

CANADA / JUDGMENT

## R.J.L. v. T.G.S.

2023 BCSC 847

### COURT

Supreme Court of British Columbia

### DECIDED

18 May 2023

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2023 BCSC 847 R.J.L. v. T.G.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.J.L. v. T.G.S.,

2023 BCSC 847

Date: 20230518

Docket: E44982

Registry: Penticton

Between:

R.J.L.

Claimant

And

T.G.S.

Respondent

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Claimant:

K. Ginther

The Respondent, appearing in person:

T.G.S.

Place and Date of Hearing:

Penticton, B.C.

March 7-9, 2023

Place and Date of Judgment:

Penticton, B.C.

**May 18, 2023**

- [1] These are reasons on applications brought by both parties following trial reasons indexed at 2023 BCSC 3 ("Reasons"). This is a family law dispute.
- [2] The main issue is the respondent's application to reopen the trial to tender further evidence and/or make further argument in four areas; alternatively, to seek a declaration of a mistrial. The parties also sought other orders arising out of the Reasons, but by the time of this hearing, these other matters were either agreed to or not particularly contentious. I will address those briefly at the end of these reasons, along with a brief comment on the evidence. I will use the same defined terms and abbreviations as in the Reasons.

### **Application to Reopen/Declare Mistrial**

- [3] The four areas in which the respondent seeks to reopen are: (1) to tender further evidence and argue that an adjustment to the equal division of family property should be made to account for the monthly mortgage payments he has been making on Heather (the former family home); (2) to cross-examine the claimant on her response to an identical question on two BC Housing application forms with respect to whether the claimant owned any real property, and to tender further evidence on this subject area; (3) to tender further evidence and/or make arguments regarding the amount of post-separation debt he incurred in maintaining Cue's (the business he and the claimant operated); and (4) to address a possible calculation error regarding his 2020 Guidelines income. It is only on the second area that he seeks a mistrial if his application to reopen is not successful. After setting out the applicable legal principles, I will address each of these.

### **Legal Principles**

- [4] A trial judge who has pronounced judgment, but before a formal order is entered, has wide discretion to reopen a trial; however, the discretion must be exercised judicially and in a principled and consistent way: *Hansra v. Hansra*, 2017 BCCA 199 at para. 44.
- [5] The trial judge should address two primary considerations in deciding whether to reopen: (1) is it probable that a miscarriage of justice would occur without reopening; and (2) would a rehearing probably change the result: *Grewal v. Grewal*, 2016 BCCA 237 at paras. 70-71.

[6] In *Mayer v. Mayer Estate*, 2020 BCCA 282 at para. 20, the Court quoted the main guiding principles as reviewed in *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 31:

- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- a judge's discretion to reopen a trial should be exercised with restraint;
- a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

- [7] If further evidence is sought to be adduced, the trial judge considers whether the evidence, if presented at trial probably would have changed the result, and whether the evidence could have been obtained before trial by the exercise of due diligence: *Hansra* at paras. 57-58. The Court will also consider the interests of finality, the cogency of the evidence, delay, fairness and prejudice: *Hansra* at para. 59.
- [8] The declaration of a mistrial is a remedy of last resort and should only be granted where no other remedial measures will suffice: *Manning v. Dhalia*, 2019 BCSC 1067 at paras. 29-33.

### Monthly Mortgage Payments on Heather

- [9] Since the parties separated, the respondent has been living in Heather and paying the mortgage. In the Reasons, I ordered that Heather be sold. The respondent seeks an order to reopen the trial to argue that the Court should reapportion the equal division of the proceeds of the sale of Heather because: (a) in October 2021, the claimant refused to sign the renewal of the mortgage on Heather; and (b) in November 2022, while the Reasons were on reserve, the claimant again refused to sign the renewal of the mortgage. He alleges that the result of each of these was an increase in the mortgage interest rate, and this was an unnecessary burden. The respondent also seeks an order that there be an adjustment to the equal division to account for the amount by which he has reduced the principal on the mortgage since October 2021. He estimates the amount of increased interest to be

approximately \$12,000 and the reduction in principal to be about \$3,500 since October 2021.

[10] At para. 117 of the Reasons I noted that the parties had agreed that to the extent the Court found Heather to be family property, it should be equally divided. Paragraph 123 states:

[123] With respect to Heather, the latest appraisal in evidence valued it at \$642,500 as of July 2021. The balance of the RBC Mortgage is about \$235,000. I conclude that the equity is about \$400,000, and this will be divided equally between the parties. I note here that even though the parties agreed to equal division of any portion of Heather that was found to be family property, I did consider that the respondent has solely paid the mortgage payments since separation and that the claimant has incurred rental costs. When I calculated the net amounts paid by each of them for housing since separation, the amounts were almost identical, and I concluded that equal division was appropriate.

