

CANADA / JUDGMENT

T.K.H. v. M.D.H.

2022 BCSC 755

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Supreme Court of British Columbia

DECIDED

9 May 2022

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2022 BCSC 755 T.K.H. v. M.D.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.K.H. v. M.D.H.,

2022 BCSC 755

Date: 20220509

Docket: E57026

Registry: New Westminster

Between:

T.K.H.

Claimant

And

M.D.H.

Respondent

Corrected Judgment: These reasons have been redacted for publication purposes on February 21, 2023.

Before: The Honourable Mr. Justice Armstrong

On appeal from: An order of a Master of the Supreme Court made on September 27, 2021 ([T.K.H. v. M.D.H.], New Westminster Registry No. E57026), plus other applications.

Reasons for Judgment

The Claimant appearing on her own behalf:

T.K.H.

Counsel for the Respondent:

J.M. Dreyer

Place and Date of Hearing:

New Westminster, B.C.

April 26, 2021

Place and Date of Judgment:

New Westminster, B.C.

May 9, 2022

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Introduction

- [1] In the course of this family law proceeding, the respondent failed to attend at two scheduled examinations for discovery and failed to remain at a third examination for discovery until it was concluded. Following an application by the claimant in August 2021, a master of this Court made an order (the "August 2021 Order") striking his response to family claim. The respondent appeals the August 2021 Order.
- [2] In her January 2021 application, the claimant also applied for an order striking out the respondent's counterclaim for the same reasons as his response was struck. The Master did not make any order concerning the counterclaim at the time of the August 2021 Order, and the claimant renewed that application with the hearing of this appeal.

Procedural History

- [3] The parties were married in August 2009 and separated in December 2015. During the relationship, they had one child, born in March 2013.
- [4] This proceeding began with the filing of the claimant's notice of family claim on February 14, 2019. The respondent filed the response and counterclaim on March 14, 2019, and he filed an amended counterclaim on January 13, 2020. The claimant has responded to the counterclaim. The orders sought in the notice of family claim and the counterclaim include a divorce; child and spousal support; orders respecting the child, parenting, and guardianship; orders respecting family property and family debt; and ancillary orders. In argument, the claimant informed the court that the parties are currently joint guardians, but she will be seeking an order for sole guardianship.
- [5] On July 11, 2019, a master made a consent order requiring the respondent to pay \$650 per month in child support to the claimant.
- [6] At various times, the parties have been self-represented and represented by counsel. From January 20, 2020, the respondent was represented by Ms. Dreyer, his current counsel. The claimant was represented by counsel up to February 8, 2021 and has remained self-represented since.
- [7] Little appears to have happened in the litigation until July 2020, when Ms. Dreyer's office received the October 2, 2020 appointment for the respondent's examination for discovery.

The First and Second Examination for Discovery Appointments

- [8] On September 23, 2020, Ms. Dreyer filed a notice of intention to act in person, which the respondent had previously signed, and sent it to the claimant's counsel. On September 24, 2020, the claimant filed a notice of intention to act in person.

- [9] The respondent did not appear on the day appointed for his examination for discovery in October 2020. He said he did not attend the first examination because he did not receive notice of the appointment due to confusion between himself and his lawyer: Ms. Dreyer had withdrawn as counsel without ensuring he was aware that she had used his notice of intention to act in person. The claimant had sent documents to Ms. Dreyer, who sent them to the respondent at the wrong email address and the respondent never received the documents. It appears she may have told him about a date; however, he was not aware of any details such as time and location, and as he believed Ms. Dreyer was continuing to act for him, he believed she was taking the necessary steps in to represent him.
- [10] The claimant rescheduled the respondent's examination for discovery for December 9, 2020 and served him two appointments; the second appointment was to change the location of the examination. The respondent did not attend either examination. In his affidavit, the respondent acknowledged that he knew about the second appointment but did not know that Ms. Dreyer was not acting as his counsel at the time. He affirmed that he told the claimant that he could not attend the appointment date because he had to work; she denies that conversation. In any event, he said he did not appreciate the fact that he was obliged to attend that examination. He did not appear at the court reporter's office for the second examination for discovery.

