

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Barnes-Morrison v. Kolias*,
2025 BCSC 166

Date: 20250131
Docket: E48799
Registry: Penticton

Between:

Clair Anita Barnes-Morrison

Claimant

And

**Evangelos Kolias, Sam Kolias, Vicki Parker, Monis Uddin,
and Evangelos Kolias, Sam Kolias, Melissa Kolias,
Samantha Kolias-Gunn, Hugh Kolias, Vanessa Kolias, and
Isabella Kolias, in their capacities as trustees of the
Sam and Van Kolias 2020 Family Trust**

Respondents

Before: The Honourable Justice Hardwick

On appeal from: An order of the Supreme Court of British Columbia, dated
November 28, 2024 (*Barnes-Morrison v. Kolias*, Penticton E48799)

Reasons for Judgment

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Place and Date of Hearing: Kelowna, B.C.
January 16, 2025

Place and Date of Judgment: Kelowna, B.C.
January 31, 2025

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The Appeal

[1] This is an appeal brought by the respondent, Evangelos Kolias, in respect of an interlocutory order obtained by the claimant, Clair Anita Barnes-Morrison, in this action.

[2] Given the respondent is technically the appellant and the claimant is technically the respondent and there are other interested/involved parties with the surname Kolia, I am going to refer to Evangelos Kolia as “Van” and Clair Anita Barnes-Morrison as “Clair” for the purposes of these reasons for judgment. I mean no disrespect in so doing.

[3] Associate Judge Schwartz made the order under appeal on November 28, 2024 (the “Schwartz Order”). As I will return to, the Schwartz Order was made on a without notice basis pursuant to the *British Columbia Supreme Court Family Rules [Rules]*.

[4] The Schwartz Order has two material terms:

- a) Sam Kolia, Vicki Parker, Monis Uddin, and Evangelos Kolia, Sam Kolia, Melissa Kolia, Samantha Kolia-Gunn, Hugh Kolia, Vanessa Kolia, and Isabella Kolia, in their capacities as trustees of the Sam and Van Kolia 2020 Family Trust (the “New Respondents”) are added as parties to the proceeding and the style of cause amended accordingly (paras. 1 and 2); and
- b) Clair is granted leave to amend her Notice of Family Claim, originally filed May 31, 2023, in the form attached as Schedule “A” to the Clair’s notice of application filed November 26, 2024 (para. 3).

[5] The new claims advanced in the amended notice of family claim filed November 28, 2024, (the “Amended Notice of Family Claim”) include claims of conspiracy, both unlawful act conspiracy and predominant purpose conspiracy, and the doctrine of unconscionable procurement.

Overview

[6] This appeal is brought in the context of a family law proceeding which is both factually and legally nuanced.

[7] From the time pleadings were commenced by Clair on May 31, 2023, until May 8, 2024, there were some 97 documents logged into the Court Services Online - Judicial Module. This included, by my count, some 11 orders, including consent orders, a without notice order, a desk order, multiple orders made after application, a judicial case conference order and a case planning order.

[8] I am going to highlight two of the above referenced orders made pursuant to s. 91 of the *Family Law Act*; the relevance of which will be apparent in due course.

[9] The first s. 91 order was made June 7, 2023, by Master Schwartz (as he was then) on a without notice basis. This order was set aside by consent and replaced with a more comprehensive s. 91 order made July 12, 2023. The July 12, 2023, order is the operative order restraining the disposition, encumbering or otherwise dealing with the property specifically identified on the terms set out therein (the “s. 91 Order”).

[10] Moving forward in the chronology, over the course of five days of hearings between May 8, 2024 and July 17, 2024, counsel for Clair and Van made competing submissions about jurisdiction and the choice of law as between the province of British Columbia and the province of Alberta. This ultimately resulted in the order of Justice Kent made July 17, 2024 (the “Kent Order”), the reasons underlying which are indexed at 2024 BCSC 1400. Van appealed the Kent Order. Said appeal remains live but, for several reasons, is presently on pause.

[11] Following the Kent Order, Clair set down for hearing an interim spousal support application which she had filed back on July 28, 2023, but which was being held in abeyance by consent (“Clair’s Interim Support Application”).

[12] Clair’s Interim Support Application came on for hearing before me in Penticton on August 28, 2024. At that time, counsel for Van sought an adjournment due to their unavailability as the hearing date had been scheduled, according to Van’s counsel, effectively unilaterally.

[13] Following submissions, I made an order allowing for the adjournment on certain terms, the most significant being the payment of “interim interim” without prejudice spousal support by Van to Clair. I further set the substantive hearing of Clair’s Interim Support Application for a 2-day chambers sitting in Kelowna and designated myself the case management justice on an interim basis.

[14] On September 6, 2024, Associate Chief Justice Holmes formally assigned this action to me for judicial management.

[15] On September 9, 2024, Supreme Court Scheduling sent a notice of assignment confirming same (the “Notice of Assignment”). The Notice of Assignment provides, *inter alia*, that:

Please be advised that **Justice Hardwick** has been assigned as the **Judicial Management Judge** in the above noted matter.