[Emphasis added.]

[11] During the trial, the respondent testified that the claimant refused to sign a renewal of the mortgage on Heather in October 2021 with the alleged result that the interest rate increased. There had also been some discussion at trial about occupation rent as the respondent had lived in Heather since separation and had been receiving the income from the rental suite in the basement, whereas the claimant had incurred rental costs to live elsewhere. The claimant submitted that the respondent should not be charged occupation rent so long as the income from the rental suite was included in his Guidelines income.

[12] Because the increased mortgage interest had been the subject of complaint by the respondent, the respondent was self-represented, and the issue of occupation rent had been discussed, when writing the Reasons, I calculated the total housing costs paid by each of the parties since separation up to the end of 2022. Despite the agreement between the parties, I wanted to assure myself that the division was not significantly unfair. I took the claimant's rental subsidies (para. 157), as well as the respondent's increased mortgage payments since October 2021 to the end of 2022, into account. I acknowledge the calculation would not have included the increase in interest in November 2022 while the Reasons were on reserve. The net housing costs were nearly identical. Hence the comments at para. 123.

[13] The circumstances surrounding why the claimant refused to sign the mortgage renewals and why Heather has not been sold until just recently, are relevant to why the respondent has incurred the increased mortgage expenses. The circumstances are set out at paras. 123 to 133 of the Reasons. At paras. 133-134, I found that the steps taken by the respondent were attempts to frustrate the orders of Master Schwarz. It was in the midst of these events that the mortgage on Heather became due and the claimant refused to sign the renewal. At the time, she had an order for sale.

[14] In my view, the respondent wishes to reopen the trial to re-argue or re-cast his case. Even though the parties had agreed to equal division, I had already considered the housing costs each incurred because of this same complaint by the respondent at trial. If the respondent

had not acted as he did, Heather likely would have been sold one and a half years ago. The parties' housing costs have been about even. I conclude that a reopening is not required to prevent a probable miscarriage of justice, and a rehearing would probably not change the result. I dismiss the respondent's application to reopen the trial to permit the respondent to tender evidence of the further increase in the mortgage interest rate in November 2022, and to make these arguments again.

## BC Housing Documents

- [15] The respondent seeks an order that the trial be reopened to permit cross-examination of the claimant regarding her response to an identical question on two BC Housing application forms contained within exhibit 60. Exhibit 60 is the claimant's BC Housing file when she applied for a rental subsidy following the parties' separation. The respondent also seeks to testify regarding this subject area.
- [16] There are two prongs to the respondent's argument: (1) he states that he did ask the claimant about her response to the two identical questions, but there is a "gap" in the trial recording which did not record the evidence and which the Court (and claimant's counsel) missed; and (2) even if he did not ask the claimant about her response, he should now be permitted to put this to the claimant as he was disadvantaged.
- [17] Some background is required. Within exhibit 60, there are two application forms completed by the claimant after the parties separated. Each application form asks a number of questions, one of which is: "Do you or your spouse own property?" The application forms indicate that the claimant answered that question in the negative. The respondent states that during the trial he asked the claimant to confirm that she had answered those two questions and she confirmed that she did. At the hearing of this application, I asked the respondent if he recalled whether he asked any further questions of the claimant regarding her responses, and he said that he did not. This is therefore the extent of the evidence the respondent states that the Court missed ("Missing Evidence").
- [18] A central issue at trial was whether Heather is family property. The respondent alleged a Verbal Agreement between the parties at the time that Heather was transferred into their names as joint tenants, to the effect that he and the claimant were holding Heather in trust for T's Fund for the benefit of the respondent's four children (this includes two adult children from a previous marriage). The claimant denied any Verbal Agreement or that she held Heather in trust. I rejected the respondent's evidence and found that there was no Verbal Agreement, and that in transferring Heather to the parties' names in joint tenancy he intended to pool their resources for their marriage-like relationship. The evidence and reasoning in coming to these findings are set out at paras. 85 to 116 of the Reasons.
- [19] The respondent focuses on para. 101 of the Reasons which states:

- [101] The respondent referred to BC Housing records of the claimant when she applied for rental assistance in 2018 and 2019 following their separation. In applying for that benefit, the claimant twice completed an application form which asked whether she owned property. She answered "no". The difficulty with the respondent making this argument for the first time in closing, is that these parts of the BC Housing records were not put to the claimant in cross-examination, contrary to the rule in *Browne v. Dunn*. I have therefore not considered the evidence.
- [20] During closing submissions at trial, the respondent referred to the claimant's responses on the two application forms within exhibit 60 and argued that these were an acknowledgement by the claimant that she did not own Heather, and which supported his evidence that the parties had a Verbal Agreement and were holding Heather in trust for T's Fund. At that time, there was a discussion of whether the respondent had put that portion of the BC Housing documents to the claimant. Claimant's counsel submitted he had not. I had neither notes nor a recollection of him putting those portions to the claimant, although at first, I thought he had. However, upon checking my notes during submissions, I concluded that I was recalling that the respondent had referred to these responses during his own examination in chief. I discussed with the respondent the difficulty with his argument, as there could be any number of reasons why the claimant apparently answered the questions that way, and why his argument offended the rule in *Browne v. Dunn*: transcript July 5, 2022, 3:48 to 3:56 p.m.
- [21] However, as a result of the respondent's statement that he was sure he put the questions to the claimant, when I wrote the Reasons, I checked my typed notes (which I take contemporaneously with the evidence, as nearly as I can verbatim), and listened to portions of the trial recording. I could not find what the respondent alleged. He had not put those questions and responses to the claimant, and more importantly, had not put to the claimant the proposition he argued, which was that her response was an acknowledgement by her that she was holding Heather in trust for T's Fund. I concluded that I could not use the claimant's apparent response to that question in exhibit 60 for the proposition the respondent was arguing. Hence, my conclusion at para. 101 of the Reasons.
- [22] As noted at para. 7 of the Reasons, at the beginning of the trial, I provided the respondent with a memorandum designed to assist self-represented litigants at trial. It contains a plain language restatement of the rule in *Browne v. Dunn*. I also explained the rule to the respondent. The rule was discussed several times during the trial as the respondent did not put all matters to the claimant to which he later testified, to the extent that at the close of the respondent's case, I permitted the claimant to be recalled to be both cross-examined and re-examined on certain topics. I also explained to the respondent that a proposition within a question he puts to the claimant in cross-examination is not evidence unless she agreed with it. I now turn back to this application.

## The Gap Argument

- [23] The respondent cannot find the alleged Missing Evidence in the trial recording. As a result, the respondent alleges that there is an up to four or five minutes (later revised to one and a half minutes) gap on January 26, 2022, day 3 of the trial, where the Court recording system did not record his cross-examination of the claimant ("Gap"). He states that during the Gap, he asked the claimant the Missing Evidence. I will first determine whether there is a Gap.
- [24] The respondent identifies the Gap as occurring just after the morning recess at about 11:49 a.m. A review of the trial recording and the transcript shows that starting at about 11:03 a.m., there was a long discussion between the Court and the respondent about the relevance of the respondent's then line of questioning regarding the claimant's relationship with a Mr. K. I expressed my concern that this particular line of questioning did not appear to be relevant to the sole parenting issue. Toward the end of the discussion near the morning recess, the respondent submitted that the questioning was also relevant to another allegation, being that he had a "claim for damages" as a result of the claimant damaging the business of Cue's as a result of her alleged public break-up with Mr. K. The discussion then turned to the respondent's pleadings and my interpretation that what the respondent was saying was that the claimant had caused a decrease in the value of Cue's post-separation and this possibly would be the basis for a claim for unequal division of Cue's. We then took the morning break, and the last comment on the trial recording is my request to the clerk to pass the trial record to me. I reviewed the pleadings during the break. My recollection is that after the break, I returned and indicated to the respondent that his pleadings did not sufficiently make such an allegation, and that the events regarding Mr. K were not relevant.
- [25] The trial recording after the morning recess starts at 11:49:11 a.m. and the log note entered by the clerk starts at 11:49:12. The first recording is my voice at 11:49:13 which appears to be mid-sentence, and starts "but I have looked at your amended counterclaim " consistent with my review of the pleadings during the break. I then went on to rule that the evidence regarding Mr. K is not relevant. Following this, the respondent questioned the claimant regarding a person by the name of R. My first typed notes of evidence after the morning recess starts with the respondent's questions regarding R.
- [26] The respondent alleges that on his memory, it was just prior to this, that the Missing Evidence was given. He further points to the recess being more than 15 minutes. It was 17 minutes 36 seconds. He states that he has a specific recollection that the clerk indicated there was a problem with the recording, and that he asked her whether she "got that" and she said she did. That is not reflected in the trial recording.
- [27] The respondent submits that if the trial is not reopened to re-ask the Missing Evidence, an appeal would not be an effective remedy because there is no record of the Missing Evidence, which he submits is critical. Hence, he seeks a mistrial if the trial is not reopened. He refers to *Cleeve v. Gregerson*, 2009 BCCA 2. In my view, that case is distinguishable. It concerned closing submissions to a jury which were alleged to have been prejudicial to a fair trial,