The January 2021 Order

- [11] On January 28, 2021, the claimant applied to strike the respondent's response to family claim due to his failure to attend the first and second examinations for discovery.
- [12] At that hearing in January 2021, the respondent said he had not learned about one of the discovery dates from his lawyer because of the email discrepancy. Nonetheless, the order was made that he should attend at the next appointment to examine him (the "January 2021 Order") failing which his response to the family claim would be struck. The specific term of the January 2021 Order was:

If the Respondent fails to attend the Examination for Discovery as scheduled in accordance with paragraph 1 of this Order, his response to the Notice of Family Claim will be struck

The Third Examination for Discovery Appointment

- [13] The next appointment was scheduled for April 6, 2021. The respondent attended for approximately 15 minutes of questions and answers, and then - before the claimant concluded her questions - he left the room and did not return. Prior to leaving, he expressed concerns about the relevance of the claimant's questions and refused to answer them. He was self-represented at this examination for discovery.

The August 2021 Order

- [14] On July 26, 2021, the respondent applied for a summary trial of the issues in the family law dispute.
- [15] The claimant applied to strike the response to family claim again based on the respondent's failure to remain at the April examination for discovery. The application was originally scheduled for July 27, 2021. On July 15, 2021, the respondent had retained a lawyer, Ms. Dreyer. Ms. Dreyer wrote to the claimant indicating her unavailability for that date and requested to adjourn.
- [16] The master's reasons for making the January order were not put before the master on August 10 or this court on this appeal, nor were the reasons included by the claimant on her application to strike his counterclaim.
- [17] The claimant's application was initially in July and reset to August 10, 2021 due to the claimant's failure to file her binder. Ms. Dreyer gave the claimant her available dates but before being informed of the scheduled date, her availability had changed
- [18] Thus, the claimant had filed her requisition to reset the application to August 10; because Ms. Dreyer's circumstances had changed and she requested a short adjournment. The claimant declined to agree to an adjournment. An articulated student for Ms. Dreyer attended Chambers on August 10 and requested an adjournment of the hearing to enable Ms. Dreyer to appear because she was much better versed in the facts of the case. The adjournment was refused, in part because the master believed there was no viable argument the respondent could advance in the circumstances.
- [19] The court did not specifically refuse the adjournment; rather, the court said there was nothing to be discussed and that it was required to strike the response. In declining to adjourn the application, the master said:

Well, the - - it seems to be a fairly simple question to be answered is - - there is an order that says if he fails to attend at an examination for discovery, number three that was scheduled, then his notice of family claim gets struck - - or response to the notice of family claim will be struck. This is an order that has not been appealed it appears, and what I have heard is that he showed up 15 minutes and then left without cause - - allowing a proper discovery to happen. In my books that's pretty much the same as not showing up.

So, unless you have some pretty good explanation for why - - why I'm understanding what has been described to me, I don't know that there is a whole lot to be discussed today, other than to strike the response to family claim, because it's really just enforcing an existing order

- [20] Having failed to achieve an adjournment, the articulated student made representations concerning the respondent's failure to attend the examination for discovery. The master then said:

So from that perspective I don't feel that I have - - have discretion to do more than to confirm that the consequences set out in Master Robertson's order of January 28, 2021 has been - - is being triggered through the failure to stay for the - - for the proper discovery. So my order is that - - pursuant to the order of Master Robertson made January 28, 2021 the response - - the response to the family claim is struck.

[21] After submissions, the master made the August 10, 2021 order as follows:

Pursuant to the order made by Master Robertson on January 28, 2021, the respondent's response to family claim is struck.

[22] Thus, in finding that by leaving the examination for discovery prematurely the master concluded the respondent had effectively not attended the third examination for discovery and breached the January 2021 Order. The master struck the respondent's response and noted he was merely enforcing the January 2021 order.

[23] The respondent's counterclaim was not struck in January 2021, despite the claimant's application to strike it in addition to striking the response to family claim. The master does not appear to have dealt with that application; however, it is not clear whether the master's failure to deal with the counterclaim was deliberate or whether it was an oversight.

The September 2021 Order

[24] On September 17, 2021, the respondent requested a reconsideration of the August 2021 Order. Oral reasons were given on September 27, 2021, now indexed at 2021 BCSC 2054 (the "September 2021 Order").

[25] In those reasons, the master refused to reconsider the August 2021 Order, concluding that Master Robertson had exercised primary discretion under the Supreme Court Family Rules, B.C. Reg. 169/2009 [the Rules] in January 2021 when she ordered the respondent's claim to be struck if he failed to attend an examination for discovery. M.D.H. had not been discovered by the time of the August 10 application, and he had offered no explanation for his continuing breach of the January 2021 Order.

