CANADA / JUDGMENT

# Cowan v. Williams

## 2022 BCCA 400

COURT
British Columbia Court of Appeal

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2022 BCCA 400 Cowan v. Williams

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cowan v. Williams,

2022 BCCA 400

Date: 20221201

Docket: CA47997

Between:

Christopher Warren Cowan

Appellant

(Claimant)

And

Leith Alison Williams

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated November 30, 2021 (C.W.C v. L.A.W., Victoria Docket E183066).

Counsel for the Appellant,

via videoconference:

G.A. Lang

Counsel for the Respondent:

K. Heinrichs

Place and Date of Hearing:

Vancouver, British Columbia

October 4, 2022

Place and Date of Judgment:

Vancouver, British Columbia

December 1, 2022

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

Summary:

The appellant common-law husband appeals an order made following a "clarification hearing", which occurred after a lengthy family trial. One of the issues related to the division of family property, including the former family residence. At the hearing, the respondent common-law wife sought "clarification" regarding the amount of the compensation payment she was owed by the appellant, who wished to keep the residence. The judge agreed with her proposed calculation and increased the amount of the compensation payment. On appeal, the appellant argues that the hearing was procedurally unfair and during the hearing of the appeal raised for the first time that the judge made a palpable and overriding error. Held: Appeal allowed. While the hearing was procedurally fair, the trial judge made a palpable and overriding error in calculating the amount of the compensation payment by restricting his analysis to certain paragraphs in a cohabitation agreement and not considering another. Although this constituted a new ground of appeal it did not prejudice the respondent to have this ground considered by this Court. The issue of the amount of the compensation payment for the former family residence is remitted to the trial court..

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

## Introduction

[1] This appeal arises from a trial judge's decision to "clarify" an unentered order pronounced on September 8, 2021 following a lengthy family law trial. At the trial, parenting time, child support, and the division of family assets and debt were at issue. The order which is impugned on this appeal was made following a "clarification hearing" (the "Hearing"), which occurred on November 30, 2021 prior to the trial order being entered.

[2] The appellant, Mr. Cowan, challenges what he describes as the "clarification order", which materially altered the order pronounced September 8, 2021 with respect to a compensation payment in relation to the former family residence, to which I shall refer as Woodley Ghyll. He does so on the basis that the Hearing was procedurally unfair because the respondent, Dr. Williams, did not adhere to the requirements of the Supreme Court Family Rules, B.C. Reg. 169/2009. Accordingly, he submits the Hearing amounted to an abuse of process and breached the rules of natural justice. He seeks an order remitting the issue of the compensation payment amount in relation to Woodley Ghyll to the trial court for a re-hearing.

[3] The trial order which reflected the decision made at the Hearing (the "Final Order") was entered on December 21, 2021.

[4] For the reasons that follow, I would not accede to the argument that the Hearing was procedurally unfair. Nonetheless, I would remit the issue of the compensation payment amount to the trial court on a limited issue, as described in these reasons, on the basis that the trial judge made a palpable and overriding error at the Hearing.

## Background to the Hearing

[5] The background is set out in some detail in the judge's trial reasons which are indexed at 2021 BCSC 1774 and I will outline only those facts which relate to Woodley Ghyll.

[6] Mr. Cowan was an electrical contractor until a workplace injury interfered with his ability to continue in that profession. Dr. Williams is a veterinarian. The parties commenced living together in July 2012 and were in a common-law relationship until they separated in December 2017.

[7] The parties owned a number of real properties including Woodley Ghyll which is located in Victoria, B.C. A joint appraisal valued Woodley Ghyll at $690,000 as of July 1, 2012, and $980,000 as of January 27, 2020; that is an increase in value of $290,000.

[8] The parties entered into a cohabitation agreement (the "Agreement") on January 9, 2017. Among other things, the Agreement set out what was to occur regarding Woodley Ghyll if the parties separated. The judge set out the relevant clauses of the Agreement in his reasons:

[100] The agreement begins with recitals that include:

A. [Mr. C. and Ms. W.] have lived together since approximately June 2012 and intend to continue to cohabit in the future.

B. This Agreement is to be fully effective even if the parties marry.

H. [Mr. C.] is the registered owner of [Woodley Ghyll], in the city of Victoria, in the province of British Columbia, which has a market value in the sum of approximately $735,000.00 (the "Woodley Ghyll Property").

