

CANADA / JUDGMENT

Padma v. Lalli

2020 BCSC 1272

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Supreme Court of British Columbia

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2020 BCSC 1272 Padma v. Lalli

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Padma v. Lalli,

2020 BCSC 1272

Date: 20200204

Docket: H150825

Registry: Vancouver

Between:

Jasbir Singh Padma, Charanjit Singh Sahota and Amitjot Singh Sandhu

aka Amit Sandhu as the Litigation Representative of

the Estate of the Deceased Nirmal Singh Sandhu

Plaintiffs

And

Karanvir Terry-Singh Lalli,

and the Estate of the Deceased Nirmal Singh Sandhu by its Litigation Representative, Amitjot Singh Sandhu, aka Amit Sandhu

Defendants

- and -

Docket: H150992

Registry: Vancouver

Between:

Amitjot Singh Sandhu aka Amit Sandhu as the Litigation Representative

of the Estate of the Deceased Nirmal Singh Sandhu

Plaintiffs

And

Karanvir Terry-Singh Lalli

and the Estate of the Deceased Nirmal Singh Sandhu by its Litigation Representative, Amitjot Singh Sandhu, aka Amit Sandhu

Defendants

- and -

Docket: H150993

Registry: Vancouver

Between:

Amitjot Singh Sandhu aka Amit Sandhu as the Litigation Representative

of the Estate of the Deceased Nirmal Singh Sandhu

Plaintiffs

And

Karanvir Terry-Singh Lalli,

and the Estate of the Deceased Nirmal Singh Sandhu by its Litigation Representative, Amitjot Singh Sandhu, aka Amit Sandhu

Jasbir Singh Padda, Charanjit Singh Sahota

Defendants

Before: The Honourable Madam Justice Matthews

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

D. Gautam

Counsel for the Defenant Karanvir Terry-Singh Lalli:

S.A. Griffin

J. Ruttle

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2020

[1] These reasons for judgment were delivered orally. I have edited them without changing the substance or the result.

Introduction

[2] The defendant, Karanvir Terry-Singh Lalli, applies at the outset of trial for orders that:

- a) the trial be adjourned;
- b) the plaintiffs each provide an affidavit of documents;
- c) the plaintiffs Amitjot Sandhu and Charanjit Singh Sahota attend for further examinations for discovery after the affidavits have been sworn;
- d) the plaintiff Jasbir Singh Padda, who has never been examined for discovery, attend to be examined for discovery;
- e) the affidavit of Baljinder Sandhu delivered in response to the application to adjourn be struck on the basis that it contains inadmissible, without prejudice communications; and
- f) costs of these applications against counsel for the plaintiff personally.

[3] The underlying actions are three foreclosure matters. They were commenced as petitions in 2015. They relate to three mortgages against a property located at 6660 Number 6 Road, Richmond, B.C by which the plaintiffs allege they advanced \$525,000 to the defendant Mr. Lalli. Mr. Lalli claims that no funds were advanced to him under the mortgages. He also argues that the limitation periods expired because the mortgages were made in 2007 and 2008, and the claims were not commenced until 2015. Counsel for Mr. Lalli advised that, with interest, the balance claimed totals up to \$1.5 million. The type of interest is in dispute and greatly influences the value of the claim. In 2017, Mr. Justice Pearlman ordered that the petitions be placed on the trial list. In 2018, Master Taylor ordered that they be tried at the same time.

[4] The plaintiffs Jasbir Singh Padda, Charanjit Singh Sahota, and the estate of Nirmal Singh Sandhu claim that they advanced the monies for the mortgages in two of the actions. The estate of Nirmal Singh Sandhu is the only plaintiff in Action number H150993. Amitjot Singh

Sandhu is the litigation representative of the estate of Nirmal Singh Sandhu. Mr. Nirmal Singh Sandhu died during the course of the proceedings. When I refer to the plaintiffs collectively, I refer to the three plaintiffs, even though they are not all plaintiffs in all three actions.

