

CANADA / JUDGMENT

Kasian Estate v. Kasian

2021 BCSC 2164

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2164 Canadian Society for the Advancement of Science in Public Policy v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kasian Estate v. Kasian,

2021 BCSC 2164

Date: 20211104

Docket: S168444

Registry: Vancouver

Between:

Kelay Ohlhauser, Executrix of Ms. Kasian's Estate of Laura Kasian

Plaintiff

And

Donald Kasian

Defendant/Counterclaimant

And

Kelay Ohlhauser, Executrix of the Estate of Laura Kasian

Defendant by Way of Counterclaim

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

July 5-9, 12 and 13, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2021

Table of Contents

Overview... 3

The Issues.. 4

Interpretation of the Minutes of Settlement.. 7

Legal Framework. 7

The Minutes of Settlement 8

Analysis. 13

Interpretation.. 13

Implied Term.. 18

Mistake.. 20

Legal Framework. 20

The Valuation of the Kasian Group. 22

Analysis. 24

Mistake as to Terms/Rectification.. 24

Mistaken Assumption.. 25

Family Law Legislation.. 28

Legal Framework. 28

Analysis.	30
Contractual Unfairness..	33
Unfairness Invoking a Contractual Doctrine.	33
Clause 18(m)	35
Conclusion on Contractual Fairness.	36
Remedy..	36
Conclusion..	38

Overview

- [1] Laura Kasian's estate seeks to enforce minutes of settlement in which she and her former husband, Donald Kasian, resolved property division issues arising from the breakdown of their 30-year marriage. In the minutes of settlement, Mr. Kasian agreed to make capital payments totalling \$2 million over ten years to Ms. Kasian for her share of his interest in his architecture business, known as the Kasian Group, but ceased making capital payments when Ms. Kasian passed away two years after they signed the minutes of settlement. At that time, the sum of the capital payments still to be made totalled \$1,350,000. Ms. Kasian's estate claims the capital payments plus interest, and seeks an order that the present value of the future capital payments be paid now.
- [2] Through his response to civil claim and his counterclaim, Mr. Kasian asserts he is not required to make further capital payments because the proper interpretation of the minutes of settlement is that payments were to cease on Ms. Kasian's death; the valuation of his architectural firm was based on a mistake about a large receivable; and the minutes of settlement were based on a mistake because they did not provide for cessation on Ms. Kasian's death. He also claims that the capital payments should be varied to correct unfairness.
- [3] I have concluded that the proper interpretation of the minutes of settlement is that the capital payments were not to cease on Ms. Kasian's death. I have concluded that Mr. Kasian has not established mistake in relation to the amount of the capital payments nor their continuation after Ms. Kasian's death. Finally, I have concluded that Mr. Kasian has not established that he should not be required to make the payments in the amount agreed to as a matter of unfairness within the meaning of the Family Law Act, S.B.C., c. 25, nor as a matter of contractual unfairness.
- [4] I have concluded that Mr. Kasian is immediately required to make the capital payments he has not made since Ms. Kasian's death plus interest. I have also concluded that he should be required to make an immediate lump sum payment discounted to the present value for the remaining capital payments.

The Issues

- [5] After Laura Kasian's death, Mr. Kasian advised her estate that he would no longer be making any capital payments toward the outstanding balance of Ms. Kasian's interest in the Kasian Group. Mr. Kasian has not made any payments relating to this amount since.
- [6] Ms. Kasian's estate submits that Mr. Kasian has breached the minutes of settlement by not making the remainder of the capital payments. It says that the minutes of settlement are clear, unambiguous, valid and enforceable.
- [7] Mr. Kasian's arguments as to why he is not or should not be obligated to make the capital payments after Ms. Kasian's death are based on two rationale. First, the parties did not intend for the capital payments to continue after Ms. Kasian's death. Second, the capital payments were based on a mistaken valuation of the Kasian Group.
- [8] With regard to the first, Mr. Kasian argues that the overarching purpose of the minutes of settlement was to provide Ms. Kasian with a steady cash flow so she could maintain the lifestyle she enjoyed while the parties were married. He argues that the capital payments were always intended to augment spousal support payments. Mr. Kasian testified that it was obvious to the parties that the capital payments were to cease on death, because much like spousal support, after Ms. Kasian's death they would no longer serve this purpose. He also points to the lack of an enurement clause in support of his interpretation of the minutes of settlement.
- [9] With regard to the second, Mr. Kasian submits that the valuation of the Kasian Group was too high because it included work in progress (WIP) that was written off in 2020. As a result, the capital payments agreed to were much higher than the actual value of Ms. Kasian's interest in the Kasian Group.
- [10] Together, these two submissions form the basis for the following defences and/or claims raised by Mr. Kasian:
- it is an implied term in the minutes of settlement that the capital payments cease on Ms. Kasian's death;
 - the minutes of settlement should be remedied on the basis of the common mistake that the capital payments would cease upon death;
 - the minutes of settlement should be remedied because of the common and/or equitable mistake as to the value of the Kasian Group;
 - the minutes of settlement should be varied under the applicable family law legislation due to unfairness; and
 - the minutes of settlement should be remedied due to contractual unfairness.

- [11] Ms. Kasian's estate contests both rationale underlying Mr. Kasian's various defences and/or claims. It submits there is no basis for saying that the parties did not intend for the payments to continue after Ms. Kasian's death. It says contrary to Mr. Kasian's characterization, the capital payments were not for the maintenance of Ms. Kasian's lifestyle; they were to compensate her for her interest in the Kasian Group. It argues that this is reflected in the fact that the minutes of settlement expressly provide that the spousal support payments would cease on Ms. Kasian's death, but are silent regarding the capital payments.
- [12] With regard to the valuation of the Kasian Group, Ms. Kasian's estate says that this issue was contested; Ms. Kasian did not accept the valuation that Mr. Kasian put forward and now asserts was wrong. Ms. Kasian's estate asserts that the alleged wrong valuation was merely used as a guide for arriving at a negotiated amount. Ms. Kasian's estate points out that Mr. Kasian retained a chartered business valuator to prepare the valuation and the business valuator was supplied the information used in the valuation by persons employed by the Kasian Group. It submits that Mr. Kasian cannot now claim that the parties' reference to the valuation was common or mutual mistake. With regard to the variation claim, it submits that this court lacks jurisdiction for two reasons: (1) the limitation period has passed; and (2) the claim must be brought in relation to a family law proceeding, not a civil action.
- [13] As a result, Ms. Kasian's estate submits that each of Mr. Kasian's defences and/or claims ought to be dismissed.
- [14] One preliminary evidentiary issue and five determinative issues arise out of the foregoing.
- [15] The preliminary issue is raised by Ms. Kasian's estate. It asks that I draw an adverse inference from the fact that Mr. Kasian did not call either Vern Blair, the chartered business valuator whom he retained to provide the valuation he now asserts was wrong, or Karen Thompson, his counsel in the family law matter, as witnesses in this proceeding.
- [16] The first of the five determinative issues concerns the contractual interpretation of the minutes of settlement, namely whether Mr. Kasian's obligation to make the capital payments continues after Ms. Kasian's death. Mr. Kasian's claim of implied term is related to this issue.
- [17] The second issue concerns the two allegations of mistake, namely whether the contract should be rectified, rescinded, or voided due to the alleged mistaken assumptions as to the capital payments ceasing on death or the alleged overvaluation of the Kasian Group.
- [18] The third and fourth issues are whether fairness requires the minutes of settlement be varied under the applicable family law legislation or for contractual unfairness. Ms. Kasian's estate arguments about jurisdiction and limitation periods apply to these issues.
- [19] The fifth and final issue is whether the court should order that the past due capital payments be made with interest and whether Mr. Kasian should be required to make all of the remaining payments now, i.e.: on an accelerated basis.