[26] In refusing to reopen the hearing, the master noted that he was not satisfied a miscarriage of justice would occur without reopening the application, nor that a rehearing would change the result. Indeed, he noted that the respondent was "still in breach of the [January 2021 Order]" without explanation. He then commented it was "within my discretion to enforce" the January 2021 Order.

Appeals of the August 2021 Order and September 2021 Order

[27] The respondent filed notices of appeal of the August 2021 Order (enforcing the January 2021 Order of Master Robertson) and the September 2021 Order (the order refusing reconsideration of the August 2021 Order).

- [28] The appeal of the August 2021 Order was filed one day out of time. The respondent was granted an extension to perfect the late filing of his appeal notice. At the same time, the respondent was permitted to adduce fresh evidence related to his reasons for not remaining at the third examination for discovery.
- [29] This family case is set for trial for five days beginning on June 6, 2022.
- [30] The respondent was recently examined for discovery by the claimant. No discovery of the claimant has taken place, although the parties are discussing options for that discovery. In proceeding with an examination of the respondent, the claimant was concerned that if she delayed further in examining the respondent, the trial might be delayed and she was anxious to move the dispute toward a conclusion.

The Parties' Positions

Claimant's Position

- [31] The claimant seeks an order striking the respondent's counterclaim for the same breaches that resulted in the striking of his response to the notice of family claim.
- [32] The claimant contends the respondent was disingenuous in his explanations for not meeting his obligations under the Rules; she says his behaviours were wilful and repeated. She argued that to relieve the respondent now after three failed discovery attempts will undermine the importance of the Rules and respect for the court system.

Respondent's Position

- [33] In this case, the respondent relies on three affidavits, each filed January 2021, July 2021, and November 2021 respectively, that explain his reasons for not attending the first two examination for discovery appointments and prematurely leaving the last one. In addition to his statement to the claimant that he did not think some questions were relevant, he adds in the new affidavit that the formality of the occasion frightened him and that he had not understood that the claimant herself would be asking him the questions. He did not provide this affidavit information at the August 2021 hearing or the September 2021 rehearing, but was granted leave to use this affidavit on the appeal.
- [34] The respondent emphasizes that orders striking pleadings are draconian in nature. He claims that these orders are "a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence" (at para. 16, citing to *Muscroft v. Eurocopter S.A.*, 2003 BCCA 229); *Besic v. Kerenyi*, 2012 BCCA 187 [Besic].
- [35] These orders--otherwise called "guillotine orders"--are generally frowned upon by courts because they deprive the litigant of a full opportunity to answer the allegations against them and they do not allow for explanations for a failure to abide by the impugned order.

Legal Framework

[36] The claimant relies on the Rules for the authority to strike the respondent's counterclaim, to oppose his appeal, and to resist his application to set aside the August 2021 Order striking his response to family claim. In particular, she relies on R. 21-5, which reads as follows:

If party does not comply with the rules

- (1) If a party does not comply with these Supreme Court Family Rules, the court may do one or more of the following:
 - (a) if the party who has not complied is a claimant or a respondent who has brought a counterclaim,
 - (i) strike out the notice of family claim, counterclaim or petition, and
 - (ii) grant judgment dismissing the claims made in the notice of family claim, counterclaim or petition;
 - (b) if the party who has not complied is a respondent or a respondent to counterclaim, strike out the response to family claim, response to counterclaim or response to petition;
 - (c) set aside a step taken;
 - (d) make an order for costs against the party;
 - (e) make any other order it considers will further the object of these Supreme Court Family Rules.

Non-compliance with rules

- (2) Unless the court otherwise orders, a failure to comply with these Supreme Court Family Rules must be treated as an irregularity and does not nullify
 - (a) a family law case,
 - (b) a step taken in the family law case, or
 - (c) any document or order made in the family law case.

Standard of Review of Masters' Decisions regarding Final Orders

[37] The standard of review for masters' decisions was set out by Justice Fenlon in *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, 2011 BCSC 999 (leave to appeal ref'd: 2011 BCCA 390) [Ralph's Auto Supply] as follows:

[7] Masters began sitting in this Court in late 1989. The standard of review to be applied on an appeal to a judge of this Court from a master's decision has been settled since early 1990:

- 1) Review of a purely interlocutory decision of a master is a true appeal and the master's decision is not to be interfered with unless it is clearly wrong.
- 2) A question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master.

