
CANADA / JUDGMENT

K.K.R. v. J.S.R.

2021 BCSC 104

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Supreme Court of British Columbia

DECIDED

22 January 2021

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2021 BCSC 104 K.K.R. v. J.S.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.K.R. v. J.S.R. ,

2021 BCSC 104

Date: 20210122

Docket: E51523

Registry: New Westminster

Between:

K.K.R.

Claimant

And

J.S.R.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs 3 and 49 on January 27, 2021

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

In Chambers

Counsel for the Claimant:

L.N. MacLean, Q.C.

F. MacLean

Counsel for the Respondent:

D.A. Boyd

M.C. de Guzman

Place and Dates of Hearing:

New Westminster, B.C.

September 8, 2020

October 7 & 8, 2020

Place and Date of Judgment:

New Westminster, B.C.

January 22, 2021

Introduction

[1] This application is being made in the course of a family trial, which is nearing the completion of the evidence and is scheduled for continuation January 25-27. The respondent seeks orders:

- for the forensic examination of the claimant's electronic devices;
- prohibiting the claimant from having contact with employees of the respondent's medical clinic - in particular, contact with his office manager R.B., including following her or attending at her home;
- requiring the claimant to post security for her compliance with these conduct orders, as well as imposing a fine for her conduct thus far; and
- special costs.

[2] The claimant and respondent are both family physicians. The trial, which has required 21 days so far, is dealing with the claimant's entitlement to spousal support, which the Court of Appeal concluded had not been definitively addressed in a previous trial on a broader range of issues. It is also dealing with the extent of her responsibility to contribute to the significant expenses that the respondent has incurred for their adult children's post-secondary education.

Forensic Examination

Evidence

- [3] On July 22 of last year, during the respondent's case, the claimant's counsel disclosed new documents that purported to deal with the purchase of property in India by the respondent and his brother. The documents consist of a power of attorney dated July 3, 2014, granted to a person with the middle and surnames of "Kaur Kang", a sale deed for the property in question dated September 15 of that same year, and a valuation certificate in relation to it dated October 19, 2014. Various names and identifying details have been redacted from these documents, apparently using a marker.
- [4] If it had actually occurred, such a purchase would have been relevant to the relative financial positions of the parties as they affect the claimant's need for, and the respondent's ability to pay, spousal support - the key issue in the trial. It would also have impaired his credibility, by indicating that he had intentionally hidden an asset.
- [5] The respondent's counsel have provided evidence from various sources to show that these documents are fraudulent. For example, the building planner listed on the valuation certificate, "Jitendra Khurana", could not be identified through an internet search and the listed phone numbers for his business are either not in service or do not belong to him. A person at the number that is in service responded to a text message by saying that they were not Mr. Khurana, and had had that number for many years, but that "many people have been reaching out to me since this morning".
- [6] The claimant's counsel, in response to my questions during submissions, candidly conceded that he disavows the documents and will not seek to rely on them to advance her case. He says that they were provided to the respondent's counsel after he received them from the claimant, in furtherance of their continuing document disclosure obligations, and so that the respondent could comment on them while he was still in his case.
- [7] Shortly after the conclusion of the July continuation dates, the respondent's counsel demanded detailed disclosure from the claimant's counsel about the origin of these documents, including all available information showing the identity of the sender and the electronic means by which they were sent.
- [8] As part of the claimant's response, her counsel provided a supplementary list of documents that included text messages between the claimant and the unknown provider of the documents. In this initially disclosed version, the messages indicate the phone number from which they originated, the time of day that they were sent, and that they began on "Wednesday", but not the dates. They set out a sequence of exchanges between the sender and the claimant, which included the following:
- Beginning with the assertion that "your opponents are celebrating, they believe they have already defeated yo[1] the sender referred to having information about "his [presumably the respondent's] offshore company investment in the BVI [which may be a reference to the British Virgin Islands] as well. This can turn the whole case in your favour."

