

CANADA / JUDGMENT

Streifel v. Forcier

2020 BCSC 1346

COURT

Supreme Court of British Columbia

DECIDED

25 June 2020

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2020 BCSC 1346 Streifel v. Forcier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Streifel v. Forcier,

2020 BCSC 1346

Date: 20200625

Docket: E161698

Registry: Vancouver

Between:

Sandra Gail Streifel

Claimant

And

Guy Joseph Roger Francis Forcier

Respondent

Before: The Honourable Mr. Justice Giaschi

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by teleconference:

D. Terpylo

Counsel for the Respondent appearing by teleconference:

K. Beazer

Place and Date of Hearing:

Vancouver, B.C.

June 8 and 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 25, 2020

- [1] THE COURT: I will deliver my reasons now. I reserve the right to amend these oral reasons for grammar or clarity, but the result will not change as a consequence of any such amendments.
- [2] On June 8, 2020, two applications came before me: one by the claimant requesting an order suspending a consent order made in this matter on March 9, 2020, and entered on March 13("the March 9 Order"); and, one by the respondent for production of the file of the claimant's previous counsel. At the hearing, I noted that there was confusion as to whether the claimant was requesting an order suspending the March 9 Order, or was seeking to set aside the March 9 Order. Given this confusion, and given that there was some urgency to the application, I considered it was not appropriate to address a temporary suspension of the March 9 Order with a later application to set it aside. Accordingly, I ordered that these applications be adjourned to June 25, today, at which time the claimant's application would proceed as an application to set aside the March 9 Order. I further set deadlines for the filing of any additional materials.
- [3] The claimant filed a new application on June 18, 2020, for an order to change or set aside, in whole or in part, the March 9 Order. These reasons address the claimant's application.
- [4] The March 9 Order, among other things, adjourned the trial of this matter which had been set to commence on March 23, 2020, and ordered that the dispute be submitted to a binding mediation/arbitration before Kathryn Sainty, Q.C., on a date to be agreed, but before September 1, 2020.
- [5] The March 9 Order also addressed the sale of a property subject to approval of this Court.
- [6] The March 9 Order contained the usual notation that the parties had approved the form of the order and consented to each of the orders within it. The March 9 Order was signed by the lawyers for each of the parties. Merle Campbell signed on behalf of the claimant and Kelsey Beazer signed on behalf of the respondent.

- [7] At the time of the March 9 Order, the trial of this matter was set to commence on March 23, 2020, and an order had been made for the sale of the family home. On February 20, 2020, the claimant filed an application to adjourn the trial and to delay the sale of the family home. The respondent had also filed an application to compel the claimant to provide keys to the realtor who was tasked with the selling of the home. The March 9 Order addressed these applications.
- [8] The proposal that this matter be referred to mediation/arbitration was initially made by claimant's counsel in an email dated January 8, 2020. Respondent's counsel responded on February 3, 2020, with her proposals. On February 27, the respondent provided a further settlement proposal.
- [9] On February 27, the parties reached an agreement in principle to adjourn their respective applications and the trial and proceed by way of mediation/arbitration. This was confirmed by a letter from respondent's counsel to claimant's counsel. There then followed multiple exchanges of correspondence between counsel culminating in the agreement contained in the March 9 Order.
- [10] On March 11, 2020, between the making and entry of the March 9 Order, a notice of appointment or change of lawyer was signed and filed notifying that Dmitrii Terpylo had been appointed to act as the lawyer for the claimant in place of Ms. Campbell.
- [11] After Mr. Terpylo's appointment, the parties agreed to change the deadline set in the March 9 Order for the exchange of document demands from March 13 to March 31.
- [12] On April 7, counsel for the parties exchanged emails regarding the mediation/arbitration, more specifically, as to whether it would proceed virtually. Notably, claimant's counsel did not raise any objection to the mediation/arbitration at this time.
- [13] On April 20, 2020, the parties attended a pre-mediation conference. At this time, claimant's counsel advised for the first time of issues with the March 9 Order and that the claimant was contemplating an application to set it aside.
- [14] Although multiple and serial affidavits have been filed by the parties, most of the affidavits are not particularly relevant to the issue before me. This practice of including every affidavit previously filed by a party is not helpful to the court and is to be discouraged.
- [15] Notwithstanding the multiple affidavits filed, I note that a conspicuous piece of evidence is not before me; namely, there is no affidavit from Ms. Campbell, the claimant's previous counsel. In this regard, the claimant's affidavit number 9 at para. 11 states:
11. Further, I am concerned that Ms. Campbell, if she is asked to testify in this proceeding, is going to simply deny my assertions, as admitting them would likely result in damage to her reputation.

