "cooperate fully with regard to the production of documents required by the accountant": see para. 4. It was also contemplated that the accountant's report would be considered by the registrar, but that ultimately did not occur due to intervening events. Of some significance, in my view, is the stark contrast between the property and income involved in *Saric* versus the case at bar. Even with the benefit of the expert report ordered by Madam Justice Bruce, the respondent was imputed an income of \$60,000 per annum and the value of the respondent's undisclosed assets were "realistically assessed" by the court to be \$100,000; see paras. 55 and 77. Given the much greater magnitude of the financial transactions in issue in this case, the need for precision in the terms of the scope of the engagement of a forensic accountant is necessarily heightened;

- e) *Moazzen-Ahmadi v. Ahmadi-Far*, 2019 BCSC 424: *Moazzen-Ahmadi* is a family law action with a number of reported decisions. In this instance, the court considered an application to vary certain support orders on the basis of an alleged material change in circumstances. The particularly complicating factor was that the payor, a pharmacist, had been making cash payments to methadone patients as an incentive for them to return to his pharmacy. These payments were found to be in breach of the payor's PharmaCare agreements and, ultimately, those agreements were terminated. At para. 23, Justice Blok references a Guideline income report commissioned by the payor which required a forensic accounting of his corporate interests. The expert was subject to cross-examination, and when she was asked about the "audit" that was ordered by the court, she testified that there are "varying degrees to what an audit can be". The expert further testified she understood there were some concerns about the financial reporting of payor, so she undertook an examination of all transactions, within a "framework of materiality", "to bring comfort to the court" that the corporate financial statements presented accurately and to outline any areas they were unable to verify: see para. 29(a);
- f) *Devathasan v. Devathasan*, 2019 BCSC 661: *Devathasan* is a trial decision involving what Justice Gomery (as he was then) described as "uncommonly wealthy" parties. Their combined wealth, I note, was estimated to be approximately one-third of the book value of Van's preferred shares that I referenced above. The same expert utilized in *Moazzen-Ahmadi* had been previously appointed by the court as a joint expert to conduct a forensic accounting of the payor, a physician, who operated a clinic that took in cash receipts which exceeded \$1.3 million dollars per annum over a five-year period: see paras.76 and 78. There are unfortunately no reported reasons for judgment wherein the court appointed the expert at first instance so as to be able to ascertain the terms of said appointment. However, the focus at trial was quite clearly on determining the payor's Guideline income and determining whether the payor had undisclosed assets: see para. 214;
- g) *Brody v. Brody*: *Brody* involved an application brought pursuant to R. 16-1(26) of the Rules for a review of an assessment of costs conducted by the registrar subsequent to a trial of the proceeding. At para. 10 of *Brody*, Justice Veenstra described how, for the purposes of trial, the wife had engaged an expert to conduct a "forensic accounting exercise". Although there was cooperation from the husband, it was not a joint expert report under the Rules. The scope of work of the expert was quite precisely articulated as follows:
 - i. tracing the funds advanced to purchase a particular property and construct a house at said property;
 - ii. identifying the source of funds used purchase another subject property; and
 - iii. tracing the disposition of inheritance funds received;

h) Zhao v. Zhou, 2020 BCSC 516: Zhao, like Fan, simply references a prior order wherein a well-known national accounting firm was appointed by the court as the "forensic accountant": see para. 11(c). The reasons for judgment underlying that order are not published, but there is reference to both parties meeting with the "forensic accountant" to address questions that the accountant had regarding the respondent's spouse's "worldwide income and assets": see para. 13.

[30] Further complicating matters for the court is the fact that, unlike, for example, a s. 211 report prepared pursuant to s. 211 of the Family Law Act (or their precursor, s. 15 reports under the previous Family Relations Act) or a business valuation, a "forensic audit" is not a judicial term of art. There are no generally standard or universal terms which the court could consider, and modify slightly as appropriate, when making the order(s) sought. That point comes through very clearly in Moazzen-Ahmadi. However, in that case Justice Blok was considering what to do with an expert report that had already been prepared and not determining whether to order such an "audit" at first instance.

[31] Moreover, I see the proposed scope of engagement set forth in the Application as fraught with potential further conflict as between the parties which will, I surmise, inevitably end up back before me and put the court in the untenable position of directing the joint expert as to how to proceed. That is exactly what the Justice Skolrood cautioned against doing in Stober.

Is the Scope of the Work Proposed a "Financial Issue"?

[32] As articulated, R. 13-3(1) expressly defines what constitutes a "financial issue".

[33] In light of my above conclusion that I cannot actually ascertain what the precise scope of work being proposed in the Application is, I am unable to actually determine whether it constitutes a "financial issue".

[34] In this regard, while I have indicated that the caselaw which I was provided with was not terribly instructive regarding the terms upon which a "forensic auditor" shall be appointed by this Court, there are two important distinguishing features between this case from several of those decisions. Firstly, is the lack of foreign assets involved and secondly, is the lack of cash operations. Boardwalk REIT is publicly traded entity currently listed on the Toronto Stock Exchange. Moreover, whilst the arrangements between Van and Sam may be murky, they are not clandestine.

