
CANADA / JUDGMENT

Keddy-Waldie v. Lawson

2015 BCSC 853

COURT

Supreme Court of British Columbia

DECIDED

21 May 2015

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2015 BCSC 853 Keddy-Waldie v. Lawson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Keddy-Waldie v. Lawson,

2015 BCSC 853

Date: 20150521

Docket: 1344042

Registry: Prince George

Between:

Sheila Keddy-Waldie

Plaintiff

And

Ian Lawson

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page on May 27, 2015.

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

Counsel for the Plaintiff:

H.L. Gansner

Counsel for the Defendant:

L.J. Hamilton

Place and Date of Trial:

Prince George, B.C.

November 3 - 7, 2014 and November 27, 2014

Place and Date of Judgment:

Prince George, B.C.

May 21, 2015

Introduction

- [1] The plaintiff seeks damages for breach of contract and breach of fiduciary duty, as well as special damages from the defendant, her former lawyer.
- [2] The defendant is opposed to this relief.

Background

- [3] On September 15, 2010, the plaintiff met with the defendant seeking assistance on her family file. The plaintiff had been in a long-term common-law relationship with J.H. There were no children of this relationship; however, the plaintiff had two children from a previous relationship.
- [4] The plaintiff was seeking spousal support from J.H. as well as a division of the matrimonial property. The plaintiff provided the defendant with a draft separation agreement during the September 15, 2010 initial consultation, dated June 1, 2010 (the "Separation Agreement"). The Separation Agreement stated that the plaintiff and J.H. were married on July 1, 2000 and separated on January 31, 2010.
- [5] The defendant sent a letter to J.H. on September 15, 2010. Between September 15, 2010 and February 2011, the defendant corresponded with J.H. in an effort to negotiate a settlement on behalf of the plaintiff for spousal support and a division of the matrimonial property.
- [6] In late February 2011, it came to the attention of the defendant that the one year limitation period to commence an action for spousal support pursuant to the Family Relations Act, R.S.B.C. 1996 c. 128, as repealed by the Family Law Act, S.B.C. 2011, c. 25, s. 259 (the "FRA") had elapsed.
- [7] The defendant drafted a notice of application in the Provincial Court of British Columbia for spousal support which was filed on March 7, 2011. The hearing was held on December 19, 2011. On December 21, 2011, the Honourable Judge J.C. Birnie dismissed the plaintiff's application.

- [8] The defendant filed a notice of appeal in the Supreme Court of British Columbia on January 24, 2012. The appeal was heard on June 5, 2012. On June 15, 2012, the Honourable Madam Justice M. Koenigsberg dismissed the appeal.
- [9] J.H. filed a notice of family claim in the Supreme Court of British Columbia on March 7, 2012 seeking reapportionment of family assets. On April 19, 2012, the defendant filed a response to family claim on behalf of the plaintiff.
- [10] On July 11, 2012, the defendant filed a notice of intention to withdrawal as lawyer in the Supreme Court of British Columbia.
- [11] The plaintiff at no time provided a monetary retainer or made any payments to the defendant for his services. A written retainer agreement was never executed between the plaintiff and the defendant.
- [12] On September 23, 2014, the plaintiff and J.H. filed a consent order which resolved the issues between them pursuant to J.H.'s notice of family claim.

The Issues

- [13] This is a solicitor's negligence case.
- [14] The issues are:
- (i) whether or not the defendant breached his contract to provide legal services to the plaintiff by failing to commence a court action for spousal maintenance within the required one year time limitation;
 - (ii) whether the defendant breached his fiduciary duty to the plaintiff;
 - (iii) if the defendant breached his fiduciary duty or his contractual duties to the plaintiff what are the damages and how should those damages be assessed; and
 - (iv) did the plaintiff cause or contribute to any of those damages?

The Evidence

Sandra Bowler

- [15] Sandra Bowler has known the plaintiff for approximately 24 years. She is employed as a bookkeeper. She met J.H. through the plaintiff. She testified that he always had work either in the logging or mining industry.
- [16] Ms. Bowler testified that the plaintiff also worked at many different jobs.
- [17] Ms. Bowler testified that the plaintiff's children considered J.H. their "dad".
- [18] Ms. Bowler prepared the plaintiff's 2013 income tax return. She testified that the plaintiff purchased a truck in order to perform her employment obligations with Canada Post.