- [16] There are three key affidavits filed by the claimant that are relevant. The first is an affidavit sworn and filed on May 27, 2020. In that affidavit, the claimant deposes, in summary:
- a) She fired Ms. Campbell shortly following the execution of the March 9 Order.
 - b) She did not consent to a number of aspects of the March 9 Order, although she does not particularize which aspects.
 - c) She was not properly informed and advised and did not understand some aspects of the March 9 Order. Again, she does not fully particularize what aspects.
 - d) She was under duress at the time.
 - e) She did not have the benefit of all relevant information at the time.
 - f) She had instructed Ms. Campbell to schedule the mediation in the Fall of 2020.
 - g) On February 21, 2020, she received from Ms. Campbell's office, a without prejudice letter from respondent's counsel which contained, among other things, a proposal to adjourn the trial and proceed by way of mediation/arbitration to be completed before the end of summer and to be peremptory on the claimant. At the time she received this, she was in hospital seeking medical attention.
 - h) On February 23, 2020, she emailed Ms. Campbell with a detailed response to the points raised in the February 21 letter. Included in her response was reference to the mediation not being before October and that it should not be peremptory.
 - i) She says she subsequently dropped by Ms. Campbell's office, although she is not specific on when. Ms. Campbell seemed unaware and could not locate either the February 21 letter or the claimant's February 23 email. Eventually they were obtained and discussed. Ms. Campbell was advised by the claimant that she did not agree to the mediation/arbitration taking place before October or to it being peremptory.
 - j) She did not agree to share the costs equally.
 - k) Ms. Campbell did not know what the last best offer model was and did not explain how a 10-day trial could be distilled to a one-day arbitration.
 - l) Ms. Campbell told her the cost of arbitration would be no more than \$4,000 to \$5,000, but she later found out that Ms. Sainty's retainer for a one-day mediation was \$6,000.
 - m) Had she known that she would be required to pay the arbitrator's fees, she would not have agreed to arbitration.
 - n) She says that she specifically instructed Ms. Campbell she would only agree to arbitration if the respondent took no further steps to sell the family home.

- o) She says she specifically advised Ms. Campbell that the respondent's attempts to sell the home were deliberate attempts to terrorize and control her, that she intended to buy out his interest in the home, and that he obtained the orders relating to the sale under false pretenses.
- p) She appears to say that she advised Ms. Campbell that the arbitration could not proceed in April or May, but should wait until the fall because of her health conditions.
- q) The next time she spoke with Ms. Campbell, the arbitration was set for May 13 and 14, 2020. She insisted the date be changed, but was told that it was too late and that nothing could be done. Ms. Campbell also told her that the respondent and his lawyer were calling the shots and that was how it had to be.
- r) She was not advised that there could be no witnesses at an arbitration and no appeal.
- s) She says she was under extreme duress, presumably because of her health conditions, but she does not specify exactly why she was under duress.
- t) Ms. Campbell told her the May arbitration was a win because otherwise she would have had to proceed with a trial in a matter of weeks.
- u) She says Ms. Campbell completely disregarded her instructions.
- v) A hearing before the arbitrator proceeded on May 20, 2020.
- w) On May 23, 2020, the arbitrator ruled the arbitration would proceed on June 11 absent a stay or setting aside of the March 9 Order;
- x) She references other considerations she considered relevant, including:
 - i) the respondent failed to provide adequate disclosure;
 - ii) there is an ongoing criminal investigation against the respondent;
 - iii) there is a civil claim by the children against her and the respondent relating to the family home;
 - iv) she has a separate proceeding against the respondent for physical and sexual abuse;
 - v) she is awaiting referral to support services; and
 - vi) due to COVID-19, she has been unable to undergo her medical tests.
- [17] The claimant's affidavit number 9, made and filed June 4, 2020, was filed in response to the respondent's application for production of counsel's file. In this affidavit, the claimant states her concerns about production of her previous counsel's file. It is in this affidavit she expresses a belief that Ms. Campbell will deny her assertions if called upon to give evidence. She further deposes to her belief that the respondent is not credible and provides numerous examples of his alleged untruthfulness or deceit.