[35] Simply stated, it may be that the claimant can reframe the relief presently sought in the Application to fall within the definition of a "financial issue" under R. 13-3(1). To say that it cannot would be to prejudice such an application and that would be inappropriate. All that I conclude for the purposes of these reasons for judgment is that I am unable to ascertain with the requisite degree of clarity what issues the forensic auditor is being asked to opine on and that is fatal to paragraph 1 of the Application.

Jurisdiction of the Court to Appoint a Joint Expert on a Non-Financial Issue

- [36] Van submits that R. 13-4(3) does not contemplate one party obtaining a court ordered appointment of a joint expert for a non-financial issue. Rather, Van submits that the only way for a joint expert to be appointed in respect of a non-financial issue is if "the parties" agree to the appointment. I concur.
- [37] However, as the question of whether the Rules permit one party to obtain a court ordered appointment of a joint witness for a non-financial issue has not yet been squarely considered in any reported decisions of this Court that were brought to my attention or which I could independently locate, it is necessary to interpret the relevant provisions.
- [38] The modern approach to statutory interpretation is set out in *R. v. Clark*, 2005 SCC 2 at para. 43 as follows:

43 It is now well established that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": [citations omitted].

- [39] Following the modern approach, one starts by reading R. 13-3(2) and (3) and R. 13-4 and giving the words their ordinary and grammatical meaning:

Rule 13-3 -- Appointing Joint Expert Witnesses

Joint appointment on financial issues

- (2) If any party wishes to present to the court expert opinion evidence on a financial issue,
 - (a) that evidence must be presented to the court by means of a jointly appointed expert unless the court otherwise orders or the parties otherwise agree, and
 - (b) Rule 13-4 applies

Other appointments on non-financial issues

- (3) If a party wishes to present to the court expert opinion evidence on an issue other than a financial issue,
 - (a) the parties may present that evidence by means of a jointly appointed expert under Rule 13-4, or
 - (b) any one or more of the parties may appoint the party's own expert.

Rule 13-4 -- Jointly Appointed Experts

Matters to be settled prior to appointment

- (1) When an expert is to be jointly appointed by 2 or more parties under Rule 13-3 (2) or (3) (a), the following must be settled before the expert is appointed:

Application to court

- (3) If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with rule 10-5 for an order
- (a) appointment a joint expert, and
 - (b) settling any matter relating to the appointment of the joint expert.
- [40] I accept that the ordinary meaning of these provisions in the Rules gives rise to the following conclusions which are relevant to the Application:
- a. If a party wishes to present expert evidence on a financial issue, they must do so with a jointly appointed expert, unless the parties agree or the court otherwise orders, and R. 13-4 will apply: see R. 13-3(2).
 - b. However, under R. 13-3(3), if "a party wishes to present expert evidence" on a non-financial issue, then they may do so in one of two ways:
 - i. "the parties" may present that evidence by means of a jointly appointed expert under Rule 13-4, or
 - ii. "any one or more of the parties" may appoint the party's own expert.
- [41] The logical conclusion is that R. 13-4 does not apply when there is no "financial issue". If it did, it would have been unnecessary and superfluous to specify in R. 13-3(2)(b) that "Rule 13-4 applies" in respect of "financial issues".
- [42] It is also notable that the legislature did not say "Rule 13-4 applies under R. 13-3(2)". Rather, the Rules state that "the parties may present evidence by way of a jointly appointed expert under R. 13-4".
- [43] I conclude that the use of the wording "the parties" under R. 13-3(3)(a) was an intentional decision. The use of that word was intended to reflect that, for a joint expert to be appointed on a non-financial issue, "the parties" are required to agree to the appointment.
- [44] This can be contrasted with the wording of R. 13-3(3)(b) which refers to "any one or more of the parties". These words contemplate that one party, or multiple parties in those somewhat rare family cases which involve same, may appoint experts, and they do not need to cooperate with one another. Rather, any one of more of the parties can appoint "his or her own expert".
- [45] It is of further note that the preamble to R. 13-3(3) starts with the words "If a party"; namely a singular party. This can be contrasted to the use of the language, "the parties".

