

CANADA / JUDGMENT

Klebe v. Klebe

2020 BCSC 577

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 577 Klebe v. Klebe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Klebe v. Klebe,

2020 BCSC 577

Date: 20200417

Docket: E15030

Registry: Chilliwack

Between:

Kevin John Klebe

Claimant

And

Melissa Sue Klebe

Respondent

Before: The Honourable Justice Shergill

Reasons for Judgment - Application to Re-open

Counsel for Claimant:

A.T. Briscoe

Counsel for Respondent:

M.M. Patton

Place and Date of Hearing:

New Westminster, B.C.

March 6, 2020

Place and Date of Judgment:

Chilliwack, B.C.

April 17, 2020

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I. Overview

- [1] By way of application, the respondent seeks reconsideration of certain orders pronounced by Justice N. Brown on August 19, 2019, and September 4, 2019 (the "Financial Orders"). The Financial Orders were made following a family law trial held before Justice N. Brown. They were issued by way of memoranda, with reasons to follow.
- [2] Justice N. Brown was unable to continue with the proceeding. On October 9, 2019, Chief Justice Hinkson made an Ex Mero Motu order pursuant to Rule 22-2(10) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules], appointing myself to render a written judgment in this matter in lieu of Justice N. Brown.
- [3] The Financial Orders resolved most of the financial issues between the parties. Remaining for my determination were primarily matters related to parenting, child support, payment of section 7 expenses, and spousal support (the "remaining issues").
- [4] Prior to my rendering judgment on the remaining issues, counsel for the respondent filed this Notice of Application dated February 24, 2020, seeking reconsideration of the following orders made by Justice Brown:
 - a) First Memorandum at para. 3(vi) - The court's finding of an indebtedness of the Klebes in the amount of \$8,220.26 owed to the respondent's parents;
 - b) First Memorandum at para. 4 - The valuation of the former family home at \$740,000; and

c) Second Memorandum at para. 2 - The finding of an indebtedness to Randy Klebe in the amount of \$118,151.

[5] For reasons that follow, the application is dismissed.

II. Background

[6] The parties were married for seven years prior to their separation in November 2017. They have two biological children, aged seven and nine. In addition, the respondent mother also has three children from a previous relationship, ranging between the ages of 16 and 20. Following separation, the respondent continued to reside in the former family home (the "property") with the children.

[7] These family law proceedings were commenced by Notice of Family Claim (the "Claim") filed January 19, 2018. The Response to Family Claim and Counterclaim were filed on April 23, 2018. Both the Claim and Counterclaim are brought under the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [DA] and the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The matter proceeded to trial, and was heard over seven days. The trial concluded on June 25, 2019.

[8] At trial, Ms. Klebe sought to purchase Mr. Klebe's interest in the property based on a March 2019 appraised value of \$680,000. Mr. Klebe was agreeable to Ms. Klebe purchasing his interest, but only based on a May 2018 appraised value of \$758,000. The parties were also at odds with respect to the amount of indebtedness to the parties' respective parents (the "parental debts").

[9] The parties agreed that the claimant's father, Randy Klebe, had loaned \$120,000 to them for the down payment on the matrimonial home. However, the claimant alleged that \$118,151, plus interest, was still outstanding, whereas the respondent argued that the balance remaining was no more than \$90,000.

[10] The parties also differed with respect to the amount owing to the respondent's parents, Pegg and George Pede. According to the respondent, her parents had made two loans to the parties totaling \$44,918. The first was a loan of \$35,200 towards the down payment for the matrimonial home, and the second was a loan of \$9,718 for various family-related expenses. The claimant took the position that only \$8,220.26 was owing to the respondent's parents, comprised of a vehicle repair expense of \$4,820.26 and a heat pump expense of \$3,400.

[11] At the conclusion of the trial, the parties advised Justice Brown that they were anxious for a decision on the valuation of the property and the parental debts, so that the buy-out could be completed quickly. They also advised the Court that they had reached an agreement regarding the payment of various other debts. Justice Brown reserved judgment. However, he indicated his willingness to consider issuing orders with reasons to follow on the matters that had some urgency for the parties.