- The sender told the claimant that they had "some documents that can help you in a big way", and that they have sent copies of them to the claimant's email. They said that they have "clear uncensored copies" of those documents, "and more" and invited her to make a "considerable offer" for them, indicating that they would reply if they were interested in the offer.
- They elaborated that "the person working inside is big taking risk for us [to obtain the documents] because they can sue her" and that "[t]he opposing party's lawyer believe that if these documents get to court, then they might suffer a big loss and might have to pay a big amount".
- In response to the claimant's subsequent statement that "they are saying the documents are forged" the sender responded, "Yes ofcourse they will say that because they know you cannot verify old [] documents from India easily. They may also get the notary to lie for them because he is their friend. And notary also doesn't keep any record so it's easy for them." The sender claimed that the notary would say he had no records because he is related to the aunt of the respondent's office manager. They added that if the claimant could pay a "good amount", "then my brother in India can get the old property owner Gupta to give his statement for you through video".
- Perhaps in an effort to encourage the claimant to purchase the documents, the sender wrote, "Can you feel stress on their faces now? Because they hid it so well and now it's out in the open". To the same effect, they noted that the respondent's "lawyer is saying that he will prove the papers baseless because the main parts are blacked out. unless you submit full copies with full details. Just letting you kniw for your reference". When the claimant asked if they could get a "full copy from India", the sender replied that they had it in their possession.
- Departing from the previous request for the claimant to make an offer for the documents, the sender asked for "Just \$50000".
- The sender rebuffed the claimant's request to speak to them, stating, "Let's not waste each other's time, only message if are you serious", and later, "Let me know when you are ready and I will send the payment method". When the claimant said that she was "not that good with computers" and did not have online banking, the sender explained that "you don't have to use computer for anything, you have to go to Vancouver to pay." The claimant then asked, "Where in Vancouver these papers can help me they are no use to you so why do not use them", to which the sender replied, "There are many locations in Vancouver. Paper or [in context, this was likely meant to be "of"] no use to me, got them only because you requested for them last time".
- The sender also declined to provide further proof of their possession of the full documents. In response to her suggestion that she pay for what she had received already, they said, "That was a free proof that we have the full documents that you ask and now have you pay to get the full documents".
- The sender asked "ok when are you going to the address I message you before"? The claimant said she had to obtain the money from her bank but that there were long lineups due to COVID-19. The sender replied, "You have until 6pm no help will be offer [after?] that because look like you are trying to fool around". The claimant protested that she was not doing so but that the

meeting place she had been given was "way in downtown" and that in order to obtain the funds she had to give notice to her bank in Surrey, "who know me". The sender responded, "ok no problem no pressure you can message if bank work out for you if not no problem have nice day".

· In the final exchange that was shown in these messages, the claimant wrote, "His lawyer said I blacked out the papers and I have the clear papers and I am doing fraud in court and should go to jail". The sender replied, "Sorry you fooled me and refused to pay so I contacted someone from the other side and they going give me even more money not to leak the papers and they are going to make payment morning tomorrow".

· Earlier in the exchange, the sender had offered information about the respondent's plans to remarry, offering details of "the divorcee women that he is interested in", "for a price". When the claimant asked the cost they replied "\$500000 for everything", although given the references to \$50,000 for the documents in the exchanges that followed, this may have been a typographical error.

[9] In her affidavit, the claimant says that she received the Indian property documents in an email from a "Karnail Gill" on July 22, and that she forwarded them to her counsel.

[10] She deposed that she had previously received an email, with two attachments, from the same email address on July 7, with the message, "I have passports and other legal and illegal documents of this family". However, she explained that she did not provide it to her counsel "because the matter seemed unrelated to my current trial, and the documents were in Punjabi".

[11] She said that she received the text messages I have referred to at the same time as the email, and first noticed them when she took her phone off of airplane mode (which she has on overnight to prevent interruptions) on the morning of July 22, "before court". (July 22 was a Wednesday, and the text messages begin with an indication of that day of the week, although they continue on subsequent days).