- [5] The defendant Mr. Lalli is the mortgagor and a defendant in all three actions. Amitjot Singh Sandhu, as the litigation guardian of the estate of Nirmal Singh Sandhu, is also named as a defendant in two of the three actions, as he was listed as an owner of the property on the mortgages involved in those two actions. In the action in which the estate of Nirmal Singh Sandhu is the only plaintiff, the other plaintiffs are also named as defendants. I have been advised that the defendants other than Mr. Lalli are named as a matter of form only because of their positions on the other mortgages and/or title. When I refer to the defendant, I refer to Mr. Lalli only.
- [6] In 2018, counsel for the defendant examined for discovery two of the plaintiffs, Mr. Sahota and Mr. Sandhu. Counsel for the defendant adjourned the discoveries and asserted he would not continue and conclude them, nor commence Mr. Padda's examination for discovery, until certain documents were produced and outstanding requests from the discoveries conducted up to that time had been addressed.
- [7] The trial was first set to commence in January 2019, but it was adjourned at the first trial management conference, at least in part because the time allotted for the trial was insufficient. It was reset to commence on February 3, 2020, for 19 days. A second trial management conference was held on December 6, 2019 before Madam Justice Warren. Neither party prepared a written order for entry and they do not agree as to what orders were made in all respects or about what was said on some issues. I will review that in more detail below.
- [8] On this application, the defendant asserts that the following matters have interfered with his ability to prepare for trial:
 - a) the plaintiffs' failure to comply with the order made by Madam Justice Warren at the second trial management conference held December 6, 2019, that the plaintiffs deliver will-say statements for their witnesses;
 - b) the plaintiffs' addition of witnesses to their witness list after the TMC and after the time to deliver witness lists had expired;
 - c) late disclosure of documents, including seven amended lists between January 15 and January 27, 2020;
 - d) the defendant's examinations for discovery of the plaintiffs are incomplete because of outstanding demands for documents, some of which were not produced until mid-January 2020; and

- e) various other irregularities and uncooperative behaviour which has occurred in the month leading up to trial.
- [9] The plaintiffs argue that the defendant cannot show any real prejudice from the things he points to, that there are minor problems of the type that are dealt with by counsel in the usual course, and the late document production does not justify continued discoveries. The plaintiffs argue that there is prejudice to them in delaying the trial and recovering the funds advanced on the mortgages.
- [10] The defendant's adjournment application was set down to be heard on January 31, 2020. It was not heard until February 3, 2020, the intended start of trial, because of an issue that arose about an affidavit said to contain without prejudice communications and because it could not be accommodated on the court hearing list on January 31, 2020. The application was adjourned to the commencement of trial which was also the next court day after January 31, 2020.

The Issues

- [11] In *Navarro v. Doig River First Nation*, 2015 BCSC 2173, Madam Justice Dillon of this court addressed the decision-making exercise to be applied to an application for an adjournment as follows:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11; *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).

[20] Other factors or considerations include (in no particular order of priority):

- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); Sidoroff at para. 10);
- the reasonableness of the request (Dhillon at para. 16);
- the grounds or explanation for the adjournment (Dhillon at para. 16; Toronto-Dominion Bank at para. 38);
- the timeliness of the request (Dhillon at para. 16);
- the potential prejudice to each party (Dhillon at paras. 16-17);
- the right to a fair trial (Dhillon at para. 16);
- the proper administration of justice (Dhillon at paras. 16 and 39; Toronto-Dominion Bank at para. 36);
- the history of the matter, including deliberate delay or misuse of the court process (Toronto-Dominion Bank at para. 38); and
- the fact of a self-represented litigant (Toronto-Dominion Bank at para. 39).

[12] On this application, the defendant claims prejudice if the trial proceeds when he has not been able to adequately complete discovery due to the conduct of the plaintiffs. The plaintiffs claim they will be prejudiced if the trial is adjourned due to financial hardship and health issues. The parties each point to the conduct of the others as causing their prejudice and accuse each other as being the makers of their own misfortunes. That focuses the issues on these applications on prejudice and the parties' conduct. That is where I will focus my analysis.

[13] There is a preliminary issue of whether the affidavit said to contain without prejudice communications should be struck. The primary issue is to determine whether the issues raised by the defendant will cause greater prejudice to him if the trial proceeds than will be suffered by the plaintiffs if it is adjourned. If it is adjourned, there is a question of whether it should be reset on an urgent basis. The court must also address the ancillary orders sought regarding affidavits of documents and examinations for discovery.

Striking the Affidavit

[14] I will deal with this issue first as it affects what evidence I refer to.