(Abermin Corp. v. Granges Exploration Ltd. (1990), 1990 CanLII 1352 (BC SC), 45 B.C.L.R. (2d) 188 (S.C.) [Abermin]; Northland Properties Ltd. v. Equitable Trust Co. (1992), 1992 CanLII 2360 (BC SC), 71 B.C.L.R. (2d) 124 (S.C.) [Northland].)

[Emphasis added].

- [38] Numerous decisions have accepted Ralph's Auto Supply as binding authority setting out the standard of review for masters' decisions - see also Mann v. Jagpal, 2020 BCSC 1919; Chow v. Wichacz, 2022 BCSC 376.
- [39] This appeal is complicated because, in addition to the respondent's application to set aside the order striking his response, the claimant makes a parallel application to strike the respondent's counterclaim also because of his failure to attend the examinations for discovery. While I accept that the master would likely have granted the order striking the respondent's counterclaim along with her decision striking out his response, I do not have the benefit of her reasoning in granting the January 2021 Order. Thus, I must decide that application based on the evidence tendered on this application and the appeal.
- [40] Combining the standard of review established in Ralph's Auto Supply and the necessity to consider all of the elements of the application to strike the counterclaim, I am persuaded to assess both the appeal and the application on the basis that I am not bound to follow the master's exercise of discretion and, where warranted, I may substitute my view.

Guillotine Orders in Family Law Cases

- [41] This trial concerns several of the customary issues that arise in family law disputes. Critically, the claimant and respondent are seeking parenting orders, including parenting time, that may have long-term impacts on their child. The parties are currently joint guardians but the claimant now seeks sole guardianship of the child.
- [42] Parenting issues raise significant questions about the best interests of a child that are usually resolved with the participation of both parents. If one parent is denied participation in a trial involving parenting, a trial judge will be asked to decide the best interests issue in a vacuum. If one parent is absent, the trial will be unbalanced and considerations of the roles of both parents and their decision making responsibilities may be seriously compromised. It is normally essential to hear from both parents before assessing the regime that will be in the child's best interests and bearing in mind the child's entitlement to optimum contact with both parents.

- [43] Pleadings in family cases with parenting issues are vital to a litigant's participation in a proceeding. As noted if a respondent's response and counterclaim are struck, that person is no longer a "party of record": see *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89 at para. 64; *XY, LLC v. Canadian Topsires Selections Inc.*, 2015 BCSC 1840 at paras. 29 and 48.
- [44] When a litigant ceases to be a party of record there is no right to appear and participate in the proceeding; thus, striking a response to a family claim will dramatically skew the analysis and interfere with the trial judge's ability to protect the child's best interests.
- [45] The participation of both parents in family law cases where parenting and guardianship are at issue is important because of the long term repercussions for a child and the risks that a parent/child relationship can be damaged permanently if not managed in a balanced and careful manner. There is a significant risk that the interests of the child will be compromised if both parents are not present at the trial.
- [46] Thus such a draconian order, particularly where the interests of a child are in issue, should be used sparingly, with great caution and when no other practical options are available.
- [47] There is a valid issue as to whether the respondent's behaviour warranted the order made, particularly in light of the parenting and child centered issues to be resolved in this litigation. In my view, the consequence of the respondent being excluded from that process underscores the draconian impact of depriving one parent the right to participate in a trial.
- [48] In this case, the August 2021 Order will prevent the respondent from participating in the trial process, unless the order is set aside or he proceeds solely on the counterclaim. In my view, it would be impractical to the point of absurdity for the trial judge to attempt to manage a trial where the respondent's response has been struck while considering a live counterclaim engaging all of the same issues raised in the response.
- [49] In light of this quandary, I address the test for striking pleadings in this family law dispute from the more critical perspective of ensuring that the trial adequately explore and resolve all of the parenting issues with a view to advancing the best interests of the parties' child.
- [50] Firstly, a decision to strike a party's pleadings in response to their behaviour (e.g., breaches of court orders or the Rules) - a "guillotine order" - is a remedy of last resort involving exceptional circumstances. It is employed only if no other remedy would be adequate to deal with the defaulting litigant. Courts are generally reluctant to use such remedies.
- [51] In *Schwarzinger v. Bramwell*, 2011 BCSC 304, Justice Fitzpatrick summarized some of the principles applicable, including:
- a) the remedy of striking pleadings is draconian and to be used in the most egregious of cases, as it deprives the litigants of a trial on the evidence;

