2020 ONSC 901, 2020 CarswellOnt 1687, 315 A.C.W.S. (3d) 519, 36 R.F.L. (8th) 167

2020 ONSC 901
Ontario Superior Court of Justice

Caparello v. Henkenhaf

2020 CarswellOnt 1687, 2020 ONSC 901, 315 A.C.W.S. (3d) 519, 36 R.F.L. (8th) 167

CLAUDIA CAPARELLO (Applicant) and MICHAEL HENKENHAF (Respondent)

Gray J.

Heard: January 28, 2020
Judgment: February 11, 2020
Docket: 37095/14

Counsel: Julie **Stanchieri**, for Applicant
Lisa I. Bombardieri, for Respondent

Subject: Civil Practice and Procedure; Contracts; Family

Related Abridgment Classifications

Family law
VI Domestic contracts and settlements
VI.5 Termination or setting aside

Headnote

Family law --- Domestic contracts and settlements — Termination or setting aside
Parties married in 2002, separated in May 2014 and were divorced in February 20198 — There was one child of marriage — Parties were shareholders of two numbered companies — Each numbered company was franchisee and operator of restaurant — Husband owned 60 per cent of shares and effectively managed both restaurants — Wife owned remaining 40 per cent of shares — Interim order made in November 2014 required husband to pay child support in amount of $3,542 per month, and spousal support in amount of $13,000 per month — Parties agreed to mediation — Parties resolved custody and access issues in December 2018 through joint custody of child with shared parenting agreement — Parties also entered into binding agreement providing for husband to transfer one franchised restaurant to wife — If franchisor refused to permit transaction, it was agreed that restaurant would be sold, and proceeds turned over to wife — Binding agreement also provided that husband would pay three more months of spousal and child support, and that there would be no equalization payment — Husband made all payments required by agreement — Notwithstanding apparent final resolution of all matters, wife issued further application, essentially seeking to set aside mediated agreements — Wife claimed husband failed to provide complete disclosure — Husband brought motion for summary judgment to dismiss wife's application; wife brought cross-motion for order requiring husband to pay interim child and spousal support, and for disclosure — Motion granted; cross-motion dismissed — Parties were in litigation for some time and were represented by competent counsel — Agreement was negotiated over course of full day with assistance of experienced mediator — It was evident that wife had sufficient level of disclosure and was confident of making agreement that was in her best interests — Agreement contained provisions regarding spousal and child support, which wife considered to be adequate — Wife received significant lump sum payment, as well as ownership of or right to sell one restaurant — Agreement remained consistent with objectives of Divorce Act, in that it provided significant level of monetary benefits to wife — Summary judgment was granted, and wife's application was dismissed.

Table of Authorities

Cases considered by *Gray J.*:

Capital Quality Homes Ltd. v. Colwyn Construction Ltd. (1975), 9 O.R. (2d) 617, 61 D.L.R. (3d) 385, 1975 CarswellOnt 852 (Ont. C.A.) — referred to

Davis Contractors Ltd. v. Fareham Urban District Council (1956), [1956] A.C. 696, [1956] 2 All E.R. 145 (U.K. H.L.) — considered

Dumbrell v. Regional Group of Cos. (2007), 2007 CarswellOnt 407, 55 C.C.E.L. (3d) 155, 25 B.L.R. (4th) 171, 220 O.A.C. 64, 279 D.L.R. (4th) 201, 85 O.R. (3d) 616, 2007 ONCA 59 (Ont. C.A.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.) — considered

Miglin v. Miglin (2003), 2003 SCC 24, 2003 CarswellOnt 1374, 2003 CarswellOnt 1375, 34 R.F.L. (5th) 255, 224 D.L.R. (4th) 193, 302 N.R. 201, 171 O.A.C. 201, [2003] 1 S.C.R. 303, 66 O.R. (3d) 736, 2003 CSC 24 (S.C.C.) — considered

Rick v. Brandsema (2009), 2009 SCC 10, 2009 CarswellBC 342, 2009 CarswellBC 343, 62 R.F.L. (6th) 239, *(*sub nom. *N.R. v. B.B.)* 385 N.R. 85, [2009] 5 W.W.R. 191, 303 D.L.R. (4th) 193, 90 B.C.L.R. (4th) 1, 266 B.C.A.C. 1, 449 W.A.C. 1, [2009] 1 S.C.R. 295 (S.C.C.) — considered

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
s. 56 — considered

s. 56(4) — considered

s. 56(4)(a) — considered

s. 56(4)(c) — considered

Rules considered:

Family Law Rules, O. Reg. 114/99
R. 16 — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — considered

MOTION by husband for summary judgment to dismiss wife's application; CROSS-MOTION by wife for interim child and spousal support, and disclosure.