[15] The affidavit in issue is the affidavit of Baljinder Sandhu, the widow of the deceased plaintiff Nirmal Sandhu. Ms. Sandhu swore an affidavit describing the prejudice to her if this trial is adjourned. In the affidavit, she describes a telephone call between herself and the aunt of the defendant. She asserts that the defendant's aunt referenced the settlement positions of the parties and describes those positions. She also asserts that the defendant's aunt pressured her to convince her son to accept the defendant's offer by using threats that the

trial would be delayed for three to four years if they did not take the offer.

- [16] The defendant submits that the affidavit contains without prejudice communications and should not be admissible, even in a redacted form. The defendant relies on well-known cases describing the privilege including *Sable Offshore Energy v. Ameron International Corp.*, 2013 SCC 37 and *Sharbern Holding Inc. v. Vancouver Airport Ltd.*, 2008 BCSC 442.
- [17] The plaintiffs argue that threats are an exception to the rule against admissibility of without prejudice communications and so the affidavit is admissible as is. Alternatively, the plaintiffs submit that the affidavit should be redacted to delete the descriptions of the settlement positions without removing the descriptions of the alleged threatening behaviour.
- [18] The communications described are between two non-parties. Notwithstanding, the plaintiffs concede the affidavit is still caught by the without prejudice rule, subject to the threat exception, because the non-parties were agents for the parties and were discussing settlement on behalf of the parties.
- [19] In my view, the alleged threats do not engage the exception. The alleged threats pertain to the timing of recovery, ie: a settlement would mean recovery now, whereas litigation means recovery down the road. The timing of recovery was already in jeopardy because this adjournment application had been made at the time of the discussion. The alleged threats are not statements that the defendant would take some steps to harm the plaintiffs if they did not agree to the settlement proposed. They are not the type of threats referred to in the case relied upon by the plaintiffs, *725952 Ontario Ltd. v. Desuri Homes Inc.*, [1995] O.J. No. 1208, 1995 CarswellOnt 2764, where one party threatened to expose illegal conduct if the other party did not accept a settlement proposal.
- [20] I conclude that the portions of the affidavit referring to settlement discussions are inadmissible.
- [21] I am of the view that the portions of the affidavit that deal with prejudice to the plaintiffs if the trial is adjourned are admissible. I see no reason to strike them as the offending paragraphs are easily severable, although not in the manner proposed by counsel for the plaintiffs. I rule that paragraphs 4-9 of the affidavit #1 of Baljinder Kaur Sandhu are not admissible and are struck. Paragraphs 1-3 and 10-12 are admissible, and I have considered them in reaching my decision.

Adjournment

Will-Say Statements and Witnesses not on Witness Lists

- [22] It is common ground that at the TMC on December 6, 2019 Madam Justice Warren ordered the plaintiff to produce will-say statements by January 16, 2020. However, no order was prepared and the actual wording of her order is not agreed upon. Mr. Lalli says that Madam Justice Warren ordered will-say statements for all witnesses in the parties' trial briefs, which includes the parties themselves. Mr. Sandhu and the other plaintiffs argue that the will-say statements were only for non-party and non-expert witnesses.
- [23] The authority for will-say statements is found in Rule 12-2 of the Supreme Court Civil Rules, subsection (9)(g):
- (9) The judge or master presiding at a trial management conference may consider the following and, without limiting the ability of the trial judge or master to make other orders at trial, may, whether or not on the application of a party, make orders respecting one or more of the following:
- ...
- (g) directing that a party provide a summary of the evidence that the party expects one or more of the party's witnesses will give at trial;
- [24] Some will-say statement orders are limited to non-party and non-expert witnesses. Will-say statements are not typically ordered for expert witnesses, as the requirements for opinion evidence include a written statement of the opinion, among other things. In these cases, the plaintiffs listed party witnesses and non-party lay witnesses in their trial briefs. In one communication, counsel for the plaintiffs referred to Madam Justice Warren's order as covering lay witnesses without excepting party lay witnesses. In the absence of any evidence that Madam Justice Warren's order was limited in some manner, I accept that she ordered the will-say statements for all non-expert witnesses listed in the trial briefs.
- [25] As to the form and content of will-say statements, In *Bartch v. Bartch*, 2017 BCSC 1625, Mr. Justice G.P. Weatherill described the purpose of will-say statements as "a procedural tool to ensure fairness, efficiency, and preparedness and to prevent ambush at trial", citing *Sawridge Band v. Canada*, 2007 FC 657. With regard to their content, Mr. Justice Weatherill said they must provide a summary of the substance of a witness's evidence, citing *Tonolli Canada Ltd. v. USW Local 9042 (Marsiglia)*, Re, 2013 CarswellOnt 3855 at para. 5 and *R. v. Vokey*, 1992 CarswellNfld 11 at para. 67. He rejected the argument that they may require inordinate time and expense or thousands of words of detail to prepare because they are "summary of the evidence, no more . . . no less" at para. 11. He held that will-say statements that provide brief and nebulous statements on the topics of evidence did not meet the standard.