- b) parties are generally entitled to second chances before the relief is granted, making these orders better suited to cases where there are repeated violations;
- c) the court is required to consider proportionality, weighing the degree of a litigant's fault with the degree and effect of sanctions;
- d) the court must consider whether a lesser remedy would cure the default and inspire confidence that the court's orders will be obeyed in the future;
- e) the court must consider explanations given by a defaulting litigant for their noncompliance; and
- f) obedience of court orders is necessary for the proper administration of justice.

[52] In *Global Banking Systems Inc. v. Datawest Solutions Inc.*, 2006 BCCA 577, the court discussed guillotine orders:

[20] In *Bird Semple Fyfe Ireland W.S. v. Dixon*, 1999 BCCA 333, Esson J.A. stated the reason for not making a "guillotine order" (at para. 9):

Mr. Hodgins seeks what might be termed a 'guillotine' order providing that if the appellant fails to comply with the order within a fixed time his appeals will stand dismissed. There is precedent for such a term in some of the cases but in my respectful view such terms should generally not be imposed - there is too much risk of prejudice arising through an accidental failure to comply.

[21] In *Dhanani v. Dhalla*, 2005 BCCA 317 (at para. 28), Low J.A. made a similar point: "In my opinion, it is better to avoid making such guillotine orders because they often cause more difficulty than they avoid and can result in injustice". In *Tribe v. Farrell*, 2005 BCCA 450 (at para. 25), Ryan J.A. stated: "It is only in rare circumstances that a 'guillotine order' is requested by counsel and granted by the court. If such an order is granted, difficulties can be encountered if it is to come into operation merely on the failing of an event to occur".

[53] Likewise, in *Saric v. Banden*, 2017 BCSC 1507, the claimant had sought an order granting automatic judgment in her favour in the event of the respondent's continued non-compliance with court orders or the court Rules. Justice Verhoeven commented: "that sort of order, which might be called a guillotine order, is generally not favoured by the courts" (at para. 13).

[54] Apposite to the circumstances of this appeal and application are the comments of the Ontario Court of Appeal in *Purcaru v. Purcaru*, 2010 ONCA 92 [Purcaru], which articulate the specific concerns that arise when guillotine orders are employed in family law cases. In my view these concerns are heightened in family law cases with self represented litigants. The court said:

[47] I wholly accept Mr. Purcaru's argument that pleadings should only be struck and trial participation denied in exceptional circumstances and where no other remedy would suffice.

- [48] This is particularly so in a family law case where the resulting judgment may provide for continuing obligations that can only be varied on proof of a change in circumstances. A change in circumstances may be difficult to establish if the initial judgment is based on incorrect assumptions, thus perpetuating injustice. Similarly, special care must be taken in family law cases where the interests of children are at issue. The consequences of striking pleadings or limiting trial evidence when custody or access is at issue was discussed in *King v. Mongrain* (2009), 2009 ONCA 486 (CanLII), 66 R.F.L. (6th) 267 (Ont. C.A.), where Gillese J.A. observed at p. 273 that pleadings should not be struck if such a remedy leaves the court with insufficient information to determine custody. See also *Haunert-Faga v. Faga* (2005), 2005 CanLII 39324 (ON CA), 203 O.A.C. 388 (C.A.).
- [49] The adversarial system, through cross-examination and argument, functions to safeguard against injustice. For this reason, the adversarial structure of a proceeding should be maintained whenever possible. Accordingly, the objective of a sanction ought not to be the elimination of the adversary, but rather one that will persuade the adversary to comply with the orders of the court. As this court said at p. 23 of *Marcoccia v. Marcoccia* (2009), 2008 ONCA 866 (CanLII), 60 R.F.L. (6th) 1 (Ont. C.A.), the remedy of striking pleadings is "a serious one and should only be used in unusual cases". The court also explained at p. 4 that the remedy imposed should not go "beyond that which is necessary to express the court's disapproval of the conduct in issue." This is because denying a party the right to participate at trial may lead to factual errors giving rise to an injustice, which will erode confidence in the justice system.