[12] On August 19, 2019, Justice Brown issued a Memorandum to Counsel/Parties (the "first Memorandum") and made various orders related to the sale of the former family home and parental debts, as follows:

[1] This memorandum relates to the case of *Klebe v. Klebe*, Chilliwack S.C. File No. E15030, heard before me on April 8-12 and June 24-25, 2019. At the close of the last day of a lengthy trial and submissions, the question of disposition of the matrimonial home arose. Specifically, the issues of interest to both parties being if the court could 1) set a figure on the value of the matrimonial home; and 2) a period of time in which, if the respondent elects, to purchase the property and paid the claimant his interest in the matrimonial home. The parties have not settled on a valuation to accommodate that. The existing appraisals at hand are \$758,000 as at May 2, 2018; and a second, more recent appraisal of \$680,000. If the claimant is bought out, he submitted he is seeking the figure of \$758,000 for his interest.

[2] The parties are at liberty to obtain a current joint appraisal. At this juncture, I find that the property should be listed for sale, with the parties sharing a joint conduct of sale.

[3] If the property is sold, after payment of:

- i. the \$294,000 mortgage,
- ii. the real estate commission;
- iii. the usual adjustments,
- iv. legal costs associated with the sale; and
- vi. amounts owed to the parties' respective parents:
 1. a payment of \$4,920.26 to the claimant's father; and
 2. a payment of \$4,820.26 and \$3400 to the respondent's parents;

the remaining sale proceeds shall then be divided equally between the parties.

[4] Alternatively, the respondent may purchase the claimant's interest in the matrimonial home based on a value of \$740,000; assuming the respondent is able to payout the mortgage and one-half of the amount owed to the claimant's father. In that event, the claimant shall pay from his buy out one-half of the amount's owed to the respondent's parents.

[5] If the respondent does wish to purchase the claimant's interest in the property, she has 30 days to arrange to do so. If she requires a reasonable extension, not to exceed 14 days, she may apply for an order if the claimant does not agree to such extension.

[6] Further written reasons will follow, later. This memorandum will be copied to the Chilliwack Supreme Court Scheduling Coordinator.

[13] On August 27, 2019, counsel for the claimant, Mr. Briscoe, made a request to appear back before Justice Brown to obtain clarification of the amount ordered to be paid to Randy Klebe. Mr. Briscoe's email provides the following explanation:

The claimant was seeking to have \$118,151 paid to his father and the respondent in her written closing submissions indicated that the debt was approximately \$80,000 to \$90,000. Therefore, the claimant is seeking clarification on that point. Furthermore, the parties had agreed that various debts be paid (set out in paragraph 39 of the claimant's written closing submissions), but those amounts are not included in the Memorandum.

[14] In response, on September 4, 2019, Justice Brown issued a further Memorandum to Counsel/Parties (the "second Memorandum") with "further written reasons [to] follow". In addition to pronouncing orders based on the matters that the parties had agreed to by consent, Justice Brown corrected the amount of the debt to Randy Klebe, as follows:

[2] Para. 3(vi) of my August 19, 2019 memorandum is corrected, and should read as follows:

vi. amounts owed to the parties' respective parents:

1. a payment of \$118,151.00 to the claimant's father; and
2. payments of \$4,820.26 and \$3,400 to the respondent's parents;

The remaining sale proceeds shall then be divided equally between the parties.

[15] On September 16, 2019, Ms. Patton (counsel for the respondent) wrote to Supreme Court Scheduling inquiring when the parties could expect to receive Reasons for Judgment from Justice Brown. She noted that the respondent was anxious to purchase the claimant's interest in the matrimonial home. However, as her previous mortgage approval had expired, the bank now required "a written agreement or court order setting out the details of child support, spousal support, arrears owed and the like".

[16] The Ex Mero Motu Order was pronounced before Justice Brown's Reasons for Judgment were released.

[17] On October 10, 2019, I issued a Memorandum to Counsel/Parties, inviting them to appear before me. At the October 25, 2019 court appearance, I advised the parties that I would be rendering a decision on the remaining issues. Counsel for the respondent expressed discontent with the Financial Orders, and asked me to reconsider the orders relating to the valuation of the property and the parental debts. Although no Notice of Application had been filed, I permitted the parties to address me on this issue.