- [26] In this case, will-say statements for some witnesses were not provided by the deadline of January 16, 2020. The plaintiffs say that is because those witnesses were not cooperating and so instead of will-say statements, the plaintiffs have provided to the defendants the answers to written questions that the witnesses provided in response to the written questions that plaintiffs' counsel asked of them. In my view, such a provision is adequate despite that they were provided after the time ordered by Madam Justice Warren.
- [27] The will-say statements of the parties and some of the non-party witnesses are not adequate. They are too general to be useful. They identify topics on which the witness will testify but not the substance of the evidence.
- [28] The defendant also points to the fact that after the 28 days before trial deadline for providing witness lists, the plaintiffs advised that they would call additional witnesses not on their witness lists in the trial briefs. This is not an unusual occurrence and it is dealt with by the trial judge based on the party seeking to call such a witness making an application addressing the test set out in such decisions such as *Fu v. Zhu*, 2017 BCSC 749 and 2017 BCSC 754 and *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 2216. These cases describe the animating principle as avoiding trial by ambush.
- [29] I do not consider the failure to identify witnesses on a witness list as a standalone reason to adjourn the trial, as such applications are usually dealt with by the trial judge who either allows the witness to be called or does not. The same is true for will-say statements; when their adequacy is called into question, the trial judge makes a ruling on the ambit of the witness's evidence, taking into account the will-say statements. However, I consider the plaintiffs' conduct in asserting that they will be calling witnesses not on their witness lists, providing only some of the will-say statements they were required to provide, and providing inadequate will-say statements for some witnesses to be evidence that they are indifferent to their responsibilities to avoid trial by ambush or are actively trying to accomplish trial by ambush. I consider this, along with the more substantive grounds argued by the defendant to which I now turn.

Late Production of Documents and Cascading Series of Events

- [30] In June 2018, the defendant's counsel examined Mr. Amitjot Sandhu and Mr. Sahota for discovery. He left multiple requests for documents, including income tax returns for the periods of the mortgages. During the examination for discovery of Mr. Sahota, he agreed that if interest payments were made on the mortgages, he would report such interest income on his income tax returns for the years in question. This is relevant because Mr. Sahota and the other plaintiffs argue that they have not received payments of interest and principle on the mortgages and because the defendant argues that the actions were commenced after the limitation periods pertaining to each of the mortgages had expired. The plaintiffs seek to overcome the limitation period defence by proving that the mortgage debts were acknowledged through payments made on each of the mortgages at particular times. If those payments included interest, the interest income would show up on income

tax returns. The defendant has raised the issue in his responses to the notice of civil claim. The following is an excerpt from the response to civil claim in Action No. VA H150993 at para. 4(c):

. . . any purported payments towards the Mortgage (including but not limited to the \$10,000 alleged to be paid as part of a \$17,000 bank draft dated January 21, 2010) were not made by the Defendant, were not in relation to the Mortgage; or in the alternative, the Plaintiff is estopped from relying on them to affirm any claim that would otherwise be barred by reason of limitations by reason of his failure to declare the income on his tax returns as obligated under the Income Tax Act, and is estopped by his fraudulent and dishonest conduct;

There are similar pleadings in the other actions.