where there was no recording of what was stated by counsel, and a dispute by counsel at the Court of Appeal as to what was said. The Court had no record of the impugned remarks by counsel and was therefore deprived of the opportunity to be able to assess whether the trial judge's reasons for granting the mistrial were supported by the record: at paras. 3, 52-53. In this case, there is no record of the Missing Evidence, but the extent of the Missing Evidence is simply that the claimant confirmed that she answered the two identical questions in the way she did.

- [28] I have no recollection of the Missing Evidence. Nor do I have notes of it. Both my recollection, and my notes coincide exactly with the trial recording, and are consistent with the topic of our discussion which was the relevance of the line of questioning regarding Mr. K. The clerk's log notes do not indicate there was a Gap. All of this leads me to conclude that notwithstanding the respondent's recollection, he is in error and there was no Gap, and there is no Missing Evidence.
- [29] As I discussed with counsel and the respondent at the hearing of this application, I do recall that at one point in the trial, immediately after one of the recesses, the court clerk indicated to stop the proceedings because she thought there might be a problem with the recording. As I recall, I was talking at the time. We stopped to permit the clerk to check that the proceedings were being recorded, which took two or three seconds. I asked the clerk to confirm that the proceedings had been recorded and she indicated they had. Whether this happened in the seconds before on this day (and mine and the clerk's comments were not recorded) or on some other day, I cannot recall. Regardless, I am confident the alleged Missing Evidence was not given, and I find it was not.

### The Disadvantaged Argument

- [30] This leads to the second prong of the respondent's argument which is even if the Missing Evidence was not given, the trial should now be reopened to: (a) permit him to put the application form question to the claimant and to go further by putting the proposition to the claimant that this was an acknowledgement by her that she held Heather in trust for T's Fund; and (b) to permit him to testify further regarding this subject matter. He argues that he was disadvantaged because: (1) he received the BC Housing documents too late to sufficiently prepare; and (2) he was self-represented.
- [31] I turn again to the background. Prior to trial, the respondent had obtained an order in chambers that the claimant use her best efforts to obtain the BC Housing documents. These had been requested by him in January 2021. No explanation was offered by the claimant as to why they were not obtained by her earlier. Not having received the documents, in late November 2021, the respondent obtained the order. The BC Housing documents were not received by the claimant until the evening of the first day of trial and were provided to the respondent prior to court on the second day of trial. Whether the claimant acted as quickly as she could have following the order cannot be determined. A BC Housing letter indicates that it received her request on December 21, 2021, but there was no evidence of when the

claimant completed the request for those documents.

- [32] On January 25, 2022, the second day of trial, between 10:56 a.m. and 11:02 a.m., the package of BC Housing records was identified by the claimant as the package she had received the evening before. Claimant's counsel wanted them marked as an exhibit simply to show that she had obtained the records ordered, and did not intend to ask the claimant questions regarding them. As these had been produced less than seven days prior to trial, I asked the respondent if he had an objection or needed more time to review the documents. The respondent indicated he had no objection to those documents being admitted as he had requested them, and he intended to use them, and he was then reviewing them. The package of documents was therefore marked as exhibit C for the time being. Later, this became exhibit 60.
- [33] The following day, January 26, 2022, commencing at 10:44 a.m. the respondent cross-examined the claimant regarding the BC Housing records. The claimant confirmed that these were the complete records she had received from BC Housing. Shortly thereafter, and concluding at about 10:52 a.m., questioning turned to what ended up being marked as exhibit 6, which is a letter the claimant had received from BC Housing. This was not a new document. It had already been produced in the claimant's list of documents. The same letter was also in the BC Housing records. The next event is the alleged Gap at 11:49 a.m.
- [34] The next time exhibit 60 was referred to was for about one minute on April 25, 2022, at the beginning of day 6 of the trial, during the respondent's direct examination, when he stated that he had looked for "a document" in the BC Housing records and did not see it. He wanted to bring some things to the Court's attention and then referred to the letter from BC Housing in exhibit 60 which refers to not having more than \$100,000 in assets (this had been put to the claimant and is to the same effect as exhibit 6), and to the question regarding ownership of property. Other than referencing them, he said nothing further about them, and then proceeded to discuss behavioural issues and the parties' son.
- [35] The next time there was a discussion of exhibit 60 was on July 5, 2022 during closing argument between 3:48 and 3:56 p.m., as discussed above. The following day on July 6, 2022 at 9:58 a.m. and again at 3:10 p.m. the respondent said that he believed that the Missing Evidence was given, on two occasions, the second and third day of trial.
- [36] I turn now to the two arguments of the respondent at the hearing of this application as to why he was disadvantaged.