[12] She has only rudimentary proficiency with text messages and emails, so she was unable to provide screenshots of these messages, as requested by her counsel. She instead gave her phone to her counsel's paralegal, who produced the copy of the messages that was initially disclosed.

[13] After the respondent's counsel filed this application, the claimant's counsel retained an expert, Bob Elder, to conduct a forensic examination of her cellphone, laptop and the Gmail messages she received. He found 76 messages between her and the sender's cell number, during the period of July 22 to August 14. According to the report, the sequence of messages that I have summarized above ended with the sender's message claiming that she had "fooled" them, at 5:49 am on July 24.

[14] The claimant deposed that when she received the expert's report, which is dated September 15, she "noted" that she had received text messages from the same phone number on July 23, 24, 27, 31 and August 14. Addressing the fact that the messages extended beyond what she

had originally disclosed, she explained that "In my mind, when I was asked to produce all emails and text messages from my laptop and cellphone, I had disclosed all of these text messages I now see that the text messages which I believed occurred all at once on the same day, actually stretched out over several days that followed. I did not take screenshots of these text messages, as that exceeds my capabilities."

- [15] The claimant said that she attempted to contact Karnail Gill by means of the email address that had sent the attachments, but received a response that the address was "not found". In response to the respondent's description of the efforts to find Mr. Khurana, the supposed author of the valuation certificate, the claimant said that she "may have" attempted to contact him. However, in the succeeding paragraph she wrote that "again" she had attempted to do so, as well as his supposed business.
- [16] The text messages retrieved from the claimant's phone by Mr. Elder included additional messages within the sequence that was initially disclosed, but that were not shown in the document that the claimant's counsel provided. Of particular relevance, in response to the claimant's request that they "be more clear about location in Vancouver", the sender provided a specific address and suite number on Burrard Street for the payment of the money, and added that "[w]e provide you account number". After informing the sender that she was in Surrey at that time, and that the banks had long lineups, she questioned how she knew they would give her the documents and, once again, "how much" they would cost. She then offered, "You can put a guarantor person in between us I will pay you ten thousand dollars I promise but have to see the papers first " The sender replied, "Sorry price was discussed before when sample given to you that is final price only message when you ready." This series of messages were sent on July 23 between 9:35 and 10:55 am.
- [17] In addition, on July 27 the claimant wrote thanking the sender for "all your help" and advising that "if the details of what you gave me are correct I still want to pay you". On July 31 she wrote, "We can still talk". Her message on August 14 asks that the documents be mailed to a post office box in Delta. Although she described these messages as "mutual exchanges of greetings" in her affidavit, there were actually no responses to them from the sender.
- [18] Mr. Elder identified the sender's number as having been subleased from Bell Mobility by an application called Text-Me. He said that in order to obtain the sender's personal information, it would be necessary to serve a production order on Text-Me, which has its headquarters in California.
- [19] The emails from Karnail Gill came from the free email service "mail.com". To identify the sender, the internet protocol (IP) address of the internet service provider involved would first have to be obtained from the email company. That internet service provider would then have to provide the subscriber information for the sender.

