

CANADA / JUDGMENT

Thind v. Smith-Gander

2022 BCSC 1167

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1167 Thind v. Smith-Gander

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thind v. Smith-Gander,

2022 BCSC 1167

Date: 20220711

Docket: S182821

Registry: Victoria

Between:

Kulwant Kaur Thind

Plaintiff

And

Pamela A. Smith-Gander and Kuldeep Singh Chaggar

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

The Plaintiff appearing in person:

Kulwant Thind

Counsel for the Defendant, Pamela A. Smith-Gander:

R. Harper

M. Taylor

The Defendant, appearing in person:

Kuldeep Chaggar

Place and Date of Trial:

Victoria, B.C.

October 18-22, 2021

January 4, 2022

Vancouver, B.C.

February 14-18, March 31, 2022

Place and Date of Judgment:

Victoria, B.C.

July 11, 2022

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Introduction

- [1] The plaintiff, Kulwant Thind, alleges negligence on the part of the defendants in their representation of her in a family proceeding in the Supreme Court of British Columbia ("BCSC") filed by her former spouse, Sarup Singh Thind. In July 2014, Mr. Thind filed a notice of family claim seeking only a final order of divorce. He obtained an uncontested divorce by way of desk order on August 24, 2016, after the plaintiff failed to file a response to

family claim. The plaintiff says she had instructed the defendants to file a response, as well as a counterclaim seeking spousal support, child support, and the division of family property. The plaintiff says the defendants negligently failed to follow her instructions, and, as a result, she lost the opportunity to claim corollary relief. She seeks damages to compensate her for this lost opportunity, as well as general damages for her emotional distress.

- [2] There is no question the plaintiff retained the defendant Pamela Smith-Gander to act for her in the family proceeding. The dispute is over the scope of their retainer agreement. Ms. Smith-Gander maintains the plaintiff retained her for the limited purpose of accepting service of documents that a process server was attempting to serve on the plaintiff. Ms. Smith-Gander says that after Mr. Thind's notice of family claim was served, her instructions from the plaintiff were to delay the proceeding in British Columbia so that divorce proceedings the plaintiff had commenced in India would have priority. Ms. Smith-Gander says she performed her limited obligation to the plaintiff competently.
- [3] The plaintiff was referred to Ms. Smith-Gander by the defendant Kuldeep Chaggar (it should be noted the spelling of Mr. Chaggar's first name in the style of cause--"Kuldeep"--is incorrect). He is not a practicing lawyer in British Columbia, and was not a practicing lawyer at the time of his interactions with the plaintiff. The plaintiff says Mr. Chaggar held himself out to her as a practicing lawyer working at Ms. Smith-Gander's firm. Mr. Chaggar denies this. He says he clearly communicated to the plaintiff that he was not a lawyer, and his only involvement with her file was to facilitate the plaintiff's referral to Ms. Smith-Gander. Mr. Chaggar says he owed no tort or contractual duties to the plaintiff in these circumstances.
- [4] The defendants say, in any event, the plaintiff has not proven she suffered any damages that are causally related to alleged breaches of their duties, at least in relation to the claim for damages arising from the plaintiff's alleged inability to pursue claims for support and property division. This is because the divorce order did not preclude the plaintiff from pursuing claims for spousal support, child support, and property division. Furthermore, and in the alternative, the defendants say the plaintiff could have avoided any loss by applying to set aside the divorce order. In light of the plaintiff's failure to take reasonable steps to mitigate her loss, the defendants say that she is not entitled to damages. Finally, the defendants say the plaintiff has not proven she suffered any compensable damages.

Factual background

- [5] I will outline the chronology of events between the parties, noting where there are significant conflicts in the evidence. The conflicts are addressed in the Analysis section of this judgment.

The plaintiff's background and move to Canada

- [6] The plaintiff was born and raised in India. She married Mr. Thind in 1990. The couple had two children: a daughter, Navpreet, born in July 1991, and a son, Karan, born in December 1993. While the family lived in India, the plaintiff worked as a teacher and a school principal. Mr. Thind worked at a coach manufacturing factory. The plaintiff has completed seven years of post-secondary education in India. She obtained a Master's degree.
- [7] In 2008, the plaintiff filed a divorce action in India, alleging that Mr. Thind had been abusive to her and had deserted her for more than two years. The parties reconciled in 2009. The plaintiff says this was due to the intervention of respected elders in their community.
- [8] In October 2009, the family moved to Canada, and settled in Surrey, British Columbia. The plaintiff got a job in a greenhouse; Mr. Thind found work in construction. The plaintiff's income in Canada in 2010 was \$11,159, while Mr. Thind's income was \$14,560.
- [9] The plaintiff says at the time the family moved to Canada, she and Mr. Thind both took leaves from their jobs in India rather than resigning. This required each of them to make extended visits back to India. The plaintiff returned to her job in India for the first six months of 2010. Mr. Thind then left for India in October 2010. While the plaintiff anticipated that Mr. Thind's trip would be temporary, he in fact never returned to the family.
- [10] The plaintiff says it took her a few months to realize that Mr. Thind intended to permanently separate from her. Mr. Thind stopped taking her calls, eventually changed his phone number, and ceased all communication with her. The plaintiff believes that since October 2010, Mr. Thind has resided primarily in India, and has made occasional trips back to Canada. On these occasions, Mr. Thind has been in limited contact with his children, at least with Karan, but he has had no contact with the plaintiff.
- [11] At the time of the plaintiff's separation from Mr. Thind in October 2010, Navpreet was 19 years old and enrolled in a part-time criminology program at Kwantlen Polytechnic University, which she did not complete. Navpreet attended a health care assistant program between June and December of 2012. She obtained employment as a health care aide following the completion of the program. Navpreet was married in India in October 2014. Thereafter, she has lived and worked in Canada.
- [12] In October 2010, Karan was 16 years old, and attending high school. He graduated in June 2013 at the age of 19. Since completing high school, Karan has worked, other than during a period of a few months in 2015 when he enrolled in part-time courses at Camosun College.
- [13] The plaintiff did not pursue a claim for child or spousal support from Mr. Thind between October 2010 and October 2014. She says she was overwhelmed in this period due to the challenges of trying to complete a licensed practical nursing program she attended between January and December 2011. After completing the program, the plaintiff worked as a nurse in order to support the family.

- [14] The plaintiff earned an income of \$37,386 in 2012, her first full year of work as a nurse. The plaintiff would not provide her income tax information after 2012, despite requests from Ms. Smith-Gander's counsel that she produce it. The plaintiff says this is because she was not provided with a reason why production of her income tax records was necessary. The plaintiff estimates she earned between \$60,000 and \$80,000 in 2020.

The commencement of the family proceeding, and the plaintiff's retainer of Ms. Smith-Gander

- [15] In July 2014, Mr. Thind commenced a family proceeding in the BCSC seeking a final order for divorce. He was represented by Baldev Sandhu of the firm Sandhu Law Office. The notice of family claim indicated that there were no children of the marriage.
- [16] Mr. Sandhu retained a process server, Atvar Bains, to serve the notice of family claim on the plaintiff. Mr. Bains swore an affidavit of attempted service that was filed in the family proceeding. Mr. Bains' affidavit of attempted service was also filed as an exhibit at this trial, and Mr. Bains gave viva voce evidence. For reasons that are explained later in this judgment, Mr. Bains' evidence is quite critical with respect to the timing of the first meeting between the plaintiff and Mr. Chaggar.
- [17] It is not in dispute that, as a result of Mr. Bains' efforts, the plaintiff became aware in the summer of 2014 that a process server was attempting to serve documents on her. The plaintiff says she was initially unaware of the nature of the documents, although she speculated that they might relate to an attempt by Mr. Thind to obtain a divorce in Canada. The plaintiff says she asked members of her community for the name of a lawyer she could consult, and she was given contact information for Mr. Chaggar.
- [18] The plaintiff says she contacted Mr. Chaggar by telephone sometime in the fall of 2014, and they had an in-person meeting at the Oakridge Centre mall ("Oakridge Mall") in late September or early October of 2014. Mr. Chaggar disputes this timing. He says he and the plaintiff met at Oakridge Mall on February 6, 2015. Mr. Chaggar and Ms. Smith-Gander both maintain that Ms. Smith-Gander attended at least a portion of the Oakridge Mall meeting by telephone. The plaintiff denies this. However, there is no doubt that as a result of this initial meeting, whatever its timing and whoever was in attendance, the plaintiff retained Ms. Smith-Gander.
- [19] The significance of the timing of the Oakridge Mall meeting relates to the fact that in late October 2014, the plaintiff--who had travelled to India to attend her daughter's wedding--filed a divorce petition in India. Around the same time, it appears she filed a separate property claim in India against Mr. Thind. There is, in evidence, a letter from the plaintiff's lawyer in India, Dr. Sunil Chhabra, dated February 23, 2016, confirming the existence of a claim for property rights brought by the plaintiff against Mr. Thind. Dr. Chhabra reports that he has been contesting this claim since November 2014. Notably, the plaintiff had produced no documents in this action related to that proceeding, other than Dr. Chhabra's letter.

- [20] The plaintiff says she commenced proceedings in India based on advice she was given by Mr. Chaggar at the Oakridge Mall meeting. The plaintiff says Mr. Chaggar held himself out at the meeting as a lawyer employed at Ms. Smith-Gander's firm, and he assured her that the firm would pursue her claims for child and spousal support and property division in Canada.
- [21] Mr. Chaggar and Ms. Smith-Gander both say the meeting at Oakridge Mall took place on February 6, 2015, which is after the plaintiff filed the proceedings in India. The defendants say the proceedings initiated by the plaintiff in India explain the plaintiff's actions in evading service, and then retaining Ms. Smith-Gander for the limited purpose of accepting service of the notice of family claim. They say the plaintiff wanted the proceedings in India to take priority. The defendants deny that Mr. Chaggar was employed as a lawyer by Ms. Smith-Gander's firm, or that he held himself out as such to the plaintiff.
- [22] The plaintiff gave a retainer cheque in the amount of \$1,000 to Mr. Chaggar at the Oakridge Mall meeting. The cheque was made out to Pamela Smith-Gander, and the date on the cheque was February 15, 2015. The plaintiff says Mr. Chaggar filled in the date and payee sections of the cheque at some point after she gave it to him. Mr. Chaggar says that the plaintiff instructed him to write the date of February 15, 2015 on the cheque, as this coincided with the plaintiff's payday. Ms. Smith-Gander cashed the cheque on February 17, 2015.
- [23] There is no written retainer agreement. The plaintiff says she believed she had retained Ms. Smith-Gander to pursue claims for child and spousal support and property division against Mr. Thind. Ms. Smith-Gander says her retainer was limited to accepting service of legal documents on the plaintiff's behalf. Ms. Smith-Gander says the retainer amount of \$1,000 was reflective of the limited nature of the retainer, as it covered only roughly three hours of Ms. Smith-Gander's time at her 2015 hourly rate of \$325.