J. For the purposes of this Agreement, the parties agree that there is approximately $355,000.00 of equity in the Woodley Ghyll Property.

K. [Mr. C.] owns a legal and/or beneficial interest in the property set out in Schedule "A" to this Agreement. [Mr. C.'s] liabilities are also set out in Schedule "A" to this Agreement.

L. [Ms. W.] owns a legal and/or beneficial interest in the property set out in Schedule "B" to this Agreement. [Ms. W.'s] liabilities are also set out in Schedule "B" to this Agreement.

[101] The agreement includes these terms:

1. [Mr. C. and Ms. W.] each acknowledge that the statements and facts set out in the recitals of this Agreement are correct.

4. Both parties are satisfied with the knowledge each has of the other's assets and liabilities and neither of them desires nor requires further or better particulars of the assets and liabilities of the other for the purposes of this Agreement.

5. [Mr. C. and Ms. W.] separately acknowledge that:

(a) in the course of their cohabitation each of them will confer benefits upon the other;

(b) the benefits conferred by one on the other are gifts; and the making of these gifts does not result in an unjust enrichment of the recipient to the detriment of the donor;

(c) neither party will rely on the oral expression, or conduct which may suggest the expression, of an intention by one party to hold property or a portion of property in trust for the other.

WOODLEY GHYLL PROPERTY

6. The parties shall share equally, all expenses associated with the Woodley Ghyll Property, including but not limited to the following:

(a) mortgage payments;

(b) property taxes;

(c) utilities, including hydro, cable, and telephone;

(d) general maintenance and repairs;

(e) capital expenses; and

(f) any other expense as agreed to by the parties.

7. In the event that the parties separate, [Mr. C.] shall have the option of purchasing [Ms. W.'s] interest in the Woodley Ghyll Property. The purchase price of [Ms. W.'s] interest shall be determined as follows:

(a) firstly, obtaining an appraisal of the property, the cost of which shall be shared equally between [Mr. C. and Ms. W.];

(b) secondly, to deduct any outstanding balance with respect to the Bank of Montreal mortgage;

(c) thirdly, to credit to [Mr. C.], his equity in the Woodley Ghyll Property in the sum of $355,000.00; and

(d) fourthly, to pay to [Ms. W.], one half of any remaining equity in the Woodley Ghyll Property, if any.

8. Should [Mr. C.] not exercise the option to purchase [Ms. W.'s] interest in the Woodley Ghyll Property within six months from the date of the parties' separation, the parties agree the Woodley Ghyll Property shall be sold, and the sale proceeds applied as follows:

(a) any real estate commission payable;

(b) legal fees and disbursements incurred in the sale of the Woodley Ghyll Property;

(c) to pay out any outstanding balance with respect to the Bank of Montreal mortgage;

(d) to [Mr. C.], the sum of $355,000.00 representing his equity at the time that the parties entered into this Agreement; and

(e) the balance of the net sale proceeds to be divided equally between [Mr. C. and Ms. W.]

[103] Mr. C.'s liabilities are listed as:

a) a first mortgage in favour of the Bank of Montreal over Woodley Ghyll in the sum of approximately $380,000;

[9] One of the key issues at the trial was whether the Agreement was valid. The judge noted that it was executed in the context of what he described as a "tumultuous" relationship: Trial Reasons at para. 90.

[10] Dr. Williams' position was that the Agreement was unenforceable because it contained material misrepresentations and had been executed by her under duress. The judge found:

[123] On all of the evidence, I cannot find that there was a material misrepresentation on the part of Mr. C. from when the agreement was formed. I do not find that in December 2016 Mr. C. intended to finally end the relationship. Instead, I conclude that as he said, he was not fully committed to the relationship and I find further that the circumstances surrounding the presentation of the agreement to Ms. W. would have caused her to reasonably believe that signing the agreement would effect significant change in the progress (or lack thereof) of

the relationship.

[124] Ms. W. was in a vulnerable state when Mr. C. presented her with the draft agreement on December 21. She had left her work in order to give birth to their second child and was without an income. That does not mean she was without resources, as she did have some money available to her, and she could rely on her parents for support if necessary. Ms. W. is an intelligent and well educated woman who has demonstrated an ability to take care of herself. During the relationship, the parties have described instances where, in the heat of an argument, Ms. W. was capable of giving as good as she got.