- [18] The claimant filed affidavit number 10 on June 18, 2020. In that affidavit, she attaches medical records attesting to her medical condition in 2018 and 2019 and emails from the RCMP confirming they are investigating complaints made against the respondent by the claimant of sexual abuse and fraud.
- [19] The claimant deposes in her affidavit number 10 that one of the key factors at the time the March 9 Order was agreed to was an application of the respondent that was set to proceed in court the next day. She says Ms. Campbell told her if she did not agree, they would have to go to court the next day. She says this was extremely distressing. She says she later found out the application set for the next day had been adjourned on February 28, 2020. She says that if she had known this, she would not have consented to the March 9 Order. Her affidavit also includes much of what is argument relating to the grave injustice she says she will suffer if the March 9 Order is not changed or set aside. This includes:
- a) The respondent has repeatedly refused to provide full and true information;
 - b) The March 9 Order does not ensure she will receive adequate document disclosure;
 - c) Full document disclosure is necessary for her to prove her case and to disprove the respondent's assertions and show him to be not credible;
 - d) The RCMP investigation is not concluded; and
 - e) She does not have the financial resources for yet another court case.
- [20] The claimant finally deposes in her affidavit number 10 that she wishes to reset a trial in this matter, obtain full disclosure, and conduct an examination for discovery of the respondent.
- [21] The claimant's notice of application is not concise in either its pleading of the facts relied upon or in asserting the legal basis for the order sought. The claimant references first that consent orders may be set aside when obtained by fraud, abuse of process, or where the underlying agreement is invalidated under contract principles. The claimant also references concepts of unconscionability, undue influence, economic duress, material non-disclosure, irreparable harm, procedural fairness, and balance of convenience.
- [22] Although the application is to change or set aside the March 9 Order, I intend to address it primarily as an application to set aside. I do so because any application to change the March 9 Order must be brought under s. 215 of the Family Law Act, S.B.C. 211, c. 25, which requires that the applicant show a change in circumstances since the March 9 Order was made. The evidence filed, including the affidavits of the claimant, make clear, and I find as a fact, that there has not been a change in circumstances since the March 9 Order was made.
- [23] The claimant relies upon the Court's inherent jurisdiction as the basis for setting aside the March 9 Order and refers me to *Racz v. Mission*, [1988] 22 B.C.L.R. (2d) 70 (B.C.C.A.), a decision of our Court of Appeal. Like the present matter, *Racz* concerned a consent order that had been signed by solicitors. In *Racz*, the plaintiff's solicitor signed an order dismissing the action with costs, but did so without instructions from the client. Prior to the

entry of the order in Racz, the defendant's lawyer was advised by the plaintiff's new lawyer that she doubted the plaintiff had consented. The plaintiff also telephoned his first lawyer instructing that he did not want the action dismissed and not to enter the dismissal order. The order was, however, entered five days later. On application by the plaintiff, Justice Lysyk set aside the consent dismissal order on the basis that the defendant's lawyer knew the authority of the plaintiff's lawyer was being questioned. On further appeal, this decision was upheld. Hutcheon J.A., writing for the court, said at paras. 8 to 11:

- [8] The law relating to the setting aside of a consent order is summarized by the editors of Fraser and Horn, *Conduct of Civil Litigation in British Columbia*, vol. 2, at p. 1064 (January 1985):

27.11 Order Obtained by Consent.

An order entered by consent is in effect an agreement of compromise and such an order may be set aside on any ground which would invalidate a contract. In all other respects the judgment has full force and validity. A separate action must be brought to set aside a final order. Where the order is interlocutory however, a motion may be made to set it aside.

