
CANADA / JUDGMENT

Lopes v. Wolff

2020 BCSC 1663

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Supreme Court of British Columbia

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2020 BCSC 1663 Lopes v. Wolff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lopes v. Wolff,

2020 BCSC 1663

Date: 20201008

Docket: E45786

Registry: New Westminster

Between:

Fernando Luis de Souza Lopes

Claimant

And

Maria Luciana Marcondes Wolff

also known as Maria Luciana Marcondes Wolff Lopes

Respondent

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

The Claimant Appearing in Person:

F. Lopes

Counsel for the Respondent:

L.J. Mathesius

Place and Date of Hearing:

New Westminster, B.C.

September 30, 2020

Place and Date of Judgment:

New Westminster, B.C.

October 8, 2020

Introduction

- [1] This is a ruling on an application relating to spousal support. The parties were divorced by way of a consent Final Order made on 20 May 2015. Mr. Lopes seeks an order reducing his spousal support obligation on a prospective basis, and reducing or cancelling his outstanding arrears. Ms. Wolff concedes that there has been a change in circumstance, appears to accept that there must be at least some reduction in prospective spousal support, and is opposed to any reduction or cancellation of arrears.

Facts

- [2] The parties, Fernando Luis Lopes and Luciana Marcondes Wolff, were married in Brazil on 21 July 1987. Mr. Lopes was 23 and Ms. Wolff was 21. They immigrated to Canada together in 1995. At the time, Mr. Lopes was an engineer, and Ms. Wolff had a degree in psychology but had no work experience. The parties separated on 26 September 2012. So it was a 25-year relationship.
- [3] The family law proceedings concluded with a Final Consent Order on 20 May 2015. The terms of the order included the following: (a) Mr. Lopes took sole ownership of the former family residence (a townhouse unit), and a boat worth some \$50,000 to \$60,000 at the time; (b) Mr. Lopes was required to make an equalization payment of \$30,000 to Ms. Wolff, to be paid in installments; (c) Mr. Lopes was to pay \$3,700 per month in spousal support, based upon a stated Guideline income of \$120,000 per year for Mr. Lopes, and an imputed income of \$15,000 per year for Ms. Wolff; and (d) spousal support could not be reviewed or revisited for five years, except in the event of a change in circumstance beyond the control of the parties, leading to a reduction in income of 15% or more.
- [4] Mr. Lopes made support payments as required in 2015, 2016, and 2017, and then stopped making regular payments some time in 2018, which is when arrears of support started to accumulate. In 2018, Mr. Lopes went on short-term disability due to stress and depression for a brief period in 2018, but his income for the year was still \$133,000, which is in fact higher than the Guideline income stated in the Final Order. In 2019, Mr. Lopes's income dropped. More specifically, on 9 May 2019, Mr. Lopes went on short term disability, at which

point his income dropped to \$92,000 per year. On 28 August 2019, Mr. Lopes went on long term disability, at which point his income dropped to \$66,000 per year, although Ms. Wolff's counsel points out that this income was tax free.

- [5] Mr. Lopes also deposes that since his divorce from Ms. Wolff he has encountered financial hardship and has sold most of his assets, including his townhouse, his boat, and a car. On 14 June 2019, Mr. Lopes declared bankruptcy and made a consumer proposal, which his creditors subsequently accepted. As a result, Mr. Lopes is required to pay some \$500 per month to his creditors.
- [6] Meanwhile, Ms. Wolff has also encountered financial difficulty since the divorce. Recall that in the consent Final Order, income of \$15,000 was imputed to her. Ms. Wolff deposes that since separation she tried to run a small business selling cakes and jewellery without much success. Her difficulties in earning income have been compounded by significant health limitations. In the past, Ms. Wolff has had operations to remove tumors from her brain and her spine. Since separation she has been suffering from osteoarthritis in both knees, fibromyalgia, and depression. As a result, in the years 2016 through 2018, Ms. Wolff made less than \$1,000 in income each year from all sources of work.
- [7] With regard to her assets and debts, Ms. Wolff deposes that she used the \$30,000 equalization payment from the divorce to fund the purchase of a two-bedroom condominium. However, she had to sell the condominium in 2019 because she could no longer afford to cover the mortgage payments after Mr. Lopes stopped making spousal support payments. Ms. Wolff sold the condominium for \$120,000, and has been using the proceeds to supplement her income and cover various expenses, including moving costs. Ms. Wolff has temporarily relocated to Brazil where the cost of living is lower. She purchased a condominium for some \$43,000, and she has a total of \$26,117 in savings.
- [8] Since moving to Brazil, Ms. Wolff has earned some income teaching English, but is unable to work more than a few hours per week. Her annualized income is a mere \$660 Canadian per year. Ms. Wolff deposes that she is unable to work as a psychologist or counsellor in Brazil for a number of reasons. To begin with, she has no certification. To obtain certification, Ms. Wolff would have to disclose her diagnosis for depression. She considers it unlikely that she would be licensed to counsel other people while she is herself suffering from depression.