The relationship between Ms. Smith-Gander and Mr. Chaggar

- [24] Ms. Smith-Gander is a sole practitioner. She was called to the bar of British Columbia in 1997. Her practice is primarily criminal, but she also takes the occasional family case, provided the issues are simple. Ms. Smith-Gander works out of a home office. She has never employed other lawyers, and she has no permanent staff.
- [25] Mr. Chaggar was formerly a practicing lawyer, but he ceased practicing as of 2005. Mr. Chaggar has continued to perform limited tasks for lawyers, such as research and translation for Punjabi clients. Mr. Chaggar also assists people in locating a lawyer on occasion. Mr. Chaggar says that given his circumstances, he is careful to clearly state to people when he meets them that he is not a lawyer.
- [26] Mr. Chaggar and Ms. Smith-Gander have known each other for many years, dating back to Mr. Chaggar's time as a practicing lawyer. They lost touch after 2005, but then reconnected in 2010 or 2011. After they reconnected, Mr. Chaggar would refer clients to Ms. Smith-

Gander on occasion, particularly people from the Indo-Canadian community who spoke Punjabi and had difficulty communicating in English. In such cases, Mr. Chaggar would also act as a translator. Mr. Chaggar and Ms. Smith-Gander both maintain that Mr. Chaggar has never been an employee of Ms. Smith-Gander and has never worked in her office. They say he did not charge any fee for his service in referring the plaintiff to Ms. Smith-Gander.

Ms. Smith-Gander's representation of the plaintiff

[27] The plaintiff had limited communication with Ms. Smith-Gander following her retainer. It appears that, whatever Mr. Chaggar said to the plaintiff at the Oakridge Mall meeting, the plaintiff believed that she could communicate with Mr. Chaggar through the email address of Ms. Smith-Gander's firm. On February 13, 2015, the plaintiff sent two emails addressed to "Kuldeep" to the email address "psglawoffice@gmail.com". In the first email, the plaintiff forwarded pay stubs from Mr. Thind. In the second email, the plaintiff asked Mr. Chaggar to send her the "court papers of divorce" so that she could send them to her lawyer in India. Ms. Smith-Gander did not respond to either email. She says she is not certain she received them due to difficulties she was having with her email at the time.

[28] On March 29, 2015, Ms. Smith-Gander sent an email to Mr. Sandhu at the email address "info@sandhulawyers.com", which is the general email listed on Mr. Sandhu's firm website. In this email, Ms. Smith-Gander stated:

I understand you act for Sarup Singh Sandhu (sic). I have been retained by Kulwant Kaur Thind. Could you please advise me of the details of the matter you are pursuing?

[29] Ms. Smith-Gander did not receive a response to this email. On April 8, 2015, she followed up on her inquiry by way of a faxed letter to Mr. Sandhu. There is also in evidence further follow-up emails sent by Ms. Smith-Gander to Mr. Sandhu on May 14 and 28, 2015, to the same email address. It is not clear from the record whether Mr. Sandhu received any of this correspondence. He did not appear as a witness at trial.

[30] Ms. Smith-Gander says the plaintiff sent two emails to her on May 20, 2015 (the "May 2015 emails"), which included the following passages:

I am sending divorce papers (case filed in India). I also give you summary in nut shell. [Summary omitted]

I filed divorce case in India in October 2014, which is under process. He wants divorce here because he thinks law is simple here. We made property together, my wages were almost double than him. I can have my share from property if case finalize in India where I can prove with my wages and bank statements. He is coming to Canada just to keep his PR continue and to have divorce easily, he has regular Govt job in India.

...

I also have court papers of case filed by my kids in India for the property came from forefathers. [A]s per Indian law they have a right on it, if you want i can send to you.

[31] The plaintiff denies that she sent these emails. She accuses the defendants of creating forged documents.

[32] Mr. Sandhu served the notice of family claim on Ms. Smith-Gander on June 1, 2015. Ms. Smith-Gander says she and Mr. Sandhu agreed in a telephone conversation that Mr. Sandhu would not take steps to obtain a divorce order in default of a response pleading without advance notice. Ms. Smith-Gander made a note of this conversation in her daybook, but did not confirm the arrangement with Mr. Sandhu in writing.

[33] On June 2, 2015, Ms. Smith-Gander forwarded the notice of family claim to the plaintiff via email. The email stated, in part, as follows:

You will notice that based on your instructions I accepted service of the Notice of Family Claim on your behalf. What this means is that the time to respond to the notice starts from yesterday and that you were not aware of the British Columbia proceedings until yesterday when you were officially served.

I understand that there are proceedings commenced by you in India. Given that you were just served here in British Columbia we will take the position that the proceedings in India should take precedence and continue.

[34] On June 4, 2015, the plaintiff emailed Ms. Smith-Gander to request "the detail of the schedule attached [to the notice of family claim], especially child support and spousal support". Ms. Smith-Gander did not respond to this email. Ms. Smith-Gander believes she received this email, and asked Mr. Chaggar to communicate to the plaintiff that there were no schedules. On July 14, 2015, the plaintiff again emailed Ms. Smith-Gander to advise that Mr. Thind had returned to India. Once again, Ms. Smith-Gander believes that she received this email, but would have referred it to Mr. Chaggar to respond to the plaintiff in Punjabi.

[35] On August 6, 2015, Ms. Smith-Gander sent an email to Mr. Sandhu, which stated in part:

I am in the process of filing a response to your client's NOFC. I do wish to put you on notice that there are presently proceedings with respect to the same issues commenced in India. I wonder if your client has advised of same?

[36] There is no evidence that Mr. Sandhu responded to this email, or indeed that he received it. There was no further correspondence between Ms. Smith-Gander and Mr. Sandhu until the fall of 2016 after Ms. Smith-Gander discovered Mr. Sandhu had obtained a divorce order.

- [37] There appears to have been no communication between Ms. Smith-Gander and the plaintiff between July 14, 2015 and June 9, 2016. On June 9, 2016, the plaintiff emailed "Kuldeep" at Ms. Smith-Gander's email address to ask for a case status update. Ms. Smith-Gander also does not recall receiving this email. If she had received it, she expects she would have asked Mr. Chaggar to communicate to the plaintiff that nothing was happening on the file.

The desk order divorce and termination of the retainer

- [38] At some point in late September or early October 2016, Mr. Chaggar discovered that Mr. Thind had obtained a desk order divorce in the BCSC family proceeding. The evidence as to how the discovery was made is less than clear. Mr. Chaggar recalls the plaintiff calling him on September 30, 2016 to complain about the lack of activity on her file. He believes that the plaintiff may have mentioned a divorce order during this call. It appears that Mr. Chaggar then did his own investigations and discovered there was an entered divorce order.
- [39] The plaintiff eventually received a copy of the divorce order, dated August 14, 2016, from her sister in India. The plaintiff's sister was acting as the plaintiff's representative in the proceedings in India. While the plaintiff testified that her sister told her that Mr. Thind presented the entered order to the court in the divorce proceeding in India, the plaintiff's evidence on this point is hearsay. There is no direct evidence--for example, a copy of the divorce order with the stamp of the Indian court--to establish that the divorce order was filed in the court in India and, if so, what effect it had on the proceeding.
- [40] Mr. Chaggar spoke to Ms. Smith-Gander about the divorce order. Ms. Smith-Gander believed that it might be necessary for her to become a witness in the event there was an application to set the order aside. In that event, she could not continue to act for the plaintiff. Mr. Chaggar says he spoke to another lawyer he knew, Mayuri Ganatra, about the plaintiff's situation. Ms. Ganatra indicated she would be willing to step in and assist. Mr. Chaggar says that he, Ms. Ganatra, and the plaintiff then had a three-way telephone call. During this call, he says the plaintiff authorized Ms. Ganatra to take over her case from Ms. Smith-Gander.
- [41] The plaintiff denies she ever spoke to Ms. Ganatra, or authorized a change of counsel. The plaintiff says that after she discovered Mr. Thind had obtained a divorce order in Canada, she expected Mr. Chaggar and Ms. Smith-Gander to remedy the situation. The plaintiff says Mr. Chaggar had phoned her to explain that Mr. Sandhu's office had obtained the divorce order without notice, and Ms. Smith-Gander was working to have the order cancelled.
- [42] Ms. Ganatra filed a Notice of Change of Lawyer in the family proceeding on October 17, 2016. Ms. Ganatra did not testify at trial. As such, the only evidence there is about the circumstances surrounding the Notice of Change of Lawyer is the conflicting stories of Mr. Chaggar and the plaintiff.
- [43] On October 27, 2015, Ms. Smith-Gander faxed a letter to Mr. Sandhu, objecting to his actions in filing the desk order divorce application without notice to her. In the letter, Ms. Smith-Gander indicated that an application would be brought to set the divorce order aside. Mr.

Sandhu responded to this letter in correspondence sent the same day. Mr. Sandhu noted the length of time that had elapsed since Mr. Thind's notice of family claim was served without a response from the plaintiff. He also noted that, to date, he had not even received a Notice of Appointment of Solicitor establishing Ms. Smith-Gander's representation of the plaintiff.