- [19] On cross-examination, Ms. Bowler confirmed that the employment income declared on behalf of the plaintiff for 2013 was from June 1 to December 31, 2013.
- [20] Ms. Bowler testified that she has prepared income tax returns since 2000 and has done the plaintiff's tax returns for a few years.
- [21] Ms. Bowler was aware that J.H. was involved in another relationship in the summer of 2009. Ms. Bowler was aware that the plaintiff and J.H. had a lot of debt.

Sheldon Waldie

- [22] Sheldon Waldie is the brother of the plaintiff. He is an equipment operator and has known J.H. since 1987.
- [23] He testified that the plaintiff and J.H. had a relationship like a regular family. He testified that the plaintiff's youngest child called J.H. "dad" early on in the plaintiff's relationship with him though it took longer for the older child to do this.
- [24] He testified that he was surprised to learn that J.H. had an affair in 2009. He testified that he helped the plaintiff find a new residence near the end of January 2010.
- [25] On cross-examination, Mr. Waldie testified that he did not know what J.H.'s income was. He testified that J.H. would let the plaintiff work outside the home; however, he would not let her work at jobs where she was out of town. He did agree though that when the plaintiff's children were older she tried a number of times to work at camp jobs.

The Plaintiff

- [26] The plaintiff testified that she met with the defendant on September 15, 2010. The plaintiff went to that interview with a binder of documents which included all of her bills and assets as well as the Separation Agreement. She testified that the meeting with the defendant lasted about an hour.
- [27] The plaintiff confirmed that she drafted the Separation Agreement and it stated that she was married to J.H.
- [28] The plaintiff testified that she told the defendant that J.H. was going to use the one year limitation period with regard to spousal support against her. She said the defendant told her that, as long as they were in negotiations, the limitation period did not apply.
- [29] The plaintiff testified that in the meeting she told the defendant that she was in a common-law relationship with J.H. and that he made anywhere from \$85,000 and up per year.
- [30] The defendant's notes made during the September 15, 2010 meeting indicate it was the plaintiff's view that J.H. made as much as \$100,000. She testified this figure was based on J.H.'s previous work history.

- [31] The plaintiff said that it was hard for her to remember everything that was discussed in that meeting because it was over five years ago.
- [32] The plaintiff testified that she placed her claim in the hands of the defendant and, in her view, she had retained him. The plaintiff said that there was very little communication between her and the defendant. She testified that they did not have J.H.'s income tax returns at the time of the meeting.
- [33] The plaintiff testified that, on March 22, 2011, the defendant forwarded to her a letter from Hillside Law who was representing J.H. That letter was dated March 15, 2011 and contained a property settlement proposal as well as notification that the plaintiff's claim for spousal support was statute-barred.
- [34] The plaintiff testified that the defendant told her not to worry about the spousal support as he was working on it. The plaintiff testified that, had the defendant discussed the property settlement with her, she would have considered accepting that offer.
- [35] The plaintiff testified that she applied for an equalization of the Canada Pension credits on her own. She also testified that she arranged for a bailiff to pick up a GMC pickup truck that was registered in her name but in the possession of J.H.
- [36] The plaintiff testified that, when she and J.H. separated, she was earning approximately \$700 to \$800 net every two weeks. At that time, she was working at All West Glass Ltd. She also took employment with Statistics Canada. She testified that she was exhausted from working two jobs.
- [37] She also testified that she suffers from a medical condition called hemochromatosis which is a condition caused by an excess of iron in the blood. This condition requires regular hospital treatments.
- [38] The plaintiff testified that, as part of the property settlement with J.H., he agreed not to pursue her for the costs associated with the appeal to the Supreme Court.
- [39] The plaintiff testified that her income for the years 2010 to 2013 was as follows:
- i) 2010 - \$26,100.30
 - ii) 2011 - \$49,150.82
 - iii) 2012 - \$32,865.20 (this consisted of \$14,405.20 employment income and \$18,430 in employment insurance benefits)
 - iv) 2013 - \$7396.47 (this consisted of \$3395 in employment insurance benefits, \$136.94 in other income, and \$3864.53 in net business income)
- [40] The plaintiff testified that in 2013 she was successful in securing a tender from Canada Post to deliver mail in Granisle, British Columbia. For that contract, she required a newer model vehicle.