- [20] With regard to the adverse inference preliminary issue, Ms. Kasian's estate submits that Mr. Kasian deliberately chose not to call Mr. Blair or Ms. Thompson because their evidence would have contradicted his submissions that the business was wrongly valued and that the parties intended for the capital payments to cease on Ms. Kasian's death.
- [21] However, without the adverse inferences sought, I am satisfied that Mr. Kasian is obligated to pay the remainder of the capital payments and his defences and/or counterclaims are without merit. Because it is not necessary to consider whether to draw an adverse inference, I decline to do so.

Interpretation of the Minutes of Settlement

Legal Framework

- [22] The principles of contractual interpretation are well established. Justice Rothstein, writing for the court, summarized them in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47 as requiring the court to determine "the intent of the parties and the scope of their understanding" by reading the contract as a whole and giving the words used their ordinary and grammatical meaning.
- [23] The circumstances surrounding the formation of the contract may be helpful in interpreting the terms of a contract. However, they "must never be allowed to overwhelm the words of that agreement" as admonished by Rothstein J. at para. 57 of *Sattva*.
- [24] The surrounding circumstances are assessed objectively, based on "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (*Sattva* at para. 58). The parties' subjective intentions do not inform the court's interpretation of a contract (at paras. 59-61).
- [25] However, the court may consider the parties' subjective intentions where, in certain circumstances, it is necessary to imply terms into the contract in order to give effect to the intentions of the parties. The Court of Appeal summarized the approach to implied terms in *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89 adopting the three circumstances identified by Justice Iacobucci in *M.J. B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 27, in turn citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 774-776, where terms may be implied in a contract:
- (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed"

[citation omitted].

- [26] The focus is on the intentions of the actual parties as opposed to reasonable parties and the implied term must be necessary to make the contract as intended (M.J.B. Enterprises at para. 29; and Moulton at para. 55). If there is evidence of contrary intention, an implied term may not be found: *Olympic Industries Inc. v. McNeil* (1993), 86 B.C.L.R. (2d) 273 (C.A.). See also: *Perrin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478; and *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216.

The Minutes of Settlement

- [27] The minutes of settlement pertain to the resolution of spousal support and property division on the dissolution of the long marriage between Mr. Kasian and Ms. Kasian. They were married on November 28, 1980. They separated in 2010 and divorced in January 2013.
- [28] Ms. Kasian retained Dinyar Marzban Q.C. and commenced a family law claim on May 5, 2011 under the Family Relations Act, R.S.B.C. 1996, c. 128. Mr. Kasian was initially represented by Jeffrey Kay, Q.C. and subsequently by Rose-Mary Liu Basham, Q.C. and Karen Thompson. By the time the minutes of settlement were reached, Ms. Basham had retired and Ms. Thompson was the senior lawyer acting for Mr. Kasian.
- [29] Mr. Marzban testified about the negotiation process and eventual settlement agreement in the family law proceeding. He testified that although the parties formally took positions that were different from equal entitlement to the value of Mr. Kasian's shareholding in the Kasian Group, the negotiations proceeded on the basis that the corporate assets would be divided equally. Over the course of the proceeding offers made Mr. Kasian included equal division of those assets. Mr. Marzban testified that the real issue was how the Kasian Group shareholding would be valued and divided.
- [30] Mr. Marzban testified that Mr. Kasian expressed an interest in selling it, which would have resulted in a liquidated value that could be readily divided. At times, Mr. Kasian raised the potential of interested buyers, but it did not sell. Mr. Kasian testified that there was a limited market of potential buyers for the business because it was a very diversified and large architectural firm. He testified that buyers of architectural firms typically search out smaller firms with a focussed practice area that compliments the buyer's business or expansion plans. His firm was not that type of target. He testified that at one point during the negotiations a large engineering firm expressed interest to which the Kasian Group responded positively but a deal was not reached.
- [31] Another option was for Ms. Kasian to become an equal shareholder with Mr. Kasian. Mr. Marzban testified that was not seriously negotiated because Mr. Kasian's majority shareholding stake was integrally tied to his accreditation and experience as an architect and a principal in the business. Ms. Kasian did not have those qualifications and if she became an equal shareholder with him, running the business would be awkward.

- [32] The final option was for Mr. Kasian to pay Ms. Kasian a dollar amount to compensate Ms. Kasian for her interest in his shareholding. In Mr. Marzban's view, barring a sale, that was the option that made the most sense. In order to pursue that option, a value had to be placed on the shareholding.
- [33] On March 14, 2013, Mr. Kasian and Ms. Kasian reached an agreement regarding the division of their personal assets. Ms. Kasian received assets valued at approximately \$1.99 million and Mr. Kasian received assets valued at \$1.47 million. The parties agreed that they would take the difference between these amounts into account when dealing with the two remaining issues: Ms. Kasian's interest in the Kasian Group and spousal support.
- [34] Mr. Kasian retained Mr. Blair to provide an estimate of the fair market value of his shareholding in the Kasian Group as of April 30, 2013.
- [35] Mr. Blair issued his expert report on September 9, 2013, in accordance with R. 13-6 of the Supreme Court Family Rules. He estimated the fair market value of Mr. Kasian's shareholding in the Kasian Group as of April 30, 2013 to be in the range of \$6,984,000-\$8,263,000.
- [36] It is not disputed that Mr. Kasian, presumably through his counsel, asked Mr. Blair to re-evaluate his estimate in light of the Kasian Group's August 31, 2013 financial statements, which covered the period from May 1, 2013 until August 31, 2013. In a memo dated October 19, 2013, Mr. Blair opined that the value of Mr. Kasian's shareholding as of August 31, 2013 was \$5,958,000.
- [37] Both Mr. Blair's September 9, 2013 report and his October 19, 2013 memo were provided to Ms. Kasian in the family law proceedings. She retained her own expert business valuator, Patti Daum, to review Mr. Blair's report. Ms. Daum opined that Mr. Blair's valuation was too low. However, Ms. Kasian did not instruct her to prepare a report and did not otherwise file or serve an expert report in reply to Mr. Blair's report.
- [38] In October 2013, the parties attended mediation to on division of the corporate assets and spousal support. The matter did not settle at the October 2013 mediation but the parties continued to negotiate with the assistance of the mediator and eventually came to an agreement and entered into minutes of settlement on November 22, 2013. Among other things, the minutes of settlement provided that Mr. Kasian would pay Ms. Kasian \$20,000 per month in spousal support and \$2,000,000 for her share in the Kasian Group, with the \$2,000,000 paid out over ten years with interest.
- [39] The minutes of settlement were prepared by Mr. Kasian's counsel in the family law proceeding at the time, Ms. Thompson.
- [40] Both parties signed certificates of independent legal advice acknowledging that they had received independent legal advice regarding the nature and effect of the minutes of settlement.

[41] The relevant terms of the minutes of settlement are as follows:

WHEREAS:

F. The parties have now reached an agreement with respect to the two remaining issues, namely division of the corporate interests and spousal support.