Analysis

Should the August 2021 Order be set aside?

- [55] The master's treatment of the January 2021 order in August 2021 reflects, to a large degree, his acceptance that he was bound by the earlier guillotine order. In August 2021, the master disclaimed any discretion to reconsider the circumstances of the respondent's failure to attend the June discovery date. He said: "I am simply enforcing an order that was made back in January that sets out a specific consequence to - - to not attending."
- [56] On a review of the circumstances in this case, it is clear the respondent was not at fault for the first non attendance; his failure to attend was clearly the fault of his lawyer. He was relying on his lawyer to keep him informed, but due to counsel's error, he was not informed of the requirement to attend. This occurred as a result of his lawyer's failure to make contact at the address he had provided.

- [57] The respondent's second failure to attend the discovery is more serious because he was aware of the date and was personally served with the appointment. He was, however, not aware that his lawyer had used his notice of intention to act in person again, without notifying him. Nonetheless, he was obliged to attend the appointment and failing to do so caused the claimant inconvenience and cost. He returned the conduct money to the claimant.
- [58] Although the respondent attended the third examination appointment, he left without answering all of the claimant's questions. The circumstances surrounding that decision do not excuse the respondent from remaining, but can be viewed in the light of two self-represented litigants in a foreign environment, acting improperly. In my view, the respondent can be criticized for his behaviour at the June date but that behaviour does not rise to the level of "the most egregious" behaviour (Besic at para. 16) justifying striking of his response.
- [59] I do not need to decide the question of whether his decision to leave the discovery was a breach of the January order; when counsel are present a witness's decision to object to answering questions is usually decided at a chambers application to compel responses. However, M.D.H.'s behaviour does not rise to the level warranting the draconian remedy ordered, nor is it clear that there could not be a lesser penalty that would preserve his right to participate in the trial.
- [60] I accept the claimant's frustration with the respondent's behaviour between January and April. She is a legal assistant but does not work in family law and has represented herself at multiple court appearances; this alone must be a stressful and frustrating experience.
- [61] Most recently, the claimant examined the respondent for discovery. Although she said she proceeded with the discovery out of caution so she will be prepared for trial if the appeal was successful and her application dismissed, she did not want to interfere with her chances of maintaining the order striking the response.
- [62] However, in essence the respondent has obviated his breach of the January 2021 Order by attending this discovery and otherwise appears to have followed his obligations.
- [63] I agree with the court's comments in Purcaru that denying participation in a family law trial in which issues of parenting are to be decided is a severe remedy. Such a remedy should be reserved for exceptional circumstances where no other remedy, short of denying one party participation in the proceedings, could achieve the goal of ensuring trial fairness or expressing the court's disapproval of the conduct in issue.
- [64] I note that at the time the August 2021 Order was issued, the master did not consider other options or remedies short of striking the response; it appears that he felt bound by the January 2021 Order. He limited his role to "simply enforcing an order", without considering all of the circumstances, the explanation, or the submissions of the articulated student.

- [65] Interestingly, on the application to revisit his order in September 2021, the master received more fulsome argument and referred to a number of authorities on the issue. He did not take into account the parenting aspect of the upcoming trial, although he referred to Purcaru. He recognized the respondent's submissions that his non-compliance should not result in a remedy beyond what was necessary to express the court's disapproval of his conduct (September 2021 Order, para. 40). He also noted that denying a party the right to participate in the trial could lead to factual errors giving rise to injustice (para. 40). He commented on the respondent's argument that his conduct did not "rise to the level of egregious or pervasive misconduct necessary to warrant striking pleadings"; however, he said he was unable to "override the entered order of a fellow master" and the respondent had not provided any authority to address that question (paras. 41-42).
- [66] The master discussed his August 2021 refusal of an adjournment to permit counsel for the respondent to appear and make submissions. He said that he did not believe the respondent had acted responsibly: He had not appealed or applied to vary the January 2021 Order, and he had failed to take steps to remedy his breach of the order (e.g., by "proactively offering to make himself available for continuation of the claimant's examination for discovery of him") (para. 53).
- [67] In the end, the master said that it was not probable a miscarriage of justice would occur without reopening the application, nor was it probable that a rehearing would change the result; he declined to reopen the application and the August 2021 Order remained undisturbed.
- [68] I am satisfied that the exceptional remedy of striking the respondent's pleading failed to take into account and weigh the important parenting aspects and interests of the child at stake in this litigation.
- [69] The respondent's second failure to attend was the most serious flaw, but standing alone, it did not merit the guillotine order made in January 2021 and enforced in August 2021. As such, I believe that the master could have made orders bringing the respondent into compliance with his obligations without striking his pleadings.
- [70] The respondent attended at the third discovery, albeit declining to answer questions and leaving. Had he been represented by counsel, I have no doubt he would have remained at the examination.
- [71] In the end, this case is not like *Besic*, where the same judge who made the earlier guillotine order on the application to enforce the earlier order was better equipped to exercise his discretion in light of all the facts. The appellant's behaviour throughout the litigation in *Besic* was overall more egregious than in this case. The order made by Justice Wong happened after a prolonged history of delay and misconduct. Additionally, the order in *Besic* was different; it was not a guillotine order, but was qualified by the words "without more, your appearance and statement of defence will be struck" (para. 7).