[125] I conclude that the cohabitation agreement was valid when made, and turn to whether the agreement should be set aside under s. 93 of the Act.

[11] In summarizing the orders made, the judge stated:

[158] The cohabitation agreement is valid and binding.

[160] Mr. C. shall pay Ms. W. her one-half interest of Woodley Ghyll in the amount of $145,000, subject to Ms. W.'s repayment of $86,000 to J.C, through Mr. C.

The Hearing

[12] The manner in which the Hearing was scheduled and proceeded before the judge on November 30, 2021 requires some background.

[13] On September 16, 2021, Dr. Williams' counsel emailed a copy of a Request to Appear (the "First RTA") to Mr. Cowan's trial counsel, which provided in part:

Subject: Mr. Justice Johnston -- VI 183066 -- Christopher Warren Cowan v. Leith Allison Williams -- TE: 30 minutes -- CONF#916219260705

Mr. Justice Johnston -- VI 183066 -- Christopher Warren Cowan v. Leith Allison Williams

Case Type: Family

Type of hearing: Application to clarify final order.

Time estimate: 30 minutes

Available dates: Subject to Mr. Justice Johnston's availability

Nature of Application: To clarify the final order, with respect to the following issues:

1. clarify terms of the order with respect to division of assets as it applies to the Skipjack boat. 2. clarify the parenting time order with respect to spring break holiday time with each parent. 3. clarify the parenting order as it applies to the children's attendance at extracurricular activities.

Reason why this must be heard by (Mr. Justice Johnston): Mr. Justice Johnston was the trial judge. His Reasons for Judgment are unclear on these trial issues. Clarification is required prior to settling the final order.

Opponent's position regarding this application/request: unknown.

[Bold emphasis in original; underline emphasis added.]

[14] Notably, the email made no reference to "clarifying" the compensation payment for Woodley Ghyll.

[15] Between mid-September and November 30, 2021 when the Hearing took place, there was correspondence between Dr. Williams' counsel, Mr. Cowan's trial counsel, and then Mr. Cowan's replacement counsel who represented him at the Hearing. The correspondence pertained to arranging a date for the Hearing and also pertained to a second RTA. This RTA was filed by Dr. Williams' counsel on November 15, 2021 and sought to set down an application before the judge to have Mr. Cowan found in contempt of court for, among other things, failing to comply with certain terms of the unentered trial order and to determine the costs of the proceedings. Ultimately, the parties agreed to adjourn the contempt/costs application and agreed the Hearing would pertain only to the clarification of the unentered order.

[16] Since there were no supplementary reasons for judgment delivered after the Hearing, it is necessary to set out some extensive extracts from the transcript of what took place.

[17] Dr. Williams' counsel began by making submissions on issues including parenting time and the division of assets in relation to a Skip Jack boat. She then turned to the calculation of the compensation payment of $145,000 for her client's interest in Woodley Ghyll. She advised the judge that the amount of $145,000, being Dr. Williams' position at trial, was premised on the Court finding the Agreement to be unenforceable. However, since the judge had found the Agreement to be valid, counsel submitted that the compensation payment should be calculated according to the formula set out in para. 7 of the Agreement.

[18] The following exchange then occurred between counsel and the judge:

CNSL B. BATE: So, at paragraph 7 it says [as read in]:

In the event that the parties separate Chris shall have the option of purchasing lease interest in the Woodley Ghyll property. The purchase price of lease interest shall be determined as follows.

And it sets out (a), (b), (c) and (d) to come up with the calculation. (a) is the appraised value and we have that value set out in Exhibit 28 and that was an appraised value of 980,000, minus any outstanding mortgage. There was none. We know that from Exhibit 20. There was to be a credit to Mr. Cowan of 355,000, representing his exclusion, and that comes to a subtotal of $625,000 under the calculation under the cohab agreement and so the divided -- the 50 percent value owing to Ms. Williams under that cohab agreement calculation is 312,500.

THE COURT: So, I got the arithmetic wrong in paragraph 160.