Grounds upon which a consent order may be set aside include lack of authority of counsel, common mistake, fraud, collusion, duress and illegality.

[Authorities omitted]

In an earlier passage at p. 1044 we find this general statement:

A court in addition has inherent jurisdiction to set aside a judgment or order:

- a) which has been obtained by fraud, collusion or perjury;
- b) which constitutes an abuse of process;
- c) on the ground that fresh evidence has been discovered; or
- d) which was obtained by consent on a ground which would invalidate a compromise not contained in a judgment or order.

- [9] In the present case, the process of the court required the registrar to act on the signature of the first solicitor because he was still the solicitor on the record. That solicitor clearly acted without authority. Thus we have, on the evidence before us, an abuse of the process of the court by that solicitor, an officer of the court.

- [10] The defendant, through its solicitor, knew before the order was entered that the plaintiff had consulted the second solicitor and knew that the authority of the first solicitor had been questioned. This is not a case in which the plaintiff was to receive some benefit from the consent order, he clearly was not because by the terms of the order the proceedings were dismissed with costs to the defendant. Nor is this a case in which there is any prejudice to the defendant from the giving of its consent to the order.

- [11] In such circumstances the defendant was not entitled to proceed on the assumption that the solicitor on record was authorized to consent to the order on behalf of the plaintiff.
- [24] There are, in my view, two key elements present in *Racz* that are not present in the matter before me. First, the court found that the solicitor clearly acted without authority and that this constituted an abuse of the process of the court by that solicitor. Second, the court found that the defendant's lawyer knew the authority of the plaintiff's first lawyer had been brought into question and was therefore not entitled to proceed on the assumption that the first lawyer had authority. This latter element is a vital distinguishing factor to which I will return.
- [25] The claimant also relies upon *McCowan v. McCowan*, [1995] 24 O.R. (3d) 707 (C.A.O.), for the proposition that a consent judgment may be set aside on the same grounds as an agreement giving rise to the judgment, a proposition which is reflected in para. 8 of *Racz*. To similar effect is *Verma v. Verma*, 2007 BCCA 566, at para. 28, citing *Shackleton v. Shackleton*, 1999 BCCA 704:
- [28] Consent orders represent an agreement of the parties and will not generally be set aside or varied unless grounds can be shown that would justify setting aside the underlying contract: see *Shackleton v. Shackleton*, 1999 BCCA 704, 1 R.F.L. (5th) 459 ¶ 12. Grounds would include such things as duress, undue influence, fraud, misrepresentation, mistake, and unconscionability. Nothing of the sort has been suggested here and, in my view, the appellant remains bound by the agreement and by the order that incorporated it.
- [26] More recently in *Jackson v. Honey*, 2009 BCCA 112, the Court of Appeal summarized the circumstances where an entered order could be revisited. One such circumstance is where the contractual defences of fraud, duress, mistake, or illegality are made out. At paras. 22 and 23, the Court stated:
- [22] A court may also amend or vary an entered order based on the contractual defences of fraud, duress, mistake or illegality. However, in this case any potential defences that might have permitted the variation of the entered Final Order were extinguished by the trial judge's finding of fact that Ms. Honey consented to the inclusion of the costs provision of the order.
- [23] The trial judge carefully reviewed the exchange of communications between the parties. She concluded that the exchanges reflected the consent of both Ms. Honey and Mr. Jackson to the inclusion of the double costs provision in the final order.
- [27] I accept that a consent order may be set aside on the same grounds as any other agreement. I further accept, as set out in *Racz*, that one such ground is lack of authority of the party's solicitor. However, I do not accept that lack of authority simpliciter is enough. In *Racz*, there was both lack of authority on the part of the plaintiff's solicitor and knowledge of this lack of authority on the part of the defendant's solicitor. Both elements, in my view, are necessary to set aside a consent order on the grounds of lack of authority of counsel. This is merely a

particular application of the general rule in agency law that an agent clothed with apparent or ostensible authority, but without actual authority, can bind her principal to a contract made with a third party, unless the third party has actual knowledge of the agent's lack of authority: see, for example, G.H.L. Fridman, *Canadian Agency Law*, 3rd Edition, at p. 163.

