

CANADA / JUDGMENT

Jiang v. Baojian

2015 BCSC 394

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 394 Jiang v. Baojian

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jiang v. Baojian,

2015 BCSC 394

Date: 20150312

Docket: 14-3437

Registry: Victoria

Between:

Shu Bo Jiang also known as Sophia Shu Bo Jiang

Plaintiff

And:

Zhang Baojian also known as Bao Jian Zhang

also known as Peter Zhang

Defendant

- and -

Docket: 14-3715

Registry: Victoria

Between:

Shu Bo Jiang also known as Sophia Shu Bo Jiang

also known as Sophia Jiang

Claimant

And:

Zhang Baojian also known as Bao Jian Zhang

also known as Peter Zhang

Respondent

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Plaintiff/Claimant:

G. K. Bains and K. A. Gill

Counsel for the Defendant/Respondent:

J. M. Hutchison, Q.C.

Place and Dates of Hearing:

Victoria, B.C.

November 27, 2014

and March 3, 2015

Place and Date of Judgment:

Victoria, B.C.

March 12, 2015

- [1] The defendant applies in two related actions for orders dismissing the plaintiff's claims or alternatively, striking out some or all of the pleadings.
- [2] In Action No. 14-3437, Victoria Registry, the plaintiff seeks damages for injuries she alleges were inflicted when the defendant struck her on the left side of her head. She says the alleged assault occurred on or about February 14, 2009. She alleges that the assault caused injuries to her face and also resulted in a permanent partial hearing loss.
- [3] The defendant says the plaintiff's action was filed well past the two-year time period established under the Limitation Act, R.S.B.C. 1996, c. 266. The plaintiff submits that the running of time has been postponed pursuant to s. 5 of the Limitation Act or that the provisions of s. 3(k)(ii) of the revised Limitation Act, S.B.C. 2012, c. 13 allow the plaintiff's right of action to be revived, even if the limitation period has expired.

- [4] The second application brought by the defendant is in Action 14-3715, Victoria Registry, for an order that the action be dismissed or struck out. In that action, the plaintiff seeks an order for spousal support and an order for compensation in respect of property the plaintiff says was not disclosed by the defendant prior to the parties entering into a separation agreement. The plaintiff also seeks a variation of the separation agreement along with other ancillary orders.
- [5] The plaintiff says that she signed the separation agreement under duress as a result of threats of death or serious physical harm made by the defendant. She alleges that the separation agreement was drawn up by the plaintiff and that she had no input into its terms. The plaintiff commenced this action alleging assault on September 15, 2014, approximately five and one-half years after the date of the alleged assault.
- [6] She commenced Action No. 14-3715 claiming spousal support and compensation for the loss of an interest in undisclosed family property and other relief on October 6, 2014. The defendant submits that the action was filed beyond the time limitations set out in the Family Relations Act, R.S.B.C. 1996, c. 128 and should therefore be dismissed.

Facts

- [7] The background to this matter is that the plaintiff and defendant were married in China on September 27, 1989. They moved to Canada in 2005 and remained here until they separated in 2011, although the defendant made frequent extended trips to China during the course of their marriage.
- [8] There were problems in the relationship and in April 2011, the defendant told the plaintiff that he wanted a divorce. She says he had been abusive to her during the marriage and that he had threatened to harm her and the family if she did not co-operate in resolving the issues between them. She claims he gave her a paper upon which he set out the proposed terms of their property division and that she signed it.
- [9] The plaintiff says the proposed property division resulted in the defendant receiving a much larger share of the assets. She says that she was not aware of all of the assets owned by the defendant and she did not consult a lawyer because she was afraid of what he would do if she refused to co-operate.
- [10] In particular, the plaintiff says that the defendant did not disclose to her the value of two companies he owned in China (China Machinery (Beijing) Jadewell Trade Co. Ltd. and Shandong Jieman Machinery Trade Co. Ltd.). She claims he also did not disclose the sums of money that he held in private accounts.
- [11] The plaintiff believes that the defendant kept approximately \$2,000,000 in value as his own assets following separation, and that she received assets valuing approximately \$500,000.