- [41] The plaintiff testified that she began dating J.H. in 1991. The plaintiff testified that the separation from J.H. caused her considerable stress given that he had left her for a younger woman.
- [42] The plaintiff also testified that her oldest son was a troubled child. The plaintiff and J.H. had disagreements with regard to the plaintiff's older son. This was a source of conflict between them.
- [43] The plaintiff testified that she was employed at when she was with J.H. She said that it was the preference of J.H. that she had an income but he also wanted her to stay at home and look after the house.
- [44] The plaintiff testified that she requested the income tax information from J.H. Exhibit 2 in this proceeding includes the income tax returns for J.H. for the years 2005 to 2013. His total income for those years can be summarized as follows:
- i) 2005 - \$92,611 (total earnings-\$86,666)
 - ii) 2006 - \$82,062 (total earnings-\$72,880)
 - iii) 2007 - \$89,432 (total earnings-\$87,843)
 - iv) 2008 - \$92,662 (total earnings-\$88,915)
 - v) 2009 - \$93,460 (total earnings-\$90,669)
 - vi) 2010 - \$95,242 (total earnings-\$92,770)
 - vii) 2011 - \$88,241 (total earnings-\$89,050)
 - viii) 2012 - \$116,092 (total earnings-\$106,620)
 - ix) 2013 - \$101,971 (total earnings-\$102,558)
- [45] On cross-examination, the plaintiff agreed that, when she first met J.H., she was collecting social assistance. The plaintiff also agreed that she never sought child support from her children's biological father. She also agreed that she never sought spousal support from her previous husband. She stated that she wanted to better herself and she achieved her high school diploma as well as some computer training while with J.H.
- [46] The plaintiff also agreed that, for the income tax years 1990 to 2000, she filed as a single person.
- [47] The plaintiff was unable to say what the income of J.H. was when they first met. She thought that J.H., from the time they met until 2005, would have been making between \$40,000 to \$60,000 a year.

- [48] The plaintiff agreed that she settled all property issues with J.H. The plaintiff also agreed that Exhibit 3 in this proceeding was a fair and accurate description of the debts and assets of the plaintiff and J.H. at the time of their separation.
- [49] Exhibit 3 shows that the total debts of the plaintiff and J.H. at the time of separation were \$248,294.71. Their total assets were valued at \$187,900. The plaintiff agreed that she has not made any payments on any portion of the joint debts. The plaintiff said that she has no money to pay off the debts despite the fact that she agreed to a consent order to be responsible for a portion of the debts.
- [50] The plaintiff agreed that all of the various offers and counter offers from J.H. included her paying a portion of the matrimonial debts.
- [51] On cross-examination, the plaintiff agreed that in 2011 her income included work that she did for Rhyason Contracting. She agreed that in 2012 she worked for that company for approximately 2 1/2 months and made \$14,436.20. She agreed that if she had stayed with the company she could have earned \$70,000 per year.
- [52] The plaintiff agreed that she moved to Granisle in August 2012 to pursue a new romantic relationship. This was prior to her obtaining employment with Canada Post.
- [53] At the end of the plaintiff's case, her lawyer, Mr. Gansner, read in a number of passages from the examination for discovery of the defendant.

The Defendant

- [54] The defendant is a lawyer who was called to the bar in British Columbia in 1985. He confirmed that he met the plaintiff for the first time on September 15, 2010. In his notes of that meeting, he recorded that the plaintiff was 46 years of age and had been in a 19 year common-law relationship with J.H. He also noted that the plaintiff told him that she made approximately \$22,000 per year and that J.H. made between \$85,000 and \$100,000 a year.
- [55] The defendant also made note of the various debts of the plaintiff. He further testified that he was pretty sure that he put an "X" through the portion of the Separation Agreement where it said that the plaintiff and J.H. were married.
- [56] The defendant testified that he could not say one way or another if he told the plaintiff to budget \$200 a month for his legal services. He did say however that this did not make any sense to him. He said that his hourly rate at the time was approximately \$250 and that the plaintiff was a private client not a legal aid client.
- [57] The defendant estimated that a one day hearing with regard to spousal support in provincial court would have cost approximately \$5000.
- [58] The defendant was adamant that the plaintiff never told him during the initial meeting that J.H. intended to rely on the one year limitation as a defence to the spousal support action.

[59] The defendant testified that Exhibit 4, which is a memo from his legal assistant dated February 24, 2011, was the first time that he realized that the limitation period had elapsed. He testified that he did not have any instructions from the plaintiff to proceed to court. He did, however, testify that the missed limitation period "came on my watch".

[60] The defendant testified that, during the initial interview with the plaintiff on September 15, 2010, he drafted a letter to J.H. The purpose of the letter was to engage in negotiations with J.H. The following is the last sentence from that letter:

If I don't hear from you within three weeks of the date of this letter, I will assume that I must secure spousal support for my client through litigation.

[61] The defendant testified that one of the difficulties in negotiating spousal support in this case was the level of debt of the plaintiff and J.H.

