
CANADA / JUDGMENT

Ren v. Emerson

2018 BCSC 221

COURT

Supreme Court of British Columbia

DECIDED

15 February 2018

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2018 BCSC 221 Ren v. Emerson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ren v. Emerson,

2018 BCSC 221

Date: 20180215

Docket: E50014

Registry: New Westminster

Between:

Jie Veronica Ren

also known as Veronica Ren

Claimant

And

Eugene Emerson

Respondent

Corrected Judgment: The text of this judgment was corrected at paragraph 66 where changes were made on February 20, 2018

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Claimant:

B.J. Ingram

Counsel for the Respondent:

R. Yousefi

Place and Date of Trial:

New Westminster, B.C.

March 27 - March 30, 2017

July 4 and 5, 2017

Place and Date of Judgment:

New Westminster, B.C.

February 15, 2018

- [1] This family law case includes claims for the apportionment of family property and spousal support. These claims are complicated by the unconventional history of the relationship between these parties. To properly explain the parties' relationship, it is necessary to summarize the history which led to their current circumstances.

Background

- [2] Prior to the parties meeting, Mr. Emerson had owned and operated language schools in both Paris, France, and Toronto, Canada. In 1990, Mr. Emerson sold the school in Paris and arranged for his assistant to transfer the proceeds of sale to him in Toronto. The amount of those proceeds were in the range of \$200,000 to \$300,000 according to the testimony of Heidi Moulin ("Ms. Moulin"), Mr. Emerson's long-time assistant. Ms. Moulin also testified to having transferred \$500,000 from Paris to Canada in 1989 from the profits of the Paris school which, she added, had earned "millions" in the years before Mr. Emerson and Ms. Ren first met.
- [3] As of the date of trial, the claimant, Ms. Ren, was 42 years of age and the respondent, Mr. Emerson, was 73 years old. They met in China in 1994 when Ms. Ren was a university student and Mr. Emerson was a guest instructor at the same university. At that time, Ms. Ren was 19 years of age and Mr. Emerson was 50 years old.
- [4] In 1996 the parties began to co-habit in a marriage like relationship while in Beijing and on August 30, 1997, their daughter, Gene, was born in Beijing.
- [5] In July 1998, Ms. Ren and Gene emigrated to Canada and began living in a residence owned by Mr. Emerson in Toronto, (the "Banstock Drive home") and shortly thereafter, on October 9, 1998, the parties' son, Cyrus, was born.
- [6] Between 1998 and 2004, Mr. Emerson transferred several hundred thousand dollars in US funds from Canada to a bank in China. At one point in that period of time he was intending to establish an English language school in China. Many of the deposits were made to the account of Ms. Ren as she was a Chinese citizen which allowed for greater flexibility in

transferring funds in and out of China. Bank records of the accounts of Mr. Emerson ending in 2004 recorded many transfers to and from China and Canada, although the ultimate use of those funds was not at all clear from the evidence.