The Court has directed that a Judicial Management conference (**JMC**) take place. ...

...

It is imperative that counsel and parties attend all hearings with their diaries in the event that adjustments to dates set or time estimates need to be made.

PLEASE NOTE:

All appearances and conferences (including the initial Judicial Management Conference) should be heard by the assigned judge, unless that judge is not available within a reasonable time frame. To request an appearance before them, the online form is to be utilized...

[16] Clair’s Interim Support Application proceeded before me on September 24 and 25, 2024, in Kelowna, in accordance with my August 28, 2024 order. As expected given the complexity of the matter, I reserved judgment following the conclusion of submissions.

[17] On October 21, 2024, counsel for Clair filed the “Notice of Trial”. The Notice of Trial sets the action, which is a Penticton file, for a 19-day trial in Kelowna commencing the week of October 14, 2025. Counsel mutually agreed upon the date and duration. The Notice of Trial indicates same.

[18] The trial date in Kelowna, arranged through Supreme Court Scheduling and confirmed in the Notice of Trial, was premised upon my being the trial judge. Although a formal memorandum was not provided to counsel confirming same at that time, my understanding was that counsel was aware of this.

[19] On November 6, 2024, I released written reasons for judgment in respect of Clair’s Interim Support Application. Those reasons are indexed at 2024 BCSC 2033 (the “Interim Support Reasons”). The Interim Support Reasons outline various background facts material to the litigation which I will not repeat again herein, but they provide some insight into the genuine complexity of this proceeding.

[20] My original intention was to release the Interim Support Reasons prior to a judicial management conference which had been previously scheduled, by consent, for November 6, 2024.

[21] Due to certain technical and logistical issues, the Interim Support Reasons could not be released to counsel and the parties until November 6, 2024. Accordingly, the judicial management conference was pushed back a day, by consent, to November 7, 2024 (the “November 7 JMC”).

[22] At the November 7 JMC, counsel was understandably still reviewing the Interim Support Reasons for the purposes of advising their respective clients. Notwithstanding this, certain progress was made at the November 7 JMC for the purposes of ongoing case management. Most significantly this included an agreement by counsel for a further judicial management conference on December 5, 2024 (the “December 5 JMC”), together with a timeline for the exchange of updated case management plans before then. There was also discussion about counsel

corresponding offline about certain issues, most notably the proposed scope of the certain contemplated expert reports, in advance of the December 5 JMC.

[23] Neither the topic of amending the pleadings nor the possible addition of new parties was discussed at the November 7 JMC. Accordingly, no orders were made or directions given about times for delivering application materials, canvassing of hearing dates or the like.

[24] Between the November 7 JMC and November 26, 2024, Supreme Court Scheduling did not inform me of any inquiry by any counsel (or their staff) in this action about scheduling a chambers application before me for any purpose. I was thus operating on the basis that I would receive the case management plans in accordance with the schedule agreed upon at the November 7 JMC and would hear submissions from counsel at the December 5 JMC to help best determine how I could best effectively case manage the file going forward.

[25] Clair’s counsel concedes that they made no request as to my availability to hear any chambers application in this action between the November 7 JMC and November 26, 2024. Clair’s counsel submits there was a justifiable basis for proceeding in this manner, which I will consider in the course of addressing the Appeal on its merits, but fortunately it is not asserted that a request was made but simply not brought to my attention for consideration.

The Amendment Application

[26] On November 26, 2024, Clair’s counsel filed a notice of application to amend the notice of family claim and to add parties to the proceeding (the “Amendment Application”). It was, as noted, a “without notice” notice of application. Van’s counsel was not served with a copy of the Amendment Application in order to attend – even for the limited purposes of seeking adjournment. I was not informed of the Amendment Application directly, nor did I even become indirectly aware of it as it was set in associate judge’s chambers in Penticton on a Thursday; a chambers’ list I would usually never check unless I happened, by chance, to be personally sitting in Penticton on that date.

[27] The Amendment Application relies on no “new” affidavits in Part 4 of Form 32. All of the affidavits relied upon in the Amendment Application were before me for the purposes of Clair’s Interim Support Application. The factual basis of the Amendment Application, namely Part 2, relies upon and makes specific reference to various quotes from the Interim Support Reasons. Those quotes, with some exception, comprise pages 2-8 of the Amendment Application.

[28] Contained on page 11 of Part 2 of the Amendment Application are the following additional facts:

10. This file is under temporary case management by Justice Hardwick.
11. A 19 day trial has been set for October 14, 2025, in Kelowna, B.C.

[29] The hearing of the Amendment Application before Associate Judge Schwartz on November 28, 2024, took 2 minutes and 39 seconds.

[30] The transcript of the hearing before Associate Judge Schwartz provides as follows:

November 28, 2024 Penticton, BC

{PROCEEDINGS COMMENCED} ([10:24:16 AM])

CNSL D. KING: Your Honour, King, initials D.M. I appear on behalf of the applicant claimant. This is an application —

THE COURT: Yes.