NOW THEREFORE IN CONSIDERATION of the premises and mutual covenants contained in these Minutes of Settlement, the parties agree as follows:

1. Ongoing spousal support of \$20,000 per month
2. Don will pay to Laura the sum of \$2 million net of tax for her interest in the Kasian Group of companies (the "Company") (the "Capital Payment"). The \$2 million will be paid out over time with interest on the amount outstanding at prime. Interest for the first 6 months will be calculated on \$1.5 million outstanding given the differential in the personal property division. \$500,000 will be paid to Laura on May 1, 2014 and \$150,000 per year starting on May 1, 2015 for the next 10 years except as follows:
 - (a) If Don's employment income is \$1.3 million or greater for the prior calendar year, \$175,000 will be the required capital payment.
 - (b) [sic] If Don's employment income is \$1.5 million or greater for the prior calendar year, \$200,000 will be the required capital payment.
 - (c) If Don's employment income is \$500,000 or less for the prior calendar year, \$125,000 will be the required capital payment.
 - (d) If Don's employment income is \$250,000 or less for the prior calendar year, \$100,000 will be the required capital payment.
8. Don will not sell or transfer any shares of the Company without Laura's consent (other than the transaction of transferring shares to Laura and buying them back through the capital payments or other such mechanism as E & Y advises which shall be at no cost to Laura) until the totality of the outstanding Capital Payment including interest has been made .
10. Don will irrevocably direct that, in the event of his death, the key man insurance with the Company shall be used first to pay Laura any outstanding Capital Payment and, upon receipt by her of such payment, Laura shall then transfer any shares she continues to hold back to the Company.
13. Spousal support will end on Laura's death and any life insurance currently held for her benefit will cease.
14. Spousal support will end on Don's death provided that the insurance referred to in paragraph 10 has been maintained.

15. If, within 5 years of the date of these Minutes of Settlement, Laura remains alive and Don has entered into a contract for the sale of his interest in the Company and will receive in excess of \$7 million net cash for his interest in the Company, Laura shall share in 15% of the net proceeds over \$7 million. Don will only be required to pay Laura that 15% interest once he has received, in his hands, in excess of \$7 million net cash.
18. Each of the parties acknowledges that he or she:
- (d) [sic] have each had independent legal advice in respect of rights against and obligations to the other party under the law and under these Minutes of Settlement;
 - (e) has read the entire Minutes of Settlement carefully;
 - (f) knows and understands these Minutes of Settlement;
 - (g) is fully aware of the effect, purpose, and intent of these Minutes of Settlement;
 - (h) is signing these Minutes of Settlement voluntarily without any undue influence...and acknowledges that the other Party did not take improper advantage of his or her vulnerability, need, or duress;
 - (i) has fully disclosed financial means and circumstances to the other;
 - (j) is not aware of any circumstances that would, under the common law, cause all or party of the Minutes of Settlement to be void or voidable;
 - (k) is satisfied with this settlement of all matters in dispute between the parties, relating to the division of corporate assets and spousal support;
 - (l) believes that these Minutes of Settlement will not result in circumstances that are unconscionable or unfair to the other party; and
 - (m) understands that the provisions of these Minutes of Settlement, if considered by the Supreme Court to be substantially unfair due to the non-disclosure of a material fact, may be reviewed and varied by the Court despite the mutual agreement of the parties that these Minutes of Settlement are final and binding.
- [42] In the following two years, Mr. Kasian largely complied with the terms of the minutes of settlement. He paid spousal support regularly and paid the first two instalments of the capital payments, albeit a few weeks late.
- [43] On December 4, 2015, Ms. Kasian passed away. After her death, Mr. Kasian ceased making spousal support payments as expressly contemplated by the minutes of settlement. He also indicated that he would no longer be making any payments toward the outstanding balance of \$1,350,000 plus interest for Ms. Kasian's interest in the company. Mr. Kasian has not made any payments relating to this amount since.

Analysis

Interpretation

- [44] There is no reasonable interpretation of the minutes of settlement by which the capital payments cease upon Ms. Kasian's death. Such an interpretation would be at odds with the plain meaning of the words of the agreement, the surrounding circumstances, and common sense.
- [45] The core obligation expressed in the second clause is to pay Ms. Kasian a defined sum (\$2 million) "for her interest in the Kasian Group of companies". I agree with the submissions of Ms. Kasian's estate that by this clause, Mr. Kasian purchased from Ms. Kasian her interest in the Kasian Group with a defined sum of money.
- [46] Mr. Kasian argues that he did not purchase Ms. Kasian's interest in the Kasian Group by virtue of this clause and the minutes of settlement as a whole because Ms. Kasian was not a shareholder and therefore had no interest in the Kasian Group for him to purchase.
- [47] I reject this argument as inconsistent with the context in which the agreement was negotiated. As Mr. Marzban testified, by operation of s. 56 the Family Relations Act, a spouse has an interest in family property that crystallizes of a triggering event. One such event is a divorce. The parties were divorced prior to executing the minutes of settlement. Given the context, it makes sense that the parties were negotiating, as Mr. Marzban testified, not about whether Ms. Kasian was entitled to an equal share in the Kasian Group, but how to value it and how the asset would be divided. The negotiations and the minutes of settlement do not make sense if Mr. Kasian is correct that Ms. Kasian had no interest in the Kasian Group. Although Mr. Kasian testified that he did not view Ms. Kasian as having an interest in the company, I conclude that he meant so in the narrow sense that she was not a shareholder. I conclude that given the experienced lawyers he retained, the fact that he hired an experienced business valuator to value the Kasian Group for the purpose of the negotiations, and he signed an agreement that provided he was to pay Ms. Kasian \$2 million dollars for her interest in the Kasian Group, he manifested an intention to divide the asset with Ms. Kasian by making instalment payments to her for her share.
- [48] Part of Mr. Kasian's resistance to the characterization of the agreement as a purchase, by him, of Ms. Kasian's interest is that he wishes to avoid acknowledging the other side of the transaction, namely he has retained all of his shareholding in the Kasian Group. According to Mr. Kasian's view of the situation, he always had the shareholding, Ms. Kasian never did, so the \$2 million payment (over time) cannot be connected to his present circumstance of having the shareholding that he had all along. Again, this is an argument that is devoid of logic and ignores the legal realities of the negotiations and what was plainly negotiated. Mr. Kasian, by paying \$2 million dollars, satisfied Ms. Kasian's family law claim to one half of his interest in the Kasian Group in a manner that avoided him having to turn over half of his shares.

- [49] The clause also provides for the payment of this sum in instalments, with interest. However, that does not change the nature of the obligation. Rather, it merely provides for a form of vendor financing to help facilitate the transaction. The addition of interest reflects this. The fact that the annual capital payment could vary depending on Mr. Kasian's income does not change the characterization of the clause as providing for the purchase of an asset with vendor financing. That clause simply reflected the logistical issues by which the parties agreed that Mr. Kasian could pay over time because he did not have sufficient capital on hand to pay in a lump sum and would have to pay it out of his cash flow from the Kasian Group or as he liquidated other assets. The parties addressed this issue by terms that required a minimum annual payment as well as a requirement to increase the annual payment (and decrease the remaining obligation) if Mr. Kasian's annual income went above certain thresholds.
- [50] Accordingly, the fact that Mr. Kasian retains the entirety of the shareholding in the Kasian Group is a relevant and persuasive circumstance that undercuts his argument that the payments were intended to end on Ms. Kasian's death. If that were the case, it would mean that her early death reduced the value of her interest in the Kasian Group, or at least the value of her interest. There is no objective evidence, in the minutes of settlement or otherwise, on which to conclude that the parties agreed that if Ms. Kasian died before all the capital payments were made, Mr. Kasian could keep the entire shareholding but stop paying for Ms. Kasian's interest in it.
- [51] Mr. Kasian also argues that the agreement is properly interpreted as the capital payments being a means of providing cash flow to Ms. Kasian. Mr. Kasian testified that Ms. Kasian's concern during the negotiations was to maintain her lifestyle. The capital payments were a means to that end.
- [52] However, reading the capital payments clause, clause two, in light of clause one, which addresses spousal support, makes it clear that the capital payments were not just another means of providing Ms. Kasian with a cash flow sufficient to maintain her lifestyle. Under clause one, Mr. Kasian was required to pay \$20,000 per month as "ongoing spousal support".
- [53] If the only objective of the payments was means to achieve lifestyle cash flow to Ms. Kasian with the corollary of that objective and the requirement to make the payments being spent on Ms. Kasian's death, the parties could simply have provided for higher spousal support payments. That would have avoided the whole complicated, expensive and time-consuming exercise of valuing the business and determining the mechanics of dividing Mr. Kasian's share in the business. The fact that the parties did not solely focus on spousal support but engaged in the more complicated exercise of valuing the business and providing for capital payments is inconsistent with the interpretation that Mr. Kasian seeks.
- [54] In addition, the ongoing nature of the spousal support payments, as opposed to the capital payments, is reflected in how the payments are adjusted according to Mr. Kasian's income. Although the minutes of settlement provide for both capital payments and spousal support