- [44] Ms. Smith-Gander did not have direct communication with the plaintiff after the entered divorce order was discovered. Based on her conversations with Mr. Chaggar and Ms. Ganatra, she assumed that the plaintiff had authorized the transfer of her file to Ms. Ganatra who would then "take up the fight" to get the divorce order set aside. Ms. Smith-Gander forwarded the plaintiff's entire file to Ms. Ganatra, along with the \$1,000 retainer.
- [45] In November 2016, the plaintiff filed complaints against Ms. Smith-Gander and Mr. Chaggar with the Law Society of British Columbia (the Law Society"). Following these complaints, at Mr. Chaggar's request, Ms. Smith-Gander compiled a document of all of her email communications with the plaintiff and forwarded it to Mr. Chaggar.
- [46] On January 31, 2017, Ms. Ganatra emailed the plaintiff to advise that she had taken over the plaintiff's file from Ms. Smith-Gander. Ms. Ganatra indicated that she had been under the impression that the plaintiff had been made aware of this. The plaintiff responded via email the same day, inquiring as to whether Ms. Ganatra's law firm was different from Ms. Smith-Gander's, and what was meant to happen next. Ms. Ganatra responded the same day as follows:

I am separate from Ms. Smith-Gander. The starting point is to see what was said in court. What would you like to achieve. You have an action in India as well. What might be useful is to determine what your goal is? My initial review of the file suggests that the action in India was started after the action started here by your husband, and that your husband's lawyer was trying serve you with the Notice of Family Claim for some time. Despite the order obtained by your husband here, it would be important to know what you would like to see happen?

Perhaps you can itemize it for me and I will respond back to you.

- [47] The plaintiff did not provide an itemized list of her objectives to Ms. Ganatra. The plaintiff next emailed Ms. Ganatra on February 15, 2017 to indicate she was still thinking about what to do. Ms. Ganatra suggested that the two of them meet in person to discuss the matter. The plaintiff did not respond. The plaintiff says she was shocked and concerned that Ms. Smith-Gander had transferred her entire file--which included personal information about the plaintiff and her children--to Ms. Ganatra without the plaintiff's knowledge or consent.
- [48] On March 14, 2017, the plaintiff emailed Ms. Smith-Gander to request that Ms. Smith-Gander deliver her entire file back to her as she had "someone else to deal with it". Ms. Smith-Gander retrieved the plaintiff's file from Ms. Ganatra, and had it delivered to the plaintiff on March 29, 2017. At the same time, Ms. Smith-Gander returned the \$1,000 retainer to the plaintiff.

[49] There is no evidence that the plaintiff took any steps after this time to either set aside the divorce order or to pursue claims for child and spousal support or property division in Canada.

ISSUES

[50] The following issues must be resolved in this case:

1. What was the scope of Ms. Smith-Gander's retainer?
2. Did Mr. Chaggar owe contractual, fiduciary, or tort duties to the plaintiff, and if so what were the scope of the duties?
3. Did Ms. Smith-Gander breach the duty of care she owed to the plaintiff?
4. If so, did Ms. Smith-Gander's breach of duty cause the plaintiff to incur damages due to a loss of opportunity to pursue claims for corollary relief? There are three sub-issues:
 - a. Was the plaintiff unable to pursue claims for child support, spousal support, and property division as a result of Ms. Smith-Gander's breach of duty?
 - b. Did the plaintiff take reasonable steps to mitigate her loss?
 - c. Has the plaintiff proven damages arising from a loss of opportunity?
5. Is the plaintiff entitled to damages for mental distress?

ANALYSIS

Preliminary issues

Credibility of the parties

- [51] As a result of the absence of a written retainer agreement, and in light of the limited written communication between the plaintiff and the defendants, the credibility of the parties is a particularly critical issue. I will address the credibility of other non-party witnesses, to the extent necessary, in resolving the particular factual disputes to which their evidence relates.
- [52] The factors to be considered by a court in assessing a witness's credibility are well-known. They include: the witness's ability and opportunity to observe events; the firmness of the witness's memory; the witness's ability to resist the influence of interest to modify their recollection; whether the witness's evidence harmonizes with independent evidence that has been accepted; whether the witness changes their testimony during direct and cross-examination; whether the witness's testimony seems unreasonable, impossible, or unlikely; whether a witness has a motive to lie; and the demeanour of a witness generally: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.

- [53] As observed by Justice Adair in *Gichuru v. Smith*, 2013 BCSC 895 at para. 130, aff'd 2014 BCCA 414, the credibility assessment boils down to the harmony of the witness's evidence with the "preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances".
- [54] I have concerns with the credibility and reliability of each of the three parties in this case.
- [55] The plaintiff was defensive and argumentative in cross-examination. She gave long and non-responsive answers to questions that were straightforward. She frequently responded to questions by simply repeating her theory of her case. The plaintiff refused to moderate her beliefs, even in the face of objective evidence that was contradictory. For example, she insisted that the May 2015 emails that undermine her case must have been forged by the defendants. She advanced such allegations in the absence of any evidence of the purported forgery. When Mr. Bains' affidavit was put to her to show that the Oakridge Mall meeting occurred later than the plaintiff maintained, the plaintiff suggested that Mr. Bains must have sworn a false affidavit.
- [56] Mr. Chaggar was equally defensive and argumentative in cross-examination by the plaintiff, and in his questioning of the plaintiff. His questions and answers were frequently couched in editorial comment that reflected disdain for the plaintiff. Court intervention was required on more than one occasion to redirect Mr. Chaggar away from such editorializing. Mr. Chaggar had occasional outbursts of anger in the courtroom. While I appreciate that Mr. Chaggar believes he has been unnecessarily brought into a lawsuit that concerns the plaintiff's retainer of Ms. Smith-Gander, his hostility toward the plaintiff undermines his objectivity.
- [57] Ms. Smith-Gander also appeared defensive during cross-examination. She had difficulty recalling events of importance to this action, such as: the scope of the information provided by the plaintiff during the initial meeting at Oakridge Mall; whether Ms. Smith-Gander received all of the emails that are in evidence; whether and how she responded to them; how she came to be aware that the divorce order had been issued; and the circumstances surrounding the transfer of the plaintiff's file to Ms. Ganatra. Given Ms. Smith-Gander's difficulty in recalling events, combined with the fact that she does not appear to have communicated directly with the plaintiff at any time during the course of the retainer, it is necessary to approach Ms. Smith-Gander's evidence regarding the scope of the retainer with caution.
- [58] As a general observation, and in light of the concerns I have with the parties' credibility, it is necessary to approach the evidence of each party with caution where it is not corroborated by objective evidence that is more reliable.

Factual misstatements in the parties' pleadings

- [59] Each of the parties was cross-examined on inconsistencies between their evidence at trial and the allegations of fact contained in their pleadings. I will highlight some of the more significant inconsistencies:
- 1) In her notice of civil claim, the plaintiff pleads, at para. 4 of Part 1, that she had been served with the notice of family claim by the time that she met Mr. Chaggar at Oakridge Mall in the fall of 2014, and that he reviewed the notice of family claim in her presence. The plaintiff alleges that having reviewed the notice of family claim, and received the plaintiff's narration of facts, Mr. Chaggar advised her that she had a strong claim. At trial, the plaintiff testified that at the time of the Oakridge Mall meeting, she had not been served with the notice of family claim and only suspected that Mr. Thind had started a divorce proceeding.
 - 2) In her response to civil claim, Ms. Smith-Gander pleads, at para. 5 of Part 1, that she was contacted by Mr. Chaggar "in or around 2014" about a person looking for a lawyer to assist with a family law proceeding, and Ms. Smith-Gander agreed to act. At trial, Ms. Smith-Gander testified that she was contacted by Mr. Chaggar in 2015, and that the only information she was given was that a person needed a lawyer to accept service of some documents.
 - 3) In his response to civil claim, Mr. Chaggar pleads, at para. 2 of Part 1, that in or around 2014, he was approached by someone on the plaintiff's behalf "seeking his guidance with respect to her separation from her husband", and that thereafter he received a call from the plaintiff. At trial, Mr. Chaggar testified that he recalled being contacted by Karminder Bajwa, who facilitated the contact between Mr. Chaggar and the plaintiff, in January or February of 2015. This conflict is somewhat more ambiguous as Mr. Chaggar also indicated that the contact from Ms. Bajwa might have been as early as December 2014.
- [60] The parties were all cross-examined on these inconsistencies at trial. There was some discussion as to whether some or all of the allegations of fact in the parties' pleadings might constitute admissions that the parties cannot withdraw at trial, at least not without the consent of the parties or leave of the court under R. 7-7(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. It is for this reason that I am addressing the inconsistencies between the pleadings and the evidence at trial as a separate issue rather than as part of the general credibility analysis.
- [61] In my view, none of the relevant allegations of fact in the parties' pleadings constitute an admission within the meaning of R. 7-7(5), as interpreted in the case authority. The alleged facts appear to be a matter of imprecise drafting rather than a deliberate and clear concession to the opposing party: *Ledinski v. Chestnut*, 2015 BCSC 373 at paras. 27-28. Even if any of the relevant allegations of fact in the pleadings could be construed as admissions, it would clearly be in the interests of justice to allow them to be withdrawn. Extensive evidence has been led over the course of a 10-day trial on the factual issues addressed in the pleadings. These issues should be decided on their merits.

[62] For these reasons, I find that the parties are not bound by allegations of fact in their pleadings, although inconsistencies between the pleadings and the parties' evidence at trial are relevant to credibility.

Issue 1: The scope of the retainer

[63] The central factual disputes between the parties as to the scope of the plaintiff's retainer of Ms. Smith-Gander are with respect to the timing of the meeting at Oakridge Mall, and the content of the discussion that occurred. I will first resolve those factual disputes before setting out my findings regarding the scope of the retainer.

The evidence regarding the Oakridge Mall meeting

[64] The parties each testified to their recollection of the time of the meeting and the topics discussed. There was also relevant evidence on these points from four non-party witnesses: Karan, Karan's friend Jitesh, Ms. Bajwa, and Mr. Bains. I will summarize the relevant evidence of each witness.

The plaintiff's evidence

[65] The plaintiff says she first became aware that Mr. Thind might have started a divorce proceeding in Canada when she received a call from Mr. Bains indicating that he had documents to serve on her. The plaintiff contacted family in India, who told her Mr. Thind was back in Canada, and that he had stated it would be easier to get a divorce in Canada. The plaintiff surmised that Mr. Thind had started a divorce proceeding, and that Mr. Bains was attempting to serve divorce papers on her.

[66] The plaintiff asked members of her community for the name of a lawyer she could contact. She was referred to Mr. Chaggar. The plaintiff cannot recall if Ms. Bajwa was the person who gave her Mr. Chaggar's name. In any event, the person she spoke to told the plaintiff that Mr. Chaggar was a lawyer. The plaintiff says she called Mr. Chaggar. He told her he was a lawyer and working in a law firm. The plaintiff explained that a process server had been contacting her and that she believed the documents he was attempting to serve were divorce papers filed by her husband. Mr. Chaggar assured the plaintiff that his law firm could act for her in the proceeding. The plaintiff and Mr. Chaggar arranged to meet in-person at Oakridge Mall the following Saturday.