SUBMISSIONS TO ADD PARTIES BY CNSL D. KING:

CNSL D. KING: This is an application to add parties and demand the claimant's notice of family claim. I've attempted to be quite comprehensive in materials and it should be apparent that these parties that we're seeking to — seeking to add are necessary parties and the trustees and beneficiaries of the subject trust, their interests are affected so they should properly be parties as well. So I'm happy to go through my application unless the court has already reviewed the materials.

THE COURT: No.

CNSL D. KING: I know it's a habit of Your Honour.

THE COURT: That's fine. I did review it, counsel, and no, I'm prepared — I know there's limitation issues claimed so I'm prepared to grant the order set out in paragraphs 1, 2 and 3 of part 1 of your November 26th application.

CNSL D. KING: Thank you. Now, I've included in the binder a vetted order. There's some urgency to getting this order entered. I didn't appreciate we'd

be doing this remotely today. I have a vetted order here that just simply sets out 1, 2 and 3 as has just been ordered. I would seek an order at this time that this order may be entered in the Penticton registry today. It's in the same form as found at tab 2 in the chamber's binder.

THE COURT: Yeah, that's fine. If it tracks exactly with paragraphs 1, 2, and 3 — I don't have the physical binder here. My schedule sort of got changed around a little bit last moment as well. I thought I would be physically there initially but I'm actually in Kelowna interestingly for a matter I thought you would be in Kelowna for. So, anyway, yes, you can file that today in Penticton. And then on an unrelated note if you're needing permission, Mr. King, to attend via Teams, that would be fine for the 10:30 matter.

CNSL D. KING: Yes, thank you. I have a — I have an email from the trial court indicating that it would be in Penticton but there's obviously been some confusion so I'll participate in Teams. I'll be ready to go as soon as I go back to my office. Thank you.

THE COURT: Sounds good. Thank you.

CNSL D. KING: Take care.

(PROCEEDINGS ADJOURNED)(10:26:55 AM)

[31] There are two errors in the transcript which can confirmed by listening to the actual DARS recording of the November 28, 2024 hearing before Associate Judge Schwartz. Both counsel agree in this regard; as does the Court. One of those errors, which relates to the salutary comment at the very end of the hearing, is immaterial. One error is material. Specifically, according to the transcript, Associate Judge Schwartz said, “I know there’s limitation issues claimed so I am prepared to grant the order...” (see lines 27 and 28 of the hard copy of the transcript contained at Tab 14 of the Appeal Record).

[32] What Associate Judge Schwartz actually said, per the DARS recording, was “I know there is no limitation issues claimed so I am prepared to grant the order...”.

[33] The Schwartz Order was entered and served on the date of pronouncement, together with the attached Amended Notice of Family Claim.

[34] I personally became aware of the Schwartz Order on or about the evening of December 3, 2024, when I reviewed the case management briefs provided by counsel for Clair and Van in advance of the December 5 JMC.

[35] The December 5 JMC proceeded as scheduled. I informed counsel at the outset, however, that I was aware of the circumstances and did not want to hear any submissions at that time on matters of substance regarding what occurred on November 28, 2024.

[36] Instead, I told counsel that given my view that case management was somewhat in a state of disarray, I had identified four options for counsel to take away to consider, discuss with their respective clients and obtain instructions on. Those four options, which I indicated were non-exhaustive, were:

- a) Vacate the Schwartz Order by consent and go back to the state of matters as of November 27, 2024. Any application to amend and add parties by Clair to be brought on in the normal course with requisite notice under the *Rules*;
- b) No consent to vacate the Schwartz Order, but consent to have any appeal of the Schwartz Order heard by another justice of this Court;
- c) No consent to vacate the Schwartz Order, but consent to have any appeal of the Schwartz Order heard by me; or
- d) No consent to vacate the Schwartz Order and there be a contested recusal application as to whether I, as case management justice, should hear any appeal.

[37] On December 13, 2024, Van filed a notice of appeal (the “Notice of Appeal”) of the Schwartz Order pursuant to R. 22-7(8.1) of the *Rules* (the “Appeal”). The Notice of Appeal seeks that the Schwartz Order be set aside.

[38] At a December 18, 2024 case management conference, which included the limited participation of counsel for the New Respondents, it was determined that option (c) was preferred such that, scheduling permitting, I would hear the Appeal of the Schwartz Order and that doing so represented no impediment to my continuing as the case management judge and, if required, the trial judge. Counsel did agree to

option (b) in the alternative should my schedule not accommodate the hearing of the Appeal in a timely way.

[39] Ultimately, I coordinated with counsel in the jury trial over which I was presiding to allocate 2.5 hours on the morning of January 16, 2025, to hear the Appeal. The fact that this Appeal could be heard in 2.5 hours underscores a point I make later in these reasons for judgment as to the efficiency judicial case management can offer in appropriate circumstances.