Analysis

Material Change in Circumstance

- [9] This application is governed by the provisions of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [the Act]. Under s. 17(4.1) of the Act, the court can only make a variation in a support order where satisfied that there has been a material change in the condition, means, needs, or other circumstances of one of the spouses. In this particular case, the Final Order says that neither party may seek to vary the support order for five years, except where there has

been a change in circumstance beyond the applicant's control resulting in a reduction of income by at least 15%. It so happens that Mr. Lopes's application to vary was filed a matter of days before the five year anniversary of the Final Order. However, counsel for Ms. Wolff concedes that there has been a material change in circumstance resulting in a reduction in Mr. Lopes's income by at least 15%. Thus, it is conceded that there is a basis for variation of the Final Order.

Continuing Entitlement to Spousal Support

- [10] Mr. Lopes argues that spousal support should be terminated, on the basis that Ms. Wolff is able to attain economic self-sufficiency. He takes this position for several reasons. First, he points out that Ms. Wolff sold her condominium for a net profit of some \$120,000 and has the proceeds available to her. Second, Mr. Lopes says that Ms. Wolff has a university degree in psychology and should be able to earn sufficient income as a counsellor in one of any number of fields.
- [11] I will start my analysis by noting the clear recognition of Ms. Wolff's entitlement to spousal support in the Final Order. Although the order does not spell out the basis for entitlement, I accept the submission of Ms. Wolff's counsel that support was warranted on both compensatory and non-compensatory grounds. This was a long-term relationship where Mr. Lopes was the primary income earner. Ms. Wolff had a college degree but it was understood that the couple's move from Brazil to Canada would significantly limit Ms. Wolff's ability to work as a counsellor for a variety of reasons, including her limited ability to work in English. Over the course of the relationship Ms. Wolff maintained the household while Mr. Lopes worked as an engineer. Ms. Wolff also had a number of serious health challenges during the course of the relationship, which limited her capacity for physical labour. Although Ms. Wolff tried from time to time to find sources of income, these efforts were never really successful or prolonged. I further agree with the submission of counsel for Ms. Wolff that in view of the length of the relationship and Ms. Wolff's age at the time of separation, both parties accepted that Ms. Wolff's entitlement to support was of an indefinite duration.
- [12] This brings me to Mr. Lopes's argument that support should be terminated on the basis that Ms. Wolff has attained or should have been expected to have attained economic self-sufficiency by this point in time. I cannot agree with that submission. I agree with counsel for Ms. Wolff that one of the objectives of support contemplated in both s. 15.2(6)(d) and s. 17(7)(d) of the Act is the goal of "promoting" economic self-sufficiency where possible, not guaranteeing or demanding it when it is not attainable. In Ms. Wolff's case, I find that her ability to become self-sufficient has been drastically compromised by her ill health. Although Ms. Wolff obtained some \$120,000 in net proceeds from the sale of her condominium, I accept the submission that it was not a business decision to sell the condominium to make a profit, but rather a decision brought about by necessary implication of the fact that Ms. Wolff did not receive the full amount of spousal support contemplated by the Consent Final Order. Ms. Wolff has had to use the funds to cover living

expenses and acquire alternate housing, in a real estate market that is more affordable for her.