[12] The parties signed the separation agreement on June 16, 2011. They were divorced in China on July 26, 2011. The parties were both present at the marriage registration office at Jinan city in China on July 26, 2011 and each of them acknowledged their desire to divorce in the terms set out in the order. The divorce order contained these terms:

2. Community Property Disposal:

I. Canadian house property (7-1880 Laval Ave.) and vehicle as well as other properties shall be owned by the woman, and the woman has the right to dispose of them independently.

II. The house property located in Beijing (No. 1003, Building 11, Wankexingyuan, Chaoyang District) shall be owned by the man, and the joint debt such as borrowing and loan shall be undertaken by the man, and the man has the right to dispose of house property independently.

III. The house property located in Jinan shall be owned by the woman and their daughter, and they may dispose of house property by negotiation.

IV. Other unfulfilled debt, creditor's right and asset shall be undertaken and owned by the man.

3. Others: No

Man's Advice and Signature: I volunteer to divorce, fully assent to the arrangements in the agreement and there is no other different advice.

Zhang Baojian (signature) July 26, 2011

Women's Advice and Signature: I volunteer to divorce, fully assent to the arrangements in the agreement and there is no other different advice.

Jiang Shubo (signature) July 26, 2011

[13] The defendant denies any threats or coercion forcing the plaintiff to enter into the separation agreement or the divorce. He does admit striking the plaintiff with an open hand when they were arguing. He said at the time she was slapping and scratching at him and he slapped her in retaliation to make her stop. He denied any other incident of violence during their marriage. He said in his affidavit that they have not lived together since July of 2011 and when he has been in Canada, he has not resided with the plaintiff. He said that other than emails to him from her, there has been virtually no communication between them.

[14] With respect to the emails, the defendant attached translations of some of the emails to his Affidavit #1 in Action No. 14-3715 to illustrate the plaintiff had no fear of him. Some of the emails expressed the plaintiff's desire to get back together with him.

[15] The defendant says these actions arose after deposits in excess of \$500,000 were made to a joint bank account that he and the plaintiff formerly had together. The monies were immediately withdrawn, but not before they were seen by the plaintiff. The defendant says those funds belonged to his sister and were intended to be deposited to his separate bank account and not the old joint account. He said those funds were put in his account because

his sister did not have an account of her own. She was apparently making arrangements to emigrate from China to Canada. The deposits were made in April and May of 2013. The defendant denies the existence of any undisclosed family assets.

Action 14-3437

- [16] I will deal first with the plaintiff's action claiming damages for the alleged assault. The defendant applies for summary dismissal of her claim based on the expiry of the applicable limitation period.
- [17] The date of the alleged assault and battery was February 14, 2009 and this action was not commenced until September 15, 2014. Until June 1, 2013, the applicable limitation statute was found in the 1996 Limitation Act. Under s. 2(a) of the 1996 Act, a limitation of two years applied to actions in respect of injury to one's person, other than acts involving sexual misconduct which the plaintiff has not pleaded or alleged. The defendant submits that this two-year period began to run on February 14, 2009 and says that the plaintiff's right to bring an action expired in February of 2011. Accordingly, he says that the plaintiff's cause of action is extinguished pursuant to s. 9(1) of the 1996 Act which provides as follows:

9(1) On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through the person in respect of that matter is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.

- [18] The plaintiff submits that if her claim did expire in 2011, it has nevertheless been revived by the repeal of the 1996 Act and its replacement with the Limitation Act of 2012, in particular s. 3(1)(k)(ii) which provides in part as follows:

3(1) This Act does not apply to the following:

- (k) a claim relating to assault or battery, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period, if the assault or battery occurred while the claimant
- (ii) was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to or acquiesced in the assault or battery;

- [19] At the time of the alleged assault, the plaintiff was married to the defendant and had been since 1989. They had a child together in 1993. After 2005, the defendant ordinarily resided in China while the plaintiff lived in Victoria with their daughter. The defendant says that after 2008, he and the plaintiff no longer lived as husband and wife, but continued to present "an appearance of marriage", though they lived under the same roof when the plaintiff travelled to China each summer or when the defendant visited Victoria. The plaintiff denies this, saying that she and the defendant continued to discuss matters related to their family as

husband and wife until the time of their separation in 2011.