[62] The defendant testified that he believed he had an estoppel argument against the limitation defence. It is clear from his evidence that, despite the Provincial Court and the Supreme Court rulings, he still to this day believes that argument should have been successful.

[63] The defendant estimates that he spent six to seven hours at most on the plaintiff's file.

[64] On October 14, 2010, the defendant received a letter from J.H. which included a letter from Copper Mountain Mining Corporation ("Copper Mountain"), which was the employer of J.H. The letter provided that J.H. received a base annual salary of \$63,440 from Copper Mountain. J.H. proposed that he pay spousal support in the amount of \$600 per month for a period of five years and that the plaintiff sign the GMC pickup truck over to J.H. and he would assume responsibility for the loan on that vehicle. Further, he proposed J.H. and the plaintiff would split the approximately \$24,000 in joint debt and the matrimonial home would be sold and any proceeds would be split between the parties.

[65] In response to the October 14, 2010 letter, the defendant drafted a counter proposal which offered \$1000 per month in spousal support for a period of five years as well as the plaintiff assuming a proportionate share of the joint debt which amounted to 38% of that debt.

[66] The counter proposal was not sent as the plaintiff required some time to consider her position.

[67] On March 3, 2011, the defendant received instructions from the plaintiff and sent a revised counter proposal to J.H. This offer proposed a lump sum spousal support payment for the year 2010 in the amount of \$6000 as well as \$800 per month in spousal support commencing on January 1, 2011 and terminating in ten years. In addition, J.H. would assume all of the family debt. The matrimonial home would be sold and the net sales proceeds would be divided equally between J.H. and the defendant.

- [68] The defendant testified that, when he took the Separation Agreement from the plaintiff, he thought it was an accurate document. He disagreed that the plaintiff told him about the one year limitation when they met on September 15, 2010. He agreed that the plaintiff made it clear to him that she was in a common-law relationship.
- [69] On cross-examination, the defendant did not agree that he should have filed an application for spousal support shortly after his initial meeting with the plaintiff. The defendant testified that he felt that it would be better to take the negotiations as far as they could be taken.
- [70] On cross-examination, the defendant confirmed that he thought the spousal support claims were improperly dismissed.

Breach of Contract/Duty of Care

- [71] The defendant concedes that he owed a duty of care to the plaintiff by virtue of his solicitor-client relationship with the plaintiff. However, the defendant argues that he was only retained to negotiate a resolution of the plaintiff's spousal support and property issues. The defendant also argues that he was never instructed by the plaintiff to commence an action against J.H. for spousal support until after the limitation period had expired.
- [72] The defendant argues that there is no air of reality to the plaintiff's evidence that she informed the defendant in their first meeting of September 15, 2010 that J.H. was going to use the one year limitation against her.
- [73] I agree with the defendant that the plaintiff's evidence regarding the one year limitation does not have the ring of truth to it. First, it makes no sense whatsoever that J.H. would tell the plaintiff of his strategy to use the one year limitation prior to that limitation period expiring. Also, the plaintiff did not specifically instruct the defendant to commence a court action until after the limitation period had expired. If the plaintiff was alive to this issue as early as September 2010, in my view, she would have been more concerned about the limitation period.
- [74] The defendant also argues that there is some evidence that the plaintiff separated from J.H. before September 2009. I do not accept this argument. This argument is based on the fact that, during the Provincial Court hearing in front of Judge Birnie, J.H.'s lawyer made a submission to that effect. There is no evidence before this Court to that effect.
- [75] The defendant also argues that the Separation Agreement prepared by the plaintiff was misleading and confusing because it suggested that the plaintiff and J.H. were married.
- [76] I do not accept this argument because the defendant's evidence made it clear that he knew the plaintiff and J.H. were in a common-law relationship as of the first meeting of September 15, 2010 that he had with the plaintiff. Also, the defendant testified that he is likely the person that put an "X" through that portion of the Separation Agreement that stated that the plaintiff and J.H. were married.

[77] In *Newton v. Marzban*, 2008 BCSC 328 at paras. 605-606, in dealing with the law with respect to the standard of care in a solicitor's negligence cases, the court stated the following:

[605] In *Millican v. Tiffin Holdings Ltd.* (1964), 49 D.L.R. (2d) 216 at 219 (Alta. T.D.) [Millican], aff'd [1967] S.C.R. 183, Riley J. provided this often-cited list of a lawyer's obligations:

- (1) To be skillful and careful.
- (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
- (3) To protect the interests of his client.
- (4) To carry out his instructions by all proper means.
- (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
- (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

[606] Halfyard J. in *Van Duzen v. Lecovin*, 2004 BCSC 1333 at para. 36 set out the standard of care applicable to a reasonably competent family law practitioner:

Would a lawyer who possessed reasonable knowledge of family law, and who had reasonable ability to use that knowledge in the practice of family law litigation, have done what the defendant omitted to do, or have avoided doing what the defendant did do?