[18] Ms. Patton argued that Financial Orders should be reconsidered on the following grounds:

- a) no reasons had been provided explaining why Justice Brown had arrived at these amounts;
- b) there was no discernable basis for the making of these orders based on the evidence and arguments at trial; and

- c) pursuant to paragraph 2 of the first Memorandum, the valuation of the former family home for the purposes of the buy-out was to be set based on a current joint appraisal to be obtained by the parties.

[19] The claimant opposed any reconsideration or re-litigation of the issues for the following reasons:

- a) the evidence and submissions at trial provided ample basis for Justice Brown to make the orders;
- b) the findings of indebtedness coincided with the figures presented by the parties, and the amount set by the court for the valuation of the property was in between the figures each of the parties were seeking;
- c) in light of the positions taken by the parties at trial, it was clear that the court had preferred the evidence of the claimant; and
- d) paragraph 2 of the first Memorandum only applied in the event that the respondent did not wish to purchase the claimant's interest in the property at the valuation set by the court.

[20] I declined to reconsider Justice Brown's orders for the following reasons:

- a) Counsel had established no basis for me to reconsider the orders made by Justice Brown.
- b) I did not have jurisdiction to issue reasons on behalf of Justice Brown for orders that were made by him.
- c) While no reasons were provided, it was evident from the orders made relating to the parental debts that Justice Brown had preferred the evidence of the claimant and his witnesses over that of the respondent and her witnesses.
- d) Reading the first Memorandum as a whole, it was clear that the valuation elicited from a joint appraisal (paragraph 2) would only apply in the event that the respondent did not wish to purchase the claimant's interest valued at \$740,000 (paragraph 4). In such case, the parties would have joint conduct of sale and the list price for the property would be arrived at based on a current joint appraisal obtained by the parties (paragraph 2).

[21] I further advised the respondent that the appropriate process to challenge the Financial Orders for lack of reasons was for the respondent to file an appeal of Justice Brown's decisions.

[22] The respondent did not pursue an appeal. Instead, Ms. Patton renewed her request for a reconsideration of Justice Brown's decision. On November 20, 2019, I granted the respondent the opportunity to make fulsome submissions upon the filing of a formal Notice of Application seeking a re-opening. I received written submissions and heard oral arguments from the parties.

III. Issues

[23] The following issues are before me:

- a) Does a judge who has been assigned a matter in lieu of the trial judge (the "assigned judge") have the power to reconsider orders made by the original judge?
- b) If so, in what circumstances can the assigned judge exercise that power?
- c) Is the failure to provide reasons a sufficient ground for reconsideration of the orders made by the trial judge?
- d) Do the circumstances of this case warrant an exercise of my discretion to reconsider the Financial Orders?

[24] I turn first to the legal framework governing matters of this nature.

IV. Legal Framework

[25] Section 14(1) of the Supreme Court Act, R.S.B.C. 1996, c. 443 provides that as far as practicable and convenient, all proceedings in court, and all business arising from those proceedings, must be heard, determined and disposed of before a single judge. Section 14(2) provides further direction regarding all post-trial proceedings in respect of a matter:

- (2) All proceedings subsequent to the hearing or trial including the final order, except as otherwise provided, and on a rehearing must, be before the judge before whom the trial or hearing took place.

[26] In situations where the trial judge is no longer able to continue with a family law proceeding, the Chief Justice of the Supreme Court has the power to nominate a replacement judge, pursuant to Rule 22-2(10) of the Rules, which provides:

- (10) If an application ought to be made to, or any jurisdiction ought to be exercised by, the judge by whom a family law case has been tried or partly tried, or heard or partly heard, then, if that judge dies or ceases to be a judge of the court during or after the trial or hearing, or if for any other reason it is impossible or inconvenient for that judge to act in the family law case, the Chief Justice or next senior judge of the court may, either by a special order or by a general order, nominate some other judge to whom the application may be made or by whom the jurisdiction may be exercised.