CNSL B. BATE: Yes and so what you did was you -- with all due respect you blended the calculation that we had put before the court on the basis that these were the calculations we were advancing if you set aside the cohab agreement, but my understanding of your decision was you upheld the cohab agreement and therefore the terms of the cohab agreement apply. So, we just simply needed to clarify that amount for the purposes of the order.

THE COURT: So, actually more a correction than a clarification.

[Emphasis added.]

[19] It was not in dispute that in March 2017, Mr. Cowan's mother, Ms. Joanne Cowan, paid off the $380,000 Bank of Montreal mortgage referenced at para. 103 of the Trial Reasons (para. 8 above).

[20] The following then occurred:

THE COURT: Mr. Harry, what do you say about that?

CNSL D. HARRY: Justice, I would actually highly disagree with my friend with respect to her interpretation of that and the reason and basis for that, Justice, is based on a party -- on your -- on your judgment, paragraph 2, "The parties began living together July 2012. They separated December 2017." This cohabitation agreement was signed in 2017 and with respect to the mortgage there was at the time of the cohabitation agreement a mortgage of two hun -- sorry, a mortgage of $380,000 on the property. That $380,000 mortgage, Justice, was paid between -- sometime between 2017 when this agreement, cohabitation agreement was made and when the separation occurred in December 2017. That -- those funds Mr. Cowan advises were from his mother and so these -- these funds - the position is there was 380,000 at the time of the cohabitation. All of a sudden that $380,000 is gone. Mr. Cowan states that that is - submits that was paid by his mother and so 380,000 was not -- that mortgage was not paid by the parties and so that $380,000 mortgage needs to be considered when we are looking at the valuation. And so, this is actually going to become a much more difficult conversation now that she has brought this up because, Justice, I believe this now needs to be reconsidered under the understanding that the way it would break down is if that mortgage was applied she would actually get less of -- than what you have ordered.

[21] Later in his submissions, Mr. Cowan's counsel said this:

And so, with respect to a correction for today this is actually a much larger issue that my friend is raising than, you know, with submissions that should be properly put before the court than to say that this should be changed on the basis this is what the cohabitation agreement says and there was no mortgage. There was a mortgage at the time of the agreement. That mortgage was paid off obviously not by the parties, because neither of them had that kind of money. And so, there is $380,000 that needs to be dealt with, with respect to Mr. Cowan's mother and her payment of it and calculating with respect to the valuation of the property.

[Emphasis added.]

[22] Mr. Cowan's counsel then submitted that if the payment of the mortgage was not to be taken into account "that opens up the issue of the inherent unfairness of the agreement ". Following further submissions from counsel, the judge said:

THE COURT: It seems to me, Mr. Harry, that I have two stark choices. One is to follow the formula if you like in paragraph 7 of the cohabitation agreement, which would leave Ms. Bates says her arithmetic tells her that leads to a payment by your client to Ms. Williams of $312,500 if Mr. Cowan wants to keep Woodley Ghyll. You bring up paragraph 8 and as I read paragraph 8, looking at it quickly, the six month period having elapsed the other option open to me is to simply order today that Woodley Ghyll be sold and the proceeds dealt with according to paragraph 8.

Now, you suggested at some point during your submission that maybe the agreement should be reopened or it should be reconsidered from the fairness perspective or otherwise. I don't think your client can spend 19 days of trial arguing that this agreement should be upheld as it is written and then suggest that when the literal translation or reading of this agreement might cost him $312,500 as opposed to $145,000 that maybe the agreement ought to be reconsidered.

Now, if you are suggesting on behalf of Mr. Cowan that this entire property division be reopened on the basis that the cohabitation agreement ought not to be upheld say so and I will hear Ms. Bate on that. If your client wants to rely on the cohabitation agreement, which I did uphold, then it seems to me he is stuck with its terms.

[23] After a brief adjournment to permit Mr. Cowan's counsel to obtain instructions, his counsel stated the following:

CNSL D. HARRY: Justice, I have spoken to my client. His instructions to me are not to reopen the agreement. However, my instructions are that in the event that we are following paragraph 7 of the cohabitation agreement that we must also uphold paragraph 6 of the cohabitation agreement, which states [as read in]:

The parties shall share equally all expenses associated with the Woodley Ghyll property including, but not limited to the following: mortgage payments, property taxes, utilities, including hydro, cable and telephone, general maintenance and repairs, capital expenses and any other expenses agreed to by the parties.