- [28] The claimant relies upon *Glyckherr v. Glyckherr*, 1998 CanLII 4154 (BC SC), at para. 36, citing from Halsbury's, as authority for the proposition that the court has discretion to set aside a consent order, even where the other side is not aware of a limitation on counsel's authority. However, the subsequent paragraph in *Glyckherr* indicates it is not authority for any such proposition. Paragraph 37 from *Glyckherr* states:
- [37] So, it seems that, even if there was a miscommunication between the respondent, and even if there was a limitation on Mr. Henry's right to settle, that limitation must have been made known to the petitioner or his counsel. There is no evidence of that having been done. Failing that, the petitioner was entitled to rely on Mr. Henry's apparent or ostensible authority to settle.
- [29] The case before me is similar to that of *Eve v. Ross*, 1990 CanLII 478 (BC SC), which is also cited by the claimant. In *Eve*, counsel had consented to an order in chambers. Later, the respondent refused to sign the consent order. The order concerned the sale of the matrimonial home. The order agreed upon was that the proceeds would be distributed after the usual adjustments. Upon application to settle the order, respondent's counsel said he was not authorized by his client to agree to the usual adjustments. In the circumstances, Justice Shaw held that the order should be settled as was agreed and presented. In so doing, he specifically found that the petitioner's counsel had no reason to think that counsel for the respondent was under any misapprehension as to the nature of the order and did not know respondent's counsel was acting without instructions:

There is no doubt the Court has the power to set aside a consent order in circumstances where the consent, as a form of agreement, may be set aside: see *Mayo Holdings Ltd. v. Canada Trust Realtor*, 1989 CanLII 5239 (BC CA), [1990] 2 W.W.R. 385 (B.C.C.A.), Legg J.A. for the Court at 393. In that case a consent order was set aside where there was a mutual mistake of the parties.

In the case before me, I start with the proposition that counsel for the respondent was an agent of the respondent, and as counsel he was cloaked with ostensible authority to give the consent that led to the order I made. Consequently, apart from the issue of mistake which I will address shortly, the consent he gave was as binding on the respondent as if the respondent had personally given his consent: see *Bowstead on Agency*, 13th ed., p. 248.

- [30] With respect to mistake, Justice Shaw held that a mistake of which the petitioner was unaware and did nothing to contribute to was not a basis for voiding a contract at common law or in equity:

The above general principle is subject to limited exceptions at common law and in equity. At common law a contract may be voided for a unilateral mistake, if it is shown that the other contracting party knew of the mistake: Anson's Law of Contract, 25th ed., pp. 299 and 301-4; Chitty on Contracts - General Principles, 24th ed., p. 292. Here, neither the petitioner nor her counsel knew of the mistake. In equity the court has a discretionary power to rescind a contract for unilateral mistake, but it must at least be shown that the unilateral mistake was contributed to by some fault of the other party: Chitty, *supra*, pp. 153-4; Anson, *supra*, pp. 324-7. Here I find no fault by the petitioner or her counsel.