***Gray J.*:**

1 The current proceeding is the culmination of a number of years of litigation. The matter has proceeded through the courts, and ultimately through mediation and arbitration before Alfred Mamo. The parties were divorced on February 14,

2019.

2 With Mr. Mamo's assistance, the parties entered into a Binding Agreement in Principle dated December 5, 2018. While that agreement has a number of provisions, which will be discussed later, in substance it provides for the respondent to transfer to the applicant one of two franchised restaurants, both of which are owned 60 per cent by the respondent and 40 per cent by the applicant. If the franchisor refused to permit the transaction, it was agreed that the restaurant would be sold, and the proceeds turned over to the applicant.

3 Subsequently, the parties entered into a further agreement, dated March 25, 2019, that related to the manner in which the restaurant was to be sold.

4 Under both agreements, Mr. Mamo was to have some continuing involvement as an arbitrator.

5 Notwithstanding the apparent final resolution of all matters, the applicant issued a further application dated October 28, 2019, in which she requests relief under a number of heads. Fundamentally, she requests an order declaring that the agreements executed by the parties on December 5, 2018 and March 25, 2019 be set aside.

6 Both parties have now brought motions.

7 The respondent has brought a motion for summary judgment, dismissing the application.

8 The applicant has brought a motion for an order requiring the respondent to pay interim child and spousal support, and for disclosure.

9 For the reasons that follow, the motion for summary judgment is granted, and the application issued by the applicant is dismissed.

Background

10 Subsequent to the filing of the current application, the parties have filed five volumes of the continuing record. It is unnecessary, in my view, to discuss in any detail the substance of the various affidavits and exhibits that have been filed. That is because the matter can be disposed of on the basis of basic legal principles, without the requirement of a great deal of analysis.

11 The parties were married on September 17, 2002, and separated on May 8, 2014. They were divorced on February 14, 2019. They have one child, Sebastian Henkenhaf, born [date omitted]

12 The parties are shareholders of two numbered companies. Each numbered company is a franchisee and the operator of a Swiss Chalet/Harvey's restaurant. The restaurant located in Grimsby is operated by 2200799 Ontario Inc., and a similar restaurant in Burlington is operated by 2200999 Ontario Inc. The respondent is a 60 per cent shareholder and the applicant is a 40 per cent shareholder of each company.

13 The franchisor was known as Cara Operations Limited, and is currently known as Recipe Unlimited Corporation.

14 It is not disputed that the respondent essentially managed both restaurants. He had formerly been employed in a management position by the franchisor.

15 After separation, and the commencement of proceedings in this court by the applicant, Miller J., on November 27, 2014, ordered the respondent to pay the applicant interim child support in the amount of $3,542 per month, and interim spousal support in the amount of $13,000 per month.

16 Both parties were represented by counsel, and each party obtained an income valuation for the businesses. The valuator retained by the applicant determined that the value of both businesses amounted to slightly more than $2.8 million as of the date of separation. The valuator did not break down the valuation by restaurant.

17 On March 22, 2017, the parties agreed to attend mediation with Alfred Mamo. On October 13, 2017, the parties signed a Mediation/Arbitration Agreement, appointing Mr. Mamo to mediate and, if mediation was unsuccessful, arbitrate their family law issues. The parties have not provided a copy of the Mediation/Arbitration Agreement to the court.

18 On December 5, 2018, the parties entered into a parenting agreement resolving custody and access issues. The parties have joint custody of their son and a shared parenting schedule.