- [31] In November 2018, counsel for the defendant wrote to counsel for the plaintiff setting out the categories of documents about which he sought production, including the request left at the examination for discovery which included the income tax returns. He stated that he would not conclude his examinations for discovery of Mr. Sahota and Mr. Sandhu and not commence his discovery of Mr. Padda until those documents were produced. Counsel for the plaintiffs responded and took issue with the relevance of many categories of the documents and the clarity of the requests left at the discovery, but not with the income tax returns. Counsel for the plaintiffs stated they would be produced.
- [32] Shortly after that time, the trial, which was then set to proceed in January 2019, was adjourned.
- [33] The plaintiffs did not produce any of the documents sought by the defendant, including the income tax returns, until mid-January 2020 in response to the defendant's application for production of the documents he had been seeking since 2018. During 2018, the defendant pursued the document production issue by providing counsel for the plaintiffs with unfiled motion material but did not pursue it beyond that point until the trial management conference held before Madam Justice Warren on December 6, 2019 at which the issue was raised, but apparently, no orders were sought or made. Counsel for the plaintiffs advised that he would be out of the country on holiday from December 14, 2019, to January 14, 2020. There was a discussion about whether the defendant's application could be handled by someone else in the same office as counsel for the plaintiff or whether the examinations for discovery that had not been concluded for two plaintiffs and not started for one plaintiff could be handled by another member of the plaintiffs' counsel's firm. Counsel do not agree on what was agreed. As a result of this impasse, counsel for the defendant did not bring on his motion because he did not want to unilaterally set down the motion in the absence of counsel for the plaintiffs, given problems the parties had earlier in the litigation about scheduling motions without consultation.
- [34] Despite being on holiday and declining to deal with the issues the defendant sought to address, counsel for the plaintiffs filed a motion returnable January 17, 2020. Once counsel for the plaintiffs returned from holiday, counsel for the defendant sent him his motion

material and asked for his agreement to make it returnable the same date as the plaintiffs' motion. Counsel for the plaintiffs would not agree. Counsel for the defendant set it for the first date it could be set, which was January 21, 2020. Between January 15 and 27, 2020, the plaintiffs delivered seven amended lists of documents listing at least 60 new documents, including some of the income tax returns.

- [35] The January 21, 2020 motion did not proceed. Counsel for the defendant sought to get back before Warren J. to deal with the unfolding issues and how it affected the trial date, but an appearance before Warren J. was not possible.
- [36] It is not adequately explained why the defendant let such an inordinate amount of time pass, including past a second TMC just seven weeks before trial, to press for these documents. Some blame must be allocated to the defendant, but given the conduct of the plaintiffs, it cannot be said that the failure to get these documents earlier is simply a failure of the defendant. The plaintiffs were thwarting, deliberately or not, the defendant's attempts. For example, while the plaintiffs took issue with many of these categories of documents, they did not dispute the demand to produce income tax returns. Their counsel said he would do so in 2018. He did not do so in 2018 or 2019. In late 2019, the plaintiffs' counsel asserted that he had produced the income tax returns. No evidence or an adequate explanation has been provided to me as to why counsel said he had produced them when he had not. They were produced on January 15, 2020. They do not show any declaration of interest payments which is directly relevant to the defendant's pleading of estoppel and to the factual basis on which the plaintiffs seek to avoid the limitation period defence.
- [37] The plaintiffs submit that the defendant is not prejudiced by this late disclosure because there are not many new documents and they do not give rise to the need for examination for discovery. The plaintiffs say that the income tax returns "speak for themselves" and the defendant can cross-examine the plaintiffs about them at trial, so the late production is not prejudicial. The plaintiffs rely on *Lopez v. Villalobos*, 2004 BCSC 1817, for the proposition that not every document produced close to a trial date gives rise to the need for further examinations for discovery. *Lopez* is about whether discoveries were required before a summary trial, which is a different context than an application to adjourn a viva voce trial. However, I readily accept the proposition that not every late-produced document gives rise to an adjournment so that an examination for discovery can be conducted.
- [38] However, I cannot accept the plaintiff's submissions that further examinations for discovery are not warranted in this case. The defendant made it plain that he would continue examinations for discovery when the document issues were addressed. While a party may not successfully rely on such a position in all circumstances, in this case, it was reasonable to insist on the income tax returns at least before concluding discoveries. Without the opportunity for discovery, the defendant will learn for the first time at trial what explanation the plaintiffs have for why they did not declare any interest, despite arguing that the mortgage debts were affirmed through payments made from time to time.