- [20] Mr. Elder expressed the overall opinion that the sender of these texts and emails "has taken some effort to hide their identity and location", by utilizing these internet-based messaging services and to remove important data from the images.
- [21] Of further significance, the documents that were attached to Karnail Gill's July 22 format are in JPEG format, and have had all of their identifying data removed. Mr. Elder advised that there are free or low-cost applications and online services that will strip images of such information.
- [22] There is also evidence of a person claiming to be in possession of the unredacted documents attempting to contact the respondent. On July 26, the respondent's medical clinic received a voice mail message on its after-hours emergency line. The caller, whose voice sounded robotic or distorted said, "Hello, [J.S.] [the respondent's first and middle names] if you want to know truths about Delhi papers then text me [number provided]." This is a different phone number than the one from which the text messages were sent to the claimant.
- [23] This after-hours line can also receive text messages and at 7:48 pm on that date it received one from the number left in the voice mail message. The sender wrote, "I was told to make those papers by lady named [K.] [the claimant's first name] I have raw papers I can provide for u". The respondent's office manager Ms. B. then engaged in a text exchange with the sender. When she asked them to provide the documents they responded, "How much can you offer me", and refused her request to identify themselves. When she told them, "That was forgery" and that the police would be provided with these messages, they replied, "Ok no prb if u dnt want I thinking it useful for u". Ms. B., it would appear assuming the role of the respondent, then advised the sender that she did not intend to communicate with the phone number from which the texts were being sent. She told the sender that they could "email me what you know and what you want from me". She provided the respondent's work email address to allow for that possibility.
- [24] Despite the findings in the claimant's expert report and the resulting disclosure from her phone of the entire exchange of text communications with the sender of the documents, the respondent's counsel maintains that a forensic examination by their expert should still be ordered. In particular, proof of harassing conduct by the claimant - creating or at least disseminating false property ownership documents - would be relevant, because it undermines the respondent's ability to pay spousal support by causing him stress and harming his reputation. It would also be relevant to show that she is using her time to engage in malicious activities instead of supporting herself through work.
- [25] In his responsive affidavit, the respondent set out a number of background facts, to support the inference that the claimant's account of how the documents came to her may not be legitimate.

- [26] As an overview, he explained that the claimant has long been obsessed with proving that he owns property in India, and that she referred to that belief in court during their previous trial.
- [27] The attachments to the July 7 email from Karnail Gill that were written in Punjabi turn out to be a document relating to the ownership of property by Ms. B.'s brother, and a voter's list from her village of origin in India. There has been evidence in the trial of considerable animosity on the part of the claimant towards Ms. B., in addition to harassing behaviour that is the subject of the application for the conduct orders. The respondent's counsel says this information may represent an effort by the claimant to tie Ms. B. into the Indian property allegations.
- [28] Although it is not included in the version of his report contained in the application material, I gather that Mr. Elder also found an email that was sent by the claimant's brother to her on August 14, attaching documents relating to property in India, and suggesting that it was "the second" such property, presumably belonging to the respondent. The point is not just that the claimant was still actively seeking to obtain such evidence, in this case with her brother's assistance, but that she did not proactively disclose the email.
- [29] The respondent also explained that the claimant has a history of bizarre and surreptitious actions during this litigation, such as having someone pose as a realtor in order to take pictures of his home after the claimant was no longer allowed to be there, and putting recording devices in their medical office and a tracking device on his car. She also falsely claimed to have been injured during the previous trial, and her defence was struck on the basis of her misconduct during the period leading up to it.
- [30] The implication of this evidence, as I took it, is that she is willing to go to extraordinary lengths to attain her goals, including falsifying these electronic communications.
- [31] The forensic examination conducted by Mr. Elder is said to have been inadequate, because it did not investigate any potential fraudulent behavior by the claimant in relation to these communications. This would include indications that she set up the text app and email accounts from which the documents and communications originated (as well as a harassing email to Ms. B.'s niece, which I will discuss when dealing with the conduct orders, that emanated from a service that provides temporary email accounts), or internet searches conducted with her devices about their fraudulent elements, such as power of attorney forms, or images of notarial or Indian government stamps.
- [32] To demonstrate the proper scope of such an examination, the respondent's counsel has provided a letter from Tyler Hatch, another qualified forensic examiner. Mr. Hatch verified that the kinds of inquiries that I have summarized above could indeed be undertaken on the claimant's devices, while still safeguarding her privileged and confidential information, as well as information that is simply unconnected to this matter. Mr. Hatch also suggested that a broader net should be cast for sources of this information, by requiring the claimant to provide a list of any other electronic devices or email addresses that she has used during the

last three years.