- [31] Even if I accept that Ms. Campbell was acting without the instructions of the claimant, there is absolutely no evidence before me that the respondent or his solicitors had any reason to question the authority of Ms. Campbell to sign the March 9 Order. I find as a fact that the respondent and his solicitors were not aware of any limitation on the authority of Ms. Campbell.
- [32] The claimant has referred me to no case law where a consent order was set aside on the grounds of lack of authority of a lawyer that was unknown to the other party and I would be very hesitant to make such a rule. Indeed, any such rule would wreak havoc. The signing of consent orders by lawyers on behalf of clients is a routine occurrence. It is presumed that a lawyer has the authority of her client to sign consent orders on the client's behalf.
- [33] The claimant also says that she did not understand the meaning and effect of several of the terms of the March 9 Order as they had not been adequately explained to her. This may be so, but this by itself does not assist the claimant. I dare say that it is often the case that a party may not fully understand the terms of an order. The question, however, is whether any such lack of understanding or misunderstanding can vitiate a consent order. In my view, it cannot, unless the lack of understanding or misunderstanding can be elevated to establish mistake under principles of contract law.
- [34] A unilateral mistake by one of the parties to a contract does not vitiate the contract unless the other party has knowledge of the first party's mistake or at least contributed to it in some fashion. There is no evidence before me that either the respondent or his solicitors knew of the claimant's state of knowledge and there is nothing in the evidence to indicate that any fault on the part of the respondent or his counsel contributed to the mistake. Indeed, it would be hard to imagine how they could have contributed to such a mistake when the alleged mistake relates to privileged communications between the claimant and her own counsel.
- [35] The claimant relies upon duress, unconscionability, and undue influence, all of which are grounds for setting aside a contract and would therefore be grounds for setting aside a consent order. However, duress normally involves a threat of unlawful or illegal action made to compel the innocent party to enter into the contract: *B.P.P.C. v. G.M.M.*, 2004 BCSC 540 at para. 30; and *R.P. v. British Columbia (Director of Child, Family and Community Services)*, 2015 BCSC 2302 at para. 15. Undue influence involves oppression, coercion, compulsion, or

abuse of power: *Dilley v. Hall-Dilley*, 2006 BCSC 794 at para. 39. Unconscionability involves inequality in the position of the parties, coupled with substantial unfairness in the bargain which raises a presumption of fraud: *Harry v. Kreutziger*, [1978] 9 B.C.L.R. 166 (B.C.C.A.) at para. 173.

- [36] The claimant has not identified any threat made by the respondent that would constitute duress under the principles of contract law. The claimant merely makes reference to her personal circumstances as constituting duress. In particular, the duress consists of the fact that she is dealing with medical issues and is generally frustrated with this proceeding and the respondent. This does not constitute duress sufficient to vitiate a contract or a consent order. Nor has the claimant identified any conduct by the respondent or his solicitors that would constitute undue influence or render the agreement unenforceable on the grounds of unconscionability. There was no contact between the claimant and the respondent at the relevant times. The claimant was at all times represented by counsel and was actively getting advice from counsel. It was counsel that negotiated the terms of the March 9 Order. There is simply, in my view, no evidence of undue influence or unconscionability.
- [37] Further, the claimant has not established that there is a substantial unfairness in the bargain represented by the March 9 Order. She has not given up her rights, but has merely changed the forum in which those rights are to be determined.
- [38] The claimant also submits and deposes that the respondent failed to disclose that his application set for March 3 had been adjourned by requisition filed February 28, 2020. She says that had she known this, she would not have consented to the March 9 Order. I do not accept this evidence. It is clear that the parties had reached agreement in principle on arbitration by February 27 and that it was then contemplated the application set for a March 3 hearing would be adjourned. I also note that the requisition adjourning the March 3 application was done by consent.
- [39] The claimant relies on irreparable harm, procedural fairness, and balance of convenience and refers me to *RCG Forex Service Corp. v. HSBC Bank Canada*, 2011 BCSC 315. *RCG Forex* was an application for an injunction, not an application to set aside or change a court order. I do not find it at all helpful in addressing whether an entered order of this Court should be set aside or changed.
- [40] The claimant submits that equitable and procedural fairness considerations favour changing or setting aside the March 9 Order. I do not agree that I have a general unfettered discretion to set aside a court order on the basis of equitable and procedural fairness considerations. Rather, my discretion must be exercised within the framework and parameters described in the case authorities to which I have referred. Nevertheless, in my view, the equities and procedural fairness considerations do not militate in favour of setting aside the order.