As set out at Day 13 of the trial, I have the -- during the cross-examination by Ms. Hemminger it was specifically stated by Ms. Williams that she only paid $1,500 a month towards expenses. Mr. Cowan has alleged during the trial that the expenses were higher than this and that she would then be subject to half of those expenses and more so that those expenses were not paid during the separation and of course if Ms. Williams is going to rely on the provision of s. 7, s. 6 would then apply that she would be on for half of the mortgage payments and property taxes, etcetera, paid between those intervening years. And more so I would say, Justice, is that mortgage payments must be specifically looked at. There was a mortgage payment, as I have been referred to by my friend at Exhibit 20, of [$380,000] made on March 4th, 2017. That is a mortgage payment

and that is a mortgage payment made by Mr. Cowan or his -- made by his mother through Mr. Cowan and so pursuant to this agreement, paragraph 6, "The parties shall share equally" any mortgage payments. That is a mortgage payment in my submission, Justice, and so because that is a payment that he has made of [$380,000] she should have been on paying half of that amount, because the payments were supposed to be equal to all expenses and it does not say -- the mortgage payments here are -- it is opened ended. It says "payments". It does not say the monthly payments. Payments generally and that is what was made here, Justice, was a payment covering off their entire mortgage. And so, Ms. Williams should, pursuant to this agreement, have paid half of that and so the agreement was upheld and that number was paid. And so, she should be repaying half of that amount pursuant to paragraph 6 of the cohabitation agreement.

[Emphasis added.]

[24] In response, counsel for Dr. Williams submitted:

CNSL B. BATE: Well, these -- I mean these are new arguments that my friend is advancing and I appreciate he wasn't trial counsel, but these were not arguments advanced by Mr. Cowan's counsel in 19 days of trial. My -- my position is that he can't re-litigate issues or litigate issues for the first time now.

The reality is that Clause 17 sets out -- or Clause 7 sets out a calculation and it sets out the outstanding balance. There was no outstanding balance. You know, my friend is raising -- and I don't want to go down -- down all of this, because I think they are re-litigation issues, but he is -- he is complaining about the appraisal. The appraisal was an exhibit put in by his counsel. I mean Mr. Cowan was fully represented at trial and the arguments were made.

Part of the difficulty at the trial was that Mr. Cowan chose not to submit all sorts of documentation. There were disclosure issues and we had to cobble the other -- the case as best we could in light of what he disclosed.

So, you know, at this point from my perspective Your Lordship's judgment makes it clear that you upheld the cohab agreement. Mr. Cowan is not asking you to revisit that and the cohab agreement at paragraph 7 sets out a calculation process and I agree with Your Lordship that you either use that calculation or the property is sold and the proceeds are divided. I mean that second scenario my client would stand potentially to make even more money, because the property would be worth another year's worth of increase.

[Emphasis added.]

[25] The judge then gave his decision regarding the amount of the compensation payment for Woodley Ghyll, stating:

THE COURT: There are a few responses I can make to this issue. One, I do not recall and I have not been taken to any evidence at trial or argument at trial that would permit me or any other judge who sat through the 19 days of trial to quantify these expenses under Clause 6 of the cohabitation agreement. There was simply, as I recall it, other than an assurance that there were

costs of carrying Woodley Ghyll, there was no attempt to prove how much they were. Nor any attempt to show what Ms. Williams' half would be, just a complaint that she wasn't carrying her share of the burden.

Two, it seems to me that I was misled or I misled myself I think is more accurate by the two appraisals I refer to in paragraph 9 of the reasons for judgment. I simply deducted the 2012 appraisal from the 2020 appraisal and divided the result in half and that led to the award in the reasons to Ms. Williams and in doing so I completely overlooked paragraph 7 of the cohabitation agreement. Having been brought back to paragraph 7 it seems to me that that governs and my response during the course of submissions was probably the right response and that is this. If Mr. Cowan wants to keep Woodley Ghyll he pays Ms. Williams $312,500, because that is what would be the cost, having followed the -- all or some paragraphs of paragraph 7. If Mr. Cowan wants to rely on paragraph 8 or Clause 8 of the cohabitation agreement then an argument has been made that since six months have passed since the Separation Clause 8 might govern, then the property should be immediately listed and sold and the deductions set out in paragraph 8 taken off the net pro -- or taken off the proceeds of sale and the balance divided equally. Logic would suggest that that might result in a somewhat higher payment to Ms. Williams. I agree with Ms. Bate there, but I have no evidence on which I can estimate that, but simply experience what real estate markets in the last year or two.