- [46] This contrast conveys meaning. In other words, if it were the intention that one party would be able to force the other party (through a court order) to participate in a joint appointment, over their objection, then it would not have been necessary to include the words "the parties" in R. 13-3(3)(a). Nor would it have been necessary to contrast those words with the words "any one or more of the parties" in R. 13-3(3)(b).
- [47] Simply stated, I accept there is an important reason why the legislator included the words "the parties" in subrule (a), and that reason is to indicate that the parties need to agree to the joint appointment. If they are not, R. 13-4 simply does not apply.
- [48] This interpretation is supported, I conclude, by a contextual review of the other provisions in R. 13-3, specifically, R. 13-3(2).
- [49] Rule 13-3(2) has a very similar preamble to R. 13-3(3). However, the wording of R. 13-3(2)(a) is drafted differently than the wording of 13-3(3)(a). Whereas R. 13-3(3)(a) begins with the words "the parties may present that evidence", R. 13-3(2)(a) does not begin in that way, it simply says "that evidence must be presented to the court by means of a jointly appointed expert".
- [50] The omission of the words "the parties" from R. 13-3(2)(a) means that it is not necessary for both parties to agree to present expert evidence by way of a joint expert if the issue is a "financial issue". As long as one party wants to present such evidence by way of joint expert, they may take steps to do so, including obtaining a court order compelling the other unwilling party to participate in the joint appointment.
- [51] By contrast, the use of the words "the parties" in R. 13-3(3)(a) signifies that no one party can force another to unwillingly present expert evidence on non-financial issues with a joint expert.
- [52] Given R. 13-3(3)(a) also includes a reference to R. 13-4, it is necessary to review that Rule as well. Rule 13-4 is quoted above.
- [53] Rule 13-4(3) does not give the court the jurisdiction to make an order appointing a joint expert over a non-financial issue.
- [54] There are two preconditions for relief in the preamble of R. 13-4(3):
- a) the parties do not agree that a joint expert is required; or
 - b) the parties do not agree on any matter relating to the appointment of a joint expert.
- [55] Should either precondition be met, then:
- a) a party may apply for an order appointing a joint expert; and/or
 - b) a party may apply for an order settling any matter relating to the appointment of the joint expert.

[56] In the result, R. 13-3(2) makes joint experts a requirement for financial issues only. It is not possible for a joint expert to be "required" for a non-financial issue. This is the only reasonable interpretation that gives proper effect to the words in the preamble of R. 13-4(3). I also consider this conclusion to be consistent with *Kasapoglu v. Kasapoglu*, 2020 BCSC 1810 wherein this Court had the opportunity to consider whether expert evidence on a nonfinancial issue (in that instance, an expert report regarding foreign law) had to be presented by way of a joint expert and concluded it did not: see paras. 21-27.

Identify and Funding of a Joint Expert

[57] In light of my foregoing conclusions regarding the inability to order the appointment of a joint forensic auditor on the basis of the terms presently outlined in the Application, I am not going to comment on the issue of the identification of an appropriate joint expert or the funding of any such joint expert.

[58] Again, I am cognizant of the fact that these issues realistically may subsequently come before me directly in the form of a revised application to appoint a joint forensic auditor or indirectly in some other form, including an application by the claimant for a further advance pursuant to s. 89 of the FLA. I will consider those issues at that time in the appropriate context and on the basis of the evidence tendered for the purpose of any such application(s).

Conclusion Regarding Relief Sought in the Application

[59] Whilst I understand the purpose of Application and the challenges that the claimant has in trying to understand the murky financial arrangements involving Van, Sam and Boardwalk, I cannot grant any of the relief sought in the Application. As presently framed it, the relief sought in paragraph 1 lacks the necessary precision to know exactly what issue(s) the forensic auditor would be engaged to provide a joint expert report on.

[60] Moreover, it is not the role of the court to be engaging in a wholesale redrafting of the proposed terms of appointment of the joint expert. On such an application, I accept that the court has the ability to wordsmith those terms to some degree. However, what is required here goes well beyond wordsmithing. It requires substantive drafting and strays into what the court in *Stober* specifically resisted doing.

[61] Further, directly related to the foregoing, it is not currently possible to actually determine whether the issue(s) proposed to be put to the proposed joint expert relates to a "financial issue" in accordance with R. 13-3(2).

[62] However, to the extent that the proposed scope of engagement addresses an issue other than a financial issue, the Rules do not provide this Court with the jurisdiction to order the appointment of a joint expert. That jurisdiction is confined to expert reports on a "financial issue" alone.

[63] The significance of this conclusion as it relates to the Application is that this Court has no jurisdiction to order the appointment of a joint expert to prepare a "Guideline income" report as sought in paragraph 2 of the Application as this Court has previously determined that "Guideline income" reports are not expert reports on a "financial issue" as defined by the Rules: see *Janis v Janis*, 2013 BCSC 116 at para 24.

Costs

[64] Costs are awardable at the discretion of the hearing judge. The general principle is that costs are awarded to the successful party, but those costs are at the discretion of the presiding judge. That includes the discretion to depart from the prima facie rule that the successful litigant should be awarded costs.

[65] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, however, the discretion is very broad.

[66] In my view, there is no basis to depart from the general rule in this instance in respect of Van. Van has been substantially successful in opposing the Application. Van is entitled to his costs of the Application in any event of the cause from the claimant, with the costs to be assessed on the basis that the matter was of "ordinary difficulty" under the tariff.

[67] As between the claimant and the remaining respondents, I exercise my discretion to order that the parties shall bear their own costs of the Application. Although the remaining respondents did file an application response and have counsel present via Microsoft Teams at the hearing of the Application, they primarily relied upon the submissions made by Van's counsel. Further, their interests were generally limited to the issue of funding any joint expert report.

"Hardwick J."

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