[78] The evidence relating to the scope of the defendant's retainer is lacking at best. The defendant did not provide a written retainer agreement for the plaintiff nor did he specifically explain the costs associated with his services.

[79] While I accept the defendant's argument that he was retained to achieve a resolution of the spousal support and property issues for the plaintiff, I do not accept that he was only retained to "negotiate" a settlement. I say that because the defendant's letters of September 15, 2010, November 26, 2010, and March 3, 2011 to J.H. all refer to the plaintiff commencing litigation if a resolution is not achieved.

[80] The defendant's argument that the plaintiff did not have the funds to pay for a hearing and that she would not likely have proceeded to court may have some applicability when assessing damages, however, in my view, this does not exonerate the defendant from the fact that he failed to protect the interests of his client.

[81] The defendant is an experienced family lawyer who did not take the appropriate precautions to diarize the one year limitation. Once the limitation period had expired, the plaintiff had no leverage to bargain for spousal support and no ability to go to court if a settlement could not be reached.

- [82] In accepting the plaintiff as a client, even if the retainer was only to negotiate a settlement, the defendant cannot stand idly by as the plaintiff's right to go to court expires.
- [83] At the very least, the defendant had a duty to warn the plaintiff of the limitation date which any competent family lawyer would have been aware of. The defendant did not take the simple steps of filing an application for spousal support or instructing the plaintiff to do this.
- [84] The defendant breached his duty of care to protect his client's interests and by doing so breached his contract to provide appropriate necessary legal services to the plaintiff and protect her from losing her claim for spousal support.

Breach of Fiduciary Duty

- [85] The plaintiff also argues that the defendant breached his fiduciary duty to her. In particular the plaintiff argues that the advice given by the defendant and the applications to apply to the Provincial Court and then the Supreme Court after the limitation period had expired were futile and not made in her interest.
- [86] The plaintiff also argues that the defendant's advice to apply for spousal support in court delayed the ultimate settlement of her property and debt issues. The plaintiff argues that the defendant's advice was made to conceal his own error.
- [87] In *C.A. v. Critchley* (1998), 60 B.C.L.R. (3d) 92 at 116 (C.A.), the court said the following with regard to recovery based upon fiduciary duties:

I conclude that it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to other usual requirements such as vulnerability and the exercise of a discretion, the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage. This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. In effect, this redirects fiduciary law back towards where it was before this experiment began but with much broader remedies, such as damages, when fiduciary duties are actually breached.

- [88] In my view, the defendant was an honest and careful witness. As I have already said in these reasons, he clearly believed that the limitation argument should not have succeeded. I do not find that any of the defendant's advice or actions in executing his duties as the plaintiff's lawyer were given or performed to obtain a direct or indirect personal advantage.
- [89] The plaintiff's claim for breach of fiduciary duty is dismissed.

Damages

- [90] Both parties agree that a "trial within a trial" is required in assessing damages in this case.

[91] This approach was approved of in *Fisher v. Knibbe*, 1992 ABCA 121 at para. 12, [1992] 125 A.R. 219 (C.A.), where the court said the following:

After conducting the "trial within a trial" to determine what damages, if any, a negligent solicitor is liable for missing a limitation period, three results are possible. First, the trial judge could find that had the case gone to trial the plaintiff would have been successful and in such case 100% of the lost damages would be awarded against the solicitor. Second, the trial judge could find that the plaintiff would not have been successful therefore only nominal damages may be awarded against the solicitor. Finally, where time has passed to such an extent that a "trial within a trial" would be impossible, then the court must to the best of its ability calculate the value of the opportunity lost to the plaintiff and award damages against the solicitor on that basis.

[92] The plaintiff is currently 51 years of age, having been born on January 23, 1964. She was 46 years of age at the date of separation from J.H.

[93] J.H. is currently 50 years of age, having been born on March 27, 1965. He was 45 years of age at the date of separation from the plaintiff.

[94] The plaintiff argues that her relationship with J.H. was a long-term common-law relationship of some 19 years. She argues that she stayed at home and cared for her children and maintained the family residence while J.H. worked primarily in camp jobs. She argues that J.H. made considerable more money than her during the relationship and has continued to do so since separation.