[27] The powers of a judge appointed under Rule 22-2(10) are set out in Rule 22-2(11) and (12):

- (11) Without limiting subrule (10), the other judge nominated under that subrule may
 - (a) order that the family law case be restored to the proper registry for retrial or rehearing,
 - (b) if, on the original trial or hearing, evidence was given orally, direct that the retrial or rehearing be on
 - (i) an official transcript of that evidence,

(ii) transcript, evidence given orally and evidence given by affidavit,

(iii) new evidence, or

(iv) any other basis,

as in his or her opinion the circumstances of the family law case require, and

(c) dispose of the costs of the original trial or hearing and of the costs of furnishing any copies of the transcript of the evidence, or refer the question of costs to the judge presiding at the retrial or rehearing.

(12) Directions for a retrial or rehearing that include a direction for the use of the transcript of the evidence do not limit or restrict the power of the judge presiding at the retrial or rehearing to permit in his or her discretion the recalling of any witness called at the original trial or hearing, or to receive other or additional evidence.

[28] The above provisions are identical to Rule 23-1(10) - (12) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

[29] There is a very little jurisprudence addressing the scope of the powers of an assigned judge. Indeed, counsel were only able to find one case that considered this issue at any length, that of B.J.L. v. J. R., 2004 BCSC 802 (also referred to as Lochhead v. Lochhead). This decision has been referred to in a number of cases (most recently in N.K.D. v H.S.D, 2019 BCSC 468 at para. 2) but without any consideration of the underlying principles.

[30] Justice Henderson presided as the trial judge in B.J.L. He issued oral and written Reasons for Judgment, and made certain orders. Before all of the orders were entered, Justice Henderson retired. Subsequently, the plaintiff filed an application seeking a reconsideration of child support and vesting orders made by Justice Henderson. The matter was assigned to Justice Wilson.

[31] Justice Wilson first addressed the law on reconsideration. He began his analysis at para. 5 of B.J.L. by noting that ordinarily, a trial judge has jurisdiction to consider or reconsider matters arising before an order has been entered. After reviewing the authorities, he concluded the following:

[6] I conclude that a judge assigned to take over the conduct of matters arising from trial, after the retirement of the trial judge, does have the same powers to reconsider matters arising from the trial judgment, and should apply the same principles with respect to reconsideration. However, in doing so, the assigned judge is at a considerable disadvantage, not having heard the trial or submissions at trial. It may well be that the powers should be exercised even more sparingly, particularly when reviewing the discretion exercised by the original judge, as compared to an error in the judgment through misconstruing material evidence or misapplying the law.

- [32] Thus the assigned judge enjoys the same powers of reconsideration as the trial judge, except that this power should be exercised even more sparingly.
- [33] It is well established that a trial judge has unfettered discretion to re-open an issue before formal judgment has been entered, though this discretion should be exercised sparingly and with the greatest of care to avoid an abuse of the court's processes. This principle was first articulated in *Clayton v. British American Securities Ltd.* (1934), 49 B.C.R. 28, [1935] 1 D.L.R. 432 (C.A.) at p. 440, and affirmed recently in *Grewal v. Grewal*, 2016 BCCA 237 at para. 70.
- [34] In writing for the court, Justice Neilson in *Grewal* at para. 70 noted that the overriding objective in permitting a re-opening is to prevent a miscarriage of justice.
- [35] While each case must be determined on its own individual facts, a party should generally not be permitted to re-open for the sole purpose of re-arguing or re-casting its case. However, new evidence is not an essential prerequisite to a trial judge's ability to exercise a discretion to re-open: *Grewal* at para. 71.
- [36] At para. 71, Justice Neilson set out two primary considerations for the trial judge when considering whether to exercise the broad discretion to re-open a case following a trial:
1. Is it probable that a miscarriage of justice would occur without re-opening? and
 2. Would a rehearing probably change the result?
- [37] A potential miscarriage of justice can occur for a wide variety of reasons, such as where:
1. The trial judge is satisfied that his or her original judgment contains material errors that may be corrected by further submissions: *Grewal* at para. 86;
 2. Material evidence has been overlooked or misconstrued: *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.) at para. 10; *M.R.A. v. R.K.A.*, 2004 BCSC 881 at para. 3; and *Strachan v. Reynolds*, 2006 BCSC 362 at paras. 120-121;
 3. The law has been misapplied: *Sykes* at para. 10; *Constantinescu v. Barriault*, 1996 CanLII 3561 (B.C.S.C.) at paras. 10 and 16; and *Mainland Sawmills Ltd. v. IWA-Canada Local 1-3567*, 2007 BCSC 1734 at paras. 25 and 29;
 4. Reasons for judgment failed to address an argument advanced at trial: *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2010 BCSC 132 at paras. 24-31;
 5. The order on its face is ambiguous and requires clarification: *Buckley v. British Columbia Teacher's Federation*, 1995 CanLII 8914 (B.C.C.A.) at para. 17; and *Fame Construction Ltd. v. 430863 B.C. Ltd.*, [1997] B.C.J. No. 1053 (S.C.) at para. 4;
 6. There has been a change in the law: *Grigg v. Berg Estate*, 2000 BCSC 858;