payments to be reduced if Mr. Kasian's income fell below \$1 million, if Mr. Kasian's income exceeds a certain amount, capital payments increase but spousal support payments do not. This is because the capital payments were intended to pay off an ultimate sum as fast as possible while the rationale for the spousal support payments was to provide Ms. Kasian with a consistent source of income.

- [55] In addition, in clauses 13 and 14, the minutes of settlement expressly provide that spousal support would cease on either party's death, with the condition that in the case of Mr. Kasian's death, he maintain a sufficient life insurance policy. These clauses demonstrate that the parties contemplated the consequences of each party's death. With regard to Ms. Kasian, the parties made it clear that her entitlement to spousal support would cease on her death and her right to spousal support would be satisfied by insurance proceeds in the event of Mr. Kasian's death. There is no similar clause for the capital payments.
- [56] Clauses 10 and 15 reinforce that the parties did not intend for the capital payments to cease on Ms. Kasian's death. Clause 10 requires Mr. Kasian to maintain "key man insurance" to ensure that in the event of his death, Ms. Kasian would be paid the outstanding capital payments. Clause 15 provides compensation for Ms. Kasian if Mr. Kasian sells his interest for more than \$7 million within five years, provided that "Laura remains alive". Clearly the parties had considered what would happen if Mr. Kasian or Ms. Kasian had died before the capital payments had been completed. In the case of the former, the minutes of settlement required Mr. Kasian to maintain insurance to ensure that Ms. Kasian was paid for her share of the Kasian Group. In the case of Ms. Kasian's death, the minutes of settlement provided that her estate would forego her share of the profit above \$7 million if Mr. Kasian sold his interest within five years. There is no suggestion that the capital payments themselves would cease on her death.
- [57] With regard to the lack of an enurement clause, given the whole of the minutes of settlement and the context in which they were negotiated, the failure to put in a boilerplate enurement clause does not foreclose an interpretation that the capital payments were to continue regardless of Ms. Kasian's death or support an interpretation that they were not.
- [58] Finally, the nature of an agreement pertaining to division of an asset (unlike spousal support) weighs against an interpretation that it was intended to end on death. Spousal support usually ceases on death while any outstanding obligations related to property division to continue: G.H.L. Fridman, *The Law of Contract*, 5th ed. (Toronto: Thomson Canada Ltd., 2006) at 698. To agree otherwise would be unusual. Since the parties were represented by highly competent legal counsel, if that was what they intended, one would expect to see it addressed expressly.
- [59] As I explain in more detail below, I reject Mr. Kasian's argument that Ms. Kasian had no reason to benefit her estate with the remainder of the capital payments so she must have intended them to end on her death. This is a re-packaging of the argument that Ms. Kasian simply wanted enough money for her lifestyle needs.

[60] Considering the minutes of settlement read as a whole, the evidence pertaining to the intention of the parties, the purpose for which the agreement was reached and the context in which it was reached, I conclude the parties did not intend for the capital payments to cease on Ms. Kasian's death. I interpret the minutes of settlement to not provide that they cease on Ms. Kasian;s death.

Implied Term

[61] I conclude that there is no basis on which to imply a term to the minutes of settlement that the capital payments were to cease on Ms. Kasian's death.

[62] As noted above, the three circumstances where a term may be implied are: (1) custom and usage; (2) as the legal incidents to a particular class or kind of contract; and (3) based on the presumed intention of the parties where the implied term is necessary to give business efficacy of a contract. Implication of terms is not a step that the court takes lightly; the court is careful not to imply terms that are "contrary to the clearly expressed intention of the parties": *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at 1097.

[63] Mr. Kasian does not identify which circumstance he says applies here, but his submissions are consistent with the business efficacy rationale. It is possible that the lack of an enurement clause could be considered under the custom and usage rationale, but I have dealt with that above.

[64] The business efficacy rationale is also known as the officious bystander test where the parties would say, if questioned, that the implied term is one that they had obviously assumed: *M.J. B. Enterprises* at para. 27. The implied term is one that must be necessary to give effect to the intentions of the parties.

[65] Mr. Kasian testified that it only makes sense that they both intended for the capital payments to cease on Ms. Kasian's death because after the breakdown of their marriage, Ms. Kasian did not have any persons close to her and so she had no interest in the payments continuing for her estate. He explained that their only child died about a year before they separated and that Ms. Kasian was not close to her siblings or anyone else in her family. Related to this, he also testified that although their marriage ended, they continued to care about each other and wanted to find a resolution to their marital dissolution without hurting each other.

[66] Keeping in mind that the implied term must be necessary to give effect to the parties' contractual intentions (*MJ.B. Enterprises* at para. 29; and *Moulton* at para. 55), the intention that Mr. Kasian must establish is that they intended for the capital payments to stop because Ms. Kasian had no desire to have her estate benefit from the capital payments. The corollary of this is that Ms. Kasian and Mr. Kasian intended for Mr. Kasian to, in effect, be the beneficiary of the remaining capital payments in the event of Ms. Kasian's death.

- [67] The evidence does not support Mr. Kasian's submissions. Despite Mr. Kasian's assertion that she did not have persons close to her to whom she wanted to benefit from her estate on her death, after they separated she made a will naming her sister, Ms. Ohlhauser, her executor. The beneficiaries of her estate are her siblings. Leaving aside the capital payments, Ms. Kasian received assets valued at almost \$2 million dollars when the parties divided their personal property. She left her considerable estate to her siblings. This evidence is contrary to the basis on which Mr. Kasian asserts the implied term should be found. Where there is evidence contrary to the evidence said to support an implied term, it should not be found: *Olympic Industries* at para. 31.
- [68] With regard to the nature of their relationship after they separated, the evidence also does not support Mr. Kasian's assertion that they were amicable and so she would not have called on him to pay capital payments after she died. They were engaged in prolonged and expensive litigation which did not resolve at the first attempt at mediation. Mr. Kasian threatened to sue her in defamation if she did not cease spreading rumours about his personal life, including about the children of the woman he had a relationship with during the time that Mr. Kasian and Ms. Kasian were negotiating.
- [69] The evidence does not support an implied term that Ms. Kasian would have preferred Mr. Kasian over her siblings to receive the benefit of the remainder of the capital payments.