- [41] The essential issues raised by the claimant concern the relationship between her and her lawyer. There is no evidence the respondent had any knowledge whatsoever of any limitations on the authority of the claimant's lawyer or of what advice the claimant had received from her lawyer. Further, I find there was no wrongful or inappropriate conduct on the part of the respondent or his counsel. Hence there is nothing inequitable or procedurally unfair in requiring the parties to abide by an agreement that they made.
- [42] I am also not satisfied that the claimant will suffer the harm she claims. The claimant was not initially opposed to the matter proceeding by mediation/arbitration. She was mostly concerned about the dates of the mediation/arbitration and not proceeding with a trial that had been scheduled to commence on March 23, 2020. She now asks that the matter proceed in this Court as a conventional family law matter. In my view, she is simply attempting to rewrite the bargain that was made, in part, to avoid the March 23 trial. Further, it is open to her to apply to the mediator/arbitrator for an adjournment of the mediation or arbitration. In fact, the mediator/arbitrator has invited her to do so but she has not yet taken that invitation up.
- [43] The claimant says she will not have the ability before the mediator/arbitrator to call key witnesses and evidence. However, I note that s. 6 of the Arbitration Act requires an arbitrator to admit all evidence that would be admissible in a court and permits the arbitrator to admit other evidence that she considers relevant. The arbitrator may also determine how the evidence is to be admitted. The claimant can apply to the mediator/arbitrator for orders relating to the evidence to be admitted at the arbitration.
- [44] I am also not satisfied that there will necessarily be greater disclosure before this Court than there will be before the arbitrator. However, as the parties have decided and agreed the matter should go to arbitration, the extent of disclosure is a matter for the mediator/arbitrator to decide.
- [45] The claimant can also take whatever positions she wishes at the ultimate mediation and arbitration when held. She has not given up any substantive rights.
- [46] Delay is also a factor that goes to the equities and procedural fairness. It is apparent that there has been much delay in this matter that has been caused by the claimant who has been dilatory and obstructive. I do not intend to outline in detail the many delays that have occurred, but a chronology is set out in the statement of facts attached to affidavit number 5 of the respondent. Some of the notable delays were:
- a) the claimant failed to attend a JCC in August 2016;
 - b) the claimant failed to attend a JCC in April 2017;
 - c) the claimant routinely failed to respond to communications from respondent's counsel;
 - d) the claimant failed to attend an examination for discovery in July 2019;

- e) the claimant failed to attend an examination for discovery set by court order in August 2019;
- f) the claimant failed to attend a hearing set for September 5, 2019;
- g) the claimant failed to attend a TMC on February 3, 2020; and
- h) the claimant interfered with the selling of the family home pursuant to the court order.

[47] If the order sought in this application was granted, there will be yet more and longer delays. Additionally, the respondent is suffering financially from the delay. He has spent over \$100,000 in legal fees and currently owes his lawyer significant amounts. Neither of the parties have significant financial resources. There is significant debt that needs to be addressed. The respondent has over \$160,000 in unsecured debt. His debts and support obligations mean that he relies upon his current partner to pay part of his day-to-day living expenses. He has had to borrow money from his mother to pay his bills. The resolution of this legal proceeding and the sale of the family home are the only means by which to extricate himself from the circumstances he finds himself in. This is not to diminish the financial hardship and medical issues the claimant must also deal with. Both parties are suffering from the continuous delays. Setting aside the March 9 Order and returning this matter to the trial list will only contribute to further delays.

[48] In conclusion, the claimant has not established a basis for changing or setting aside the March 9 Order and the application is dismissed. In view of the conclusions reached on the claimant's application, the respondent's application for production of counsel's file is moot.

[49] I will now hear submissions on costs.

[SUBMISSIONS ON COSTS]

[50] THE COURT: In respect of costs, I am fixing the costs at \$2,000 for both today's hearing and the hearing on June 8, and the costs are awarded to the respondent.

"Giaschi J."

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