[67] The plaintiff cannot recall the exact date of the Oakridge Mall meeting, but is certain it was in late September or early October of 2014. She says the meeting definitely occurred before she left for India to attend her daughter's wedding in October 2014. The plaintiff brought her son, Karan and his friend Jitesh with her to the meeting. The plaintiff and Karan were living on Vancouver Island at the time. Jitesh picked the plaintiff and Karan up at the ferry terminal in Tsawwassen and drove them to Oakridge Mall. The plaintiff then met Mr. Chaggar, who was there with his son. The plaintiff denies that Ms. Smith-Gander attended

any part of the meeting by telephone.

- [68] The plaintiff says she and Mr. Chaggar, along with his son, sat together at a table in the food court in Oakridge Mall. Karan and Jitesh sat nearby at another table. The plaintiff says in the course of the meeting, she told Mr. Chaggar facts relevant to her claim for child and spousal support, and division of property, including the age of her children, her education and qualifications, and the existence of family assets in India. She says Mr. Chaggar advised her to either restart her 2008 divorce proceeding in India or commence a new case so that there would be "duplicity" in proceedings. He also said his firm would represent her in the family case, and they would file a counterclaim seeking child and spousal support as well as property division.
- [69] During her meeting with Mr. Chaggar, the plaintiff received a call from a number that she knew to belong to Mr. Bains. The plaintiff advised Mr. Chaggar that the process server was calling her again. Mr. Chaggar said he would speak to Mr. Bains, and he took the plaintiff's phone. Mr. Chaggar then had a conversation with Mr. Bains in the presence of the plaintiff. Mr. Chaggar told Mr. Bains that his office would contact the other party's lawyers to receive service of the material. This was the only time that Mr. Chaggar spoke to Mr. Bains on the plaintiff's phone.
- [70] At the end of the meeting, Mr. Chaggar gave the plaintiff Ms. Smith-Gander's business card and said he could be contacted through the email address listed on the card. The plaintiff gave Mr. Chaggar a cheque for \$1,000. She left the payee and date sections blank; Mr. Chaggar filled that information in later.

Mr. Chaggar's evidence

- [71] Mr. Chaggar testified that he first became aware of the plaintiff when he received a phone call from Ms. Bajwa, likely in January or February 2015 but possibly earlier. Ms. Bajwa is an acquaintance of Mr. Chaggar's. Mr. Chaggar had previously assisted Ms. Bajwa's now-husband in finding a lawyer to represent him in a family case. Ms. Bajwa told Mr. Chaggar that her mother's friend was looking for a lawyer, and she asked if he could assist. Mr. Chaggar says that after talking to Ms. Bajwa, he confirmed with Ms. Smith-Gander that she would be willing to act for the plaintiff. He then facilitated the scheduling of a meeting at Oakridge Mall on February 6, 2015.
- [72] Mr. Chaggar says he originally anticipated that Ms. Smith-Gander would attend the meeting. However, it turned out that she was unavailable. Mr. Chaggar agreed to go on his own to meet with the plaintiff. He brought his son with him.
- [73] Mr. Chaggar says that during the meeting, he and the plaintiff sat at a table in the food court of Oakridge Mall. They had a brief conversation, during which the plaintiff explained that she believed her husband was trying to serve her with papers. She may also have mentioned that she suspected her husband had initiated divorce proceedings. The plaintiff stated that all her assets were in India. As they were talking, the plaintiff received a phone call that

turned out to be from Mr. Bains. The plaintiff handed her cell phone to Mr. Chaggar, who then spoke to Mr. Bains. Mr. Bains would not disclose the nature of the documents he was attempting to serve. Mr. Chaggar told Mr. Bains that the plaintiff was in the process of retaining a lawyer and she would be in touch.

- [74] Mr. Chaggar says after his conversation with Mr. Bains concluded, and while he was still with the plaintiff, Ms. Smith-Gander called him. Mr. Chaggar explained to Ms. Smith-Gander that the plaintiff needed a lawyer to accept service of documents for her. Ms. Smith-Gander instructed Mr. Chaggar to get a retainer from the plaintiff, and he did so. The plaintiff gave Mr. Chaggar a cheque for \$1,000. Mr. Chaggar wrote Ms. Smith-Gander's name down as payee, and also wrote in the date of February 15, 2015. Mr. Chaggar says the plaintiff instructed him to write this date down because it coincided with her payday.
- [75] Mr. Chaggar confirms that he provided Ms. Smith-Gander's business card to the plaintiff so that she would have contact information. Mr. Chaggar denies he ever told the plaintiff that he was a lawyer, or that he worked with Ms. Smith-Gander. Mr. Chaggar denies that the plaintiff gave him information about her children, her employment, or property in India, or that he agreed he and Ms. Smith-Gander would act on her behalf in the family proceeding. Mr. Chaggar denies he advised the plaintiff to start a divorce proceeding in India.

Ms. Smith-Gander's evidence

- [76] Ms. Smith-Gander says she became aware of the plaintiff sometime in February 2015 when Mr. Chaggar contacted Ms. Smith-Gander to advise that the plaintiff needed a lawyer to accept service of documents. Ms. Smith-Gander agreed to assist. Ms. Smith-Gander says it was her impression that the plaintiff was not proficient in the English language, and thus an interpreter would be required.
- [77] Ms. Smith-Gander confirms Mr. Chaggar's recollection that the meeting took place on February 6, 2015 at Oakridge Mall. Due to a miscommunication between Mr. Chaggar and Ms. Smith-Gander, the meeting was scheduled for a time that Ms. Smith-Gander was in Toronto. As such, she did not attend the meeting personally.
- [78] Ms. Smith-Gander says she called Mr. Chaggar via WhatsApp while he was with the plaintiff in Oakridge Mall. She spoke to him for five to 10 minutes. Mr. Chaggar told Ms. Smith-Gander that the plaintiff had been contacted by a process server, and she wished a lawyer to accept documents on her behalf. Ms. Smith-Gander does not recall being advised of the nature of the documents. Ms. Smith-Gander talked to Mr. Chaggar about reducing the retainer amount to \$1,000 because she understood the plaintiff to be experiencing financial hardship, and the task Ms. Smith-Gander was undertaking was relatively simple. Ms. Smith-Gander says that as she spoke to Mr. Chaggar, he was relaying information to the plaintiff in Punjabi.

- [79] Ms. Smith-Gander has a practice of keeping notes of her professional activities in a daybook. Her notes contain no reference to the plaintiff in the year 2014. There is also no entry for Friday, February 6, 2015. The first entry related to the plaintiff is on February 10, 2015. The note states "Baldev S. Sandhu, filed July 9, 2014, simple divorce". Ms. Smith-Gander says she likely attended the court registry on Tuesday, February 10, 2015, following the Family Day statutory holiday on Monday, February 9, 2015, in order to ascertain what documents Mr. Bains was attempting to serve on the plaintiff. Upon attending the court registry, Ms. Smith-Gander discovered the notice of family claim.
- [80] Ms. Smith-Gander says from the time she received the plaintiff's May 2015 emails, she understood her instructions to be not only to accept service of the notice of family claim, but also to delay the progress of the proceeding as much as possible in order to establish the priority of the proceedings in India.

The evidence of Karan and Jitesh

- [81] Karan testified that he and his friend Jitesh attended the Oakridge Mall meeting with the plaintiff. He recalls the meeting took place in the fall of 2014. In advance of the meeting, the plaintiff explained to Karan that she had been contacted by someone who wanted to serve papers on her, and that she needed to talk to a lawyer. Karan and the plaintiff took the ferry from Victoria. Jitesh picked them up in Tsawwassen and drove them to Oakridge Mall.
- [82] Karan says that during the meeting between the plaintiff and Mr. Chaggar, he and Jitesh sat at a separate table so he did not hear very much. He does recall Mr. Chaggar talking to someone on the plaintiff's phone during the meeting. Mr. Chaggar stood up and stated loudly "We will take the papers on her behalf". Karan also recalls the plaintiff giving Mr. Chaggar a cheque. He does not remember anything else. Karan and Jitesh were chatting and looking at their phones, rather than focussing on the meeting between the plaintiff and Mr. Chaggar.
- [83] Karan says that the plaintiff asked him to come to court and testify approximately two weeks before he attended court to give evidence on October 22, 2021. This was the first time the plaintiff had asked him for his recollection of the Oakridge Mall meeting. Karan says he cannot recall if the plaintiff suggested the date of the meeting to him during this conversation. He was stressed out by the prospect of testifying.
- [84] Jitesh also testified that the meeting at Oakridge Mall took place in 2014, but he cannot remember which month. He believes it was in the fall. Jitesh is now 26, and was 18 at the time of the meeting. He picked the plaintiff and Karan up at the ferry and drove them to Oakridge Mall. Jitesh recalls being told that the plaintiff was going to meet a lawyer. Jitesh and Karan sat at another table in the food court. He did not follow any of the conversation between the plaintiff and Mr. Chaggar. He did notice Mr. Chaggar speaking on the plaintiff's phone at one point.

[85] Jitesh says the plaintiff first contacted him at the end of 2021 to ask what he remembered about the Oakridge Mall meeting. Karan also called Jitesh at the end of 2021 to see if Jitesh could go to court and help the plaintiff. Karan and Jitesh talked about their testimony once or twice over the phone. Jitesh says they did not talk about the date of the meeting.

Ms. Bajwa's evidence

[86] Ms. Bajwa has known Mr. Chaggar for seven years. Mr. Chaggar assisted Ms. Bajwa's now-husband in finding a lawyer to represent him in a family proceeding. Ms. Bajwa knew the plaintiff because the plaintiff worked with Ms. Bajwa's mother. Ms. Bajwa, who is a financial advisor, also had contact with the plaintiff when the plaintiff was taking out a mortgage.

[87] Ms. Bajwa recalls running into the plaintiff sometime in late 2014 at the eating area of a local temple. The plaintiff asked Ms. Bajwa if she knew of a lawyer who could assist with a separation. Ms. Bajwa contacted Mr. Chaggar to see if he would assist in finding a lawyer for the plaintiff. Mr. Chaggar agreed that Ms. Bajwa could pass on his contact information. Ms. Bajwa says Mr. Chaggar told her to advise the plaintiff that he was not a lawyer, but that he could help connect her with one. In accordance with this instruction, Ms. Bajwa says that she told the plaintiff that Mr. Chaggar was not a lawyer, but he would help her find a lawyer.