- [20] Regardless of whether their marriage had broken down after 2008, it is clear that the defendant and the plaintiff remained in an intimate and personal, though volatile, relationship with one another until they divorced in 2011. They were in fact living with one another under the same roof of the time of the alleged assault. They cohabited whenever they were in China or Canada together. According to the defendant, it was only from May 2010 onwards that he and the plaintiff began to occupy separate bedrooms when living together or that the plaintiff ceased doing his laundry or making his meals.
- [21] Whether their marriage continued to function or they merely presented it as such, they were clearly intimately and personally involved with one another at the time of the alleged assault. In the alternative, the evidence indicates that the plaintiff was financially dependent upon the defendant. Accordingly, the exemption under s. 3(1)(k)(ii) of the 2012 Act applies to the plaintiff's cause of action. Thus, the transition provisions under s. 30 of the 2012 Act do not apply here.
- [22] However, that does not end the analysis. The s. 3(1)(k)(ii) exemption is novel and there was no analogous provision respecting assaults in personal and intimate relationships in the 1996 Limitation Act. Accordingly, the defendant is correct in his submission that the plaintiff's cause of action was extinguished under s. 9(1) of the 1996 Act unless it can be shown that the running of time was postponed or suspended. Absent postponement or suspension, the plaintiff's cause of action cannot proceed unless revived by the 2012 Act.
- [23] The question of whether a new limitation statute will revive extinguished claims under a prior statute has been addressed in British Columbia previously: *J.P. v. Sinclair*, [1997] B.C.J. No. 1327 (C.A.). At issue in *Sinclair* was whether statutory amendments purporting to eliminate the limitation period applicable to causes of action based on sexual misconduct also operated to revive previously extinguished claims.
- [24] Between 1992 and 1994, amendments to the Limitation Act, R.S.B.C. 1979, c. C-236 ("the 1979 Act") were enacted which eliminated limitation periods applicable to causes of action based on "misconduct of a sexual nature". However, as with the 1996 Act, s. 9(1) of the 1979 Act stipulated that expired claims were extinguished, and the amendments did not expressly address the status of extinguished claims. The issue raised in *Sinclair* mirrors the situation in this case; the 1996 Act stipulates that the plaintiff's action was extinguished and while the 2012 Act has effectively removed the limitation period applicable to such claims, the status of extinguished claims has not been expressly addressed.
- [25] Writing for the majority in *Sinclair*, Newbury J.A. noted that limitation statutes "are not to be construed as having retrospective operation unless the construction is expressly or by necessary implication required; and that vested rights are not to be affected unless the legislation is clear". The relevant provision of the 1979 Act provided in part as follows:

3(3) A person is not governed by a limitation period and may at any time bring an action

(k) For a cause of action based on misconduct of a sexual nature, including, without limitation, sexual assault,

(ii) whether or not the person's right to bring the action was at any time governed by a limitation period;

[emphasis added]

[26] As held in *R.A. v. Children's Foundation*, [1996] B.C.J. No. 868 (S.C.), it is clear that the expiry of a limitation period does vest a right in a defendant, which may only be interfered with by clear statutory language to that effect (para. 14). Significantly, the language at issue in *Sinclair* is nearly identical to that employed in s. 3(1)(k)(ii) of the 2012 Act. The court held that language was sufficiently explicit to invoke retrospective application, and concluded that the provision operated so as to revive previously extinguished causes of action. The court was unanimous on this point. Newbury J.A. focussed on the phrase "was at any time" finding that the Legislature's use of the past tense "was" rather than "is" and the broadness of "any time" evinced an intention on the part of the Legislature to overcome rules of construction which otherwise would have precluded retrospective application.