### **BC Housing Records Received Late**

- [37] The respondent argues he only received the BC Housing records the day before he cross-examined the claimant. He argues that if he had had more time to prepare, he could have asked the Missing Evidence and other questions. As a result, whether he asked the Missing Evidence or not, he submits he should be given the opportunity to explore this further.

- [38] While I accept that the BC Housing records were produced late in the day, the respondent had them for a day before questioning the claimant. It is not a large file and they are not complicated documents. It would not have taken long to read them. In his submissions at this hearing, the respondent said he did read them and had put a sticky tab on those two particular questions as being something he would ask the claimant. That was part of the reason he was so sure that the Missing Evidence was given. At the hearing, he held up what he said was his copy of exhibit 60 with sticky tabs still on it. It was not suggested at any time prior to this application that he did not have enough time to prepare. I therefore reject timing of the receipt of the BC Housing records as disadvantaging him.

### Respondent was Self-Represented

- [39] The respondent argues that if he did not elicit the Missing Evidence, or did not go far enough in his questioning of the claimant by putting to her that exhibit 60 was an acknowledgment by her that she held Heather in trust, then the trial should be reopened to permit him to now do this, and he should be able to further testify regarding this.
- [40] The respondent speculates that the claimant may now recant her evidence that there was no Verbal Agreement, and admit that she was holding Heather in trust. He argues that by answering this question, the claimant was defrauding the government of rental subsidies.
- [41] The respondent also wishes to testify regarding this topic. He wishes to testify about and put to the claimant an email exchange between them in the summer of 2020. The emails apparently have nothing to do with this topic area, but he recalls that it was about the time of this email exchange that the claimant said to him words to the effect that Heather "belonged to the kids". This was already put to the claimant by the respondent at trial and she denied it.
- [42] Finally, although this was abandoned by the respondent at the hearing of this application, for completeness, I will identify a related topic of evidence which was initially raised as an area where the respondent wanted to be able to question the claimant and tender more evidence from himself. This concerns an alleged "trust letter". On January 26, 2022, in the exchange starting at 10:44 a.m., the respondent asked the claimant whether, when she applied for the rental subsidy, she brought with her the "letter that was written from the trust about the house". I indicated to the respondent that I did not know what letter he was referring to. The respondent said he had been trying to find a document that he had written "from the trust" to help the claimant secure a rental subsidy. He asked the claimant and she said "I do not know of such document". She said she had asked BC Housing to supply her with the entire file. As noted above, on April 25, 2022 when the respondent testified, he stated tangentially that he did not find "a document" in the BC Housing records, and nothing more. I assume now that refers to the alleged trust letter. The respondent did not point me to any part of the trial where he gave evidence concerning a trust letter, but states that he thinks at some point he made a brief reference to it in his cross-examination. Other than the above, I have not found any reference to it in my notes. In his affidavit sworn February 15,

2023, the respondent stated that he had written a letter as trustee to assist the claimant in receiving the rental subsidy as he was concerned that her name on title of Heather would prevent that. The letter stated that the claimant was holding the property in trust. No such document was ever produced.

- [43] As noted above, at the beginning of the trial, I provided the respondent with the memorandum designed to assist self-represented litigants, I went over that with him, and explained the rule in *Browne v. Dunn*. It came up frequently in trial. I assisted the respondent throughout the trial to the extent I could. As discussed in *C.A.T. v. S.T.B.*, 2020 BCSC 593, at paras. 95-97, *aff'd* 2021 BCCA 274, fairness "is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer", citing *Dauids v. Davids*, [1999] O.J. No. 3930, 125 O.A.C. 375 (C.A.) at para. 36. The respondent was given an opportunity to adduce evidence on all material points and to cross-examine the claimant. Trial fairness does not guarantee that would happen: *C.A.T.* at para. 100.
- [44] In my view, the respondent is attempting a "second kick at the can". Having lost on the issue of whether there was a Verbal Agreement, he latches on to para. 101 and the alleged Missing Evidence as if it was the only piece of evidence on this issue, and that all the other reasons of the Court for not finding the Verbal Agreement were not important. There were many reasons I found that there was no Verbal Agreement, and the evidence and reasoning are discussed at paras. 85-116 of the Reasons, and particularly paras. 112-115. There was compelling evidence that pointed away from any alleged Verbal Agreement to hold Heather in trust. I was aware of the claimant's apparent response on the application form. I say apparent, because it was not put to her. There could be any number of reasons she responded that way, which are not consistent with an acknowledgment that she held Heather in trust. The claimant denied any such Verbal Agreement, and I accepted her evidence. The parties are entitled to and expect finality, and to not incur the further expense of reopening a trial without very good reason. The respondent had an opportunity to present all of the relevant evidence he wished, and to put his proposition to the claimant.
- [45] In considering all of the above, I conclude it is not probable that a miscarriage of justice would occur without reopening the trial, and that a rehearing probably would not change the result. I dismiss the respondent's application to reopen the trial on this basis, or to declare a mistrial.