Mr. Bains' evidence

[88] Mr. Bains has been a process server for over 26 years. As noted, Mr. Bains' affidavit of attempted service from the family proceeding was tendered in evidence in this action, and Mr. Bains appeared as a witness at trial.

[89] Mr. Bains' affidavit, which he confirmed to be accurate, recounts a number of unsuccessful attempts by Mr. Bains to serve the notice of family claim on the plaintiff at an address in Surrey B.C. between July 31, 2014 and February 6, 2015. Mr. Bains' affidavit includes the following paragraphs:

6. That on Thursday the 28th of January 2015, I spoke with Kulwant Kaur Thind over the phone. She advised me that she had been away in India and was now back. She claimed she would accept the documents next Saturday the 7th of February 2015. Once again she would not specify an address or time, but simply that she would contact me on Friday to make arrangements. I advised her that we can not continue to hold the file for this long of a period and that if she did not accept documents next Saturday, we would have no choice but to seek a sub service order and leave a copy of the documents at the Residence address.

7. On February the 6th 2015, I received a call from an adult male from the number of [omitted]. He wanted to know what I wanted with Kulwant Kaur Thind. I advised him that there are legal documents to be served on her and that I had explained it to her in Punjabi numerous times. He would not identify himself to me. However he was verbally abusive and stated that "he knew how to handle little [expletive omitted] like me" and then promptly hung up the phone. I attempted to call back, however it just went to the voice mail.
- [90] In his evidence at trial, Mr. Bains explained that his practice is to keep a worksheet attached to documents that he is attempting to serve. On the worksheet, he keeps notes of attempts at service, the place, time and method of the attempt, and the identity of anyone he speaks to. Mr. Bains' notes are prepared more or less contemporaneously with the service attempts. Before he swore the affidavit of attempted service in the family proceeding, Mr. Bains checked to ensure that the content of the affidavit was consistent with his notes. Mr. Bains says on the occasions he spoke to the plaintiff over the telephone, he explained that the documents he was attempting to serve related to a family proceeding, but he did not provide additional detail.

Findings regarding the Oakridge Mall meeting

When did the meeting take place?

- [91] I find the evidence establishes that the meeting at Oakridge Mall took place on February 6, 2015, and not in the fall of 2014 as the plaintiff maintains. I have already explained the difficulties I have with the credibility of the parties. Accordingly, in my view, it is necessary to look at other objective evidence to determine the timing of the meeting. The evidence supporting a finding that the meeting occurred on February 6, 2015 includes:
- a) The notes in Ms. Smith-Gander's daybook reflect that she located the notice of family claim in the court registry on February 10, 2015. This timing is consistent with the meeting having occurred on February 6.
 - b) The first email communication between the plaintiff and Ms. Smith-Gander's office was on February 13, 2015.
 - c) The retainer cheque is dated February 15, 2015, and was cashed on February 17, 2015. While I acknowledge the plaintiff's explanation that Mr. Chaggar filled the date in later, I find it implausible that the plaintiff would have written a cheque to Ms. Smith-Gander for \$1,000, and then make no inquiries while the cheque remained uncashed for five months.
 - d) Mr. Bains' evidence strongly supports the conclusion that the Oakridge Mall meeting occurred on February 6, 2015. First, his affidavit of attempted service describes a conversation he had with the plaintiff on January 28, 2015, during which the plaintiff said she would accept service of the documents. This makes no sense if, as the plaintiff maintains, she had retained the defendants in the fall of 2014. Second, Mr. Bains describes speaking to an adult male on February 6, 2015 who was calling from the plaintiff's phone. The only plausible inference that can be drawn from the evidence is that this was the

conversation with Mr. Chaggar. The plaintiff confirmed in her testimony that there was only one time that Mr. Chaggar spoke to Mr. Bains using the plaintiff's phone. Mr. Chaggar agrees he was the "adult male" who made the statements to Mr. Bains that are recounted in para. 7 of Mr. Bains' affidavit.

- [92] I do not accept the evidence of Karan and Jitesh that the meeting at Oakridge Mall occurred in the fall of 2014. I find it implausible that these two witnesses would have such clear and certain memory of the timing of a meeting that happened seven years earlier. Jitesh testified that he frequently gave the plaintiff and Karan a ride from the ferry terminal in the years 2014 and 2015, and there is nothing apparent in the evidence would have distinguished this trip. Karan and Jitesh communicated with each other, and with the plaintiff, in advance of their testimony. I infer that Karan and Jitesh were aware from this communication that it would be helpful to the plaintiff's case if they testified that the meeting occurred in the fall of 2014. I find this influenced their recollection, possibly subconsciously. Karan and Jitesh were both motivated to help the plaintiff.
- [93] Of all of the witnesses who testified, I place the greatest weight on the evidence of Mr. Bains. He is an objective witness with no interest in the outcome of this proceeding. In the ordinary course of his job duties, Mr. Bains recorded a precise chronology of the relevant events regarding the service of the notice of family claim as they occurred. He swore his affidavit of attempted service in the family proceeding without any knowledge of the significance that the sequence of events set out in the affidavit would have in an action that had not even commenced at the time the affidavit was sworn. Mr. Bains' evidence pinpoints February 6, 2015 as the date of the meeting between the plaintiff and Mr. Chaggar.

The nature of the discussion

- [94] I do not accept the plaintiff's evidence that, at the Oakridge Mall meeting, Mr. Chaggar advised the plaintiff that she should file a divorce proceeding in India, and that Ms. Smith-Gander's firm would file, and pursue, a counterclaim for child and spousal support and division of family property in the BCSC family proceeding. The plaintiff's evidence is implausible and inconsistent with the objective factual circumstances that existed on February 6, 2015.
- [95] First, by the time the plaintiff and Mr. Chaggar met at Oakridge Mall, the plaintiff had already commenced divorce and property proceedings in India. I reject the plaintiff's evidence that she did so based on Mr. Chaggar's advice. She and Mr. Chaggar had not yet met at the time she commenced the proceedings in India. Instead, I conclude that the plaintiff commenced divorce and property proceedings in India because that is the jurisdiction where she wanted the family issues resolved. In portions of the plaintiff's examination for discovery evidence that were put to her at trial, the plaintiff agreed she wanted the divorce proceeding to take place in India because that is where the family property was located. The plaintiff did not resile from this evidence at trial.

- [96] Second, at the time of the plaintiff's meeting with Mr. Chaggar, she had not yet been served with the notice of family claim, and had only a suspicion that Mr. Bains was attempting to serve divorce papers. It is illogical to suppose that Mr. Chaggar would have provided detailed legal advice on how to respond to legal documents that had not yet been served, and the content of which the plaintiff could only guess at.
- [97] I find that the conversation between Mr. Chaggar and the plaintiff at Oakridge Mall was, in substance, as described by Mr. Chaggar in his evidence. The plaintiff told Mr. Chaggar that a process server was attempting to serve her with documents, and that she suspected it was her husband serving divorce papers. The plaintiff also told Mr. Chaggar that she and her former spouse had property in India. I do not accept the plaintiff's evidence that she also told Mr. Chaggar details about her children, and her own employment and income, for the purpose of receiving his advice about pursuing a claim for child and spousal support and property division in Canada. The plaintiff wanted the family issues determined in India, not in Canada.
- [98] I also do not accept the plaintiff's evidence that Mr. Chaggar expressly represented to her that he was a lawyer who worked at the law firm of Ms. Smith-Gander. I accept Ms. Bajwa's evidence that she was the one who referred the plaintiff to Mr. Chaggar. Ms. Bajwa is a disinterested witness who appeared at trial under subpoena. I found her to be a credible witness who answered questions in a direct and straightforward manner. I also accept Ms. Bajwa's evidence that she told the plaintiff that Mr. Chaggar was not a lawyer, but he could help her find one. Mr. Chaggar had no apparent motive for representing himself as a lawyer to the plaintiff, and then putting Ms. Smith-Gander's name on the retainer cheque. Mr. Chaggar derived no financial advantage from the plaintiff's retaining of Ms. Smith-Gander.
- [99] I accept that, despite the absence of any misrepresentation by Mr. Chaggar, the plaintiff may have misunderstood the situation. Ms. Smith-Gander appears to have delegated virtually all communication with the plaintiff to Mr. Chaggar. I will have more to say about that later in this judgment. However, to the extent this led to a misunderstanding on the part of the plaintiff as to Mr. Chaggar's role, in my view, the fault for any such misunderstanding lies with Ms. Smith-Gander and not Mr. Chaggar. Ms. Smith-Gander was the one who owed tort, contractual, and fiduciary duties to the plaintiff. It was Ms. Smith-Gander's responsibility to ensure that the plaintiff understood Mr. Chaggar's role in relation to the services Ms. Smith-Gander had undertaken to provide.
- [100] Finally, I consider it unnecessary to resolve the dispute between the parties as to whether Ms. Smith-Gander spoke to Mr. Chaggar over WhatsApp during the Oakridge Mall meeting. Nothing turns on this dispute. Whether or not Ms. Smith-Gander briefly spoke to Mr. Chaggar during the meeting, or spoke to him after and received an update, is not material. In any event, Ms. Smith-Gander clearly accepted the retainer.

What was Ms. Smith-Gander retained to do?

[101] My findings regarding the scope of the retainer between Ms. Smith-Gander and the plaintiff flow from the findings I have made about what was discussed during the meeting at Oakridge Mall, and the factual context for those discussions. For the reasons already stated, I reject the plaintiff's theory that she had retained Ms. Smith-Gander's firm to pursue claims for child and spousal support and property division in Canada. The plaintiff wanted the family claims to be adjudicated in India rather than Canada. At the time the plaintiff met Mr. Chaggar in Oakridge Mall, the pressing issue was Mr. Bains' attempt to serve documents on the plaintiff. The plaintiff wanted a lawyer to accept service of the documents on her behalf in order to determine what the documents were. Once it was confirmed that Mr. Thind had filed a notice of family claim seeking only a final order for divorce, the plaintiff wanted to delay the proceeding in Canada in order to give priority to the proceedings in India.