[95] The plaintiff argues that but for the error of the defendant she would have been successful in a spousal support claim for an indefinite period of time. The plaintiff argues that she should be awarded damages equivalent to a lump sum spousal support award.

[96] The plaintiff has provided a number of calculations for lump sum spousal support based on the petitioner having an income of \$20,000 and J.H. having an income of \$91,851. These calculations assume three different spousal support durations. One of 13 years and six months, another of 20 years, and an indefinite period of spousal support payments.

[97] Based on the above noted calculations, the midpoint range for lump sum spousal support is between \$208,380 and \$577,128.

[98] The plaintiff is seeking \$500,000 in damages for breach of contract and breach of fiduciary duty. The plaintiff is also seeking damages for stress and emotional injuries.

[99] The defendant argues that because the plaintiff is claiming for loss of cause of action the appropriate method of assessment of damages is to determine what the court would have awarded at the time. In this case, the defendant argues that the appropriate date would be December 19, 2011 which is the date that the spousal support application was first heard.

[100] The defendant argues that, in considering the plaintiff's claim for spousal support, the length of cohabitation period is important. The defendant argues that, while the plaintiff and J.H. may have been in a dating relationship for a number of years, they were not in a

"marriage-like relationship" until 2000. The defendant says this because the plaintiff on her tax returns admitted that she filed as a single person until approximately 2000. Also, the Separation Agreement that the plaintiff drafted and brought to the defendant had a marriage date of July 1, 2000. Finally, the plaintiff and J.H. purchased their first home together in 2000.

- [101] The defendant argues that J.H. had begun new employment post-separation in June 2010 and his base salary at that time was \$63,440 per year. The defendant acknowledges that post-separation J.H. has made between \$90,000 and \$100,000. However, he also points to the fact that the income of J.H. is subject to such contingencies as shut downs in the mining industry.
- [102] The defendant points to the fact that the plaintiff earned \$26,100 in 2010 and \$49,150 in 2011. The defendant argues that, based on the plaintiff's income while she was working at Rhyason Contracting, in 2011 she could have made approximately \$70,000 per year had she stayed there.
- [103] The plaintiff currently has a five-year contract with Canada Post, earning approximately \$40,000 per year. On the plaintiff's evidence, this job has not been as financially rewarding as she thought it would be.
- [104] The defendant argues that I should take into account the fact that J.H. was not called as a witness and the court only has the plaintiff's evidence with regard to their relationship.
- [105] The defendant also argues that the plaintiff, throughout her relationship with J.H., was responsible for the support of her two children and that the plaintiff has not been disadvantaged as a result of her relationship with J.H. During the relationship, the plaintiff completed her GED and took some computer courses.
- [106] The defendant argues that the plaintiff and J.H. had debts that exceeded their assets at the time of separation. The defendant argues that J.H. has taken on the responsibility of the majority of the family debt.
- [107] The defendant argues that, had the plaintiff pursued a claim for spousal support, she would not have been able to establish entitlement on a compensatory basis. The defendant argues that at best the plaintiff may have been able to establish entitlement on a modest needs basis.
- [108] The defendant argues that if the court was to accept that the plaintiff was entitled to a needs-based award for spousal support the court should use the plaintiff's and J.H.'s incomes from 2011. In addition, the court should take into account the considerable amount of debt that J.H. assumed and was paying.

- [109] The defendant argues that the plaintiff moved to Granisle to pursue a new relationship. The plaintiff testified that the person she was living with in Granisle was more like a roommate. I do not accept the plaintiff's explanation for two reasons. First, the plaintiff left a lucrative job at Rhyason Contracting to move to Granisle where she initially did not have employment. Second, the plaintiff referred to this new person as her spouse in her Canada Post application.
- [110] The defendant argues that damages are meant to place the plaintiff in the same position she would have been in had the error not occurred. The defendant submits that the plaintiff would not have received a lump sum spousal support award had she been able to move forward with her claim.
- [111] The defendant argues that the plaintiff's claim should not be larger just because it cannot be made against J.H. In that regard the defendant argues that the various offers to settle from the plaintiff to J.H. should be considered.
- [112] The defendant states that any award to the plaintiff should be reduced by the amount of legal fees that would have been required to take the matter to a hearing. The evidence of the defendant was this would be approximately \$5000.
- [113] Finally, the defendant argues that the plaintiff's claims for damages for mental distress should be dismissed. The defendant argues that this claim was not made out in the pleadings or in the evidence. The defendant says that the plaintiff had a number of stressors in her life including the fact that her relationship with J.H. disintegrated. Also there is no evidence of any psychological injury or evidence establishing a causal nexus between the actions of the defendant and the plaintiff's psychological injury.