[27] The precise language which was the focus of Newbury J.A.'s ruling in *Sinclair* viz, "was at any time governed by a limitation period" is present in verbatim form in s. 3(1)(k)(ii). Accordingly, *Sinclair* is strong authority in favour of the plaintiff's position that her claim has been revived under the 2012 Act.

[28] However, there is a further issue: s. 3(3) of the 1979 Act stated, "A person is not governed by a limitation period and may at any time bring an action" where an exemption is made out. On the other hand, s. 3(1) of the 2012 Act merely provides that the Act "does not apply" to exempt causes of action. In essence, this raises a question of statutory interpretation, namely, whether the differently worded exemption in s. 3(1) of the 2012 Act is still capable of reviving extinguished claims. As held by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the appropriate analysis is as follows:

[21] Today there is only one principle or approach, namely, 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.

[29] At the outset, it should be noted that the divergence in wording referenced above amounts to a distinction without a difference. The outcome of the exemption is the same in either case, as the effect of the 2012 Act being inapplicable to a cause of action is essentially that a person is not governed by a limitation period and may at any time bring an action. This follows from the fact that limitation periods are creatures of statute. As noted by Graeme Mew in *The Law of Limitations* (2nd ed. 2004), the common law generally did not impose time limits on the bringing of an action. See also *LeClair v. Goulette*, [2000] N.B.J. No. 107 (Q.B.) at para. 18 and *Kelly v. Canada (Attorney General)*, 2007 P.E.I.J. 19 at para. 45.

- [30] Turning to the scheme and object of the 2012 Act, the scheme of limitation statutes generally (and the 1996 Act specifically) was considered by the Supreme Court in *Novak v. Bond*, [1999] 1 S.C.R. 808. McLachlin J. (as she then was) held at paras. 67 and 68:
- [67] The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.
- [68] The general scheme of the British Columbia Limitation Act reflects this evolution. Section 3 provides concrete limitation periods for most actions. Depending on the cause of action, an action must be commenced within two, six, or ten years after the date on which the right to bring it arose, i.e., the date on which all the elements of the cause of action came into existence:
- [31] Neither McLachlin J. nor the dissenting opinion referenced any exemptions under the 1996 Act, though exemptions were present in the legislation. In addition to the four characteristics listed above, a fifth should be recognized: limitation statutes which include exemptions such as those found in s. 3(3) of the 1979 Act, s. 3(4) of the 1996 Act, or s. 3(1) of the 2012 Act also function to preserve the legal rights of particularly vulnerable persons such as minors and those who are assaulted or battered in the context of a relationship of dependency or an intimate and personal relationship. This function of limitation statutes is not encapsulated by the other characteristics enumerated by McLachlin J. and assumes increased importance in view of the expanded ambit of exemptions in the 2012 Act, as opposed to its predecessors.
- [32] Further, the scheme of the 1996 Act differs from the 2012 Act, in that the latter legislation does not contain a provision which extinguishes causes of action upon the expiry of the limitation; the express function of s. 9(1) of the former legislation. Under the 2012 Act, there is no extinguishment of the cause of action, but rather only a statutory bar to the commencement of a court proceeding. This change evinces an intention to depart from the prior mode of extinguishment of a claim upon expiry. In light of that intention, it would seem contradictory to interpret the language in s. 3(1) of the 2012 Act as being incapable of reviving an extinguished claim.

- [33] There is nothing in the words of s. 3(1) or elsewhere in the 2012 Act to suggest that the Legislature contemplated the non-revival of actions which were previously extinguished. To the contrary, the retention of the precise wording which was the focus of the Court of Appeal's decision in *Sinclair* indicates that the 2012 Act is no less capable of reviving previously extinguished actions than the 1979 Act.
- [34] Ultimately, both *Sinclair* and the application of interpretive principles indicate that s. 3(1)(k) of the 2012 Act, where applicable, operates to revive previously extinguished actions.
- [35] Accordingly, while the plaintiff's cause of action expired in 2011 pursuant to the 1996 Act, it was revived on June 1, 2013 when the 2012 Limitations Act came into force. Her claim in assault and battery is therefore not governed by any statutory limitation period and is not time-barred. Therefore, the defendant's application to dismiss or strike out her claim is dismissed.