19 On the same date, the parties entered into the binding Agreement in Principle referred to earlier.

20 While the agreement contains 29 paragraphs, only certain of them are relevant for the purposes of this matter. They are:

> 1. The parties own 2200999 Ontario Inc., located at 1950 Appleby Line, Burlington, Ontario and 2200799 Ontario Inc., located at 5 Windward Drive, Grimsby, Ontario. Both 2200999 Ontario Inc. and 2200799 Ontario Inc. operate as Swiss Chalet Plus Restaurants. Michael is a 60% shareholder and Claudia is a 40% shareholder of each corporation. The parties agree that Mike will transfer by way of share rollover to Claudia his 60% interest in 2200999 Ontario Inc. and Claudia will transfer by way of share rollover to Mike her 40% share of her interest in 2200799 Ontario Inc. The intention of the rollover of shares is that Claudia will be the sole owner and operator of the Burlington restaurant and Mike will be the sole owner and operator of the Grimsby restaurant. The businesses will be transferred "as is".
>
> 2. Mike will pay to Claudia the sum of $257,000 in full and final satisfaction of any money owing from either party to the other for the share transfer of the businesses. The payment of $257,000.00 will be made by way of RRSP Rollover from Mike's TD RRSP in the amount of $275,000.00, said sum representing $275,000.000 grossed up to take into account Claudia's future tax liabilities.
>
> 4. Mike will immediately initiate the process of the License Transfer of 2200799 Ontario Inc. and 2200999 Ontario Inc. with CARA and will support the License and share transfer of 2200999 Ontario Inc. to Claudia.
>
> 5. Both parties will take any and all steps necessary to complete the process of the License Transfer with CARA.
>
> 6. Claudia will immediately take any and all steps necessary to complete the "Purchaser Evaluation" as required by CARA to be approved as a suitable purchaser, and upon successful completion of the evaluation process, she will immediately commence the training sessions as required by CARA. Claudia will take any and all other steps required by CARA to be approved as and to complete the process of becoming a purchaser/franchisee by no later than March 31, 2019.
>
> 7. The share transfer rollovers shall be completed by March 31, 2019.
>
> 10. Upon completion of the share transfers, the parties release one another from any and all claims, past, present, or future that either party may have against the other with respect to the businesses.
>
> 11. If Claudia is not approved as a purchaser by CARA by March 31, 2019 for the purchase of 2200999 Ontario Inc., the 2200999 Ontario Inc. will immediately be sold. Mike will take any and all steps necessary for the sale to be completed and the full proceeds of sale will be paid to Claudia. Claudia will also immediately sign any and all documentation to complete the rollover of the share transfer of the transfer of her 40% interest in 2200799 Ontario Inc. to Mike.
>
> 13. Mike shall maintain the status quo with respect to the personnel until the share transfer is complete.
>
> 14. Neither party shall directly or indirectly advise the staff about the transfer/transition until CARA has approved Claudia for the transfer and until the parties agree on how the transition will be announced to staff.
>
> 15. Immediately upon completion of the transfer of 2200999 Ontario Inc. Mike shall be removed as an officer/director/officer from the corporation.
>
> 16. The parties acknowledge that corporate counsel was not present when the terms of this Agreement were negotiated

and that there may be other steps or issues that arise as a result of the share transfer or license transfer. These issues will be addressed through either corporate/family Counsel, and where necessary, incorporated into the terms of the Separation Agreement.

17. Whether Claudia is approved as a Purchaser by CARA or not, all of the terms of this Agreement remain in full force and effect. If Claudia is not approved as a Purchaser, Mike is not permitted to purchase 2200999 Ontario Inc. and it has to be sold to an independent purchaser.

Matrimonial Matters

18. There is no retroactive and/or arrears of table or section 7 child support or spousal support owing from either party between the date of separation and December 31, 2018.

19. In full and final satisfaction of any and all spousal support obligations owing from the Mike to Claudia, the Mike shall pay spousal support to Claudia in the monthly amount of $13,000.000 for January, February, and March 2019. The support will be paid on the first day of each month. Upon the final payment of support on March 1, 2019, there is no further spousal support owing from Mike to Claudia. The parties shall execute spousal support releases.

20. In full and final satisfaction of any and all table child support obligations owing from either party to the other, Mike will pay to Claudia child support of $3,542.00 for the months of January, February, March 2019. Upon the final payment of child support on March 1, 2019, there is no further table amount of child support owing from either party to the other.

23. There is no equalization payment owing from either party to the other. The parties will sign a Separation Agreement containing complete property and estate releases.

25. With the exception of the Divorce, which has been severed and is proceeding on an uncontested basis, all other claims made by either party in Court File #37094/;14 are disposed of. Upon signing the Separation Agreement and the completion of the share and license transfers, the parties shall simultaneously serve Notices of Withdrawal, withdrawing their claims from the Court.