7. There has been a change in circumstances between the date of the judgment or order and the time of the application to re-open, and before the order has been entered: *Cheema v. Cheema*, 2001 BCSC 298 at paras. 17 and 18; and
 8. New evidence has come to light which evidence was not available at the time of the original trial: *Sykes* at para. 10.
- [38] The onus is on the applicant to show on a balance of probabilities that a miscarriage of justice would probably occur if the matter is not reopened to permit further argument, and that if the matter is reopened a change in judgment would likely occur: *Cheema* at para. 22.
- [39] The discretion to re-open should not be exercised where the application to re-open is based on a desire to advance an alternative argument that could have been made at trial but was not, rather than on any perceived error in the trial judge's approach to the evidence: *Sykes* at para.12.
- [40] Whether a miscarriage of justice would occur if the application to re-open is denied will depend in part on whether an alternative remedy is available to the applicant. Errors of law are ordinarily addressed by commencing an appeal: *Grewal* at para. 85.
- [41] The failure to provide reasons may constitute a ground of appeal: *Bolin v. Lylick*, 2018 BCCA 127 at para. 13. In such a case, it is the function of the appellate court to review the record to determine whether the decision can be sustained: *Robertson v. Dhillon*, 2015 BCCA 469 at para. 63. In considering whether a decision can be sustained, the appellate court must take a functional and substantive approach. This includes reviewing the evidence, the arguments at trial, and the live issues as they emerged during the trial to determine whether there is a logical connection between the decision and the basis for the decision: *R. v. Relkie*, 2011 BCCA 440 at para. 23, quoting *R. v. R.E.M.*, 2008 SCC 51 at para. 35.

V. Analysis

- [42] The arguments made by the parties are similar to those made at the October 25, 2019 court appearance, except they are now grounded in case law. I will therefore not repeat them here, except to note that as further authority in support of her position, the respondent asked me to consider anecdotal "evidence" about the outcome in a case cited only as *R. v. Kuntz-Angel* (no action number is provided).
- [43] It is asserted that a mistrial was declared in the *Kuntz-Angel* case by the assigned judge who took over the case in lieu of Justice Brown, on the grounds that Justice Brown's Reasons for Judgment contained insufficient findings of fact to enable a meaningful appellate review. Not surprisingly, counsel for the claimant objects to submissions which are not supported by any admissible evidence. No Reasons for Judgment from the *Kuntz-Angel* case, or a transcript of the *Kuntz-Angel* proceedings, or even affidavit evidence from someone who had direct knowledge of what had transpired, was provided to support the respondent's assertion. I therefore have placed no weight on it.