Mr. Lopes's Guideline Income

- [13] Going forward, on a prospective basis, I have no difficulty concluding that Mr. Lopes's Guideline income should be set at \$66,936 per year and although this is non-taxable, the Spousal Support Advisory Guidelines [SSAGs] provide that non-taxable income of a payor spouse should generally not be grossed up because, while the payor may have more funds available as a result of not paying taxes, that benefit is largely offset by the inability to deduct support payments. So, going forward, Mr. Lopes's Guideline income will be \$66,936.

Ms. Wolff's Guideline Income

- [14] Mr. Lopes submits that Ms. Wolff's Guideline income should be grossed up by including the \$120,000 proceeds from the sale of her condominium, referred to in Mr. Lopes's pleadings as a "non-recurring capital gain". He cites *Vincent v. Vincent*, 2012 BCCA 186, in which one of the three presiding appellate justices reasoned that in some instances it is appropriate to include the net proceeds from the sale of a principal residence in Guideline income as a non-recurring gain under s. 17 of the Federal Child Support Guidelines, SOR/97-175 [CSGs] or as imputed income under s. 19 of the CSGs. It should be noted that Huddardt J.A. made those comments in a case where the payor spouse sold his principal residence in circumstances where he was basically involved in flipping houses for profit, with a concomitant increase in standard of living. Even still, the Huddardt J.A. concluded that the trial judge erred by including the net proceeds in the payor spouse's income, for a variety of reasons which I need not review. In a concurring judgment, Groberman J.A. stated explicitly that he did not have to decide whether the proceeds from sale of a principal residence would ever be appropriately included in Guideline income under either s. 17 or s. 19 of the CSGs. The third judge, Garson J.A., did not express any independent view on this point.
- [15] I will proceed on the assumption that it may be appropriate in some instances to include net proceeds from the sale of a principal residence in Guideline income under either s. 17 or s. 19 of the CSGs. Nonetheless, I do not consider it appropriate to do so on the facts of this case. I say that because Ms. Wolff was forced to sell the property due to an unsustainable position following Mr. Lopes's failure to pay support. This placed Ms. Wolff in a position where she had to sell her most significant asset to cover living expenses. Ms. Wolff has seen no increase in standard of living, and is left with dwindling savings and a new residence in Brazil worth considerably less than her old one in Canada.
- [16] Mr. Lopes also argues that income of \$30,000 per year should be imputed to Ms. Wolff on the basis that she is underemployed within the meaning of s. 19 of the CSGs. Mr. Lopes says Ms. Wolff is capable of earning some \$30,000 per year as a counsellor. I do not agree, for two reasons. First, I accept Ms. Wolff's assertion that it is not practical or realistic to think that she could be certified to work as a counsellor when she herself is suffering from diagnosed

depression. Second, I accept Ms. Wolff's evidence that she is unable to work any more than nominal hours because of her medical and health limitations. The reality is that Ms. Wolff is limited to working only a small number of hours per week, teaching ESL.

- [17] However, I also do not agree with Ms. Wolff's position that her Guideline income should be set at \$655 per year as per her most recent financial statement, for two interrelated reasons. First, Ms. Wolff's current income is for ESL teaching in Brazil, where she earns considerably less than could be expected to earn doing to same kind of work in Canada, and her current cost of living in Brazil is considerably less than the cost of living that is baked in to the table amounts in the CGSs in Canada. Taking all of this into account, I conclude that income should be imputed, and I see no reason to depart from the \$15,000 per year in Guideline income imputed to Ms. Wolff in the consent Final Order. This figure would appear to reflect what the parties agreed to be Ms. Wolff's income-earning potential at the time of the consent order, and I see no reason to adjust or vary it going forward.