Decision on Damages

- [114] In coming to a decision on damages, the length of the relationship of the plaintiff and J.H. is important. I do not accept the plaintiff's evidence that she was in a "marriage-like relationship" with J.H. for 19 years. Taking into account all of the evidence, I find that she was in a marriage-like relationship for 9 1/2 years. I say this because she claimed as a single person on her income tax returns up until the year 2000 and she stated in the Separation Agreement that she married J.H. on July 1, 2000. I also find that the plaintiff and J.H. separated in January 2010.
- [115] In the case of the plaintiff and J.H., any action for spousal support would have been brought pursuant to the FRA. Section 89 of the FRA reads as follows:

89 (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;

- (b) an express or implied agreement between the spouses that one has a responsibility to support and maintain the other;
 - (c) the custodial obligations respecting a child;
 - (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
 - (e) economic circumstances.
- (2) Except as provided in subsection (1), a spouse or former spouse is required to be self-sufficient in relation to the other spouse or former spouse.

[116] There are three models for entitlement to spousal support. Those being compensatory, non-compensatory or needs-based, and contractual. In this case, there is no evidence of any contract and as such I will only consider the compensatory and needs-based models.

[117] In *Lee v. Lee*, 2014 BCCA 383 at paras. 25-26, in discussing the law with regard to entitlement for spousal support, the court said the following:

[25] The judge noted that the Supreme Court of Canada has recognized three conceptual bases, or "models", for entitlement to spousal support, namely compensatory, needs-based, and contractual. (Since the parties did not enter into any agreement in this case, I need not discuss the contractual model.) He cited a long passage from *Moge v. Moge*[], [1993] 3 S.C.R. 813 at 864-65] which ended with the following observations:

The equitable sharing of the economic consequences of marriage or marriage breakdown, however, is not a general tool of redistribution which is activated by the mere fact of marriage. Nor ought it to be. It is now uncontentious in our law and accepted by both the majority and the minority in *Messier v. Delage*, supra, at pp. 416-17, that marriage per se does not automatically entitle a spouse to support. Presumably, there will be the occasional marriage where both spouses maximize their earning potential by working outside the home, pursuing economic and educational opportunities in a similar manner, dividing up the domestic labor identically, and either making no economic sacrifices for the other or, more likely, making them equally. In such a utopian scenario there might be no apparent call for compensation. The spouses are able to make a clean break and continue on with their respective lives. Such cases would appear to be rare. In most marriages in which both partners make economic sacrifices and share domestic responsibilities, or where one spouse has suffered economic losses in order to enable the other spouse to further a career, their role should be considered in the spousal support order.

[26] The compensatory model had, he observed, been "expanded" by the Supreme Court in *Bracklow* [v. *Bracklow*, [1999] 1 S.C.R. 420], to which I will return below. He also noted the description of this approach given by the Court in *Barton v. Ophus*, 2009 BCSC 858 [at para. 51]:

The non-compensatory approach is based upon the theory that primary responsibility falls on the former spouse, rather than the government, to provide for his or her former partner. This approach views marriage as a relationship of interdependence and one of permanence and challenges the notion that spouses can clearly or easily disentangle themselves from the relationship. In certain instances where self-sufficiency is not possible, or compensation is not applicable, "a support obligation may nonetheless flow from the marriage relationship itself": Bracklow at para. 37[.]

[Emphasis added in Lee.]

- [118] The compensatory model for entitlement to spousal support in my view does not apply to this case. Both the plaintiff and J.H. worked outside of the home throughout their relationship.
- [119] The plaintiff and J.H. did not have any children together. In my view, the evidence is conflicting as to whether or not J.H. assumed a parental role with the plaintiff's children. While there was evidence that the plaintiff's youngest child called J.H. "dad" there was also evidence that there was conflict in the relationship because of the plaintiff's older child. I do not have any evidence from J.H. as to what role he assumed with regard to the plaintiff's children. Based on the evidence, I do not find that J.H. assumed a parental role over the children.
- [120] The evidence is that the plaintiff was required to support her children as well as work outside of the home and contribute to the household expenses. Given their assets and liabilities, both the plaintiff and J.H. were clearly living paycheck to paycheck.
- [121] The plaintiff upgraded her education and vocational skills during her relationship with J.H. Neither J.H. nor the plaintiff gained any particular advantage or disadvantage with regard to their careers as a result of their relationship.
- [122] The plaintiff did not contribute financially or through her own services any more than J.H. to the accumulation of assets.
- [123] The plaintiff was not economically disadvantaged by her relationship with J.H. and J.H. did not achieve any particular economic advantage as a result of his relationship with the plaintiff.
- [124] However, the plaintiff would have been entitled to spousal support based on need. The plaintiff, at the time of her separation from J.H., was not economically self-sufficient.
- [125] In coming to a decision on what an appropriate amount of spousal support would have been but for the error on the part of the defendant in failing to protect the plaintiff's right to spousal support, the court is in a unique position. In my view, not only can I consider the duration of the relationship, the respective incomes of the plaintiff and J.H., and the matrimonial assets but I can also consider the various offers made by J.H. and the plaintiff as well as the likelihood that the plaintiff and J.H. would have settled the spousal support