- [7] The parties married in Toronto on March 4, 2001. During their time in Toronto, Mr. Emerson continued to own and operate a language school and was the sole provider for the family.
- [8] In 2002, the parties moved to Vancouver where Mr. Emerson founded a second Canadian language school. The family resided in a house on Edgewater Lane in North Vancouver, BC which was purchased by Mr. Emerson.
- [9] Mr. Emerson closed both language schools in 2003 because the SARS epidemic resulted in far fewer students arriving in Canada from China. This, in turn, reduced the profitability of the schools, which had been very successful to that point in time. Closure of the schools resulted in a lawsuit commenced against Mr. Emerson by his former wife, who had been involved in the Toronto school, and a second action commenced against Mr. Emerson's company by the landlord of the Toronto school. Those lawsuits included claims in excess of \$2.5 million and \$1.8 million respectively.
- [10] In 2004, Mr. Emerson sold the Edgewater Lane home which resulted in net proceeds of approximately \$200,000.
- [11] In February 2005, Mr. Emerson signed a Personal Statement of Assets and Liabilities (Ex. 15 - Tab V1), which disclosed a net worth as of February 10, 2005, of \$1,789,480. Assets included a term deposit of \$1,016,520, the Banstock Drive home valued at \$800,000, and other assets valued at \$95,000. His only liability was a mortgage of \$122,040 registered against the Banstock Drive home.
- [12] Approximately one month after Mr. Emerson signed the Personal Statement of Assets and Liabilities, on March 12, 2005, the parties entered into a Separation Agreement (Ex. 15 - Tab R1), which included the following:
- A recital that stated the "parties have been living separate and apart since approximately January, 2, 2004 and intend to continue to do so",
 - A statement that each was aware of the other's financial information,
 - A mutual release of all property claims against each other (para. 2.1), a specific release of any claims by both parties "upon bank accounts, savings and investments in the name of the other" (para. 2.4).
 - An acknowledgement by Mr. Emerson that he was being personally sued by the landlord of the Toronto school and that "[h]is liability in such law suits is in excess of \$2,000,000" and that he alone "shall be liable for such liabilities and releases the Wife from any claim or adjustment in connection with these lawsuits": see para 2.6. During the trial of the present action, the pleadings in the suit by the landlord were submitted to Mr. Emerson in which it was shown that Mr. Emerson was not being sued by the former landlord of the school and only his limited liability

company was being sued.

- A statement that his former wife had filed "a lien upon the Husband's Home and he is unable to sell it without the agreement of his former wife" followed by an agreement by Ms. Ren that she agreed to "release any and all claims upon the Husband's Home" at para. 2.7.
- A waiver of spousal support
- Child support was to be paid to Ms. Ren in an amount of \$468 per month based upon Mr. Emerson's income being \$32,000.

The Separation Agreement was prepared by a lawyer in Vancouver at the request of Mr. Emerson and was signed by Ms. Ren while at her employment at a bank in North Vancouver in 2005. Ms. Ren did not receive legal advice prior to executing the Separation Agreement and now seeks to set it aside.

[13] Considering the February 2005 Personal Statement of Assets and Liabilities, Mr. Emerson indicated assets of almost \$1.8 million and debts of \$122,000. Ms. Ren was forgoing all claims against those assets at a time when she had essentially no assets. Mr. Emerson also misled Ms. Ren by alleging he was being personally sued by his former landlord. The intent of the above clauses in the Settlement Agreement was for Ms. Ren to give up any claim against Mr. Emerson's assets which were purported to be at risk to creditors. The effect of the Settlement Agreement appears to have been that by releasing claims she may have had against Mr. Emerson's property, those assets were more exposed to claims by persons he claimed to be creditors. Ms. Ren's release disadvantaged her and left assets exposed to creditors. The logic of the thinking which led to the Separation Agreement is baffling and appears to be a ruse to keep assets away from his wife.

[14] Ms. Ren seeks an order setting the Settlement Agreement aside as a sham or unconscionable. Mr. Emerson submits that an application to set aside the Settlement Agreement is barred by the limitation period set out in s. 198 of the FLA which requires an application to "set aside or replace . . . all or part of an agreement respecting property or spousal support... to be made no later than two years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making such an application".

[15] Subject to the issue of a limitation on the commencement of proceedings to set aside the Separation Agreement, the Separation Agreement was grossly unfair to Ms. Ren. There was little, if any, disclosure by Mr. Emerson as to his assets. Mr. Emerson misrepresented the nature of the claim by the former landlord of his Toronto school by stating there was a claim against him personally. The Separation Agreement left Ms. Ren with no assets and no spousal support after a relationship of 8-9 years. The Separation Agreement was signed by Ms. Ren without legal advice and it is difficult to imagine how any reasonable family law lawyer could possibly have recommended she sign the agreement.

[16] On May 24, 2005, a consent divorce order was granted to the parties by this court.