Determining Quantum of Spousal Support, Prospectively

- [18] The SSAGs provide that based on Mr. Lopes's Guideline income of \$66,936 per year and Ms. Wolff's Guideline income of \$15,000 per year, Mr. Lopes is required to pay support of \$2,171 per month. However, Mr. Lopes argues that paying this amount every month would cause him undue hardship. He says he is the sole income earner in his household, and that his monthly expenses greatly exceed his income. He also says he has accumulated a number of significant debts, and his obligation to service those debts places him in further economic hardship.
- [19] The concept of undue hardship is dealt with in s. 10 of the CSGs. In *Kelly v. Kelly*, 2011 BCCA 173 [Kelly], the Court explained that a claim for undue hardship must be analyzed in two stages. At the first stage, the party seeking relief must establish that the amount of support contemplated in the Guidelines would cause undue hardship to that party, considering the non-exhaustive factors in s. 10(2), and keeping in mind that the governing threshold is very high, owing to the need for predictability in the application of the Guidelines. If the moving party satisfies the court that the first stage has been passed, the court will then go on at the second stage to engage in a comparison of the standard of living of each party. If, after going through both stages of the analysis, the court is satisfied that the table amount would result in undue hardship, the court has the discretion to order support in a different amount.
- [20] In the case at bar, my analysis of his Mr. Lopes's hardship claim is as follows:
- a) Stage 1: Mr. Lopes's financial statement indicates that he has monthly expenses of \$9,490 against monthly income of \$5,578. However, those figures include support of \$3,700 per month, whereas under the analysis set out above I have determined that he is required to pay only \$2,171 per month. Also, Mr. Lopes claims to be solely responsible for monthly housing, utilities, and living expenses totalling \$3,920, even though he lives in a townhome with three other adults. At least two of those adults, Mr. Lopes's nephew and his nephew's

fiancée, are of working age and there appears to be no good reason why they cannot contribute to the household expenses. I would reduce these expenses by 60%. Finally, Mr. Lopes claims monthly debt expenses of \$700 per month, \$200 of which is unsubstantiated by any independent documentary evidence. In the result, I calculate Mr. Lopes's monthly expenses at \$5,409. Thus Mr. Lopes appears to have a slight surplus of \$169 per month in income over expenses. This leaves Mr. Lopes with little or no room to spare, but in the context of the incomes of these two parties, I question whether it is enough to meet the first stage of the undue hardship analysis described in the Kelly decision. Assuming for the sake of argument that the undue hardship claim passes the first stage of the analysis, I will go on to the second stage.

- b) Stage 2: Ms. Wolff's most recent financial statement indicates expenses of \$2,765 per month against actual income of \$55.00. However, I have determined that her Guideline income should be imputed at \$15,000. Adding in the monthly spousal support payments of \$2,171 per month, I come up with a net, after tax, annualized income of \$33,448, which converts to a monthly after tax income of \$2,787. When placed against her expenses, this gives rise to a net shortfall of \$22 per month. Contrasting Mr. Lopes's net surplus of \$169 per month with Ms. Wolff's net shortfall of \$22 per month, I cannot conclude that the standard of undue hardship in s. 10 of the CSGs has been met.

- [21] My conclusion in terms of prospective support is that the Final Order should be varied, effective from October 2020, to provide as follows: (i) Mr. Lopes's Guideline income is \$66,936 (ii) Ms. Wolff's Guideline income is \$15,000, and (iii) Mr. Lopes is required to pay spousal support in the amount of \$2,171 per month, commencing on 1 October 2020 and continuing each and every month thereafter.

Arrears of Support

Identifying the Proper Legal Test

- [22] In his notice of application, Mr. Lopes frames the issue as a request for an order "adjusting spousal support retroactively" and "expunging" arrears. Although the notice of application does not cite any case law on this issue, the references to retroactive adjustment and expunging outstanding arrears appear to evoke the concept of retroactive variation as discussed in the leading cases of *D.B.S. v. S.R.G.*, 2006 SCC 37 (dealing with retroactive child support) and *Kerr v. Baranow*, 2011 SCC 10 (dealing with retroactive spousal support).
- [23] Mr. Lopes's reliance on the concept of retroactive variation is misplaced. Retroactive variation arises where a recipient spouse seeks a retroactive increase to support, reaching back prior to the date of the court application, or even prior to a time when there was any court order at all. By contrast, where a payor spouse seeks to reduce the amounts that have previously become due under an existing order, that request is properly conceived of as an application to reduce or cancel arrears of support. It is cancellation of an existing debt owing under a prior court order. Such an application is governed by the more stringent test

set out in *MacCarthy v. MacCarthy*, 2015 BCCA 496 [MacCarthy] at paras. 54-58. As Savage J.A. explained in *MacCarthy* at para. 54, "The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a 'higher threshold'."