### Post Separation Debt to Maintain Cue's

- [46] The respondent seeks to reopen the trial to lead further evidence on the amount of post-separation debt he incurred to maintain Cue's. In the Reasons, I found the amount of post-separation debt proved was \$15,179 (para. 84). The respondent seeks to lead further evidence to challenge the three adjustments made at para. 81 of the Reasons, which would increase the amount of post-separation debt to \$26,659. He also seeks other adjustments not made in the Reasons to further increase the post-separation debt. I will first address the three items at para. 81 of the Reasons.

- [47] The first item is the \$2,948.86 payment of property taxes on Heather through the shareholder's loan. I identified this as a personal amount. The respondent agrees it is a personal amount, but submits that it is already accounted for, and in effect it was double counted. The respondent has persuaded me that I likely made a mathematical error. In my view, this argument comes within the principle summarized in Moradkhan that a judge may reasonably exercise such discretion to reopen where the applicant alleges a relatively discreet error in math.
- [48] The second item is the \$6,200.76 adjustment for the van. The respondent argued at trial that he should not be wholly responsible for the difference between the book value of the van in the financial records of Cue's and the amount outstanding on the loan to purchase the van when he sold Cue's. I rejected that argument at trial for the reasons set out at para. 72. I therefore adjusted for the entry in the shareholder's loan ledger crediting the respondent with the difference, and increasing the amount owing to him. The respondent wants to make the same arguments again. He is attempting to re-argue his case. It is not probable that a miscarriage of justice would occur without reopening and a rehearing would probably not change the result. I dismiss his application to reopen to argue this issue again.
- [49] The third item is the \$2,330.24 which is the net amount of six items dated April 15, 2020 which are marked as "personal" in the shareholder's loan ledger (exhibit 31). The respondent now wishes to lead evidence that "personal" in the shareholder's ledger is truncated, and refers to several corresponding ledgers which record business expenses charged to his personal credit cards. I noted at para. 83 of the Reasons that the respondent had produced his Visa statement showing an amount of about \$7,000 owing, but there was no documentary evidence of the charges that led to that debt, and that the respondent had therefore not met the evidentiary burden of establishing that these charges were incurred for the purpose of maintaining Cues.
- [50] The respondent wishes to reopen the trial to put into evidence the corresponding ledgers which record the business expenses and show the balancing entries to the shareholder's loan ledger which are marked as personal. These detailed ledgers show the individual charges to those accounts and are attached to his affidavit in support of the application. Reviewing the nature and description of the charges, it appears to me that some or all of these could legitimately be business expenses.
- [51] The respondent also alleges that of the six entries that make up the net \$2,330.24, the \$6,636.79 entry actually relates to the previous year and "is an entry moving the amount into the correct year". He states that amount should have been reflected in the shareholder's ledger account on June 30, 2019. However, there is in fact an entry for this amount on exhibit 31 for June 30, 2019. In other words, it is already taken into account in the starting balance on June 30, 2019. After taking into account the two counterbalancing entries for that account on April 15, 2020 (\$7,174.20 less \$6,636.79), the net adjustment for that business account is \$537.41 only, which corresponds exactly with the balance in the expense ledger account before those two entries were made. The real issue here is that the respondent

wants to calculate the change in the shareholder's loan from a date prior to June 30, 2019, and that is addressed next.