28. Alf Mamo shall arbitrate issues with respect to language necessary to give effect to the intent of this Agreement.

29. The parties agree that if any issues arise as a result of the terms of this Agreement/the Separation Agreement the parties will first negotiation, they may chose to mediate with Mr. Alfred, and if they do not want to mediate, issues of interpretation or implementation of the terms of this Agreement, shall be summarily arbitrated by Mr. Alfred Mamo. The process will be decided by Mr. Mamo.

21 The matrimonial home was sold in June, 2015. Each party received approximately $416,000 after the deal to sell the house closed.

22 The applicant has had four different family law lawyers representing her in the course of the various proceedings. They are Michael Clarke, Catherine Haber, Darryl Willer, and her current counsel Julie **Stanchieri**. They are all excellent family law lawyers. The respondent has been represented by Lisa Bombardieri throughout these proceedings.

23 The respondent has complied with the monetary aspects of the agreement. He paid the spousal and child support as required. To comply with paragraph 2 of the agreement, the respondent rolled over the sum of $275,000 to the applicant's RRSP.

24 In addition to the family law lawyers who have represented the applicant, she has also been represented by an experienced corporate lawyer, Andrea Parliament. She retained Michael Carnegie of Taylor Leibow, a business valuator. He also assisted with an income analysis with respect to the respondent's income. Furthermore, she has been advised by Bennie Esposto, a chartered accountant. He has been involved in the food/hospitality business.

25 There is a dispute as to how the final Binding Agreement in Principle came about. The respondent asserts that it was

finalized as a result of his acceptance of an offer that was made by the applicant. He relies on some handwritten notes, allegedly made by the applicant's counsel during or before the negotiations that led up to the agreement executed on December 5, 2018. The applicant and her counsel at the time dispute this. She alleges that the agreement was the result of some detailed negotiations, which involved offers back and forth and which occurred during the course of a full day. She and her then counsel have filed affidavit material that suggests that it was never the applicant's intention to settle on a specific value for the Burlington restaurant.

26 As I will discuss more fully later, it is doubtful whether this evidence is even admissible, but having regard to the view I take of the matter, it is not necessary to resolve the disputed evidence.

27 Subsequent to the execution of the Agreement, efforts to have the applicant approved as a purchaser or operator of the Burlington restaurant were unsuccessful. As noted in the Agreement itself, it was necessary for the applicant to be approved by the franchisor as an operator of the Burlington restaurant.

28 The applicant made inquiries of the franchisor as to what was necessary for her to be approved, and she set about making efforts to become approved. She put together a business plan, and she attended before a panel put together by the franchisor for an interview.

29 Ultimately, the applicant was not approved by the franchisor. It is clear that the applicant suspects that the respondent was, at least in part, responsible for the lack of approval.

30 Two issues assumed a prominent position in terms of the approval, or lack thereof, of the franchisor.

31 The franchisor took the position that there would be a maximum price, or notional price, to be paid for the restaurant. That was approximately $764,000. The second impediment was the apparent requirement of the franchisor that there be substantial renovations done at or around the time when the franchise would be disposed of, or perhaps before. Estimates of the cost of the renovations varied between $250,000 and $750,000. The franchisor has equivocated as to the timing and the amount of the required renovations.

32 These impediments arose subsequent to the applicant being rejected by the franchisor as an operator of the restaurant. Once she was rejected, it was then contemplated under the Agreement that the restaurant would be sold. Some different purchasers of the whole, or part, of the restaurant were found. Ultimately, none of the potential purchasers was interested enough to carry through with a transaction, and at least one of them was not approved by the franchisor.

33 The applicant became convinced that the respondent was, directly or indirectly, responsible for the prevarication of the franchisor, and the lack of success of any sale efforts. She became convinced that what the respondent really wanted to do was to purchase the restaurant through a third party. One of the potential purchasers, as it happened, was a person who worked for the respondent.

34 On March 25, 2019, the parties executed a Mutual Agreement to Sell. Under that agreement, the applicant was effectively given the right to negotiate with the franchisor, and to exclude, to the extent possible, the respondent from the sale process.

35 Ultimately, there has been no sale. The applicant obviously believes that the respondent is responsible, and that he still wants to purchase the restaurant surreptitiously.

36 The applicant alleges that the franchisor has been less than helpful in communicating with her, and in providing information respecting the finances and other issues regarding the Burlington restaurant. She alleges that the answer from the franchisor has often been "you will have to ask the respondent for that information — we cannot give it to you," or words to that effect. She alleges that this has been the case notwithstanding that she is a 40 per cent shareholder in the business.