[102] Accordingly, I accept the position of Ms. Smith-Gander that her retainer was limited to accepting service of the documents Mr. Bains was attempting to serve, and thereafter to delaying the BCSC family proceeding as long as possible without allowing Mr. Thind to obtain a divorce order. For the reasons stated, I reject the plaintiff's evidence that she retained Ms. Smith-Gander to pursue claims for child and spousal support and property division in Canada.

Issue 2: Did Mr. Chaggar owe legal duties to the plaintiff?

[103] Mr. Chaggar is not a lawyer. He cannot be liable in contract to the plaintiff because there was no contract between them. The retainer agreement was between the plaintiff and Ms. Smith-Gander. The plaintiff also alleges that Mr. Chaggar breached his fiduciary duties to the plaintiff. However, the allegation of breach of fiduciary duty is premised on the assertion that Mr. Chaggar's relationship to the plaintiff was akin to that of solicitor and client. It was not. The plaintiff's claim for breach of fiduciary duty fails for the reasons I have already noted: Mr. Chaggar is not a lawyer and did not owe professional obligations to the plaintiff.

[104] Mr. Chaggar could conceivably be held liable to the plaintiff in tort if he induced the plaintiff's reliance by holding himself out as someone with legal expertise. A defendant may be held liable for a negligent misrepresentation where they undertake to provide a representation or service to the plaintiff in circumstances that invite reasonable reliance: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at paras. 22-30. However, I have found that Mr. Chaggar did not hold himself out as a lawyer to the plaintiff, and therefore there was no undertaking by Mr. Chaggar to provide a service. As such, Mr. Chaggar cannot be held liable in tort to the plaintiff.

[105] Given my conclusion that Mr. Chaggar did not owe contractual, fiduciary, or tort duties to the plaintiff, it is unnecessary to consider the scope of any such duties. The plaintiff's action against Mr. Chaggar must be dismissed.

Issue 3: Did Ms. Smith-Gander breach her duty of care?

[106] There is no dispute that Ms. Smith-Gander owed contractual, fiduciary, and tort duties to the plaintiff as a result of Ms. Smith-Gander's provision of professional services. Although the plaintiff has pleaded that Ms. Smith-Gander breached her fiduciary duty to the plaintiff, the notice of civil claim does not include any material facts that would amount to a breach of fiduciary duty, nor did the plaintiff adduce any evidence at trial to show that Ms. Smith-Gander acted in a manner that was disloyal or that she placed her own interests above that of the plaintiff. The plaintiff's case, rather, is grounded in the allegation that Ms. Smith-Gander breached her contractual and tort duty to take reasonable care in the provision of legal services to the plaintiff.

[107] While the plaintiff's case is framed in both contract and tort, there is no relevant distinction between the two in this case in defining the content of the duty of care. Subject to any express contractual limitations of liability, a retainer agreement between a lawyer and client imposes a duty on the lawyer to exercise the care and skill of a reasonably competent lawyer in accordance with the standards of the profession. A lawyer also owes their client a duty of care in negligence to perform their obligations in accordance with professional standards: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Victoria & Grey Trust Co. v. Apple* (1984), 32 R.P.R. 230 at 239 (Ont. H.C.).

[108] The obligations of a reasonably competent lawyer include:

- (1) To be skilful and careful.
- (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
- (3) To protect the interests of his client.
- (4) To carry out his instructions by all proper means.
- (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
- (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

Zink v. Adrian, 2005 BCCA 93 at para. 23 [Zink], citing *Tiffin Holdings Ltd. v. Millican et al.* (1964), 49 D.L.R. (2d) 216 at 219 (Alta. S.C.), *aff'd* [1967] S.C.R. 183.

[109] In the case at bar, Ms. Smith-Gander agrees she owed a duty in contract and tort to the plaintiff to exercise the care and skill of a reasonably competent lawyer in providing the services required by the retainer agreement. The contest is over whether Ms. Smith-Gander met her standard of care, whether the plaintiff suffered any damages as a result of any such breach, and whether the plaintiff failed to mitigate her damages.

- [110] While expert evidence is generally required in a solicitor's negligence case to establish the standard of care, there are at least two exceptions to this general rule. First, it may be possible for the court to reliably determine the standard of care because the court is faced with "non-technical matters or those of which an ordinary person may be expected to have knowledge": Zink at paras. 44-45. Second, the impugned actions of the defendant may constitute such a marked departure from any standard of reasonable conduct that it is unnecessary for the court to determine the precise parameters of that standard: Odobas v. Yates, 2021 BCSC 2320 at paras. 30-40; Trillium Motor World Ltd. v. General Motors of Canada Ltd., 2017 ONCA 544 at para. 300 [Trillium].
- [111] Ms. Smith-Gander says this case is one in which expert evidence is required to establish the standard of care. I do not agree. The standard of care applicable to Ms. Smith-Gander in performing her obligations under this retainer were not technical or complex. Furthermore, Ms. Smith-Gander's actions throughout the retainer constituted a marked departure from any standard of conduct that could be considered reasonable. The deficiencies in Ms. Smith-Gander's performance of her duties include the following:
- a) Ms. Smith-Gander did not directly communicate with the plaintiff at any time through the course of the retainer, but rather relied on Mr. Chaggar to act as conduit;
 - b) Ms. Smith-Gander made no effort to determine the plaintiff's level of English language ability, while simultaneously citing the plaintiff's lack of proficiency in the English language as justification for Ms. Smith-Gander's reliance on Mr. Chaggar;
 - c) Ms. Smith-Gander continued to assume that the plaintiff lacked English language proficiency despite receiving emails from the plaintiff that were written in English;
 - d) Ms. Smith-Gander did not explain the limits of Mr. Chaggar's role to the plaintiff, thus creating the potential for misunderstanding and miscommunication;
 - e) Ms. Smith-Gander failed to directly respond to any of the plaintiff's emails seeking information and case updates, and cannot even confirm that she read all of them;
 - f) Ms. Smith-Gander did not confirm with Mr. Sandhu in writing the purported agreement that Mr. Sandhu would not apply for a divorce in default of pleading without prior notice;
 - g) After she became aware that the final divorce order had been granted, Ms. Smith-Gander did not directly communicate with the plaintiff but rather assumed that Mr. Chaggar had spoken to her;
 - h) Ms. Smith-Gander transferred the plaintiff's file to Ms. Ganatra without direct confirmation from the plaintiff that she had authorized the file transfer;
 - i) After the plaintiff filed complaints with the Law Society, Ms. Smith-Gander sent Mr. Chaggar all of her privileged communication with the plaintiff without the plaintiff's consent.

[112] Ms. Smith-Gander emphasizes the limited nature of her retainer agreement with the plaintiff. While I accept that the retainer was limited, Ms. Smith-Gander was nevertheless required to perform her professional duties competently. The plaintiff was, to Ms. Smith-Gander's knowledge, a recent immigrant to Canada who was not familiar with the Canadian legal system. It is reasonable to expect that Ms. Smith-Gander would have, at minimum, established clear communication with the plaintiff, and taken steps to ensure her interests were protected within the limited scope of the duties Ms. Smith-Gander had undertaken to provide. Importantly, Ms. Smith-Gander failed to take reasonable steps to perform the one obligation that was perhaps most critical to the plaintiff: preventing Mr. Thind from obtaining an uncontested final divorce order.

[113] I conclude, accordingly, that Ms. Smith-Gander fell short of the standard of care that she owed to the plaintiff, and thus she breached her duty to the plaintiff.

Issue 4: Did Ms. Smith Gander's breach of duty cause the plaintiff to incur damages for loss of opportunity to pursue corollary relief?

Legal framework

[114] Where a solicitor's negligence claim is based on a plaintiff's alleged loss of opportunity to secure a financial benefit or avoid a financial loss, the plaintiff may advance a claim for damages for "loss of chance": *Trillium* at para. 263. That is, even if the plaintiff cannot prove on a balance of probabilities that they would have wholly succeeded on their claim but for the defendant's negligence, the plaintiff may still recover damages for the loss of opportunity to obtain a benefit or avoid a loss. This is because in most solicitor's negligence cases, liability is based in both tort and contract. In contract law, proof of damage is not part of the liability inquiry. If a defendant breaches their contract with the plaintiff, and as a result the plaintiff loses the opportunity to gain a benefit or avoid harm, that loss of opportunity may be compensable: *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.) at para. 73.

[115] Accordingly, in a solicitor's negligence case, the assessment of damages may lead to three results: (1) the court finds that the plaintiff would have been wholly successful at trial and awards 100 percent of the damages, (ii) the court finds the plaintiff would not have been successful and awards only nominal damages, (iii) the prospect of recovery by the plaintiff is uncertain, in which case the court must value the loss of opportunity and assess damages on that basis: *Nichols v. Warner, Scarborough, Herman & Harvey*, 2009 BCCA 277 at para. 26, citing *Fisher v. Knibbe*, 1992 ABCA 121 at para. 12.

[116] The threshold for the recovery of lost opportunity damages is evidence of a "reasonable possibility" that there was a financial loss. The claim must not be merely "fanciful". Once the threshold is met, the court must assess the strength of the possibility, having regard for the exigencies of the litigation: *Nichols v. Warner* at para. 27.