- [33] I should add, as a practical matter, that the process of examining the electronic devices does not require that they be retained by the examiner. As in the case of Mr. Elder's examination, the necessary information can be copied from them without disturbing their original contents, after which they are returned intact to the owner.

Discussion

- [34] Although the respondent's counsel has made this application pursuant to Rule 9-5(4) of the Supreme Court Family Rules ("Order for examination and preservation of property"), courts have approached requests to examine electronic devices within the framework of the document disclosure regime. This is because the information stored in such devices, including metadata showing the manner in which they were used, falls within the expansive definition of "documents" under the Rules. A very helpful decision on this issue is *Sonepar Canada Inc. (c.o.b. Gescan) v. Thompson*, 2016 BCSC 1195:

46 During the course of submissions, counsel referred to numerous authorities that deal specifically with the principles applicable to the production of electronic documents from a computer hard drive or other electronic devices. From those cases, I draw the following principles:

- 1) A computer hard drive is the digital equivalent of a filing cabinet or documentary repository. While the court may order the production of relevant documents stored on the hard drive, Rule 7-1 [the Supreme Court Civil Rules' counterpart to Rule 9-5] does not authorize the court to permit the requesting party to embark upon an unrestricted search of the hard drive: *Desgagne v. Yuen et al.*, 2006 BCSC 955 at para. 20; *Peter Scherle Holdings Ltd. v. Gibson Pass Resort Inc.*, 2007 BCSC 770 at para. 21.
- 2) A computer hard drive as a document storage facility is generally not producible in specie. A hard drive will often contain large amounts of information that is irrelevant to the matters in issue in the litigation, including information that is private and confidential and that ought not to be produced: *Innovative Health Group Inc. v. Calgary Health Region*, 2008 ABCA 219 at para. 33.
- 3) In exceptional circumstances where there is evidence that a party is intentionally deleting relevant and material information, or is otherwise deliberately thwarting the discovery process, the court may order the production of the entire hard drive for inspection by an expert. There must be strong evidence, rather than mere speculation, that one party is not disclosing or is deleting relevant information in order to justify such an order: *Innovative Health Group Inc.* at paras. 3 and 39.

- 4) On an application for production of electronic records from a computer hard drive, the court must balance the objective of proper disclosure with the targeted party's privacy rights: *Greg Court Developments Ltd. v. Sievert*, 2014 BCSC 551 at para. 34; *Desgagne* at paras. 36 to 40; *Park v. Mullin*, 2005 BCSC 1813; *Privest Properties Ltd. v. W.R. Grace & Company*, 1990 CarswellBC 1745 (B.C. S.C.); and *Bishop v. Minichiello*, 2009 BCSC 358.
- 5) Proportionality is a factor for the court to consider in determining the scope of the search parameters: *Greg Court Developments Ltd.* at para. 36.
- 6) Metadata consisting of information stored on the software which shows the use of the computer, such as dates when a file was opened, last accessed, or sent to another device, is information recorded or stored by means of a device and is therefore a document within the meaning of the Rules: *Desgagne* at paras. 28 and 29.
- 7) As a general rule, the producing party's counsel should have the first opportunity to vet for relevance and privilege any information produced from the hard drive or from any other source of electronic data containing private information unrelated to the lawsuit: *Roeske v. Grady*, 2006 BCSC 1975 at para. 27.
- 8) To that, I would add that there may be circumstances where it will be appropriate to depart from the general rule, for example, where there is evidence that the producing party has deliberately destroyed records or is likely to interfere with or thwart the production of relevant information.

47 I must balance the privacy interest of the defendants with the plaintiff's right to obtain disclosure of material and relevant documents, and the public interest in ensuring that litigation is conducted with the full disclosure contemplated by the Rules.