- [17] On July 5, 2005, Mr. Emerson, who by that time owned a residence known as Peterson Avenue, (located in Coquitlam, BC) established an irrevocable Family Trust (Ex. 15 - Tab Q1) in which he was trustee and the two children, Gene and Cyrus, were the beneficiaries. The property of the Family Trust consisted firstly of the Peterson Avenue residence and subsequently, after sale of the Peterson Avenue residence, the home on Thimbleberry Court, also located in Coquitlam, after purchase of the latter in July 2007. The claimant, Ms. Ren, and the children have lived in the Thimbleberry Court residence since its purchase. Mr. Emerson lived in a rented apartment on Beach Ave. in Vancouver at the time of the purchase of Thimbleberry but he has also lived at Thimbleberry Court for considerable periods of time since purchase of Thimbleberry.
- [18] The Thimbleberry Court residence was appraised as of September 2016 at \$1.25 million. Mr. Emerson had arranged a line of credit in an amount of \$570,000 which was secured as a charge against the Thimbleberry Court home.
- [19] In 2006, Mr. Emerson testified to having earned approximately \$400,000 from the purchase and sale of a commercial property in Vancouver which he testified was used towards the purchase of the Thimbleberry Court residence. As he has testified the parties were separated as of 2004, Mr. Emerson claims the funds realized from the sale of the commercial property are excluded property under the Family Law Act, S.B.C 2011, c. 25.
- [20] In spring 2008, Mr. Emerson admitted to having begun to live at the Thimbleberry Court residence, saying the parties had reconciled.
- [21] In 2009, Mr. Emerson sold the Peterson Avenue residence and used the proceeds of the sale to reduce or eliminate the mortgage on Thimbleberry Court.
- [22] In or about 2009, Ms. Ren obtained her license as a realtor and gradually began to establish her career, her first commissions being received in 2010.
- [23] Also in or about 2009, the lawsuit commenced by the landlord of the Toronto school was abandoned.
- [24] Mr. Emerson has testified that the parties separated for a second time in 2012 when he moved his belongings, including a bed, into the basement of the Thimbleberry home. Ms. Ren and their two children who testified at trial disagreed with Mr. Emerson's statement, saying that he moved his desk, books and some other furniture downstairs but they all gave evidence to the effect that although he spent time in the basement (Gene testified that he slept in the basement "sometimes") they continued to live as a family in the home. The evidence of the parties and their children as to the living arrangements for Mr. Emerson was conflicting, however, I conclude that it is more likely than not that both Mr. Emerson and to a lesser extent, Ms. Ren, were holding onto the possibility of reconciling and did not wish to share their relationship problems with their children. The children, both of whom I found to be very intelligent and credible, were of the impression that the parties continued to live as a married couple into 2015. Considering all of that evidence, including an apparent

contradiction by Gene between some of her evidence at trial and the contents of an affidavit she swore in 2016 for her father, I find the evidence of Ms. Ren, Cyrus and Gene to be the most believable. I found that in cross-examination Gene more than adequately explained the statements in her affidavit.