- [117] In light of the evidence in this present case, it is important to note that the threshold question is whether there is any causal connection between the defendant's breach of duty and the plaintiff's alleged loss of opportunity. It is only necessary to assess damages if causation is established. As explained by the Ontario Court of Appeal in *Trillium*:
- [278] As I have described above, the jurisprudence on loss of chance claims confirms that the concepts of loss of chance, causation and damages overlap. The governing authorities establish that, at the first stage of a loss of chance analysis, liability, the plaintiff must prove on a balance of probabilities that, but for the defendant's conduct, it had a chance to obtain a benefit or avoid a loss. This is fundamentally a question of causation. At the second stage, damages, the court is required to determine how much of the plaintiff's loss is attributable to the defendant's conduct. This, too, is a question of causation.
- [118] It is open to the defendant in such a case to raise the defence of mitigation. A plaintiff cannot recover damages they could have reasonably avoided: *Ueland v. Lynch*, 2019 BCCA 431 at para. 1 [*Ueland*].
- [119] In the event that a defendant solicitor is found to have breached their contractual duty to exercise reasonable care in the provision of professional services, a plaintiff is entitled to nominal damages even where no actual damage is proven. The purpose of such an award includes the recognition of the violation of a legal right: *Chaster (Guardian ad Litem of) v. LeBlanc*, 2007 BCSC 1250 at para. 221 [*Chaster*]; *Newton v. Marzban*, 2008 BCSC 328 at paras. 847-850 [*Newton*]; *Fong v. Lew*, 2015 BCSC 436 at para. 258 [*Fong*], *aff'd* 2016 BCCA 67.
- Sub-issue 4(a): Did Ms. Smith-Gander's breach of duty cause the plaintiff a loss of opportunity for financial benefit?
- [120] The plaintiff says Ms. Smith-Gander's negligence and breach of contract deprived her of the financial benefit she would have received if the undefended divorce order had not prevented her from pursuing claims for support and property division. The threshold question is whether Ms. Smith-Gander's breach of duty led the plaintiff to lose the opportunity to gain a financial benefit by pursuing claims for corollary relief. As noted in *Trillium*, this is fundamentally a question of causation. Factual causation is generally determined in accordance with the "but for" test; that is, the plaintiff must prove on a balance of probabilities that the loss of chance would not have occurred but for the defendant's negligent act: *Nelson (City) v. Marchi*, 2021 SCC 41 at para. 96.
- [121] The issue of causation in this case is complicated by the existence of parallel proceedings in India, which appear to raise at least some overlapping claims. There is no evidence to show the status of those proceedings, the precise nature of the claims advanced, and the impact, if any, of the BCSC divorce order. The plaintiff's claim is that Ms. Smith-Gander's negligence impeded her ability to pursue family claims in Canada. By necessity, this must be the focus of the negligence analysis. This means Ms. Smith-Gander has the onus to prove that the plaintiff has recovered, or can recover, any loss through the proceedings in India. In light of the plaintiff's pleading, the causation question I must address is whether Ms. Smith-

Gander's breach of duty caused the plaintiff a loss of opportunity to pursue claims for corollary relief in Canada.

- [122] In my view, the plaintiff has not proven causation. The immediate, and most significant, consequence of Ms. Smith-Gander's breach of duty is that Mr. Thind obtained a final order for divorce on an undefended application. However, the plaintiff's claims for child and spousal support and property division did not thereby become barred. As of the time Mr. Thind obtained the divorce order in August 2016, the plaintiff had two years to commence a claim for spousal support and property division under s. 198(2)(a)(i) of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. She faced no limitation period in claiming spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). There is also no statutory time limit on a claim for child support, including retroactive child support, although there is a presumptive rule at common law that retroactive support will not be awarded for a period that is more than three years prior to the date that formal notice was given to the payor parent: *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 123 [D.B.S.].
- [123] In these circumstances, it cannot be said that Ms. Smith-Gander's breach of duty caused the plaintiff a loss of opportunity to pursue claims for corollary relief. The granting of a final divorce order did not present any sort of bar. Indeed, even if the plaintiff had filed a counterclaim for child and spousal support and property division, she could not have prevented Mr. Thind from obtaining a final divorce in the absence of evidence of prejudice: *Gill v. Benipal*, 2022 BCCA 49. The cause of the plaintiff's loss, it seems to me, was her own failure to pursue claims for support and property division after the divorce order was granted.
- [124] The plaintiff says she did suffer a loss due to Ms. Smith-Gander's lack of care in that Mr. Thind had permanently moved to India by 2016, and was only motivated to participate in the BCSC family law proceeding in order to obtain a divorce. If the desk order divorce had not been granted, then Mr. Thind would have been forced to attend a judicial case conference, file a Form F8 financial statement, and provide disclosure of his income and the properties in India, before he could obtain a divorce. The plaintiff says she could not have compelled Mr. Thind to participate in a family proceeding in Canada after he obtained the divorce. She invites me to assume that Mr. Thind would not have responded to any further litigation commenced in Canada.
- [125] There is no credible evidence to support the plaintiff's assertion that Mr. Thind has resided in India since 2016. It is, furthermore, pure speculation to suggest that he would not have responded to a family proceeding in Canada after the divorce order was issued, had the plaintiff commenced one. I conclude that the plaintiff did not take any steps to pursue claims for support and property division because she was focussed on pursuing a negligence claim against Ms. Smith-Gander and Mr. Chaggar.

[126] My finding that Ms. Smith-Gander's breach of duty did not prevent the plaintiff from pursuing Mr. Thind for support and property division is, in itself, sufficient to dispose of this aspect of her claim. However, in the event that I am wrong in my conclusion on causation, I will go on to consider the issues of mitigation and proof of damages.

Sub-issue 4(b): Did the plaintiff fail to mitigate her loss?

[127] The plaintiff cannot recover damages she could reasonably have avoided. This is because a plaintiff has a duty to take all reasonable steps to mitigate their loss, and cannot recover damages that are due to the failure to take such steps: Ueland, citing *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673 (U.K.H.L.) at 689. The defendant has the onus to prove that a plaintiff has failed to mitigate their damages on a balance of probabilities: Ueland at para. 9.

[128] Ms. Smith-Gander argues that to the extent that the desk order divorce may have presented some impediment to the plaintiff in pursuing claims against Mr. Thind for support and property division, the plaintiff could have taken reasonable steps to avoid such a loss by applying to set the divorce order aside. Ms. Smith-Gander communicated to the plaintiff her willingness to swear an affidavit in support of such an application on an expedited basis. Ms. Ganatra also communicated to the plaintiff her willingness to bring such an application in a timely way. If the plaintiff was not content with Ms. Ganatra's representation, she could have retained another lawyer to assist her in bringing such an application. Instead of taking reasonable steps to avoid the loss, the plaintiff focussed on her grievances with Mr. Chaggar and Ms. Smith-Gander.

[129] There is no question that the BCSC has jurisdiction to set aside a final order obtained in an undefended family law case pursuant to R. 10-10 of the Supreme Court Family Rules, B.C. Reg. 169/2009. The source of this jurisdiction is s. 200 of the FLA and the Court's inherent jurisdiction: *Nichol v. Nichol*, 2015 BCCA 278 at paras. 27-28 [Nichol]. As explained in *Nichol*, at para. 35, such applications are guided by the framework set out in *Miracle Feeds v. D. & H. Enterprises Limited and Giesbrecht* (1979), 10 B.C.L.R. 58 (S.C.) at 61, which has been appropriately modified for the family law context. There are three criteria:

- 1) The respondent must establish that they did not willfully and deliberately fail to file a Response to the NOFC. This inquiry is meant to focus on personal and actual intent of the respondent and not their counsel.
- 2) The respondent must establish that they applied to set aside the R. 10-10 final order as soon as reasonably possible after having had obtained knowledge of the R. 10-10 final order or, alternatively, must offer a reasonable explanation as to any delay in applying to set the order aside.
- 3) The respondent must establish that they have a meritorious defence or at least a defence "worthy of investigation".

[130] I agree with Ms. Smith-Gander that if the plaintiff had applied to set aside the divorce order, she would have likely succeeded, provided that she could establish she would suffer prejudice if Mr. Thind obtained a divorce while her claims for corollary relief remained unresolved. The plaintiff did not wilfully or deliberately fail to file a response; she had the opportunity to bring an application without delay; and she could establish that she had meritorious claims that were worthy of investigation. It was, in my view, unreasonable for the plaintiff to fail to take steps to set aside the divorce order if, as she now maintains, she believed that the order presented an impediment to her in pursuing claims for support and property division. It would not have been complex, difficult, or time consuming to bring such an application. The law does not permit the plaintiff to elect to make unreasonable choices concerning mitigation and look to the defendant for compensation: Ueland at para. 32.

[131] As such, I conclude that if the divorce order did prejudice the plaintiff in some manner in her ability to pursue claims for support and property division in Canada, Ms. Smith-Gander has met her onus to prove that the plaintiff acted unreasonably in failing to take steps to mitigate her loss. If the plaintiff had taken steps to apply to set aside the divorce order in a timely way, her entire loss would have been avoided. A 100 percent reduction in damages is therefore in order: Ueland at para. 33.

Sub-issue 4(c): Has the plaintiff proven her damages?

[132] The final prong of Ms. Smith-Gander's response to the plaintiff's claim for loss of opportunity damages is the submission that the evidence does not establish, in any event, a reasonable possibility that the plaintiff would have succeeded on her claims for child and spousal and property division had they been pursued in the family proceeding. In other words, Ms. Smith-Gander says that even if the plaintiff had proven that Ms. Smith-Gander's negligence caused a loss of opportunity to pursue corollary relief, the plaintiff has not proven that the loss has any value.

[133] In light of my conclusions on causation and mitigation, it is not strictly necessary to resolve this point. However, given that this issue was fully argued, and in the interest of providing a comprehensive analysis of the parties' pleadings and submissions, I will address the issue of proof of damages. Ms. Smith-Gander's submission requires consideration of the evidence as it relates to the three claims that the plaintiff says she lost the opportunity to pursue: child support, spousal support, and property division.

Determining the income of the plaintiff and Mr. Thind

[134] The assessment of spousal support and child support requires, as a starting point, a determination of the income of the former spouses over the relevant time period. The evidence of income in this case is sparse. The only evidence of Mr. Thind's income is his 2010 Canadian tax return, which reflects a line 150 income of \$14,560, and salary records from India showing Mr. Thind's income, in rupees, during certain months in 2013 and 2014.

The plaintiff agreed in her evidence that the salary records reflect that Mr. Thind earned a monthly income of approximately \$1,000, which would give him an annual income of \$12,000 in the years of 2013 and 2014.

[135] The plaintiff has tendered in evidence her 2010 tax return, which reflects a line 150 income of \$11,159. At the request of counsel for Ms. Smith-Gander, the plaintiff also produced her 2012 income tax return. The plaintiff agrees her income in 2012 was \$37,836. As noted, the plaintiff refused to produce her income tax information after 2012. There is, therefore, no evidence regarding the plaintiff's income after 2012, other than her estimate that she earned \$60,000-\$80,000 in 2020.

[136] In her closing submissions, the plaintiff asked me to impute income to Mr. Thind on the theory that he could have had a real estate career in Canada. There is no evidence to establish that Mr. Thind was realistically capable of earning income in the real estate field, or that he had the skills and training to pursue such employment. Income cannot be imputed on the basis of speculation or guess-work: *Small v. Small*, 2020 BCSC 707 at para. 194. There is also no evidence to establish the income that Mr. Thind might have earned by working in real estate, in whatever role the plaintiff may have imagined him performing.