- [24] The law requires that in order to obtain a reduction or cancellation of arrears, Mr. Lopes must (i) establish a material change in circumstances, and (ii) show that it would be "grossly unfair" not to cancel the arrears: see *Burgie v. Argent*, 2013 BCCA 247 at para. 23, citing, *inter alia*, *Earle v. Earle*, 1999 BCSC 283 [Earle] at para. 22-23. The Earle decision provides support for the proposition that the burden cast on the applicant is a "heavy" one, which includes an obligation of full financial disclosure. There is also a principle that arrears will only be cancelled where the applicant shows that he or she is unable to pay "now or in the future": *Earle* at para. 26-27; *MacCarthy* at para. 58.
- [25] I should note that some of the factors discussed in *Earle* relate specifically to child support, and therefore do not apply in the case at bar, which is concerned only with arrears of spousal support. In this regard, I find para. 78 of *Lochhead v. Lochhead*, 2010 BCSC 1048 helpful in its discussion of the principles of spousal support, and how they play out in terms of an application to cancel or reduce arrears or support.
- [26] Before undertaking the analysis required in the case law, it is first necessary to identify the time periods in issue in this case, and the amount of arrears that have accumulated over those time periods. Specifically:
- a) The time period from 15 January 2018 to 10 February 2018, a period of some three weeks during which Mr. Lopes was on sick leave and did not receive regular pay. He fell behind in his support payments and, by the time Ms. Wolff registered with Family Maintenance Enforcement Program ("FMEP") in July 2018, he owed "approximately \$1,110". Ms. Wolff says that despite the fact that Mr. Lopes went on sick leave and his pay dropped during this period, his overall income in 2018 was actually higher than the \$120,000 per year specified in the Final Order.
 - b) The time period from 9 May 2019 to 28 August 2019, a period of some three and one-half months during which Mr. Lopes was on short term disability leave and his annualized income dropped from \$120,000 to \$92,594 per year. During this period, Mr. Lopes was making irregular support payments and he accumulated arrears of some \$5,700.
 - c) The time period from 29 August 2019 to the present, a period of some 13 months during which Mr. Lopes was on long term disability leave and his annualized income dropped further to \$66,936. During this period, Mr. Lopes has made only sporadic support payments and has accumulated arrears of some \$24,400.
- [27] According to FMEP, Mr. Lopes owed a total of \$32,927.85 as of 6 September 2020. This does not include a further \$1,850 owing for the second part of September 2020. Thus, the total arrears owing as at 1 October 2020 are \$34,777.85.

- [28] Applying the legal test outlined above to the facts in this case, firstly I am satisfied that Mr. Lopes has demonstrated a material change in circumstance relating to his income. This is conceded by Ms. Wolff, although she points out that it was only in the 2019 calendar year that Mr. Lopes's income only dropped by more than 15%, and that the arrears in this case go back much further than that. However, having found a material change that engages the jurisdiction of the court, I prefer to deal with the timing as part of the gross unfairness analysis, which is the second enumerated element of the legal test.
- [29] Moving on to the second part of the test, the question is whether it would be grossly unfair not to cancel the arrears. There are a number of factors to consider here.
- [30] To begin with, I note that a relatively small amount of arrears accumulated before Mr. Lopes experienced any drop in his income, in the order of some \$1,100. The only basis for Mr. Lopes's argument in respect of this period of time is a current inability to pay, owing to his currently dire financial position. In assessing the inability to pay argument, I agree with counsel for Ms. Wolff that Mr. Lopes has not presented a meaningful explanation for his inability to pay support and apparent accumulation of substantial debt during a time when he was earning some \$120,000 per year, and had access to substantial assets including his remaining equity in the former family residence, and an expensive boat. In this sense, Mr. Lopes could reasonably be criticized for a failure to make full financial disclosure.
- [31] With regard to the time period from 9 May 2019 onward, Mr. Lopes has a much stronger argument, owing to a reduction in income that was occasioned by medical leave. Mr. Lopes first went onto temporary disability and his annualized income dropped to \$92,500, and three months later went onto long term disability at which point his income dropped to \$66,960. In July 2019, acting through counsel Mr. Lopes, broached the topic of a reduction in his support with Ms. Wolff's counsel. Ms. Wolff's counsel says a dialogue then ensued where Ms. Wolff asked for financial disclosure which was not coming for a number of months, but no agreement was ever reached, and ultimately Mr. Lopes filed an application on 2 May 2020. I make two points about this time frame. First, it is fair to say Mr. Lopes had little control over his inability to work due to stress and anxiety. Second, in July 2019, Mr. Lopes effectively put Ms. Wolff on notice of his reduction in income and its affect on his ability to pay support, in correspondence through counsel.
- [32] Mr. Lopes says that when he went on long term disability in August of 2019, his income dropped by almost 60%. In response, Ms. Wolff makes two further points. First, it is asserted that in 2017 and 2018, Mr. Lopes's income was actually \$130,000 per year, which was \$10,000 per year higher than his Guideline income in the Final Order. Second, it is submitted that Mr. Lopes's long term disability income is tax free, such that his actual income only dropped by 30%. This submission overlooks Mr. Lopes's consequential inability to deduct support. When this is taken into account, the actual reduction in Mr. Lopes's income from August of 2019 onward is closer to 33%.