Van’s Grounds of Appeal

[40] The grounds for appeal as articulated in Notice of Appeal are as follows:

- a) Ground 1: That the order was made contrary to R. 8-1(b) of the *Rules*;
- b) Ground 2: That the order was made contrary to R. 8-2(11) of the *Rules*;
- c) Ground 3: That the order made denied Van his right to basic procedural fairness under the *Rules*;
- d) Ground 4: That the application was brought before the Associate Judge and not the assigned case management judge, the Honourable Justice Hardwick;
- e) Ground 5: The insufficiency of reasons; and
- f) Ground 6: The failure of Clair’s counsel to fulfill his broad obligation in the context of an *ex parte* application to disclose all matters that might give the court pause.

[41] In addition, Van seeks special costs of this Appeal and the Amendment Application either paid by Clair or personally by Clair’s counsel.

[42] Van’s argument for special costs against Clair’s counsel personally was not withdrawn at the hearing of the Appeal but was pursued with less vigour given Van’s counsel’s acknowledgement that the identification of the error in the transcript

regarding the issue of any limitation period does make clear that counsel for Clair did not fail to correct the court on the record about a material misunderstanding. The statement of Associate Judge Schwartz that there “are no limitation period issues” is consistent with what is contained in the Amendment Application, but Van’s counsel originally, and understandably, relied on the transcript which states the contrary.

Clair’s Position on the Grounds of Appeal

[43] Clair opposed the Appeal. The crux of Clair’s argument is summarized as follows:

- a) Van waived his right to raise objections about the way the Amendment Application was brought by filing the Notice of Appeal instead of seeking to change or set aside the order under R. 10-9(8) of the *Rules*. As such, Van is limited to satisfying the court that Associate Judge Schwartz was “clearly wrong” in making the Schwartz Order;
- b) Van should be disentitled to pursuing the Appeal as he is in breach of the s. 91 Order;
- c) The reasons for judgment of Associate Judge Schwartz are sufficient when read in light of the record;
- d) The Schwartz Order is not clearly wrong; and
- e) There is no basis for special costs.

[44] Clair’s counsel also submits that success on the Appeal would be a hollow victory for Van as no order made on the Appeal would disentitle Clair from bringing on the Amendment Application for hearing in due course with proper notice.

Standard of Review

[45] I accept the submission of Van’s counsel that there are two different standards of review which potentially apply in relation to the Appeal.

[46] The first involves a reconsideration of the questions which were before Associate Judge Schwartz on the basis of a rehearing or a hearing *de novo*.

[47] The second involves deference to the Associate Judge's decision, which will only be overturned if it is shown to be "clearly wrong": see *Abid v. Khan*, 2018 BCSC 1292 at para. 17.

[48] As further explained in *Abid*, the question of which standard of review applies usually begins with a consideration of *Abermin Corp. v. Granges Exploration Ltd.*, 1990 CanLII 1352 (B.C.S.C.), 45 B.C.L.R. (2d) 188.

[49] *Abermin* was summarized in *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309, where the Court observed:

[33] It is not the role of this Court to hear the application afresh. Our task is to determine whether the chambers judge erred in dismissing the appeal from the master's decision. The questions we must determine are whether the chambers judge properly identified and then applied the appropriate standard of review.

[34] At the outset of her reasons the chambers judge gave consideration to the standard of review. She found that the order was a discretionary one, requiring the master to balance a number of factors. She found that to be successful on the appeal the plaintiff must show that the master was clearly wrong.

[35] The clearly wrong standard was first pronounced by MacDonald J. in *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (B.C. S.C.), who stated at 193:

An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the master.

[36] The clearly wrong standard was subsequently approved by this Court in *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231 (B.C. C.A.).

[50] Lastly, the Schwartz Order does not raise questions which are vital to the final issue in the case and accordingly, a case-by-case analysis of the level of deference is not required: see *Kalafchi v. Yao*, 2015 BCCA 524 at para. 16.

[51] The applicable standard, I accept, is thus whether Van can satisfy the burden of proving that the making of the Schwartz Order was “clearly wrong”.

Importance versus Urgency

[52] At the core of the Appeal is whether the Amendment Application was urgent. In my view, counsel for Van very clearly addressed this point by articulating the difference between the concepts of importance and urgency.

[53] As a starting point, R. 10-9(6) of the *Rules* provides that the court may make an order without notice in the case of urgency.

[54] Given my ongoing role as the case management judge and, if necessary, the trial judge, I will not and am not reaching any conclusion with respect to the merits of the new claims that Clair is advancing in the Amended Notice of Family Claim beyond stating that they are outside of the norm of what is typically plead in family law proceedings. Counsel for Clair essentially conceded this in the course of oral submissions.

[55] The portions of the Interim Support Reasons quoted by Clair in the Amendment Application accurately detail certain concerns this Court identified with the financial disclosure to date in the action and the financial dealings as between Van and his brother, Sam Kolia, which were revealed, to some greater extent, in the affidavit material filed in opposition of Clair’s Interim Support Application.