- [72] In the end, a majority of the Court of Appeal in *Besic* noted that the ultimate question was "whether a lesser remedy would suffice" (para. 17). In view of the child focused issues in this case I conclude that the answer to that the question on this appeal and the application to strike the counterclaim is yes. With counsel representing the respondent, a new date for discovery could have been ordered and special costs could have been granted to express the courts disapproval of his behaviours. In *Chapman v. Chapman*, 2020 BCSC 1896, Justice Jackson summarized these principles:
- [4] This Court has the discretion to order costs of a family law case be assessed as special costs: Supreme Court Family Rules, R. 16-1(1)(b)(i) [SCFR]. Awards of special costs in family and civil proceedings are governed by the same principles.
- [5] Special costs are punitive and imposed to sanction a party's reprehensible conduct during the litigation, conduct from which the court seeks to disassociate itself: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 745, 9 B.C.L.R. (3d) 242 (C.A.) [*Garcia*]; *R.A.C. v. V.L.C.*, 2009 BCSC 1207 at para. 11. The word "reprehensible" is broad and encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia* at 746-747. Improper pre-litigation conduct is excluded from consideration: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 133-134.
- []
- [8] It is not necessary for the party's conduct throughout the litigation to have been reprehensible to warrant an award of special costs for the entire action: *Bradshaw Stenner*, 2012 BCSC 237 at para. 9, leave to appeal ref'd 2012 BCCA 481. Nonetheless, while special costs are usually awarded for the whole proceeding, where such an award would be disproportionate, the court has the discretion to award special costs with respect to particular steps in the litigation: SCFR R. 16-1(1)(b)(ii); *Gichuru v. Smith*, 2014 BCCA 414 at para. 91, leave to appeal ref'd 36221 (16 April 2015).
- [73] Overall, I am satisfied that the respondent's conduct was not so egregious to justify the draconian order, more so because of the impact striking the response will have on the trial of the parenting issues. Also, I am satisfied a lesser form of penalty could have been imposed to ensure compliance with the respondent's duty which is established by his eventual appearance at a discovery.
- [74] I therefore grant the respondent's appeal of the August 2021 Order.
- Should the Court strike the respondent's counterclaim?
- [75] For the same reasons discussed above, in exercising my discretion on these facts, I would not strike the respondent's counterclaim. The ultimate question is whether a lesser remedy would suffice, and I find it would and he has now been discovered. I therefore dismiss the claimant's application in this regard.

Remedy and Disposition

- [76] I grant the respondent's appeal of the August 2021 Order striking his response, and I dismiss the claimant's application to strike his counterclaim. In the result it is not necessary to address the September 27, 2021 order.
- [77] As I found the remedy imposed inappropriate, there remains a question as to an appropriate remedy. As noted, the respondent has now been examined for discovery. Exercising my discretion, I find that in the special circumstances of this case, the respondent must answer for his actions in a way that reflects the court's disapproval of his conduct from December 2020 to the present.
- [78] I notice that the master made no order as to costs on the August 10, 2021 order. Pursuant to R. 21-5(1)(d) , I am inclined to order that M.D.H. pay costs of the August application and the application made with this appeal. I will hear argument from the parties as to whether the respondent's conduct merits an order for special costs.

"Armstrong J."

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Prepared on 25 October 2026 · Esheria