Mistake

Legal Framework

- [70] There are three types of mistake: common mistake, mutual mistake, and unilateral mistake. Common mistake is where both parties make the same mistake. Mutual mistake is where both parties are mistaken, but for different reasons. Unilateral mistake is where only one party is mistaken, but the other party knows or ought to have known about the mistake: *Hannigan v. Hannigan*, 2007 BCCA 365 at para. 63, quoting *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, 2003 ABCA 221 at paras. 12-13.
- [71] The type of mistake alleged affects the analysis as to whether an agreement still exists. Where a party alleges common mistake, they are admitting that an agreement existed. The question to be determined is whether "the mistake was so fundamental as to render the agreement void or unenforceable on some basis": *Hannigan* at para. 63. With mutual or unilateral mistake, on the other hand, the party alleging it is denying that an agreement ever existed. This is based on the premise that there was never any meeting of the minds and, as a result, no agreement could ever have resulted.
- [72] Mistakes can arise from either the assumptions under which the contract was entered (i.e. mistaken assumptions) or the contract itself (i.e. mistakes as to terms).

- [73] Mistaken assumptions encompass what is often referred to as "common law mistake" and "equitable mistake". The former refers to the principles expressed by Lord Atkin in *Bell v. Lever Brothers*, [1932] A.C. 161 (H.L.). Lord Atkin identified three kinds of mistaken assumptions that could result in the contract being declared void: mistaken identity; mistake as to existence of the subject matter of the contract or of a possibility; and mistake as to an essential quality of the thing contracted for (at 217-218; see also Bruce MacDougall, *Mistake in Contracting* (Toronto: LexisNexis Canada Inc., 2018 at 407-408, and 463).
- [74] Mistake of the essential quality of the thing contracted for encompasses principles expressed by Lord Denning in *Solle v. Butcher*, [1950] 1 K.B. 671 (C.A.), and is seen as providing a flexible framework for finding and remedying mistaken assumptions (at 693):

A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.

- [75] The remedy available depends on the type of mistake found. At common law, a finding of mistake results in the contract being void. The result in equity is that the contract is declared voidable. The party seeking that relief then has the option to rescind the contract or affirm it: MacDougall at 48.
- [76] Generally speaking, the court must first assess whether the contract is void at common law before it can determine whether to declare the contract voidable in equity: *McMaster University v. Wilchar Const. Ltd.*, [1971] 3 D.L.R. (3d) 801 (Ont. S.C.) at 810-811, cited by this court in *Re 0741508 BC Ltd*, 2014 BCSC 1791 at para. 64.
- [77] Common and unilateral mistakes may be remedied by rectification. Rectification is an equitable remedy that allows the court to rewrite the mistaken term(s) to reflect the intentions of the parties. As Justice Brown explained in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at para. 13, "[i]ts purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions."
- [78] In the case of common mistakes, rectification is available only where the applicant can show the following (*Fairmont* at para. 14):
- a) the parties had reached a prior agreement whose terms are definite and ascertainable;
 - b) the agreement was still effective when the instrument was executed;
 - c) the instrument fails to record accurately that prior agreement; and
 - d) if rectified as proposed, the instrument would carry out the agreement.
- [79] The test for ordering rectification for unilateral mistakes is more stringent (at para. 15):
- a) the party resisting rectification knew or ought to have known about the mistake; and

- b) permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud".

The Valuation of the Kasian Group

- [80] Mehb Jessa, the chief financial officer of Kasian Architectural Group, testified about the Kasian Group's financial performance and general operation during the period immediately before the minutes of settlement to the present day. In particular, he testified about the Kasian Group's inability to recover a significant amount of WIP incurred in relation to a project for Alberta Infrastructure.
- [81] Mr. Jessa and Mr. Kasian testified that the problems with recovering the Alberta Infrastructure WIP was a long running problem that underwent many twists and turns, including times at which the WIP was brought up to date or nearly up to date, only for more work to be done and not paid for when invoiced. Part of the problem was that Kasian Group's client did not accept that it was required to pay the Kasian Group's invoices. Rather, it required the Kasian Group to seek pre-approval to issue an invoice. On some occasions when the Kasian Group sought such approval, the client would simply not address the approval sought. On other occasions it raised issues with the invoice sought to be approved which took months or years to resolve.
- [82] The evidence is uniform that this situation created a great deal of stress and uncertainty at the Kasian Group. Mr. Kasian had the ability, on some occasions, to speak to certain persons in positions of authority or influence with the client that addressed the instant problem or problems. However, sometimes he was not able to do so. I find that throughout the time that Mr. Blair was preparing his valuation report, Mr. Kasian and the Kasian Group were experiencing uncertainty and financial stress regarding this client and the WIP that was outstanding from time to time.
- [83] Mr. Kasian and Mr. Jessa also testified that up until 2018, the management team of the Kasian Group, which Mr. Kasian was on, was optimistic that eventually substantially all of the Alberta Infrastructure WIP would be collected. This changed when the Kasian Group's legal team determined that the WIP was uncollectible and recommended that it be written off. It was written off in 2020. I accept this evidence.
- [84] Mr. Blair gave the Alberta Infrastructure WIP full value in his report.
- [85] For the purposes of this case, Mr. Kasian retained Jeffrey Harder, who was qualified as an expert in business valuation. Mr. Harder conducted two valuations of Mr. Kasian's interest in the Kasian Group (inclusive of Ms. Kasian's undivided share): one as of September 30, 2013 and the other as of September 30, 2018. He assigned a value in the range of \$3,125,000 to \$3,724,000 for the former and \$863,000 to \$1,256,000 for the latter.

- [86] Mr. Harder gave a lower value to the Alberta Infrastructure WIP as at 2013, when the Blair valuation was done and the management team was optimistic about its eventual recovery, because of his view that a notional buyer would have done due diligence and not given it full value in coming to a purchase price.
- [87] Mr. Harder's valuation also differed from Mr. Blair in that he assigned no asset value to the Kasian Group's proprietary software.

Analysis

- [88] Mr. Kasian has pleaded a combination of claims regarding mistake and seeks a variety of remedies. In essence, he asserts that there was common or unilateral mistake that the payments would cease on death and common mistaken assumption regarding the valuation of the Kasian Group. He seeks rectification and a declaration that the minutes of settlement are either void or voidable, respectively.
- [89] Ms. Kasian's estate objects to the mistake claims that Mr. Kasian raises for the first time in his counterclaim on the basis that they are time-barred. However, I do not find it necessary to decide this point because, as discussed below, I do not find any merit in any of the mistake claims alleged.

Mistake as to Terms/Rectification

- [90] As I have already discussed in relation to the implication of terms, there is no evidence that Ms. Kasian intended for the capital payments to cease on her death. Therefore there is no basis for claiming that the failure of the minutes of settlement to provide for cessation was a common mistake.
- [91] There is no evidence that supports unilateral mistake because there is no evidence that Ms. Kasian knew or ought to have known that Mr. Kasian was unilaterally mistaken that the payments would cease on death.
- [92] Accordingly, there is no basis for either declaring the minutes void for mistake or ordering the rectification of it to include the term that the capital payments would cease on death. There was no common mistake so the minutes of settlement are not void ab initio. Similarly, there is no evidence of a prior agreement to have the capital payments cease on death to justify rectification under the test for common mistakes, nor is there evidence of fraud on the part of Ms. Kasian--let alone of knowledge of the alleged mistake--to warrant rectification under the test for unilateral mistake.

Mistaken Assumption

- [93] Mr. Kasian has not established that the parties were under a common mistaken assumption as to the value of the Kasian Group, whether at common law or in equity.