I am comforted to some extent by the fact that simply looking at paragraph 7 and paragraph 8 they both result in about the same thing if one assumes that the 2020 appraisal remains the value of Woodley Ghyll and that is not at all clear, but the net result is about the same.

So, having upheld at Mr. Cowan's insistence, and he did succeed at trial on upholding the cohabitation agreement, it seems to me it governs and that the cost to him of buying Ms. Williams out of her interest in Woodley Ghyll is the $312,500 Ms. Bate has calculated. So, that in answer to clarification 7(b) will be the amount or the number put into the final order and that is payment for the respondent's interest in Woodley Ghyll, $312,500.

[Emphasis added.]

[26] Matters, however, did not end there. Mr. Cowan's counsel then stated:

CNSL D. HARRY: Justice, I just wanted to clarify. Are you saying that the Exhibit 20, which [was marked] the payment of a mortgage payment, that we are discounting that mortgage payment with respect to paragraph 6 of the cohabitation agreement?

[Emphasis added.]

[27] To which the judge responded:

THE COURT: What I am saying is what I have just said.

[28] The Final Order, which should be compared to para. 160 of the Trial Reasons, quoted at para.11 above, provides, in part:

14. The cohabitation agreement is valid and binding.

16. Mr. Cowan shall pay Ms. Williams her one-half interest of Woodley Ghyll in the amount of $312,500, subject to Ms. Williams's repayment of $86,000 to J.C. through Mr. Cowan.

[29] The $86,000 payment to Ms. Joanne Cowan (referred to as J.C. in the excerpt above) was a separate adjustment between the parties and did not relate to the Bank of Montreal mortgage.

## Issues

[30] I will address the issues on this appeal as follows:

(1) Was the hearing procedurally unfair?

(2) Should the new ground being advanced on appeal be considered?

(3) Did the judge commit a reviewable error with respect to the amount of compensation payment for Woodley Ghyll?

## Analysis

(1) Was the hearing procedurally unfair?

[31] Mr. Cowan grounds his appeal on the basis that the hearing ought not to have occurred in the manner it did. He says that Dr. Williams ought to have filed a Notice of Application identifying the orders sought with respect to Woodley Ghyll and/or formally applied to re-open the case. In the alternative, he says that the judge erred by altering a substantive finding, contrary to Rule 15-1(18) of the Supreme Court Family Rules.

[32] I would not accede to this ground of appeal.

[33] In Chand v. Insurance Corporation of British Columbia, 2009 BCCA 559, this Court set out the applicable framework:

[41] on an application in which a party is seeking to determine the intention of an entered order, it is essential that the entered order be before the court. Similarly, on an appeal from a master's order, the appeal should not proceed until the court has before it the entered order appealed from. To proceed in the absence of the entered order gives rise to unnecessary uncertainty. The court hearing the application or the appeal must know that the order under consideration is not susceptible to review or variation by the master who made the order because, of course, until the order is entered, the master is not functus officio. The proper course in light of the unentered order would have been for the chambers judge to direct ICBC to immediately appear before Master Baker for the purposes of clarifying his order.

[42] Once the order is entered, the court is functus officio. In R. v. Roberts, 2004 BCCA 436, this Court said that "[i]t is well settled that the court remains seized of a matter and is not functus officio until the formal judgment of the court is entered and, until that time, the court has the power to reconsider, vary or revoke its judgment" (at para. 7).

[43] Variation is expressly authorized by the Rules of Court, under Rule 41(24):

The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter which should have been but was not adjudicated upon.