issue if the limitation period had not elapsed.

- [126] If the limitation period had not elapsed and an application for spousal support had been filed to preserve the limitation period, in my view, the plaintiff and J.H. would have settled this matter in early 2011 or had a court hearing before the end of 2011. In either case, the incomes that would have been considered would not be those from 2011 as suggested by the defendant but their incomes from 2010.
- [127] In 2010, the defendant's line 150 income was \$95,242 and the plaintiff's line 150 income was \$26,100. Taking into account a 9 1/2 year relationship, the Spousal Support Advisory Guidelines suggest a low range of \$821 per month, a medium-range of \$950 per month, and a high-end range of \$1095 per month. The duration would be 4.75 to 9.5 years.
- [128] Neither the plaintiff nor J.H. was in a financial position for extended litigation. Both sides were willing to negotiate. The March 3, 2011 offer from the plaintiff was for a lump sum payment of \$6000 for the year 2010 as well as \$800 per month for a period of 10 years. Based on an e-mail the plaintiff sent to the defendant on February 24, 2011, it is also clear that the plaintiff would have accepted \$600 per month.
- [129] The issue from J.H.'s perspective in terms of settling the matrimonial issues with the plaintiff was the amount of debt that the parties had. Given that he assumed the majority of the debt after the separation, in my view, J.H. would not have agreed to an offer to pay a lump sum for 2010 nor would a court have ordered lump sum maintenance in these circumstances. There was no ability on the part of J.H. to pay a lump sum maintenance award.
- [130] Both the plaintiff and J.H. have increased their incomes since 2010, however, given the circumstances of this case, it is my view that whether they went to court or settled it on their own this would have included a fixed-term duration for spousal support. I have not considered their current incomes in this decision.
- [131] Taking into account what the plaintiff would have been entitled to for spousal support pursuant to the Spousal Support Advisory Guidelines and the plaintiff's and J.H.'s respective offers to settle, in my view the plaintiff is entitled to damages equivalent to periodic spousal support in the amount of \$800 per month for seven years. This would equate to \$67,200 in spousal support. The plaintiff would have had to pay income tax on any periodic spousal support award. A deduction of 20% is fair given the plaintiff's income level.
- [132] In result, on the issue of spousal support, I award the plaintiff \$53,760 as damages for the defendant's breach of contract with her.
- [133] The plaintiff is also seeking damages for mental distress. There was no expert evidence in this case opining to any psychological disorder of the plaintiff. There is also no evidence to support the plaintiff's contention that the defendant's actions caused her anything more than some short-term distress.

[134] I would award the plaintiff nominal damages for mental distress in the amount of \$1000.

[135] The defendant seeks a reduction from any damages award for legal fees that the plaintiff would have incurred had she proceeded to trial on her spousal support claim. I find it unlikely that the plaintiff would have proceeded to court but rather she would have negotiated a settlement. The evidence from the defendant is that a hearing for spousal support would have cost the plaintiff \$5000. The defendant also testified that his hourly rate was \$250 and had he been able to settle this matter he would have spent between seven and eight hours on the file. In my view a fair deduction for legal fees would be \$2500.

Conclusion

[136] The plaintiff is entitled to damages in the amount of \$53,760 for breach of contract. The plaintiff is also entitled to \$1000 for damages for mental distress. There will be a deduction from this amount of \$2500 for legal fees. Therefore, the total of the plaintiff's award is \$52,260.

[137] Unless there are matters of which I am not aware, my view is that the plaintiff is entitled to her costs at Scale B. If either party seeks a different costs award, they have leave to bring this matter back in front of me if need be.

"R.S. Tindale, J."

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