- [33] Counsel for Ms. Wolff argues that Mr. Lopes has not made full financial disclosure. For one thing, there is Mr. Lopes's failure to disclose what became of his equity in the former family home, what became of a boat worth some \$50,000 or \$60,000, and how he came to accumulate the debt which led to his personal bankruptcy proposal during a time when his annual income was some \$120,000 to \$130,000 per year. Although I considered the failure to disclose this information as a factor telling against a reduction of arrears accumulating in 2018, I consider this gap in the evidence much less relevant or significant insofar as arrears accumulating in the period from August of 2019 to the present. I say this because the documents attached to Mr. Lopes's affidavit make it abundantly clear that, whatever the reason, Mr. Lopes has now become insolvent and is required to pay \$500 per month to his creditors under a consumer proposal in bankruptcy. In the circumstances, there is in my view virtually no chance that Mr. Lopes has squirreled away assets in Canada while shirking his responsibility to pay support to Ms. Wolff. I would say the same thing with respect to Ms. Wolff's argument that Mr. Lopes has not accounted for access to property in Brazil, including a possible family inheritance. I find it hard to believe that at the same time that he was facing insolvency leading to liquidation of all of his notable assets in Canada, he also had access to significant assets in Brazil.
- [34] My conclusion is that it would be significantly unfair to require Mr. Lopes to pay the full amount of the arrears of support for the period from July 2019 onward. While acknowledging that Mr. Lopes raised the point through counsel in July of 2019, Ms. Wolff says she requested disclosure which was never provided, such that she was not wrong in refusing to reconsider her position on support. I accept that as a relevant consideration but at the end of the day what I find most telling about this period of time is that Mr. Lopes's income in fact dropped by 33%, that he raised the issue with Ms. Wolff through counsel but no adjustment was ever made until the court application was filed, and that Mr. Lopes clearly does not presently have an ability to pay the full arrears, nor is there any real prospect of an ability to pay in the future.
- [35] Having said all of this, complete cancellation of Mr. Lopes's arrears for the period from July 2019 onward is clearly unwarranted, because that would overshoot the mark. The appropriate remedy is an order that the arrears should be reduced in proportion to the reduction in Mr. Lopes's income and ability to pay. I would therefore reduce Mr. Lopes's arrears by one-third, for the period from July 2019 to present. I calculate this as a reduction of almost exactly \$18,500, plus a pro-rated reduction of interest in the amount of \$447, for a total reduction of \$18,947. Applying this against the outstanding arrears of 34,777.85, I conclude that Mr. Lopes's outstanding arrears as at 1 October 2020 should be reduced to \$15,830.85.

Summary

- [36] In summary, I have concluded that:

- a) The Final Order dated 20 May 2015 is hereby varied pursuant to s. 17 of the Act, to provide that effective 1 October 2020 Mr. Lopes's Guideline income is \$66,936. Ms. Wolff's Guideline income is \$15,000, and commencing on 1 October 2020 and continuing each and every month thereafter, Mr. Lopes will be required to pay spousal support in the amount of \$2,171 per month.
- b) Effective 1 October 2020, Mr. Lopes's arrears of support are hereby reduced to \$15,830.85.
- c) With the exception of points (a) and (b) above, and the issue of costs, which is yet to be spoken to, all other relief sought in Mr. Lopes's notice of application dated 4 May 2020 is dismissed.

"Riley J."

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