Action No. 14-3715

- [36] The plaintiff seeks spousal support and advances certain property claims in this action. The defendant says that the plaintiff's action was not commenced within two years of the dissolution of the marriage as required by the Family Relations Act. I will deal first with the claim for spousal support.
- [37] I note the Chinese divorce order did not deal with spousal support. It is clear on the authority of *R.N.S. v. K.S.*, 2013 BCCA 406 at para. 34 that the plaintiff is not precluded from claiming spousal support on the ground the divorce was a foreign divorce granted in China. Moreover, the defendant has clearly attorned to the jurisdiction of this court. See *Lightcubes, L.L.C. v. Northern Light Products Inc.*, 2009 BCSC 181.
- [38] The new Family Law Act, S.B.C. 2011, c. 25, also imposes time limitations as to the bringing of an action for spousal support. In particular, s. 198(2)(a)(i) says that a proceeding for spousal support must be made within two years of granting a divorce. There do not appear to be any transitional provisions in the Family Relations Act which apply to proceedings for spousal support, so it appears that this order is properly sought under the Family Law Act, rather than the Family Relations Act. As the parties were divorced on July 26, 2011, the plaintiff's right to bring a claim for spousal support under the Family Law Act expired in July 2013, more than a year prior to her notice of family claim filed on October 6, 2014. Relying on s. 198(3) of the Family Relations Act, however, the plaintiff submits that she may bring an application for spousal support within two years of the time that she discovered, or reasonably ought to have discovered, the grounds for making the application. In that regard, the plaintiff says that she believes the defendant did not disclose other assets that he owned at the time of the divorce.

- [39] However, s. 198(3) applies where a spouse is applying for an order to set aside or replace an agreement or order respecting spousal support. On the facts of this case, there is no agreement or order respecting spousal support as is noted in the defendant's Affidavit #1 at para. 43. Accordingly, s. 198(3) is not available to the plaintiff.
- [40] Alternatively, it seems that the plaintiff's application would nevertheless fail to satisfy the discoverability criteria under s. 198(3). The plaintiff does not suggest in her evidence or the pleadings that her failure to apply for spousal support was in any way related to her knowledge of the defendant's financial situation. In other words, there is no apparent relationship between the defendant's alleged non-disclosure and the grounds for the plaintiff's application. While his non-disclosure may have misled the plaintiff as to the amount of spousal support which might be ordered, there is nothing to indicate that she mistakenly believed, as a result of his non-disclosure, that she was not entitled to any spousal support.
- [41] Similarly in mid-2011, at the time of the divorce, the plaintiff believed that the terms of the divorce were unfair and inequitable to her. Upon her return to Canada, following the divorce, it should have been clear to the plaintiff that her expenses exceeded her earnings absent the financial support of the defendant. At that time, even though she claimed to be afraid of the defendant, he was not living in Canada at the time and she was at liberty to seek legal advice respecting spousal support, but failed to do so.
- [42] While various statutes indicate that fraud or concealment of material facts relating to the cause of action may postpone the running of time for the purposes of a limitation period, s. 198(3) is not available where the claimant knew or ought to have known "the grounds for making the application". Here, those grounds included the divorce itself as well as the plaintiff's apparent economic hardship following the divorce. The plaintiff was aware of those facts from the moment the divorce was granted, notwithstanding the defendant's alleged deceit. Accordingly, even if s. 198(3) applied, the plaintiff cannot avail herself of that provision.
- [43] Therefore, the plaintiff is not entitled to bring a spousal support application at this late date and those portions of the Notice of Family Claim under Schedule 3 relating to spousal support are struck out.

Family Assets

- [44] The plaintiff further seeks relief to reapportion family assets pursuant to the now repealed Family Relations Act. In her Notice of Family Claim, she purports to rely on ss. 56, 58, 65 and 66 of that Act.

[45] The defendant submits that the applicable section of the Family Relations Act is s. 68. The Family Law Act replaced the Family Relations Act as to most of its provisions on May 29, 2014. The Family Relations Act contained transition provisions. Section 252(2) provides that the plaintiff's claims for relief respecting property division are to be commenced or continued "under the former Act as if the former Act had not been repealed".