- [94] First, the alleged error in the valuation of the Kasian Group was entirely Mr. Kasian's responsibility. He hired Mr. Blair, instructed him, and provided him the information to conduct his valuation. The WIP was included in the financial documents on which Mr. Blair relied. After reviewing his report, Mr. Kasian chose to rely on it by serving it on Ms. Kasian. Ms. Kasian played no role in this process, nor was she in a position to do so. Mr. Kasian was uniquely situated to assess Mr. Blair's valuation of the Kasian Group, particularly with regard to the collectability of the WIP from the Alberta Infrastructure project. He testified as to the ongoing struggles, including his personal involvement in trying to address them. I have accepted his evidence that the issue was one that cause significant financial uncertainty and stress at the Kasian Group from 2008 through 2018, notwithstanding the management team's optimism, up to 2018, that the WIP would eventually be recovered.
- [95] Second, the alleged mistake was not common; Ms. Kasian was not under the mistaken assumption that Mr. Blair's valuation was correct. She never accepted Mr. Blair's valuation of the Kasian Group. Instead, she retained her own expert to review the report and potentially to prepare her own report. Her expert was of the opinion that the valuation was too low. Mr. Marzban testified that Ms. Kasian only considered Mr. Blair's report in order to reach a compromise. In any event, there is no evidence that Ms. Kasian adopted Mr. Blair's valuation of the Kasian Group or agreed that it was the exclusive basis on which the capital payments were calculated. The parties did not list the value of Mr. Kasian's interest in the minutes of settlement or in a schedule to it, as was the case in *Desrosiers v. Desrosiers*, 2006 BCSC 258; and *Klopfstein v. Klopfstein*, 2021 BCSC 498, on which Mr. Kasian relies. Rather, the minutes of settlement simply provide that Ms. Kasian was to be paid a total of \$2 million for her interest in the Kasian Group.
- [96] Nor was the mistake unilateral. In *Akenhead v. Akenhead*, 2000 BCCA 249, the parties agreed to a consent order whereby the plaintiff would pay the defendant \$10,000 as a full settlement of the outstanding claims. The consent order did not disclose any basis for arriving at that figure. Two days later, the plaintiff realized that she was mistaken in her calculations leading to the \$10,000 figure and sought to have the agreement varied. The Court of Appeal agreed with the trial judge that a unilateral misapprehension of facts "would not prevent the enforcement of the agreement the parties had reached" (at para. 29).
- [97] Lastly, the alleged mistaken assumption was not fundamental to the minutes of settlement. The parties sought to divide an asset whose value was not readily ascertainable. Unlike assets such as real estate or shares in a publicly traded Kasian Group, the "market value" of Mr. Kasian's interest could not be determined with any degree of certainty.
- [98] With few other viable options available to them, the parties approached the valuation through a "notional sale" of the Kasian Group. While the goal was to divide the interest evenly, determining an appropriate amount necessarily involved a significant degree of estimation and negotiation. Mr. Blair was required to make judgment calls about how to quantify the value of the Kasian Group. This included deciding whether and to what extent to include the Kasian Group's accounts receivables and WIP in the valuation. Mr. Blair either

accepted management's view of their collectability in determining whether to include them or made his own determination about collectability or both. In the end, things turned out differently than Mr. Blair and the Kasian Group's management envisioned. However, this was always a possibility, particularly given the fact that the WIP had already become an issue by the time the parties signed the minutes of settlement. Mr. Blair's valuation was contingent on unknown future events. That some of those events did not happen does render the minutes of settlement void or voidable. The 100% accuracy of Mr. Blair's valuation was not fundamental to the parties' agreement. As Mr. Marzban testified, the valuation was reference point for the negotiations.

- [199] Similarly, and illustrative of the differences that reasonable people could have in undertaking such a valuation, Mr. Blair ascribed a value to the proprietary software of the Kasian Group while Mr. Harder did not. The evidence did not disclose any rationale other than business valuator judgment being applied with different outcomes. This demonstrates that a large range in the value of the business could result not from mistake, but from different views of the same set of facts.
- [100] Mr. Kasian cites a number of cases in which a mistaken valuation of a key asset was found to be fundamental to the agreement to divide property: *Brandt v. Brandt*, [1998] B.C.J. No. 448 (B.C.S.C.); *Desrosiers*; *Hannigan*; and *Klopfstein*. However, in all of those cases the assets at issue had readily ascertainable values and the precise value of those assets was fundamental to the specific division of assets that the parties were trying to achieve.
- [101] In *Desrosiers* and *Klopfstein*, as noted, the agreement specifically listed the value of the real estate the parties were seeking to divide. Neither party relied on a professional valuation. When the plaintiffs had the property professionally valued in the months following the agreement, they discovered that the appraised value was significantly different from that listed in the agreement. In *Brandt*, the parties had already sold the matrimonial home and so knew exactly the proceeds available from it; the discrepancy in the division of those proceeds was due to a debt to the plaintiff's parents that was unaccounted for. Finally, in *Hannigan*, the mistaken assumption concerned whether the defendant had an interest in the company he had worked for, not the value of that interest.
- [102] In those cases, the parties relied on the mistaken assumption to achieve a specific and precise distribution of the parties' property. In *Brandt*, the evidence was that the parties intended for the plaintiff to receive \$100,000 from the sale of the matrimonial home, give or take \$2,000. The unanticipated debt resulted in the plaintiff only receiving \$86,000. Given the expectation of both parties that the plaintiff would receive almost exactly \$100,000, Justice Sigurdson was satisfied that this mistaken assumption constituted a fundamental condition to the agreement. Similarly, in *Klopfstein*, the parties sought to divide their property 59/41 in favour of the wife, in lieu of any spousal support. However, when the properties were later appraised, it became clear that the actual division of the property was nowhere near the 59/41 split the parties had intended. In fact, the wife's equity in the property she received was valued at -\$9,000, instead of the initially agreed upon \$528,000.

- [103] This is also not a situation like *Williams v. Gled*, 2006 BCSC 743, where the contract was declared void because neither party would have entered the contract had they known that the defendant's personal line of credit was registered as a charge against title. The high valuation was a common misapprehension that was fundamental and not the fault of the party seeking to set the agreement aside.
- [104] The mistaken assumption that Mr. Blair's valuation was a 100% accurate picture of the Kasian Group's value was not common to Mr. Kasian and Ms. Kasian or fundamental. To the extent that it was wrong (then, as opposed to now), it was wrong due to the fault of Mr. Kasian who knew the uncertainty around the WIP and that the management team was optimistic. He chose to include it in the information provided to Mr. Blair expressly or through asking Mr. Jessa to provide information that Mr. Blair requested, including about WIP.
- [105] For these reasons, the reduction in the Kasian Group's value based on the Alberta Infrastructure WIP and the proprietary software does not satisfy the test for mistake under either *Bell* or *Solle*. The reduction in value did not make the minutes of settlement essentially different than what was bargained for. The parties sought to divide the "corporate asset" and the minutes of settlement did so.

Family Law Legislation

Legal Framework

- [106] Mr. Kasian pleaded ss. 65(1) and 68 of the Family Relations Act in both his response to civil claim and his counterclaim; however, he conceded in his submissions that the Family Law Act, S.B.C. 2011, c. 25 applies because the minutes of settlement were executed in November 2013, after the Family Law Act came into force on March 18, 2013: see Family Law Act, s. 252; *Halliday v. Halliday*, 2015 BCCA 82 at para. 42.
- [107] Section 93 of the Family Law Act provides that a court may set aside a settlement agreement where it determines either the agreement was entered into unfairly or the agreement itself is significantly unfair:

Setting aside agreements respecting property division

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.

[108] The analysis under s. 93 of the Family Law Act is two-pronged. The first inquiry considers the formation of the agreement; the second inquiry looks at its effect: *Asselin v. Roy*, 2013 BCSC 1681 at para. 125.