[56] Clair’s counsel asserts that Van has been effectively turned into a “straw man” who is potentially judgment proof from claims by Clair should the Agreement (as defined at para. 22 of the Interim Support Reasons) be set aside. As I stated at para. 71(f) of the Interim Support Reasons:

What [sic] “agreements” there are between the respondent and Sam Kolia regarding the preferred shares is murky at best....

[57] Paragraph 71(f) is not exhaustive. What I did not specifically detail in the Interim Support Reasons, as I considered my description sufficient for those purposes, is that there are two handwritten “agreements” from February 12, 2024, as between Van and Sam which are written on what appears to be generously described as large lined post-it notes. The variety of which one would use for grocery lists but not usually for multi-million-dollar agreements.

[58] Clair’s “straw man” theory is accordingly not without certain *prima facie* merit.

[59] The Amendment Application based on that theory is not, however, urgent. To the extent that there has been financial mischief between Van and Sam Kolia in an effort to defeat Clair’s claims in this action, it has already been done well before the Interim Support Reasons. Clair’s amended claims seek to undo or unravel that alleged financial mischief to her benefit; they do not seek to prevent it.

[60] The amount of money involved in this particular case is also relevant, in my view, in considering urgency versus importance. Van and Sam Kolia presently hold an equal number of preferred shares in their respective companies, which companies are defined in the Interim Support Reasons. Their respective 103,563 shares have a redemption value of \$1,000 per share. Thus, Van and Sam Kolia are each the registered owners of preferred shares worth \$103,563,000 for a total of \$261,126,000.

[61] Clair is entitled to pursue her claims without the risk of a dry judgment after lengthy and financially arduous litigation.

[62] However, \$103,563,000 is a considerable amount of money to disappear into the proverbial ether.

[63] Further, that is simply the preferred shares. There are other assets within the Boardwalk Properties Group (as again defined in the Interim Support Reasons). It took me many hours over the course of the approximately six weeks that the Interim Support Reasons were under reserve to attempt to understand corporate structure and the dealings between Van and Sam Kolia.

[64] I ultimately conceded that even trying to determine Van’s *Guideline* income for interim support purposes, something usually done on the basis of rough justice, was asking me to “play the judicial version of pin the tail on the donkey *at this particular point* of this particular case”: see para. 88 of Interim Support Reasons.

[65] I recognize that Clair’s counsel cited this paragraph of the Interim Support Reasons in the Amendment Application but must conclude that Clair’s counsel placed an unreasonable burden on Associate Judge Schwartz by bringing on the Amendment Application on a without notice basis and relying on Associate Judge Schwartz’s statement confirming that he “read the materials”.

[66] Specifically, I say, with great respect for Associate Judge Schwartz, that there is a distinct chasm in this particular case between reading the materials and understanding the materials. It took me hours to conclude that I was left with more questions than answers from Van’s application response materials.

[67] In push back to this, counsel for Clair submits that the threshold for the amendment of pleadings under the *Rules* is generally quite a low bar. I do not disagree with that proposition. However, where the proposed amendments plead what are novel claims in a factually complex case, sufficient information needs to be put before the court to determine if that low bar is met. The addition of the 10 New Respondents and three new causes of action were not routine amendments.

[68] Further it was not sufficient, in my view, to rely upon Associate Judge Schwartz’s statement that he “read the materials” to mean he appreciated from the one line statement at paragraph 10 of Part 2 the Amendment Application (contained at page 11) that this action was being actively case managed by myself with the December 5 JMC just one week away and to specifically advise him that no efforts had been made to canvass my availability to hear the Amendment Application.

[69] Similarly, if Clair’s counsel, as submitted for the purposes of the Appeal, intentionally did not canvass my availability because he unilaterally concluded it would put me in an uncomfortable position as case management judge of being

asked to consider a without notice application, that also ought to have been specifically brought to Associate Judge Schwartz’s attention. Associate Judge Schwartz could then have determined fulsomely whether he agreed with that submission. Instead, my role in the action was limited to the one-line statement that this action was “under temporary case management by Justice Hardwick”.

Judicial Case Management and Procedural Fairness

[70] The above broader conclusions dovetail directly into my analysis about the role of the case management justice generally and specifically grounds #3 and #4 of the Appeal: namely that Van was denied his right to procedural fairness and that it was an error that the Amendment Application was brought before Associate Judge Schwartz instead of myself in the circumstances.

[71] Although Van’s counsel cited these as two independent grounds in the Notice Appeal, they are so closely intertwined such that, in my view, they must be considered together.

[72] In this regard, Clair’s counsel correctly identifies that the Notice of Assignment uses the word “should” as opposed to the word “must” or “shall”. Specifically, as set out above, the Notice of Assignment provides that:

All appearances and conferences (including the initial Judicial Management Conference) should be heard by the assigned judge, unless that judge is not available within a reasonable time frame.