- [52] I turn now to the other adjustments argued by the respondent, which are not adjusted for in para. 81 of the Reasons. First, the respondent argues that the Court should reopen the trial to hear further argument regarding the dates from which the difference in the shareholder's loan was calculated. This was the starting calculation from which the respondent calculated the amount of post-separation debt he incurred. The respondent submits that the Court should calculate the difference in the amount of the shareholder's loan using different dates. At para. 79 of the Reasons, I used the shareholder's loan balances on June 30, 2019 and the date Cue's was sold on April 15, 2020, to calculate the difference. I did so because these are the dates the respondent used in calculating the difference in the shareholder's loan (para. 78), and because he testified that by July 2019, Cue's was not able to pay its bills (see para. 77). He now wishes to argue that the calculation should be made from a year prior to this on July 1, 2018, or at least from May 2, 2019. The respondent now argues that Cue's could not pay its bills prior to this, and points to a \$3,000 entry on May 2, 2019 which he states was an infusion by him of cash. The \$6,636.79 entry on June 30, 2019 would also be captured by this argument. I have checked my trial notes and cannot find any reference a \$3,000 deposit in May 2019. The respondent did testify to a \$3,000 deposit to cover payroll, but this was in April 2020 just after the COVID-19 pandemic started, and this and other cash infusions were accepted as an appropriate adjustment. In my view, this is the respondent attempting to recast his case to different dates than he used at trial.
- [53] The evidence of these expense ledgers was not tendered at trial. The respondent said that he had difficulty in obtaining Cue's records from the new owner. I noted this at para. 79 of the Reasons and I accept that evidence. In his affidavit sworn February 15, 2023, the respondent states that at the time of trial he had very limited access to Cue's records, and he has "now been granted further access". As clarified at this hearing, he did in fact have access to these business expense ledgers at the trial, but he said he did not have permission of the new owner of Cue's to produce them, and there was a term in the purchase and sale agreement that he could not disclose financial information of Cue's without consent. I have also considered that even if the respondent felt he could not produce these ledgers, he had access to his own credit card statements which would have provided the same information. The respondent also states that he thought he had sufficiently explained the records and proved his case.
- [54] I have considered that the respondent is attempting to bolster his case once the Court has found he did not meet the evidentiary burden. This is a step explicitly discouraged by case authority because it undermines trial fairness and finality. I have also considered that there was some confusion with exhibit 31, with the entries being marked as "personal" when it now appears these correspond with other business expense ledgers; however, the respondent could have proved these expenses with his own credit card statements. I have also considered that the respondent was self-represented and I accept that in his mind, he

concluded that what he had tendered was sufficient. In my view, the respondent was trying his best to put forward his case. I accept that he was honestly mistaken in believing that he had sufficiently proved this. On the other hand, the only amounts for which the respondent has persuaded me that there may be some reasonable argument (other than the alleged property tax entry), and where he is not simply re-casting his case (for example now choosing different dates to calculate the difference in the shareholder's loan), is the net \$2,330.24 adjustment for the personal credit card charges. Because there is equal division, this results in an amount in issue of \$1,165, a small amount. It would require the trial to be reopened for the respondent to tender the expense ledgers, identify all of the entries, and to be cross-examined on them. While many may be legitimate business expenses, that is not a foregone conclusion. This application itself already took more than two days of court time, and while this particular issue took up only part of that time, the time spent was not proportional to the amount involved. Given the manner in which the respondent provides evidence, I anticipate it would take at least another hour of court time to address what would be at most an adjustment of \$1,165. There is a strong argument in finality, and discouraging applications which make minimal if any changes to the ultimate result. Reopening is reserved for cases of substantial injustice. Balancing all of these factors, I exercise my discretion to dismiss the application to reopen the trial to tender evidence of the many adjustments that make up that at most \$1,165 difference. In my view, it is not probable that a miscarriage of justice would occur without reopening and a rehearing would probably not change the result in any significant way. I dismiss the respondent's application to reopen to tender further evidence and argue this issue again.

- [55] In conclusion, the result of all of the above, is that I will permit the reopening of the trial only with respect to the \$2,948.86 adjustment for the property taxes, which appears to be a mathematical error on my part. No further evidence may be tendered. I would hope that the parties can agree on this, and if not, the trial will reopen to address this briefly at the next court appearance before costs are addressed. It should not take more than 10 minutes.

#### 2020 Guidelines Income and Child Support

- [56] The respondent argues that there is an error in the determination of his 2020 Guidelines income because if the claimant is entitled to one half of Cue's, she should have half of the \$16,128 in capital gains from the sale of Cue's attributed to her. The respondent actually received the capital gains as he was the sole shareholder of Cue's, so I do not agree. However, upon the respondent raising this subject matter, it appeared to me that I may have made a different double counting error. I raised this with the parties at the hearing. The \$16,128 was included in the proceeds of the sale of Cue's and was divided, so should not have been included in income. It was not my intention to double count this. This is the type of mathematical error discussed in *Moradkhan*, for which a trial judge may reopen. There is no further evidence to be adduced. As this was revealed only at the hearing, I will reopen to permit the parties to make further submissions with respect to it at the next hearing. Assuming there is double counting, the 2020 Guidelines income should be reduced to

\$36,258 (para. 153). This would also result in a reduction for child support payable by the respondent for 2020, and a reduction in the total arrears owing. Again, it is hoped that the parties can agree on this, and if not, the trial will reopen to address this briefly at the next court appearance before costs are addressed.