[109] To set aside an agreement under the second stage, s. 93(5) of the Family Law Act, the party seeking it must demonstrate that the agreement is "significantly unfair". "Significant unfairness" is a high threshold: *Azanchi v. Mobrhan-Shafiee*, 2021 BCCA 55 at para. 51. As Justice Harris notes in *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42 in relation to the similar use of the term in s. 95(2) of the Family Law Act, establishing significant unfairness "will require something objectively unjust, unreasonable or unfair in some important or substantial sense".

Analysis

[110] Ms. Kasian's estate raises two objections to Mr. Kasian's claim for relief under s. 93 of the Family Law Act. First, it says that Mr. Kasian's claim must be brought in a family law proceeding, pursuant to R. 3-1(1) of the Supreme Court Family Rules. Second, it submits that the claim is time-barred by virtue of s. 198(3) of the Family Law Act because Mr. Kasian did not file his counterclaim until February 2021, six years after he says he first discovered the grounds for the unfairness. I will return to these objections, which I refer to as the jurisdictional issue and the limitation period issue, respectively, below.

- [111] Mr. Kasian focuses his submissions on substantive unfairness under s. 93(5) of the Family Law Act; he does not allege any procedural unfairness under s. 93(3) of the Family Law Act. He says that continuing to make the capital payments after Ms. Kasian's death is significantly unfair because it is not in keeping with the purpose of the capital payments, which was to provide financial security for Ms. Kasian during her life. He also claims unfairness on the basis of the reduction in the value of his interest in the Kasian Group as a result of writing off the Alberta Infrastructure WIP.
- [112] Mr. Kasian's submissions on significant unfairness are largely similar to those in relation to implied terms and mistakes. For the same reasons discussed above, I dismiss his argument that the capital payments were only for Ms. Kasian's financial security or the maintenance of her standard of living. The capital payments were for the purpose of achieving a division of the value of Mr. Kasian's shares in the Kasian Group. There is no unfairness in having the payments continue beyond her death.
- [113] I also do not accept there was unfairness arising from the evolution of the valuation of the Kasian Group. Valuing such an asset is much more of an art than a science; it is "a notoriously inexact exercise . Negotiations toward an agreement are generally based on predictions but there can be no certainty in those predictions, especially those based on markets": *C.O.A.C. v. A.D.C.*, 2018 BCSC 2324 at para. 36. Valuations are often products of the moment in time in which they are made.
- [114] The object of the negotiation was to find a way to divide an asset that was difficult to value and difficult to divide. The fact that the uncertain collectability of the Alberta Infrastructure worked out differently than Mr. Kasian and his management team predicted at the time is not, in these circumstances, unfair. If that were the case, it would not be possible for parties to achieve any measure of finality when dividing a capital asset where the asset's valuation depends on contingent future events. The goal of s. 93 of the Family Law Act is not to ensure continuing fairness. As Justice Lambert noted in *Gilpin v. Gilpin* (1990), 50 B.C.L.R. (2d) 251 (C.A.) at 259, "[c]ontinuing fairness is impossible to achieve. Fairness at a particular point in time is the legislative goal."
- [115] The fact that the Kasian Group may not be as valuable as it was thought to be is not enough to establish significant unfairness, particularly where the change in value is the product of the Kasian Group's own accounting decisions.
- [116] Mr. Kasian cites two cases where the court has found that the division of property was unfair following the death of one of the former spouses: *Fong v. Fong* (1983), 45 B.C.L.R. 222 (C.A.); and *Dowell Estate v. Dowell*, 2009 BCCA 175. Both cases concerned applications to vary an agreement under the Family Relations Act. As a result, they considered a factor, "the needs of each spouse to become or remain economically independent and self-sufficient", and a standard, "unfairness", which are different than in the case before me.

- [117] Fong concerned the ability of the husband, who was retired at the time, to pay out his former wife's estate for the deceased's share of the family property. The court addressed the husband's proven inability to pay out the deceased's share by giving him a life estate in the wife's share of the property. The remainder went to her estate. In this case, there is no issue as to Mr. Kasian's ability to pay Ms. Kasian's share of his interest in the Kasian Group. The capital payments were spread out over ten years and adjusted to Mr. Kasian's income for that very purpose. Moreover, the parties in Fong did not come to a separation agreement. The wife had passed away while the litigation was still ongoing and before the order for reapportionment had been made. Here Mr. Kasian and Ms. Kasian agreed to a means for dividing the corporate asset and adhered to it until Ms. Kasian passed away.
- [118] In Dowell Estate, the wife applied to vary a pre-nuptial agreement on the basis that it did not adequately provide for her needs. The trial judge granted her application and ordered the husband to transfer certain property to the wife, along with cash. No spousal support was ordered. The husband appealed. However, the wife passed away in between trial and the appeal. On appeal, Justice Mackenzie considered the impact of the wife's death on the decision to vary the agreement. He concluded that it was no longer necessary for the husband to transfer the full amount ordered by the trial judge, since the wife no longer had any needs. These unique circumstances are not present in the case at bar. Ms. Kasian did not pass away until two years after the parties had agreed to the minutes of settlement. The issue here is not the variation of a marriage agreement made 25 years prior; it is a separation agreement that included spousal support.
- [119] I conclude there is no basis on which to vary the minutes of settlement or rescind them based on statutory principles of fairness. Accordingly, I do not need to consider the jurisdictional issue or the limitation period issue raised by Ms. Kasian's estate.

Contractual Unfairness

- [120] In the alternative to his claim under s. 93(5) of the Family Law Act, Mr. Kasian seeks the variation of the minutes of settlement due to "contractual unfairness". He cites doctrines including unconscionability, undue influence, duress, and mistake as underlying the general principle "that contracts should not be enforced where to do so would undermine the purposes of enforcing contracts and where the reasons for non-enforcement outweigh the reasons for enforcement." Mr. Kasian also relies on clause 18(m) of the minutes of settlement, which he asserts expressly allows the court to vary the minutes of settlement on the basis of unfairness.

Unfairness Invoking a Contractual Doctrine

- [121] There is no overarching power to set aside contracts on the basis of unfairness. Rather, the facts must give rise a recognized doctrine of contract law such as unconscionability, undue influence, duress or mistake. I have already addressed mistake.

- [122] In addition to the reasons discussed above under s. 93(5) of the Family Law Act, which I have rejected, Mr. Kasian says that the minutes of settlement are unfair because he has to pay the capital payments with his after-tax dollars. He says that although the intention of the parties was to divide the corporate asset evenly, net of tax, the calculation of the payment failed to account for the source of funds that Mr. Kasian would use to make the capital payments. He asserts that the settlement reduced the notional sale of the business by capital gains tax, not by personal income tax. He argues that because he is paying with funds on which he has paid personal income tax, he has unfairly borne the tax burden of the asset.
- [123] I do not accept this submission. Parties to family law litigation routinely provide for one party to make an equalization payment to the other when dividing assets that are not liquid. It is not unusual to do so with some form of financing, by selling other assets, or with cash on hand. These sources are after tax dollars unless the parties find some way to create a tax favourable method. For example, Mr. Marzban testified that at one point during the negotiations he thought that the parties might want to consider a butterfly transaction which I understand to be a means of dividing family assets in a tax efficient manner. Nothing came of that.
- [124] The point is, if a specific actual tax treatment of a transaction is a part of the bargain, the parties must address it. In this case, the valuation simulated a notional sale and applied notional tax to it. The valuation based on a simulated sale was because the business was not, in fact, going to be sold. Mr. Kasian opted to take the shares and pay Ms. Kasian her share of their value. It was not fundamental to the agreement that the shares would be sold at some point in time and Mr. Kasian would pay the capital gains tax. Whether he ever pays tax on the asset he acquired or not, and whether that tax bears any relation to the after tax value that Ms. Kasian bargained for remains to be seen, as it did at the time he made the agreement.
- [125] Mr. Kasian also argues that the minutes of settlement were unfair because of the mistake in the value of the Kasian Group. I have found that Mr. Kasian has not proved mistake as a legal doctrine. I also find that there was no mistake of any nature. The parties used Mr. Blair's valuation as a basis on which to negotiate. It had a relatively broad range of values, any of which could be the actual value that the business could have notionally sold for.
- [126] Ms. Kasian's estate does not articulate how the alleged unfairness amounts to unconscionability, duress, undue influence or mistake or attempt to prove the facts necessary to invoke such doctrines, except mistake, which I have addressed. Instead, he asserts that the question is whether Mr. Kasian could have entered into the contract while rationally considering his self-interest. If he could not, the contract ought not be enforced because to enforce it runs counter to the object of contracts.