[73] In contrast, for comparison purposes, the draft model order for the preservation of assets, colloquially known as the Mareva injunction order, has the following proposed term:

All applications to vary or discharge this Order, or arising out of the issuance or enforcement of this Order, shall be heard by the Judge who issued this Order with the exception of:

- (a) urgent matters for which the Judge is not available; or
- (b) as otherwise directed by the Judge.

[74] In this regard, Van’s counsel concedes that unlike orders which seize a particular justice of certain issues or for certain defined periods of times, there does not appear to have been, at least to date in this province, judicial consideration of whether the language “should” in a notice of assignment requires counsel or a self-represented party, whichever it may be, to first attempt to bring on a matter before the case management judge before scheduling in regular chambers (whether before another justice of this Court or an associate judge).

[75] In my view, there must be something akin to a purposive interpretation given to the word “should” in this particular context. I say akin to purposive as I recognize this is not a legislative interpretation per se.

[76] However, judicial case management is an exception to the usual litigation process. It is done where the Chief Justice or the Associate Chief Justice considers it an appropriate use of limited judicial resources to have a particular justice or associate judge, assigned to a particular file to achieve the object of the *Rules*, in the case of civil or family actions, of securing the “just, speedy and inexpensive determination of every proceeding on its merits.” The assigned justice or associate judge is generally one whom is (but not necessarily) either familiar with the specific action(s) or the relevant subject area of the law at issue.

[77] Case management does not permit litigants to move inappropriately ahead in the judicial que, but it can expedite matters significantly due to the case management judge’s familiarity of the issues, which frees up judicial resources for other matters.

[78] Case management also reduces the drain on judicial resources, in certain cases, due to the multiplicity of court applications where litigants inappropriately attempt to obtain the same (or substantially the same) relief from multiple presiders.

[79] In this action, between my first handling of the file on August 28, 2024, and the Schwartz Order, a period of exactly three months, there was:

- a) an “interim interim” spousal support order;

- b) a financial disclosure order;
- c) a 2-day contested hearing for Clair's Interim Support Application;
- d) filing of a Notice of Trial;
- e) the writing and release of the Interim Support Reasons;
- f) the November 7 JMC with accompanying procedural orders; and
- g) the scheduling of the December 5 JMC.

[80] However, even if the factual matrix was different and the assigned case management justice was not in a position due to other obligations to have given the same degree of judicial attention to the action, the obligation still exists, in my view, to canvass the availability of the case management justice unless there are truly urgent circumstances.

[81] The most obvious example of such urgent circumstances I can identify is a protection order – such orders may need to be granted on a without notice basis, sometimes on hastily prepared materials arising from unanticipated events. In that situation, the delay associated with seeking the availability of the case management justice could present a genuine risk of harm to the applying party. Another justice hearing the protection order application, and upon being appropriately advised of the case management assignment, could, if they considered appropriate, make a short duration protection order and then remit the matter back to the case management justice.

[82] That is not, however, what occurred in this case. As I have already addressed, Van at least partially disclosed the alleged financial mischief which Clair relies upon as the factual basis of the Amendment Application to Clair after his counsel filed his response materials to Clair's Interim Support Application on or about September 11, 2024. This is consistent with the fact that the material relied upon by Clair in Part 4 of the Amendment Application were, with the exception of the

Interim Support Reasons, all affidavits sworn and served prior to the commencement of the hearing of Clair's Interim Support Application on September 24, 2024.

[83] Moreover, neither the Notice of Assignment nor the *Rules* preclude a case management justice from hearing a without notice application.

[84] In my view, the above supports the conclusion that Van was denied his right to procedural fairness and in so doing Associate Judge Schwartz was clearly wrong in making the Schwartz Order on a without notice basis without considering the appropriateness of having it scheduled before the presiding case management judge.

[85] This is consistent with the recent Court of Appeal decision in *L.D.B. v. A.N.H.*, 2023 BCCA 480, wherein Justice Butler, on behalf of the Court, stated:

[85] Procedural fairness is a foundational principle; all parties must have an opportunity to present evidence and advance their submissions: *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 81.

...

[87] The legal principles applicable to the scope of a judge's trial management powers were recently summarized in *R. v. Samaniego*, 2022 SCC 9, at paras. 19–26. The same principles apply, with appropriate modification, to the exercise of case management powers in the conduct of a contentious chambers application. Case management power allows a chambers judge to control the process to enable a hearing to proceed fairly, effectively and in an orderly fashion. A chambers judge is able to intervene to conduct chambers hearings in many ways, including by: directing when and for how long a hearing will take place; directing the order of hearing of multiple applications before the court; and limiting the time for submissions so long as those powers are exercised carefully. Of course, when making the necessary orders and directions to facilitate the hearing, a chambers judge must not sacrifice the rules of evidence.

[88] This Court is generally reluctant to interfere with interlocutory directions made by a case management judge who has an informed appreciation of the facts and circumstances of a case because of their role in managing the litigation: *Sienema v. British Columbia Insurance Company*, 2001 BCCA 440 at para. 14. Such decisions are discretionary and attract appellate deference.