- [25] Complicating the issue of when the parties separated a second time was Mr. Emerson's purchase of an apartment on Seymour St. in downtown Vancouver in October 2014. Gene spent her weekdays at the apartment in 2014, which greatly reduced her commute to UBC where she started studies in September 2014. She returned to Coquitlam on most weekends to spend time with her mother. Gene and Cyrus both testified they understood the reason for the purchase of the Seymour St. apartment was to reduce Gene's commute to UBC. Both children added that they had no cause to believe their parents had permanently separated. Gene testified at trial that her father told her his reason for staying at the Seymour St. apartment was "pension reasons".
- [26] At Ex. 12, Tab 6, there are 34 pages of text messages between Mr. Emerson and Ms. Ren which were sent between December 2014 and October 2015. Those messages do not reflect a couple who have separated but do indicate tensions in the relationship. There are messages which revealed a plan to eat dinner together and have a bottle of wine, messages reflecting cooperation in Ms. Ren dropping off food for Gene at the Seymour St. apartment and other areas of cooperation between the parties which would not lead to the conclusion the parties had separated.
- [27] Gene also testified that between 2012 and 2014, "we all lived there", referring to the Thimbleberry Court home, that the family all ate together "more or less" and that her father stayed overnight at the house, "he lived and slept there". Both children added that their parents would swim together at a local pool early many mornings. Gene was "not sure" when her parents had separated and said that it was "gradual". Finally, Gene testified she had not been aware of a separation in 2004 or 2005. Cyrus' evidence was essentially the same--he did not know when his parents separated.
- [28] Late in November 2015, after renovations had been completed on the Thimbleberry Court home a dispute arose between the parties when, according to Ms. Ren, Mr. Emerson had denied he was intending to sell the home but she learned that he had brought a realtor and potential buyers into the home which led to a confrontation and Ms. Ren concluded that Mr. Emerson no longer wanted to live with her. Soon after, on December 4, 2015, Ms. Ren issued the notice of family claim.
- [29] I conclude that the parties separated for the final time on or about November 30, 2015, when, as Ms. Ren attributed to Mr. Emerson, she stated that he "burned the final bridge".

- [30] As of the date of trial, Ms. Ren continued to live in the Thimbleberry Court home with the children, although Gene was in the planning stages of leaving to continue her education abroad. The Thimbleberry Court home continues to be registered in the name of Mr. Emerson pursuant to the Family Trust.
- [31] Parenting of the children is not an issue. Both parents have contributed to the welfare, education and activities of Gene and Cyrus who are both mature, intelligent and talented young persons, who are of age and are comfortable living and spending time with either parent.

Issues

A. Apportionment of Property

- [32] Ms. Ren seeks a finding of fact that the parties' marriage-like relationship commenced in 1996 in Beijing when they began to cohabit and that they married in 2001. She seeks an order setting aside the March 2005 Separation Agreement. Ms. Ren also seeks a finding that the triggering event for the purposes of s. 56 of the Family Relations Act, R.S.B.C. 1996 c. 128 [the "FRA"], was the divorce granted May 24, 2005, on the basis that the FRA was in force as of that date.
- [33] The parties have consented to the FLA applying to property division regardless of whether or not the Separation Agreement is set aside.
- [34] The parties acknowledge that although the Thimbleberry Court home is registered in the name of Mr. Emerson, it is held in trust for the children and is not family property nor the property of Mr. Emerson.
- [35] The only assets of any substantial value are those of Mr. Emerson and consist of the Seymour St. apartment, a \$10,000 vehicle, \$88,000 in financial assets and a RRSP valued at \$53,500. Mr. Emerson's debt is a line of credit which, at the time the apartment was purchased in October 2014, was valued at \$331,500 and registered against the Seymour St. apartment.
- [36] Mr. Emerson's position regarding his current assets is that those assets are excluded property under s. 85 of the FLA. The portions of s. 85 applicable to the circumstances of this case are as follows:

Excluded Property

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;

....

- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.
- [37] In *Shih v. Shih*, 2017 BCCA 37, the Court of Appeal set out the test for establishing a claim to excluded property under s. 85:
- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.
- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [38] Mr. Emerson's method of establishing his current assets, principally his interest in the Seymour St. apartment, is to total the value of his assets as they were in or about 2006-2008, the period which the parties were separated. Mr. Emerson submits that with the equity he held in the Banstock property in Toronto and investments he maintained at that time, including the Thimbleberry Court home, one can infer that the funds with which he purchased the Seymour St. apartment were derived from the previously owned assets acquired before the marriage or before they reconciled in 2008. Mr. Emerson further refers to the fact that he has not worked since the parties reconciled, the inference being that the investment in the Seymour St. apartment had to have come from assets owned by him at the resumption of the relationship between the parties.
- [39] It is apparent that the parties have spent a considerable amount of funds in maintaining and renovating the Thimbleberry Court home, especially in 2015, in providing music lessons, education and other benefits to their children and other costs of living to the point in time. Also it would be very difficult to be able to trace, with even a modest degree of certainty, whether or not the funds used to purchase the Seymour St. apartment were family property or excluded property under the FLA.
- [40] Ms. Ren is in a very poor financial situation. Her assets amount to \$17,401 in financial investments but her debts amount to \$112,537.