[127] I do not accept that the lens of "rational self-interest" can be used as a proxy for proving the facts necessary to invoke a recognized contractual doctrine on which a contract can be set aside. For example, in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, the majority considered the doctrine of unconscionability and explained that traditionally, inequality of bargaining power and improvidence were the hallmarks of unconscionability (at paras. 54 and 62). At para. 58-60, the majority described situations where equity will permit a court to set aside a contract. In each case, the position of the party making the improvident bargain was characterized by extreme vulnerability, lack of knowledge or abject desperation. According to the concurring opinion of Justice Brown (not on this point), the majority broadened the doctrine of unconscionability beyond its appropriate ambit (at para. 174). Too broad or not, in order to invoke unconscionability, the party doing so must show some feature, that combined with improvidence, demonstrates that the party was "vulnerable in the contracting process" (*Uber*, para. 60) and suffered loss or improvidence as a result. At para. 65, the majority confirmed that in saying this, it was not departing from the traditional approach which requires both an inequality of bargaining power and a resulting improvident bargain.

[128] Mr. Kasian's position on lack of rational self-interest only goes to the improvidence feature of unconscionability. He has not sought to prove nor has he proven inequality of bargaining power or vulnerability in the contracting process.

[129] The same lack of analysis and proof of doctrinal factual underpinnings applies to the other contractual doctrines that Mr. Kasian raises. Mr. Kasian has not proved any basis to set aside the minutes of settlement or any portion of them based on a recognized common law contractual doctrine.

Clause 18(m)

[130] Mr. Kasian invokes clause 18(m) of the minutes of settlement. I set out that clause again, for convenience:

18. Each of the parties acknowledges that he or she:

(m) understands that the provisions of these Minutes of Settlement, if considered by the Supreme Court to be substantially unfair due to the non-disclosure of a material fact, may be reviewed and varied by the Court despite the mutual agreement of the parties that these Minutes of Settlement are final and binding.

[131] Mr. Kasian has not established that Ms. Kasian did not disclose a material fact to him that engages this clause and renders the provisions of the minutes of settlement substantially unfair. Mr. Kasian knew that recovering the WIP was uncertain at the time Mr. Blair's valuation was prepared and at the time the parties used it in negotiating. According to the evidence of Mr. Jessa, the reason for the eventual write off was not known by Mr. Kasian until 2018. While the precise reason for the write off became known in 2015, the general uncertainty and the numerous problems with collection had been known by Mr. Kasian all

along.

[132] There is no evidence that Ms. Kasian knew of the facts that relate to the Alberta Infrastructure WIP aspect of the valuation at the time of the negotiations. There is no evidence that she was ever made aware of the issue that resulted in the write off and which did not come to Mr. Kasian's knowledge until 2018.

[133] Accordingly, there was no duty on Ms. Kasian to make disclosure and no non-disclosure by her. If circumstances that unpredictable facts turn out differently than predicted can be considered non-disclosure, there was no harm done to Mr. Kasian by the non-disclosure because he was aware of the uncertainty. Clause 18(m) is not a basis to set aside the minutes of settlement or any of its provisions.

Conclusion on Contractual Fairness

[134] There is no basis on which to set the contract aside based on unfairness.

Remedy

[135] Ms. Kasian's estate seeks an order that Mr. Kasian be required to make the missed capital payments plus interest at prime and the future capital payments.

[136] The evidence establishes that Mr. Kasian did not make the May 1, 2016 through May 1, 2021 capital payments, totalling \$900,000. Ms. Kasian shall have judgment in that amount.

[137] Clause 2 of the minutes of settlement provide that interest on the outstanding capital payments shall be paid at prime. Clause 4 provides that if Mr. Kasian makes payments late, he will pay additional interest of 3% on the late payment or payments.

[138] Ms. Kasian's estate has adduced evidence that the outstanding prime rate interest to May 1, 2021 is \$245,193 and the penalty interest to May 1, 2021 is \$102,224. Ms. Kasian's estate shall have judgment in those amounts.

[139] Ms. Kasian's estate has also provided the per diem prime interest (\$30.31) and the per diem penalty interest (\$94.19). Ms. Kasian's estate shall have the per diem amounts of both added to her judgment from July 1, 2021 to the date of these reasons.

[140] With regard to the future capital payments, Ms. Kasian's estate seeks damages equivalent to the present value of the future payments using the 2% discount rate prescribed by the Chief Justice pursuant to s.56(2)(b) of the Law and Equity Act, R.S.B.C. 1996, c.253. Ms. Kasian's estate has provided calculations demonstrating that the present value of the May 1, 2022, May 1, 2023 and May 1, 2024 capital payments totals \$434,252.

- [141] In *Six Factor Professional Services Ltd. v. Aquilini Investment Group Limited Partnership*, 2020 BCSC 127 at para. 13, the court held that a contract to pay by instalment does not give rise to a debt with regard to instalments payable in the future, but if the party to pay the instalments has committed a breach of instalments such that the other party is entitled to terminate the contract, an award of damages may be made for the loss of the future payment (citing *Chitty On Contracts*, 32nd Ed. Vol.1 p.1762).
- [142] In this case, the only defence to the breach of contract claim was the claim that the contract should be interpreted such that the capital payments ceased on death or such a term implied. I have not accepted either proposition and given that his counterclaim to have the contract varied or rescinded has failed, Mr. Kasian's declaration that he would not make any further capital payments is a fundamental breach of that provision of the contract entitling Ms. Kasian to treat it as at an end and to be compensated in damages.
- [143] Ms. Kasian's estate shall have judgment in the amount of \$434,252 as the present value of the May 1, 2022, May 1, 2023 and May 1, 2024 capital payments.
- [144] Subject to matters of which I am not aware, I award Ms. Kasian's estate costs at Scale B. If the parties wish to address costs, within 30 days of these reasons the party who seeks a costs order different from Mr. Kasian paying Ms. Kasian's estate costs at Scale B shall deliver written submissions to me and arrange for a date appear to make oral submissions. The responding party shall deliver written reply submissions within 45 days of these reasons.

Conclusion

- [145] I award Ms. Kasian's estate damages in the amount of \$900,000 for past payments not made, interest (prime and penalty interest) of \$250,367 to July 11, 2021 plus prime interest of \$30.21 per diem from July 11, 2021 to the date of these reasons, penalty interest of \$94.19 per diem to the date of these reasons and damages of \$434,252 as the present value of the future value capital payments provided for in the minutes of settlement.
- [146] The counterclaim is dismissed.
- [147] Unless the parties make submissions on costs in the manner provided for in these reasons, I award Ms. Kasian's estate costs of its claim and the counterclaim at Scale B.

"Matthews J."

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