- [39] The plaintiffs say the rest of the documents are not amenable to discovery for various reasons. Time does not permit me to delve into all of them but, for example, one document is a handwritten document apparently made by the now-deceased Mr. Nirmal Sandhu describing the interest on one of the mortgages. It may be probative of whether the interest is simple or compound. The examination for discovery of his litigation guardian, his son, on that issue would be important. I was advised that the issue of whether the interest was simple or compound has a potential magnitude of \$500,000.
- [40] While the size of the late production is not enormous, it is substantial and defence counsel had to interrupt his trial preparation to address it.
- [41] In addition, at the time these late documents were listed and produced, there was a flurry of activity that both counsel had to deal with, in part because counsel for the plaintiffs had been away from the office from mid-December 2019 to mid-January 2020. Counsel for the defendants describes it as a situation of chaos created by counsel for the plaintiffs. For example, the plaintiffs had not discovered the defendant and unilaterally set January 22, 2020, as his discovery date, notwithstanding that on about January 20, 2020, the plaintiffs filed trial certificates. Such certificates require a certification that the party filing has completed examinations for discovery. Instead, the plaintiffs certified that they would complete their discoveries. Although the practice of the registry is to not accept such trial certificates, but rather to strike the case from the trial list, it accepted them in this case, so the trial stayed on the list despite that the required steps had not been undertaken.
- [42] Another example is the disagreement over what the parties discussed at the December 6, 2019 trial management conference. I cannot fault one counsel over the other for disagreement as to what was said or agreed to, but given the history of this litigation, it is regrettable that an order formalizing the trial management conference orders was not prepared.
- [43] During January, the parties also cross-accused each other of unilaterally setting applications down, not agreeing to dates, and unreasonably asking for certain dates. The plaintiff brought an ex parte application for short leave in New Westminster Registry, despite that the defendant's counsel objected to an application in these matters, which are all Vancouver Registry matters, being brought on short leave in New Westminster. The plaintiffs delivered will-say statements as described above, including for witnesses not identified in the plaintiffs' trial briefs.
- [44] Regardless of who was to blame for the situation, it is clear that counsel were not operating on a level of cooperation expected of senior counsel.

- [45] The plaintiffs offered discovery dates for the discoveries the week before trial. In many cases, short discoveries on discrete issues are done as a cleanup immediately before trial. In this case, where counsel were not in a cooperative mode, I accept that counsel for the defendant could not properly and effectively represent his client by receiving the volume of late discovery documents, absorbing it, preparing for and conducting the discoveries on major issues the week before trial, given everything else that was going on.
- [46] I conclude that the plaintiffs and the defendant have contributed to a situation where the defendant's counsel has not been able to prepare his client's case for trial.
- [47] I have had regard to Madam Justice Dillon's explanation of the weighing of factors that apply to this case as she set out in paras. 23-25 of Navarro including whether there has been a previous adjournment; the timeliness of the request; the reason for the adjournment and prejudice on both sides.
- [48] There has been a previous adjournment in this case, but the plaintiffs did not assert that it was due to the conduct of the defendant and did not resist the defendant's submission that it was because the trial sitting was not long enough to accommodate the witnesses the plaintiff sought to call. The defendant also argues that the case was in a state of chaos at that time, but I am not in a position to address that, nor do I need to.

Prejudice

- [49] The law requires the court to look beyond the dilatoriness of counsel in such circumstances. As I have explained, while the defendant's counsel should have pressed harder for the document production in 2018 and 2019, I accept that the entire context and constellation of events is such that even if the defendant had pressed, it may not have made a difference because of all of the matters and circumstances that have thwarted the defendant's ability to prepare for trial. The failure to produce the promised income tax returns followed by an assertion that they had been produced is a primary, but not the only, example of the plaintiffs' approach, which was to ignore their responsibilities to ensure that the defendant received the discovery he was entitled to from them and the steps required for him to adequately prepare for trial. As a result, the defendant is clearly in a position of prejudice if the trial proceeds.
- [50] The plaintiffs have delivered affidavits pertaining to the prejudice they will experience if the trial is adjourned.
- [51] The first is the affidavit of Baljinder Sandhu to which I have referred. Ms. Sandhu deposed:
- a) that she is under severe financial constraint;
 - b) her daughter sleeps in a room with no closet or washroom;
 - c) she is unable to do renovations or buy furniture due to lack of funds; and