- [41] The Seymour St. apartment is the residence of Mr. Emerson and is registered in his name. The appraised value of the apartment as of the date of trial is \$710,000 whereas it was purchased in 2014 for the sum of \$510,000, so there is approximately \$200,000 in increased value since its purchase.
- [42] The onus of proving property is excluded falls on the party claiming that property is excluded: see FLA, s. 85(2). Here it is obvious that the property is in the name of Mr. Emerson. It is apparent the Seymour St. apartment was purchased with monies that are classified as excluded assets under s. 85 of the FLA. It is not disputed that the parties divorced May 24, 2005. Given my findings later in these reasons that the Separation Agreement cannot be set aside, and the fact that Mr. Emerson has not worked since the parties reconciled, the natural conclusion is that the Seymour St. apartment was purchased with monies excluded from a family claim by virtue of the Separation Agreement.
- [43] While the Seymour St. apartment is excluded property, s. 84(2)(g) makes it clear Ms. Ren is still entitled to half of the appreciation in the property value since its purchase in 2014. Section 84(2)(g) of the FLA reads:
- (2) without limiting subsection (1), family property includes the following:
 - (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.
- [44] There is no dispute between the parties regarding the property value at the time of purchase versus the time of trial. Ms. Ren is entitled to a one half interest in the appreciation of the Seymour St. apartment.

Setting Aside the Separation Agreement

B. Date of Separation

- [45] I have made a finding earlier in these reasons that the date of separation was November 30, 2015.
- [46] Ms. Ren seeks an order that the March 2005 Separation Agreement be set aside. In so doing, this court would be allowing the claimant to set aside an agreement 12 years after its entry and execution, and in spite of the limitation periods in the FRA and FLA. While the parties have agreed to have the FLA govern the property division regardless of whether the Separation Agreement is set aside, I have looked to both the FRA and the FLA to determine if the Settlement Agreement can be set aside.

Limitation Period under the FRA

[47] The Separation Agreement was executed in 2005, before the FRA was repealed. As such, absent agreement between the parties to have the FLA govern, the application to set it aside must be dealt with under FRA as per s. 252 of the FLA. Section 252 is a transitional provision providing for the setting aside of agreements related to property made before the coming into force of the FLA. It reads:

Transition -- proceeding respecting property division

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

(2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

[48] The British Columbia Court of Appeal discussed the effect of s. 252(1) of the FLA in *Halliday v. Halliday*, 2015 BCCA 82, at para. 42 [Halliday]. Goepel JA., writing for the Court stated:

[42] The effect of s. 252(1) of the FLA is to allow parties that would otherwise have been subject to the FLA property regime at the time they filed their claim to proceed under the old FRA regime despite it having been repealed. In essence, s. 252(1) preserves the FRA regime as it concerns property division for any separation agreements that were finalized before the FRA was repealed, unless the parties elect to proceed under the FLA.

[49] The FRA does not have an express limitation period, however one has been read into the legislation by virtue of the definition of "spouse" under the FRA. This was also discussed in *Halliday* at para. 34:

While the FRA did not have a specific limitation provision, a limitation period was read into the legislation by way of the definition of "spouse". Only a "spouse" could seek spousal support or challenge a property division. By definition, a person ceased to be a "spouse" 2 years after a divorce was pronounced, becoming instead a "former spouse". In the result, there was no jurisdiction to hear applications for spousal support or division of assets under the FRA if proceedings were brought more than two years after the parties were divorced: see *Suckau v. Suckau*, 2002 BCCA 300, *Tatlock v. Tatlock*(1994), 88 B.C.L.R. (2d) 197 (C.A.). The FRA contained no provisions pursuant to which the time to bring an action could be extended.