[86] The facts in *L.D.B.* are distinguishable as the order appealed from was made on notice and after a hearing conducted by the case management justice. However,

even with those distinguishing features, the Court still concluded that the appellant had been denied her right to procedural fairness.

Ground of Appeal #1 – Amendment to the Pleadings After Notice of Trial Filed

[87] Ground #1 of the Notice of Appeal asserts that Associate Judge Schwartz made the Schwartz Order contrary to R. 8-1(b) of the *Rules* given the Notice of Trial had been filed back on October 21, 2024.

[88] Rule 8-1(1), which stipulates to when a pleading may be amended, provides as follows:

- (1) Subject to Rules 8-2 (7) and (9) and 9-6 (5), a party may amend the whole or any part of, including any Schedule to, a pleading filed by the party, other than by adding or changing parties or withdrawing an admission,
 - (a) once without leave of the court, at any time before service of the notice of trial, or
 - (b) after a notice of trial is served, only with
 - (i) leave of the court, or
 - (ii) written consent of the parties.

[89] Quite obviously, Clair did not seek consent and she brought the Amendment Application without notice.

[90] There was no copy of the Notice of Trial in the application materials before Associate Judge Schwartz, but paragraph 11 of the Amendment Application states that “a 19 day trial has been set for October 14, 2025, in Kelowna, B.C.” That, but for the other circumstances, was sufficient to alert the Court to the fact that a Notice of Trial had been filed and any amendments to the pleadings must be considered accordingly pursuant to the *Rules*.

[91] Further, amendments are frequently granted, with leave of the court, once a notice of trial has been filed. Particularly where the notice of trial has only been recently filed, disclosure is ongoing, examinations for discovery have yet to be conducted and so forth.

[92] In my view, the error of Associate Judge Schwartz in this case was concluding, by effective implication, that the Amendment Application was indeed urgent. My conclusions regarding the difference between urgency and importance outlined above are equally appropriate here and I shall not repeat them except to say I am satisfied that the Amendment Application was not urgent and Van has met the clearly wrong standard.

Ground of Appeal #2 – The Notice Obligation when Adding a Party

[93] Ground #2 asserts that the Schwartz Order was made contrary to *Rules* 8-2(7) and 8-2(11) which address the addition, removal and substitution of parties to a family law case.

[94] Rule 8-2 provides, in part:

(7) At any stage of a family law case, the court, on application by any person, may, subject to subrule (9),

(a) . . .

(b) order that a person be named as an additional party or be named as a party in substitution for another named party if

(i) that person ought to have been named as a party, or

(ii) that person's participation in the family law case is necessary to ensure that all matters in the family law case may be adjudicated on, and

(c) order that a person be named as an additional party if there may exist, between the person and any other person who is named as a party to the family law case, a question or issue relating to or connected with

(i) any relief claimed in the family law case, or

(ii) the subject matter of the family law case

that, in the opinion of the court, it would be just and convenient to determine as between the person and the other person who is named as a party.

. . .

(11) Unless the court otherwise orders, an application under subrule (7) may be made without notice to any person who is not a party.

[95] The plain and obvious interpretation of R. 8-2(11) is that Van was entitled to notice of the Amendment Application as it pertained to the addition of the 10 New Respondents and the corresponding amendment to the style of cause.

[96] To the contrary, the New Respondents were not *prima facie* entitled to notice of the Amendment Application under the *Rules* unless the court specifically ordered that they be given such notice.

[97] Somewhat curiously, the Amendment Application did refer to R. 8-2(11) and Van argues that this amounts to a concession by Clair that Van was entitled to notice: see page 11, para. 1. I am not sure that the mere reference can be fairly regarded as such. Nevertheless, Clair gave no justification and cited no authority for proceeding without notice as against Van. Nor did Associate Judge Schwartz inquire about his ability to add the New Respondents without notice to Van in the face of R. 8-2(11).

[98] In the circumstances, I am satisfied that the making of the Schwartz Order was again clearly wrong. Unlike the amendments against Van alone which can, if appropriate, be brought on a without notice basis where there is urgency, R. 8-2(11) required Van to be provided notice and does not provide jurisdiction to an associate judge to modify that requirement.

Remaining Grounds of Appeal

[99] Having concluded that Van has successfully met the clearly wrong standard of review in respect of the first four grounds of appeal (grounds 3 and 4 combined as indicated), it is unnecessary to consider the remaining grounds of appeal except to say as follows:

- a) Insufficiency of reasons for judgment only constitutes an error of law when the reasons are so deficient that the appellate court cannot discern the foundation of the judge's ruling from the record as a whole: see *Sea v. Hem*, 2024 BCCA 161 at para. 61, citing *R. v. R.E.M.*, 2008 SCC 51 at para. 57;

- b) The Amendment Application was an interim application for which the associate judge gave oral reasons for judgment contemporaneously from the Bench. They are not reasons for judgment from a trial or a lengthy chambers application. Unfortunately, for the reasons identified, certain errors were made, but it is not difficult to see where matters went awry; and
- c) The assertion that Clair's counsel failed to fulfill his obligation in the context of a without notice application to make full and frank disclosure of all matters that might give the court pause is an argument more properly advanced under an application pursuant to R. 10-9(8) to change or set aside the Schwartz Order which is not the route that Van elected to proceed with.