- d) she had to obtain a line of credit to pay her legal bills in this matter and she will incur interest on the line of credit.
- [52] The inference I am asked to draw from this is that if the case is heard now and if the plaintiffs are successful, Ms. Sandhu's situation will be resolved or relieved. However, she does not say that and that is significant because she is not a plaintiff. She is a beneficiary of the estate of the deceased plaintiff. Her son is the litigation guardian of the estate. There is no evidence as to what portion of a successful judgment would flow to her through the estate and whether that would relieve the financial hardship she describes.
- [53] There is also an affidavit from Charanjit Singh Sahota. Mr. Sahota is 69 years old. He deposed that he has had bypass surgery, but he does not depose as to when that was or provide any details as to his current health. He deposed that he sometimes has problems with his memory. He is concerned that a delay in the trial will mean that he cannot participate or will not live to see a judgment. I cannot conclude on the evidence that there is any material risk that a delay in the trial will prejudice Mr. Sahota based on the evidence he provides about his health. Mr. Sahota also deposed that he had to borrow money from his son to pay the legal fees in this matter and to pay for a house he is constructing in Delta. The house is for another son who is disabled. He deposed that the non-payment of the mortgages has caused him financial distress. He does not say how much money he had to borrow from his son for legal fees, as opposed to the house he is building for his other son. Overall, the affidavit does not provide compelling evidence about financial prejudice that a delay in the trial would create or exacerbate.
- [54] There is no evidence from Mr. Padda, the third plaintiff, and no evidence from Amitjot Singh Sandhu, the litigation representative of Nirmal Singh Sandhu.
- [55] In my view, the balancing of prejudice calls for the trial to be adjourned. That is the only way to afford fairness to the defendant and the plaintiffs have demonstrated very little evidence of actual prejudice. I say that knowing that all parties to litigation find it stressful and find adjournments of trial distressing. However, as described in Navarro, the court must consider whether a trial can be fairly conducted at the point at which it is to commence. I conclude that this one cannot be.

Resetting the Trial

- [56] Counsel for the defendant has conferred with the registry and has advised the court that a new trial date can be obtained in the fall of 2020 if the court considers the case urgent. Counsel for the plaintiffs says he is not available in that timeframe.
- [57] For the same reasons described in addressing prejudice, there is no evidence that convinces me that this matter is urgent. In addition, the conduct of the parties and the lack of cooperation between counsel raises a concern about the amount of time needed to prepare for a trial and the steps to be undertaken.

- [58] I direct that the parties attend a case planning conference within 60 days of these reasons in which they each attend with a list of all matters that must be addressed and/or undertaken in preparation for trial, a plan for doing so, and proposed trial dates. I am not seized of this matter and the case planning conference should be scheduled in the usual manner.

Affidavit of Documents and Examinations for Discovery

- [59] The defendant relies on case law calling for affidavits of documents in circumstances where there has been late production.
- [60] In my view, the late production and the manner in which it occurred raises a reasonable concern about the plaintiffs' document production. However, and acknowledging that the defendant cited some cases in which late production prompted an order for affidavits, it is not a typical order simply because of late production. I am of the view that it is not appropriate at this stage in these cases.
- [61] The defendant has established that it is entitled to continue its examination for discovery of Mr. Sandhu and Mr. Sahota, and to conduct an examination for discovery of Mr. Padda. Those discoveries are not limited to the matters I have discussed in these reasons. Because of the issues pertaining to document discovery, I grant leave to the defendant to ask questions at the examinations for discovery on that issue.
- [62] I dismiss the application for affidavits of documents with leave to the defendant to bring it on in the future based on evidence of further document production issues or if further evidence is revealed about the document production issues to date.

Costs

- [63] The defendant sought costs against counsel for the plaintiffs personally. He did not make any submissions in support of that position. In an earlier application in this matter, counsel made a similar request and Mr. Justice Pearlman asked for written submissions. Given that experience, I conclude that it is apparent to counsel that if such a request is to be made, it must be supported with submissions and authorities.
- [64] I do not consider it appropriate to receive further submissions, given that this is primarily an adjournment application and because of my views that the circumstances that required it are a constellation of problems created by all parties and their respective counsel.
- [65] I order costs payable by the plaintiffs to the defendant in the cause.
- [66] MR. GAUTAM: My Lady, would you consider -- after yesterday, I did consider if you could have -- take up the September date, because if we go past that, there is no end date to aim for. Once we have a 60-day CPC, we're in February, March and April, that will leave sufficient time for those pre-trial steps. We have already served an expert report, there will be no expert report other than what has been served. We were ready to proceed on this trial date. Whatever is left to be done is on the defendant's end of things, so in that respect, a

six-month time period should be sufficient, given what I had argued yesterday, that the issues have been crystallized, it is all about --

[67] THE COURT: Mr. Gautam, yesterday you advised the court that you were not available during that trial setting.

[68] MR. GAUTAM: I was not available. I am not available.

[69] THE COURT: Well, I am not revisiting my reasons. I have given them.

"Matthews J."

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