[50] As such, Ms. Ren ceased to be a spouse under the FRA, May 24, 2007, two years after the divorce was ordered. Therefore her request for an order setting aside the Separation Agreement cannot be granted.

Setting Aside the Agreement under the FLA

[51] If the FLA applies, Mr. Emerson argues that an application to set aside the Separation Agreement would be time barred under s. 198 of the FLA. Section 198 reads:

Time limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

- (2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,
 - (a) in the case of spouses who were married, the date
 - (i) a judgment granting a divorce of the spouses is made, or
 - (ii) an order is made declaring the marriage of the spouses to be a nullity, or
 - (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
 - (3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.
 - (4) The time limits set out in subsection (2) do not apply to a review under section 168 [review of spousal support] or 169 [review of spousal support if pension benefits].
 - (5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional.
- [52] Again the Court of Appeal's analysis in Halliday is apposite. Beginning at para. 37 the Court said:
- [37] Section 198(2) of the FLA requires, in the case of spouses who have been married, that a spouse who seeks an order to divide property or family debt, a pension, or for spousal support bring the claim within two years of the parties' divorce.

- [38] Section 198(3) concerns applications where the parties have entered into an agreement respecting property or spousal support. In those situations, if a party seeks to set aside the agreement or replace the agreement with an order under Part 5, 6 or 7 of the FLA, the application must be brought within 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.
- [39] While "grounds" is not defined in s. 198 of the FLA, s. 164 of the FLA sets out a myriad of factors that must be considered when a spouse seeks to set aside or replace a spousal support agreement. The factors are similar to those set out in Miglin. The relevant provisions are as follows:

Setting aside agreements respecting spousal support

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

...

- (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;

- (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].
- [40] Section 164(3) says that the court may only set aside or replace with an order all or part of an agreement when satisfied that one or more of the circumstances set out in that subsection existed. That provision is then contradicted by ss. 164(5) which indicates the circumstances set out in ss. 164(3) need not exist if the agreement is significantly unfair on consideration of a completely different set of circumstances. Given the language of s. 164 determining when a party first discovered, or reasonably ought to have discovered, the grounds for making the application is, I suggest, a matter of some complexity.
- [53] In this case, Ms. Ren was aware that the Separation Agreement was significantly unfair, however she believed it was necessary to protect Mr. Emerson and herself from liability as a result of the two lawsuits against himself and his limited liability corporation. Despite this, she made no efforts to have the Separation Agreement set aside. As such, her application is time barred and the Separation Agreement remains in force and effect.

Conclusion on Setting Aside the Separation Agreement

- [54] Regardless of whether this application is handled under the old FRA or the new FLA Ms. Ren's claim is statute barred. She was aware of the unfairness of the Separation Agreement at the time of signing. She was also aware that she did not obtain legal advice before signing. A reasonable person in Ms. Ren's shoes would have taken steps to determine if she had grounds for an application to set aside the Separation Agreement. The fact that she did not does not stop the limitation period from running. As a result, Mr. Ren does not have a claim to any property she may have been able to trace from family property held by Mr. Emerson at the time the Separation Agreement was executed.

C. Spousal Support

- [55] An interim order for spousal support was granted by Schultes J. on March 16, 2017, in which he awarded Mr. Emerson spousal support commencing October 1, 2016, in an amount of \$2,700. In coming to that amount of spousal support, Schultes J. considered it "appropriate to depart from the Spousal Support Advisory Guidelines [SSAG] due, it would appear, to uncertainty regarding the income of Ms. Ren.
- [56] Regarding a final order of spousal support, I find that the only basis for an award of spousal support to Mr. Emerson is on a non-compensatory or "needs" basis. There is no evidence before the court which could support an order for compensatory spousal support. To establish such a claim, it is necessary for the payee to prove he or she should be compensated for foregoing a career and employment opportunities due to the respective

roles of the spouses during the relationship. Mr. Emerson was never economically disadvantaged as a result of the marriage. Ms. Ren acknowledges an entitlement to spousal support of Mr. Emerson based upon a non-compensatory basis. Mr. Emerson's income in recent years has been limited to Canada Pension Plan and Old Age Security with some investment income. Considering his income for the years 2013 through 2015, I impute an income of \$20,000 as it would appear the chances of any significant change in his income is unlikely.