[137] I conclude that the incomes of the plaintiff and Mr. Thind must be determined in accordance with the limited tax and employment records in evidence:

Mr. Thind

2010 \$14,560

2013 \$12,000

2014 \$12,000

The plaintiff

2010 \$11,159

2012 \$37,836

[138] There is no basis in the evidence to determine income after 2012 (in the plaintiff's case) and 2014 (in Mr. Thind's case).

Child support

[139] At the time the plaintiff says she anticipated Ms. Smith-Gander would file a counterclaim on her behalf--which would have been after the notice of family claim was served on June 1, 2015--she could only claim child support if Navpreet or Karan remained children of the marriage. This is because an initial application for child support under the Divorce Act could only be brought while the beneficiary was still a child of the marriage: *D.B.S.* at paras. 88-89. The recent decision of the Supreme Court of Canada in *Michel v. Graydon*, 2020 SCC 24 [Michel] has changed the law as it relates to an application to retroactively vary a child

support order under s. 152 of the FLA. However, Michel did not directly overrule D.B.S. as it relates to an initial application for child support under the Divorce Act: Michel at para. 14.

[140] The Divorce Act provides that a court may order a spouse to pay child support to a "child of the marriage". A child of the marriage is defined in s. 2(1) as a child of two spouses or former spouses who, at the material time:

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life; .

[141] Once a child reaches the age of majority (which is 19 years of age in BC), the presumption is that they are no longer a child. To remain a "child" for support purposes, an adult child must be unable to withdraw from their parents charge, or unable to obtain the necessities of life because of illness, disability or another reason. The pursuit of post-secondary education may constitute another cause for an adult child's inability to withdraw from their parents' charge. If an adult child is still living at home but is not ill, disabled, or for some other reason unable to withdraw from parental charge or obtain the necessities of life, the adult child is not a child for support purposes. The party applying for support bears the onus of proving the child is still a child: *Forrest v. Aerin*, 2022 BCCA 184 at para. 100, referring to *Dring v. Gheyle*, 2018 BCCA 435 at paras. 49-52.

[142] In July 2015, the earliest date that claims for corollary relief would likely have been advanced, Navpreet was 24 years old, had married, and was working and living independently. She was clearly no longer a child for support purposes. Karan was 21 years old. Other than the period of a few months when he was enrolled in part-time courses at Camosun College in 2015, Karan was working. Although Karan continued to live with the plaintiff, there is no evidence that he was unable due to illness, disability, or any other reason, to withdraw from the plaintiff's charge. I conclude, accordingly, that the plaintiff has not met her onus of proving that either Navpreet or Karan continued to be a "child" for child support purposes at the time the plaintiff's response to family claim and counterclaim would have been filed. There is no reasonable possibility on the evidence that her claim for child support would have led to financial recovery.

[143] Finally, I note that even if the Court had the jurisdiction to consider the plaintiff's claim for child support despite that it was filed when Navpreet and Karan were no longer children of the marriage, the plaintiff's financial recovery would have been modest. The plaintiff likely would have been limited to the three-year period preceding the filing of her response to family claim and counterclaim, with a start date in or around July 2012. At the latest, as of January 2013, Navpreet was no longer a child of the marriage as she had graduated from the health care assistant program and had started working. Karan ceased to be a child of the marriage when he graduated from high school in June 2013, at the age of 19, and thereafter worked.

[144] As such, even if the plaintiff had filed a claim for child support in or around July 2015, it would have covered two children for a six-month period of time (July-December 2012), and one child for an additional six months (January-June 2013). Based on Mr. Thind's annual income of \$12,000, he would have owed a monthly table amount of \$118 for two children and \$42 for one child, resulting in a total amount of potential retroactive child support of \$960. There is no evidence that the plaintiff incurred s. 7 expenses during this period.

Spousal support

[145] The threshold question is whether the plaintiff has established there is a reasonable possibility that she would have been entitled to an order for spousal support, had one been sought. Only if entitlement is established is it necessary to consider the duration and quantum of support.

[146] The objectives of spousal support set out in the Divorce Act encompass both compensatory and non-compensatory grounds for support: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 34-43 and 49.

[147] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of economic advantage on the other spouse: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50-51 [Chutter]. Compensatory support should continue until compensation for the economic disadvantages of the marriage and its breakdown are achieved: *Chutter* at para. 79. Non-compensatory support is grounded in the 'social obligation model' of marriage in which marriage is seen as an inter-dependent union. Upon marriage dissolution, it falls on the former partner, not the state, to meet the needs of a disadvantaged spouse: *Chutter* at para. 54. "Need" in this context refers to something more than the basic necessities of life: *Chutter* at para. 55.

[148] I agree with Ms. Smith-Gander that there is no basis in the evidence to establish that the plaintiff would have been entitled to an award of spousal support on the compensatory ground. There is no evidence that the plaintiff stayed home for any extended period of time to raise the children. The plaintiff worked throughout her marriage to Mr. Thind, and, if anything, appears to have earned more income than Mr. Thind. There is no evidence that the plaintiff was left economically disadvantaged by the marriage.

[149] There is also no basis in the evidence to suggest that the plaintiff would have been entitled to support on the non-compensatory ground. In 2011, the plaintiff continued to work while she obtained her nursing qualification, earning \$11,638 in that year. After 2011, the plaintiff's income increased substantially. In the post-separation years for which income information is available, the plaintiff consistently earned more than Mr. Thind. In 2012, her first full year of working as a nurse, she earned substantially more than Mr. Thind.

[150] In light of the evidence adduced at trial, I find there is no reasonable possibility that the plaintiff would have been successful in her claim for spousal support.

Family property division

[151] There is no evidence that either the plaintiff or Mr. Thind owned property in British Columbia as of the date of separation. The plaintiff's focus is on three properties that she maintains Mr. Thind owned in India, and which he has now sold. The plaintiff alleges that Ms. Smith-Gander's negligence deprived the plaintiff of the opportunity to share in the value of the properties.

[152] In my view, the evidence does not establish a reasonable possibility that the plaintiff would have succeeded on a claim for division of these properties had Ms. Smith-Gander filed a counterclaim. The documents that the plaintiff has tendered in evidence in relationship to these three properties establish only:

- a) in relation to the first property, Mr. Thind granted a mortgage in possession to his sister in December 2014;
- b) in relation to the second property, Mr. Thind purchased the property in 2005;
- c) in relation to the third property, Mr. Thind swore an affidavit in the land registry attesting to his willingness to execute a sale deed.

[153] There is no evidence that Mr. Thind owned any of these properties as of the date of separation. As such, there is no basis in the evidence to find that the properties in India are family property within the meaning of s. 84 of the FLA. There is, therefore, no reasonable possibility on the evidence that the plaintiff would have been successful in her claim for division of the three properties in India.

[154] Given this conclusion, it is unnecessary for me to address Ms. Smith-Gander's alternative submission that a judge of the BCSC would likely have declined to exercise jurisdiction in relation to property located in India in circumstances where the plaintiff had already filed a property claim in India, and the parties had resided in that country for most of their marriage: FLA, s. 106-108; Jiang v. Shi, 2017 BCCA 276. Such a prospect would have to be accounted in the assessment of damages if the plaintiff had established a reasonable possibility of success on the claim for property division.

Summary on Issue 4

[155] In summary, I conclude that the defendant's breach of duty did not cause the plaintiff a loss of opportunity to pursue claims for child and spousal support and property division. This conclusion is a sufficient basis, on its own, to dismiss the plaintiff's claims for damages against Ms. Smith-Gander, other than nominal damages.

[156] In the event that I am wrong in my conclusion on causation, I have gone on to consider Ms. Smith-Gander's remaining arguments on mitigation and damages. I conclude that the plaintiff unreasonably failed to mitigate her loss, and the failure to mitigate should lead to a reduction of 100 percent of her damages. In the further and final alternative, the plaintiff has not proven a reasonable possibility that she would have succeeded on her claims for corollary relief in any event.

Issue 5: Is the plaintiff entitled to an award of damages for mental distress?

[157] Finally, and separately from the claim for damages for loss of opportunity, the plaintiff also seeks an award of damages to compensate her for the mental distress she says she has experienced as a result of Ms. Smith-Gander's negligence. Such an award is only available where the threshold for injury described in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 [Mustapha] is met on the evidence--that is, there was a serious and prolonged psychological disturbance that rose "above the ordinary annoyances, anxieties and fears that people living in society routinely, if somewhat reluctantly, accept": *Mustapha* at para. 9. This threshold will rarely be met in cases of solicitor's negligence: *Dhillon v. Jaffer*, 2014 BCCA 215 at para. 55.

[158] I accept that the plaintiff has suffered emotional upset as a result of Ms. Smith-Gander's negligent representation of her. The plaintiff feels very strongly that Ms. Smith-Gander's conduct has deprived her of the opportunity to pursue family claims, and this has caused her some level of anxiety and agitation. The actions of Ms. Smith-Gander in transferring the plaintiff's file to Ms. Ganatra without the plaintiff's express consent, and in disclosing privileged file material to Mr. Chaggar was particularly upsetting to the plaintiff. However, the evidence does not establish that the plaintiff has suffered a serious and prolonged psychological disturbance that would meet the threshold test for compensable injury as established in *Mustapha*.

[159] Accordingly, the plaintiff is not entitled to an award of damages for mental distress.

CONCLUSION/ORDERS

[160] In summary, I conclude that although Ms. Smith-Gander did not exercise reasonable care in her representation of the plaintiff, the plaintiff has not established that she suffered actual pecuniary loss or compensable mental injury as a result of the breach of duty.

[161] As I have found that Ms. Smith-Gander breached her contractual duty of reasonable care, the plaintiff is entitled to nominal damages even though she has not proven actual damages. An award of nominal damages in the amount of \$1,000 was made in each of *Chaster*, *Fong*, and *Newton*. These cases seem to me to be appropriate precedents. Accordingly, I award the plaintiff \$1,000 in nominal damages against Ms. Smith-Gander.

[162] The plaintiff's action against Mr. Chaggar is dismissed.

[163] If the parties cannot agree on an appropriate order for costs arising from this judgment, they have liberty to request a further one-hour hearing before me at 9 am on a date convenient to the parties and the court.

"Horsman J."

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