[46] The sections of the Family Relations Act the plaintiff relies upon relate to the scheme of matrimonial property division which created a presumption of an undivided one-half interest to each participant as tenants in common.

[47] Section 65 of the Family Relations Act gave the court the power to reapportion family assets, or matrimonial property in certain defined circumstances, essentially on the ground of unfairness. However, s. 68 of the Family Relations Act provides as follows:

68 (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, if circumstances warrant, extend the period during which an application may be made or power exercised under this section.

[48] The agreement in this case is a written agreement apparently signed by both parties, although no copy was produced in the materials, and dated July 26, 2011. It is not, in my view, a marriage agreement as that term is defined in s. 61(2) of the Family Relations Act. That section provides:

61 (2) A marriage agreement is an agreement entered into by 2 people before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

- (a) management of family assets or other property during marriage, or
- (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

[49] By s. 61(3) of the Family Relations Act, a marriage agreement must be in writing, signed by both spouses and witnessed by one or more other persons. Here, there is no evidence that the agreement was anything other than a piece of paper that was presented to the plaintiff. There was a suggestion that perhaps a more formal agreement was entered into, but it has not been produced. There is nothing to suggest that such a document has been signed and

properly witnessed by the parties. Therefore, it seems appropriate to me to treat the agreement as though it is not a marriage agreement under s. 61(2) of the Family Relations Act and instead to proceed under s. 68 of that Act.

- [50] The issue is whether the time limit under s. 68 should be extended in the circumstances of this case. Given the emphasis of the Family Relations Act on a fair division of property, in my view, the principles of fairness should be the primary consideration here.
- [51] It is clear from the plaintiff's Affidavit #1 at para. 20 that she believed the division of family assets in the July 26, 2011 divorce order was unfair from the outset. Nevertheless, she went with the defendant to the divorce proceeding in China and acknowledged that the property issues were agreed as between her and the defendant. While she claims she signed the divorce order, and the agreement that apparently was signed by the parties, under duress and in fear of physical harm, there is no evidence the parties had any significant contact after July of 2011, nor did they ever reside together again. In fact, the defendant has mostly lived in China since that time while the plaintiff has lived in British Columbia.
- [52] While the emails to the defendant from the plaintiff attached to his affidavit may have been chosen specifically to advance his arguments, there are none from the plaintiff to contradict them. Thus, it would seem the plaintiff has waited more than three years to file her action, all the time being aware that the defendant was away from Canada and believing that the settlement she had made was unfair.
- [53] Having said that, the application here is to strike the pleadings pursuant to R. 11-2 of the Supreme Court Family Rules. The test to be applied in striking out pleadings is well known. In *Waters v. Michie*, 2011 BCCA 364, the court said at para. 15:
- [15] There is no dispute regarding the applicable test to strike pleadings on the basis that they disclose no reasonable claim. As stated by the chambers judge (at para. 15), the court assumes the pleaded facts are true; it must be plain and obvious the pleading does not disclose a reasonable cause of action; the fact a claim is weak or novel is not a ground for striking the pleading: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
- [54] In this case, the plaintiff has a possible claim under s. 68 to vary the terms of the separation agreement provided, upon application, that she is able to persuade the court that the time for making the application should be extended. I am not able to say that claim is bound to fail. Therefore, the plaintiff's claim under Schedule 5 will survive the defendant's application to strike out, save and except for paras. 1 and 2 of Schedule 5. The plaintiff is entitled to have the opportunity to persuade a court to extend the time for filing her claim. If she is able to do so her claim may proceed, otherwise the defendant's limitation defence will prevail.
- [55] The plaintiff's claim under Schedule 4 relates to a reapportionment of family assets pursuant to s. 65 of the Family Relations Act and I have concluded it is not appropriate to the facts of this case as alleged in the application. Therefore, the pleadings under Schedule 4 of the Notice of Family Claim are struck out.

[56] Costs will be costs in the cause.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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