[57] Ms. Ren's income in 2015 was \$44,047 and for 2016 was \$94,399. There was evidence at trial as to Ms. Ren's income to date in 2017 and pending sales and listings which may or may not have resulted in further income. Mr. Emerson submits that based upon that evidence, it would be appropriate to impute an income of \$150,000 to Ms. Ren for 2017. Ms. Ren submits a more realistic income would be \$120,000. Considering the uncertainties regarding some of the pending sales and listings I find that the lower of the proposed incomes is more appropriate. I impute an income for 2017 of \$120,000 as proposed by Ms. Ren.

[58] Counsel for Ms. Ren has provided written submissions with the following calculation based upon the SSAG, which is submitted as appropriate in the circumstances:

Ms. Ren submits that the "without child support" formula should be applied using the following criteria: a 7 year relationship, Guideline incomes of \$20,000 and \$120,000, low range support. This yields $1.5\% \times 7 \text{ years} = 10.5\%$ of income differential of \$100,000 which translates to \$10,500 per year or \$875 per month retroactive to November 15, 2015 less \$2,700 paid already.

[59] Section 7.1 of the SSAG, "The Basic Structure of the without child support formula" includes the following which is the basis of the above calculation by counsel:

Without Child Support Formula

Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the gross income difference) for each year of marriage (or, more precisely, years of cohabitation), up to a maximum of 50 percent. The maximum range remains fixed for marriages 25 years or longer at 37.5 to 50 percent of income difference. (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses' net incomes--the net income cap.)

Duration ranges from .5 to 1 year for each year of marriage. However, support will be indefinite (duration not specified) if the marriage is 20 years or longer in duration or, if the marriage has lasted 5 years or longer, when the years of marriage and age

[60] The "rule of 65" referred to above would apply in the case of Mr. Emerson who is now 73 years of age which would result in an indefinite duration for the payment of spousal support.

- [61] The SSAG at para. 5.7 also set the timing for determining income as the date of the hearing or the date of an agreement, accordingly, the income to be used in the formula for Ms. Ren would be her most current income which I find to be \$120,000.
- [62] Regarding the applicable range of spousal support, s. 9 of the SSAG refers to several factors for consideration including the "Needs and Ability to Pay of the Payor", "Property Division and Debts", "Recipient's Needs" and "Strength of Any Compensatory Claim". Considering the asset reapportionment included in this decision, the debts of Ms. Ren, the applicability of non-compensatory support in this case, the relatively short duration of the relationship from the reconciliation which commenced in 2008 and other factors listed in the SSAG I accept that it is appropriate to apply the low range.
- [63] Based upon all of the above, I accept the calculations submitted by counsel for Ms. Ren of spousal support of \$875 per month retroactive to December 1, 2015, less any amounts paid to date.

Conclusion

- [64] The request by Ms. Ren for an order setting aside the Separation Agreement of March 2005 is denied. She is statute barred under both the FRA and FLA. The parties agree the Thimbleberry Court home is to be held in trust for the children and is not family property. All other properties were either sold prior to the Separation Agreement, or resulted in proceeds which have been used to pay down the mortgage of the Thimbleberry Court home. As such, the only family property to be divided amongst the parties is the increase in value of the Seymour St. apartment.
- [65] In conclusion, I order the following:
- Ms. Ren is to pay spousal support of \$875 per month retroactive to December 1, 2015, less any amounts paid to date; and
 - Mr. Emerson pay Ms. Ren one half of the value of the increase in valuation of the Seymour St. apartment as of the appraisal at the time of trial--i.e. \$100,000.
- [66] The parties may make submissions in writing on costs within 30 days of the issuance of these reasons for judgment.

"Jenkins J."

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