## Other Matters

[57] As noted at the beginning of these Reasons, the notices of application sought orders with respect to matters which either by the time of the hearing were agreed to or were not particularly contentious. I will confirm these here although they were already addressed at the hearing.

### From What Date is Monthly Child Support Payable?

[58] Although it initially appeared the respondent was disputing this, by the time the parties attended the hearing they agreed that child support was payable commencing January 1, 2023. In my view, that was clear from my Reasons (paras. 156, 164 and orders 11 and 14 at para. 197). To the extent the parties required a further order stating this more explicitly, I ordered that child support is payable in monthly amounts on the first of each month commencing January 1, 2023 until the children are no longer children of the marriage as defined in the Family Law Act, S.B.C. 2011, c. 25. The monthly amount that is presently payable is \$510 by the claimant, and \$596 by the respondent, for a net monthly payment by the respondent of \$86 (para. 156).

### What Costs of Heather is the Respondent Responsible for Paying Until the Sale of Heather is Completed?

[59] The claimant sought an order that with respect to Heather, the respondent shall be responsible for the ongoing costs of maintaining Heather until the sale of it has completed, and that this includes any outstanding costs related to the monthly mortgage payment, and "property taxes, and/or any other charges for which a third party may hold the claimant responsible or for which the respondent is responsible". The respondent agreed he was responsible for utilities and other costs related to Heather. The matter in dispute was the property taxes.

[60] At para. 134 and order 4 at para. 197, I ordered that the claimant shall have conduct of sale on the terms set out in the orders of Master Schwarz. Those terms set out what costs are to be paid from the sale proceeds, and they include property taxes owing. At order 6 of para. 197 I ordered that "[a]ll expenses of the conveyance and all outstanding property taxes are to be shared equally with the exception of the costs of discharging the CPLs".

[61] The claimant submits that the respondent should pay arrears of property taxes. I disagree. Although the claimant did not frame her application as such, this is also in effect an argument to reopen the trial and the claimant did not bring such an application. I was aware there were arrears of property taxes when I made the order. That evidence was given at trial.

My orders that the sale be completed on the terms of Master Schwarz' order, and that all outstanding property taxes were to be shared equally was intentional. At the hearing of this application, I dismissed the claimant's application for an order that the respondent be responsible for arrears of property taxes and penalties. That cost will be shared equally. The claimant's order sought (with the exception of the property taxes) was granted only to the extent to clarify that the respondent is responsible for costs such as utilities related to the respondent's occupation of Heather, and the monthly mortgage payment.

Are the Proceeds of Cue's to be Divided \$84,320 or \$85,320?

[62] There is a typographical error at order 2 at para. 197. The parties agree. The sale proceeds of Cues were \$84,320 (para. 20) and not \$85,320 (para. 197), with corresponding changes to the calculation in that order. At the hearing, I corrected this pursuant to the slip rule: Supreme Court Family Rules, R. 15-1(18). This calculation of the amount owing is subject to the narrow reopening permitted above with respect to post-separation debt to maintain Cue's.

### Clarification of the Parenting Time Order

[63] The respondent sought an order clarifying the parenting time order. I clarified at the hearing that my intention and order was that the 4/4 schedule continues as it had been since 2020, with such variation as agreed to by the parties. The words "to coincide with the claimant's work schedule" in order 16 is merely a descriptor to identify the existing schedule which happens to coincide roughly with the claimant's work schedule. It does not mean that the respondent may demand that the schedule be changed to match the claimant's work shifts if they do not coincide with the 4/4, or that either party may demand a change to the 4/4 schedule if the claimant works more or less than a 4/4 schedule. Any variation of the 4/4 schedule to accommodate the parties is by consent of the parties.

### Comment on Evidence

[64] The claimant submitted at the beginning of this hearing that parts of the respondent's affidavits are inadmissible as being argument, irrelevant, adjectival descriptions and subjective description of reactions; inadmissible opinions, opinions regarding motives, and privileged communications. I agree with many of her submissions. However, parts of the claimant's affidavits are also inadmissible, although not to the same extent. I have considered only those parts of the affidavits which are relevant and admissible.

"Norell J."

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