- [44] I turn now to the Grewal case. In answer to the first part of the Grewal test, the respondent argues that a miscarriage of justice would occur if the Financial Order is not reopened. It is submitted that "to leave the orders as they are would leave the respondent in a position of having had orders made against her in a vacuum, with no reasons given and the inability to appeal."
- [45] I accept that the respondent found herself in a difficult situation through no fault of her own. She was faced with a decision that she was unhappy with, with no Reasons for Judgment to support it. However, the remedy for this unfortunate predicament was to appeal the Financial Orders. Despite being advised of this at the October 2019 hearing, the respondent chose not to pursue an appeal, citing in part financial considerations and in part what is clearly an incorrect understanding of the law. There is ample authority to support the proposition that the absence of Reasons can constitute a ground of appeal.
- [46] While I agree that the assigned judge has the power, in certain circumstances, to reopen a case and reconsider the decision of the trial judge, I do not find that the grounds for doing so exist in this case. In so holding, I note that the discretion to reopen should be exercised sparingly, exceedingly so when it is the assigned judge who is asked to reconsider an order made by the trial judge. As held in *Cheema* at para. 5, inherent difficulties arise when an assigned judge embarks on a reconsideration of a decision of the trial judge, not the least of which is that the assigned judge must "make certain assumptions as to what the trial judge was aware of when he exercised his discretion to make the order" (see *Rotvold v. Rocky Mountain Diesel Ltd.*, 2001 BCSC 533).
- [47] The assigned judge's discretion to reconsider the decision of the trial judge is to be exercised to avoid a miscarriage of justice. It is not to be used as an alternative to an appeal.
- [48] The applicant relies on *Grewal* in support of her contention that a re-opening can occur even if an alternative remedy, such as an appeal, is available:
- [85] The question of whether a miscarriage of justice would occur if the application to re-open was denied is more difficult, primarily because Zora had an alternative remedy. The errors he identified in the first trial judgment were primarily errors of law, which would ordinarily be the subject of an appeal to this Court.
- [86] Given the unique circumstances I have outlined, I do not accept that the interests of justice in this case confined Zora to taking an appeal from the first trial judgment. I agree with Mr. Justice Wood's view, at para. 10 of *Sykes*, that the discretion to re-open may be properly exercised by a trial judge who is satisfied that his or her original judgment contains material errors that may be corrected by further submissions. Indeed, trial judges in this province have relied on this comment to justify re-opening a trial in a variety of circumstances that did not involve the presentation of new evidence
- [49] The respondent also points to the court's conclusion at para. 87 that the time and expense of further litigation are proper factors to consider.

- [50] Grewal was a civil proceeding involving eight appeals from four actions brought by three brothers over the ownership of assets. One of the grounds of appeal questioned the trial judge's decision to re-open the trial for supplemental submissions. In dismissing the appeal on this issue, the court acknowledged "a number of factors unique to this case". The underlying litigation was extremely protracted, spanning 21 days of trial time, with multiple, and sometimes contradictory, decisions made over several years. The likely result on appeal had the trial judge not re-opened the case would have been an order for a re-trial, leading to further delay and expense.
- [51] The Grewal case was unique and distinguishable from the one at bar. In the present case, the trial was of considerably shorter length and complexity.
- [52] With respect to the financial concerns related to the cost of appeal transcripts, Rule 22-2(11) (c) provides the assigned judge with authority to "dispose of the costs of the original trial or hearing and of the costs of furnishing any copies of the transcript of the evidence". The respondent could have sought such an order, but chose not to.
- [53] In answer to the second part of the Grewal test, the respondent submits that "we do not know whether a reconsideration would probably change the result since we do not know how or why the result was arrived at in the first place and the only way to determine a just outcome is through a reconsideration".
- [54] I have had the benefit of reviewing all of the evidence in this case, including the trial transcripts and the submissions made by counsel. I am of the view that even if I was to re-open the case in order to reconsider the Financial Orders, it is unlikely the outcome would be any different.
- [55] As in Sykes, I find that the application here is not to correct any perceived error in the trial judge's approach to the evidence, but rather to re-argue a case that has already been argued in the hopes of arriving at a different outcome. In my view, this is not a proper basis upon which to exercise the discretion to re-open: Sykes at para. 12.
- [56] I conclude that there are insufficient grounds to support the exercise of my discretion to re-open the case and reconsider the Financial Orders. The applicant has failed to meet the burden of showing on a balance of probabilities that a miscarriage of justice would probably occur if the matter is not reopened to permit further argument, and that if the matter is reopened a change in judgment would likely occur.
- [57] The application for a reopening is dismissed.

VI. Costs

[58] In the ordinary course, costs follow the event. However, given the unique circumstances of this case, I am of the preliminary view that each party should bear its own costs of this application. Should a party wish to make submissions on the question of costs, they may do so as part of any costs submissions made in relation to my Reasons for Judgment on the remaining issues in the trial.

"Shergill J."

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