[44] There are limits as to what can be corrected under Rule 41(24). McLachlin and Taylor, British Columbia Practice, 3rd ed. by Frederick Irvine (Markham, Ont.: Butterworths, 2006), summarize these limits at 41-38 to 39:

Notwithstanding that R. 41(24) is much wider than the old "slip rule", it cannot be used to amend or alter a substantive finding even though that finding might be demonstrated to be in error ... R. 41(24) does not permit changing a final order where a judge has second thoughts about his order, or to permit the parties to provide fresh details on matters already before the court . Its proper use is (1) to rectify a slip in drawing the order which, if unamended, would produce a result contrary to the intention of the court or of the parties or (2) to provide for a matter which should have been but was not adjudicated upon . [citations omitted].

[Emphasis added.]

[34] Though the Rules referred to in Chand have since been replaced, Rule 15-1(18) of the Supreme Court Family Rules is identical to Rule 41(24) of the former Supreme Court Rules, B.C. Reg 221/90. Therefore, the framework in Chand remains the appropriate framework to be considered in this case.

[35] It is clear that what occurred at the Hearing was not, as set out in the First RTA, a "clarification" of the order pronounced at the time the judge's reasons were rendered, nor was it an attempt to invoke the "slip rule". Rather, Dr. Williams sought to bring a specific matter to the judge's attention, being that her submissions at the trial with respect to Woodley Ghyll had been predicated on the Agreement being found to be unenforceable. Accordingly, in my view, she was seeking to have the Court "reconsider" its judgment on that issue in light of the finding that the Agreement "was valid and enforceable".

[36] The issue then becomes whether Mr. Cowan was prejudiced by what occurred at the Hearing. In my view, he was not.

[37] While I acknowledge that the First RTA did not refer to a recalculation of the compensation payment regarding Woodley Ghyll, referring only to the "Skipjack boat", I am satisfied that when the record leading up to the Hearing is placed in its proper context, Mr. Cowan's counsel was prepared to deal with Woodley Ghyll at the Hearing. In any event, he did not seek an adjournment of the Hearing or indicate to the judge that he could not properly

respond to Dr. Williams' submissions relating to that issue. Therefore, even if there was non-compliance with the Supreme Court Family Rules with the manner in which Woodley Ghyll was before the Court that day, it is my view that any non-compliance was waived by Mr. Cowan's counsel.

[38] If a party takes issue with a procedural flaw, an objection should be taken as soon as possible and that objection maintained, or the party will be considered to have waived its right to complain about the flaw: Johnson v. Canada (Attorney General), 2011 FCA 76 at para. 25; High-Crest Enterprises Ltd. v. Canada, 2017 FCA 88 at para. 102, Stratas J.A. dissenting (but not on this point). Failure by counsel to object to an alleged impropriety in a timely way at trial is a significant consideration in deciding whether to order a new trial: Brophy v. Hutchinson, 2003 BCCA 21 at para. 50.

[39] It is clear from the record that Mr. Cowan's counsel made fulsome submissions regarding Woodley Ghyll. And it is based on those submissions and the judge's reasoning pertaining to the compensation payment that I would allow the appeal for the reasons I shall now explain.

(2) Should the new ground advanced on appeal be considered?

[40] It is perplexing that Mr. Cowan advanced only one ground on appeal, which was that the Hearing was procedurally unfair. In my view, the manner in which the Hearing unfolded, as shown by the excerpts set out above, clearly indicates that whether the judge made a palpable and overriding error in relation to the compensation payment should also have been advanced as a ground of appeal.

[41] During the hearing of this appeal, Mr. Cowan's counsel, in response to questioning from this Court, did advance this argument as an alternative ground of appeal.

[42] The issue then becomes whether we should entertain this new ground at this time.

[43] The principles regarding this issue are well settled.

[44] This Court may permit a party to use arguments, raise points of law, or cite authorities that were not used, raised, or cited in a party's factum: Court of Appeal Rules, B.C. Reg. 120/2022, R. 36. A key factor in the exercise of the Court's discretion is potential prejudice to the other party: Johnson v. British Columbia (Attorney General), 2022 BCCA 82 at para. 112. The Court is less inclined to exercise its discretion in allowing new points of law and arguments to be raised unless the other party could reasonably have expected from the party's factum that it would be raised at the hearing of the appeal: Sutton v. Alaska Air Group Inc., 2014 BCCA 58 at paras. 5-6.