[emphasis added]

- [35] This is an unusual situation. On the face of it, some unidentified figure has been seeking to sell, or suppress for a fee, fraudulent documents that are related to an issue in the litigation, namely the respondent's property ownership. While it was not apparent to me at the time the documents were produced that the claimant did not intend to rely on them, that is now her position, so the documents are effectively off the table as a substantive allegation that the respondent needs to refute.
- [36] Nevertheless, he is entitled, if he wishes, to advance the position that she has fabricated both the documents and the communications with the sender, showing malicious intent towards him and undermining her credibility; or at the very least has recklessly introduced the documents into the litigation, causing additional delay and expense.
- [37] However, acknowledging that these are issues that the respondent is entitled to pursue is not the same thing as concluding that the test for production of the actual devices has been met. Specifically, I cannot find on the current evidence that there are exceptional circumstances, based on strong evidence, that the claimant has intentionally deleted relevant and material

information, or has otherwise deliberately thwarted the discovery process. As the authorities summarized in *Sonepar* show, permitting a search of electronic devices is an exceptional measure to ensure the integrity of the document disclosure process, not a tool to enable a party to secure evidence on a particular issue. The fact that the claimant retained her own forensic examiner in response to this application, while it yielded relevant evidence that was properly disclosed, is not in itself a basis to order an additional examination on behalf of the respondent.

- [38] This conclusion is certainly not an endorsement of the claimant's response to the situation. Her affidavit, as the portions I have quoted show, is vague and inconsistent on relevant points, and leans too heavily on her supposed lack of technological skill to be entirely convincing. As the exchange of text messages shows, she was avidly seeking the unredacted documents in the period that followed her initial receipt and disclosure of the redacted version, a position that her affidavit does not directly address. It is also troubling, whatever her skill level in dealing with her phone and providing the text messages to the legal assistant, that an incomplete version of these messages was initially delivered to the respondent, and that they were properly documented and disclosed only in the report of her forensic expert.
- [39] However, these are shortcomings in her fulfillment of her disclosure responsibilities, not efforts to thwart the overall discovery process, and there is no indication that she has deleted any relevant information. It was and still is open to the respondent to seek the "second-tier" document disclosure permitted by Rule 9-1(8), which extends beyond those documents capable of proving or disproving material facts, and in this case might include metadata showing registration for email accounts, internet searches for applicable terms or other relevant information. If there is concern about the completeness of her "first-tier" disclosure, an application to have her provide an affidavit verifying her most current list of documents could be sought. I mention these alternatives not to encourage their use or imply that I would necessarily make orders in relation to them, but to show that the exceptional order currently being pursued is not the only way to obtain information on the relevant points.
- [40] As a result, this part of the application must be dismissed.

Conduct Orders

Evidence

- [41] As I have mentioned, there has been evidence in the trial of a significant degree of animosity on the claimant's part towards Ms. B.
- [42] She also testified about ongoing harassing behaviour by the claimant, which in the recent past has included the claimant driving by her house repeatedly, as well as getting out of her vehicle and staring at the house. Photographic evidence depicting the vehicle there on July 8, 10 and 12, 2020 was submitted to provide support for Ms. B.'s account, which involves a

larger number of attendances. In her affidavit, Ms. B. asserts that the claimant would have no reason travel on her street to reach home, which is in Vancouver, or to visit her close relative in the area, and that she no longer has privileges at the local hospital, which might also have required her to travel by that route.