Clean Hands

[100] It is correct that our Court of Appeal has stated that a party who is in breach of an order may be disentitled to appeal a related order: see *Larkin v. Glase*, 2009 BCCA 321 at paras. 7 and 31.

[101] The decision to refuse to hear or to dismiss an appeal of a party who is in breach of an order is permissive. It is exercised at the discretion of the court: *Larkin* at para. 34.

[102] Moreover, if one reviews *Larkin* in context, it clearly speaks to the broader principle that refusal to obey court orders strikes at the heart of the rule of law and litigants cannot unilaterally decide what orders to comply with and which ones to disregard: see para. 31.

[103] The s. 91 Order must be obeyed. Sanctions should and will follow if Van has intentionally disregarded it with the assistance of Sam and other persons associated with the Boardwalk Group of Companies. They clearly had notice of the order and Clair's claims as they existed prior to the Amendment Application.

[104] However, as I touched on above, the financial mischief which Clair asserts is in breach of the s. 91 Order is complicated and involves multi-millions of dollars.

[105] In the circumstances, the mere allegation of a possible breach of the s. 91 Order cannot disentitle Van from pursuing an otherwise merited appeal.

Special Costs

[106] As noted above, Van seeks special costs of the Amendment Application and this Appeal against Clair or her counsel in his personal capacity.

[107] The basis for this claim relates exclusively to the manner in which the Amendment Application was brought on for hearing and reliance upon the representation by Associate Judge Schwartz that he had “read the materials” when Clair’s counsel, who is a senior member of the bar, ought to have recognized this was not a garden variety interim application. Rather, to quote Van’s counsel from oral submissions, Clair’s counsel knew they were doing an “end run”.

[108] However, while there is merit to that submission, this is not a situation that I conclude justifies special costs.

[109] Special costs are discretionary, punitive in nature, and are awarded to express the court’s disapproval of a party’s misconduct in the litigation that is reprehensible and “deserving of reproof and rebuke”: see *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56 and 57.

[110] In *Vassilaki v. Vassilakakis*, 2024 BCCA 15, the Court of Appeal dealt with a somewhat analogous situation and concluded special costs, which had been ordered, were not appropriate. *Vassilaki* is not on all fours with this case, which I acknowledge, but Justice Hunter’s conclusions at paras. 40 to 54 are instructive.

[111] Hunter J. concludes that something more than bringing a claim that is without merit is required to warrant special costs. For instance, special costs may be appropriate in “a case that was utterly without hope so as to amount to misconduct”

or “where a party pursues a meritless claim and is reckless with regard to the truth”: *Vassilaki* at paras. 48 and 49.

[112] In my conclusion, and directly adopting the language of Hunter J., this was a deficient litigation strategy by Clair’s counsel. One that has delayed the progress in this already complicated case by two months.

[113] However, I am not satisfied that it meets the threshold of reprehensible conduct when one considers that the materials relied upon in the Amendment Application are generally correct – quoting extensively from the Interim Support Reasons and relying on Affidavit materials already filed and served in this action. For this reason, it cannot be said there was a reckless regard to the truth.

[114] It follows that I am also not satisfied that the circumstances meet the high threshold of reprehensible conduct required to award special costs against counsel.

[115] It simply just should have come on with proper notice in accordance with the *Rules* and before me as the case management justice unless I directed otherwise.

[116] For this reason, I have not engaged in a substantive analysis of the special costs claim against Clair. Clair’s role is limited to providing instructions to her counsel to proceed with their recommended litigation strategy. In these circumstances, that is not conduct deserving of rebuke.

[117] I thus dismiss the claim for special costs as against Clair or her counsel in his personal capacity.

Ordinary Costs

[118] Turning to ordinary costs.

[119] Costs are awardable at the discretion of the hearing judge. The general principle is that costs are awarded to the successful party, but those costs are at the discretion of the presiding judge: see R. 14-1(9). This is the same in chambers, at a summary trial or under a petition.

[120] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

[71] Rule 14-1(9) ... grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.

[72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by this court: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

[121] In my view, there is no basis to depart from the general rule in this case. Van has been substantially successful. Van is entitled to his costs of the Appeal in any event of the cause, with the costs of the Appeal to be assessed on the basis that the matter was of “more than ordinary difficulty” under the tariff. Van is not entitled to costs of the Amendment Application as Van did not participate in the Amendment Application, the very reason for the Appeal.

Conclusion

[122] In conclusion, I allow the appeal and set aside the Schwartz Order. I further dismiss the claim for special costs as against Clair or her counsel in his personal capacity. Van is entitled to the ordinary costs of the Appeal, assessed on the basis that the matter was of “more than ordinary difficulty” under the tariff.

“Hardwick J.”