[45] At the hearing of the appeal, counsel for Dr. Williams did not request the opportunity to make further written submissions or to have the hearing adjourned so that this issue could be addressed. He accepted that the record, in particular the transcript of the Hearing, was sufficient for this Court to consider whether the judge committed a reviewable error in his application of the formula set out in the Agreement to the compensation payment in

question. Furthermore, both parties were provided with the opportunity to comprehensively address the issue during the hearing of the appeal.

[46] I am of the view that we should consider this ground of appeal since any prejudice to Dr. Williams was mitigated by the fact that she was prepared to address the issue at the hearing of the appeal. There also exists a substantive issue arising from the judge's decision which should be addressed by this Court, being the proper application of the formula set out in the Agreement regarding the compensation payment that should be paid to Dr. Williams for her interest in Woodley Ghyll.

(3) Did the judge commit a reviewable error with respect to the amount of compensation payment for Woodley Ghyll?

[47] A palpable error is one that is plainly seen or obvious: Housen v. Nikolaisen, 2002 SCC 33 at paras. 5-6; Salomon v. Matte-Thompson, 2019 SCC 14 at para. 33 [Salomon]. An error will be palpable if a judge made an unreasonable finding of fact or a finding unsupported by the evidence: H.L. v. Canada (Attorney General), 2005 SCC 25 at paras. 55-56. An error is overriding if it is determinative of the outcome of the case: Salomon at para. 33.

[48] In my view, the judge made a palpable and overriding error in the manner in which he applied the formula set out in the Agreement in relation to Woodley Ghyll.

[49] The judge, as is apparent from what is set out at para. 25 above, restricted his analysis to paras. 7 and 8 of the Agreement.

[50] During Mr. Cowan's counsel's closing submissions at the trial in July 2021, the judge remarked in regard to the payment of the $380,000 mortgage:

THE COURT: Well, unless Ms. Bate persuades me otherwise, it seems to me that it's reasonably clear that the money that came from Joanne Cowan came as a loan. It's a debt. It's family debt. And so the family property at issue here is that property after the debt is subtracted. So, you know, right now I'm not terribly concerned about Joanne Cowan's input into this. It's all debt that has to be accounted for, and it's the difference that is the equity that we're here arguing about.

[Emphasis added.]

[51] This statement accords with para. 6 of the Agreement. And yet, when applying the formula set out in the Agreement at the Hearing, the judge restricted his analysis to paras. 7 and 8 without considering para. 6. As is evident from the transcript excerpts referenced at paras. 22-26 above, he made his decision, having heard submissions from Mr. Cowan's counsel regarding para. 6. In fact, having rendered his decision which did not reference para. 6, the judge was asked by counsel whether the compensation payment was being "discounted" to take the mortgage into account. Rather than specifically addressing the issue, the judge responded:

THE COURT: What I am saying is what I have just said.

[52] I would add that the judge's statement that there was no evidence to prove what the costs of "carrying Woodley Ghyll ... were" (at para. 25 above) was also a material error. I say this because, at least in so far as the Bank of Montreal mortgage was concerned, there was evidence of when Ms. Joanne Cowan paid the mortgage and the amount. The evidence of this was found in Exhibit 20 and was referred to by Mr. Cowan's counsel at the Hearing, referenced at para. 23 above. Accordingly, the judge had the evidence required to properly apply the provisions in the Agreement relating to the Bank of Montreal mortgage, including para. 6, but chose not to, even after being invited by Mr. Cowan's counsel to do so.

[53] The question then arises as to whether this Court can properly apply the formula and order the appropriate amount for the compensation payment. In my view, we cannot, and the parties agree on this point.

[54] It is clear from the transcript of the Hearing that costs other than the mortgage may need to be taken into account in determining the appropriate amount for the compensation payment and there is not a sufficient record on appeal for this to occur.

## Conclusion

[55] Accordingly, I would allow the appeal and remit to the trial court the discrete issue of the compensation payment to be made by Mr. Cowan to Dr. Williams for her interest in Woodley Ghyll pursuant to the Agreement, including but not necessarily limited to paras. 6, 7, and 8. This may well include the parties tendering additional evidence. It will be for the judge hearing the application to give the directions which they consider necessary in that regard.

[56] Since I would allow the appeal on a ground first raised by Mr. Cowan at the hearing of the appeal, I would make no order as to costs.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fenlon"

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