- [43] Past harassing behaviour by the claimant that Ms. B. alleges has included stealing her cellphone (which the claimant is said to have admitted to the police); telling the College of Physicians and Surgeons and the Delta Police that Ms. B. is involved in selling drugs; having someone impersonate a police officer calling from Toronto to question her about drug dealing; complaining that she is in a romantic relationship with the respondent and that he prescribes her drugs; and contacting people in Ms. B.'s village in India to spread malicious rumours about her.
- [44] The respondent adds that the claimant had conduct orders imposed on her in the previous trial as a result of her actions in relation to him and his office staff, including Ms. B. Although it was mentioned in the context of the application to examine her electronic devices, it is relevant to note that a large number of anonymous calls were received by his clinic around the time of the message inviting him to text a number to obtain information about the "Delhi papers", the majority of those calls coming in before that message was left. These calls were blocked by the phone system because they were from an anonymous source.
- [45] The catalyst for the present application was an email sent to Ms. B.'s 15 year-old niece in July, from an account at guerillamail.com (which, as I have mentioned, is a service that provides temporary email addresses). The writer advises the niece that she was an unwanted child because she was not a boy and that her mother was unable to have an abortion only because of medical complications. Ms. B. believes that the claimant is responsible for this email because of how it fits within her overall pattern of harassment, as well as its use of the word "foetus" in the email, which she says is characteristic of the writing of a medical professional. This is actually the second abusive electronic message that her niece has received during the trial. In May she received a text message from an unknown sender providing her with sensitive and damaging allegations about her father's conduct in his previous marriage, a relationship of which the niece was previously unaware. Ms. B. was able to trace this message to a service in Toronto called Globphone.
- [46] For her part, the claimant denies all of the allegations, including the underlying behaviour that led to the conduct orders at the previous trial. In relation to her alleged harassment of Ms. B., she says that does not know where she currently lives and has not known the location of her home for 20 years. Any instances of her passing by the current home would have been coincidences. She indicates that instead Ms. B. has engaged in aggressive and harassing behaviour towards her, and points to evidence that Ms. B. has attempted to call her twice on July 27. (Ms. B. acknowledges this, and says that she spoke to the claimant once that day, in response to the offensive email to her niece. The only other time she has called the claimant, she says, is after the claimant began calling people in her village.)

Discussion

- [47] Situations can certainly arise during the course of an ongoing family trial that require some form of interim conduct order, to restrain behaviour that would otherwise interfere with the proper resolution of the matter, quite apart from the evidence and issues in the trial itself. For example, there might be an altercation during a parenting exchange while the trial is ongoing that calls for orders governing a party's behaviour until the trial judgment is rendered.
- [48] The difficulty in this case is that there is no such stand-alone evidence that points reliably to the claimant as the author of the shockingly distasteful email to Ms. B.'s niece. Instead, a finding that the claimant is responsible for it, or for any of the other acts of harassment that have been alleged since the first trial, will depend on an assessment of the whole of the evidence that has been led in the present trial, and the findings of credibility that will need to be made based on it. There is simply no way to weigh that evidence against her blanket denial at this point, without prematurely deciding core trial issues that have not yet been fully presented or argued.
- [49] The one exception I find to this conclusion arises from the photos that were provided of the claimant's vehicle outside Ms. B.'s residence on three separate days in July. Leaving aside the broader issues of credibility that must be assessed on the evidence as a whole, these photos provide objective circumstantial evidence of the repeated presence of her vehicle there. Those attendances in themselves have the capability of disrupting the orderly progress of this trial, by inflaming the already hostile relationship between the claimant and Ms. B. This is true even if, as the claimant deposes, the attendances were coincidental. Reaching that conclusion in no way prejudices the claimant's overall position in the trial. I am simply finding that it will be conducive to the orderly completion of this matter if the claimant is required to proactively avoid contact with Ms. B., something she has no need to have, and claims no interest in having. It is not practical to enforce such an order without including Ms. B.'s family, coworkers and workplace in the terms, but I stress that their inclusion involves no findings on the broader harassment allegations.
- [50] As a result, on an interim and without prejudice basis, the claimant will be subject to a conduct order in the terms set out in paragraphs 8 and 9 of the respondent's notice of application.

Conclusion

- [51] As to the remaining relief sought, in view of my conclusions I do not consider it appropriate to require security for compliance with the conduct order, to impose a fine for the broader harassing conduct that has been alleged previously, or to impose special costs. The respondent is of course entitled to seek those remedies in the final submissions.

[52] Finally, because the subject matter of the main applications is closely related to the issues that remain to be resolved by this trial, the costs of this application will be in the cause.

"Schultes J."

[1] The spelling and punctuation in the quotes from the text messages are from the original.

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Prepared on 29 October 2026 · Esheria