37 The applicant alleges that, subsequent to the execution of the Binding Agreement in Principle, the respondent has refused to provide her with accurate financial information about the restaurant. Furthermore, she says she has discovered some suspicious transactions, including the fact that the respondent has taken $500,000 from the Burlington restaurant. She

says the amounts taken by the respondent from the restaurant do not line up with his tax returns.

38 Both parties have filed material regarding potential purchasers, or investors, that showed interest in the Burlington restaurant. The potential sale prices, or investments, vary widely. The applicant's position is that the amounts are too low, and have been artificially depressed because of the conduct of the respondent or the franchisor, or both. The respondent's position is that the refusal of the applicant to follow up on these possibilities is evidence of her unreasonable behaviour. For the purposes of my decision, it is not necessary to resolve these issues.

39 The applicant still believes the respondent is conspiring with the franchisor to defeat an arms length sale.

40 The applicant has now brought a motion to require the respondent to pay interim spousal support and child support. She also requests an order that the respondent disclose all funds he has removed from the Burlington restaurant, and to pay those funds to the applicant. She requests an order that the respondent maintain the status quo of the Burlington restaurant, and that she be furnished with all of the financial records of the restaurant. She requests an order that the respondent swear an affidavit outlining any funds paid to himself and others on his behalf. She requests an order that the respondent produce all written correspondence between himself and the franchisor.

41 The respondent, for his part, requests an order dismissing the current application, based on the terms of the Binding Agreement that was executed on December 5, 2019.

42 As noted earlier, the parties have filed material that now consist of five volumes of the continuing record. I have given only the most skeletal outline of the numerous allegations made between the parties. In my view, it is unnecessary to review the balance of the material because it is not necessary for the purposes of my decision.

Submissions

43 Ms. **Stanchieri**, counsel for the applicant, submits that the respondent's motion for summary judgment should be dismissed. Further, she submits that the various interim orders and the other relief she is seeking should be granted, and the matter should proceed to trial.

44 Ms. **Stanchieri** submits that the Agreement must be set aside, pursuant to s.56 of the *Family Law Act*. Pursuant to s.56(4) of that Act, a domestic contract can be set aside because of a lack of disclosure; because a party did not understand the nature or consequences of the contract; or "otherwise in accordance with the law of contract." Ms. **Stanchieri** submits that the contract can be set aside on either or both of the first and third grounds.

45 With respect to the first ground, Ms. **Stanchieri** submits that there has been a notable lack of disclosure prior the execution of the Agreement. She notes that many of the suspicious transactions that have been discovered by the applicant were not disclosed to her prior to the execution of the Agreement. Furthermore, while the applicant had some understanding that the franchisor would need to approve her purchase of the Burlington restaurant, it was never disclosed to her that the franchisor would, or might, require substantial renovations at or around the time of any transaction, nor was it disclosed that the franchisor would place a cap on the price that could be paid for the restaurant. She submits that had the applicant known of these aspects of the matter, she would not have executed the Agreement.

46 In the alternative, Ms. **Stanchieri** submits that the imposition of a maximum price that can be charged for the restaurant on a sale means that the Agreement has been frustrated. From the applicant's perspective, she would obviously want to obtain the very highest price that she could obtain, and if the franchisor imposed an artificial cap on the price, that would mean that one of the objectives of the transaction would be frustrated.

47 Ms. **Stanchieri** submits that there is clearly a substantial issue as to whether the agreement should be set aside, and in those circumstances an interim order for spousal and child support is appropriate. The amounts she is asking for are not out of line. She notes that the agreement contains a waiver of spousal and child support for a very short period of time subsequent to the execution of the Agreement, and the validity of such a clause must be considered in terms of the analysis of the Supreme Court of Canada in *Miglin v. Miglin*, [2003] 1 S.C.R. 303 (S.C.C.). She submits that there is a serious issue as to whether the Agreement in terms of spousal and child support can survive a *Miglin* analysis.

48 Ms. **Stanchieri** submits that there is sufficient evidence to call into question the role of the respondent in frustrating the sale of the restaurant, and the maximizing of any price that can be obtained for it. Accordingly, she submits that it is appropriate to make the orders for disclosure that she has requested.

49 Ms. Bombardieri, counsel for the respondent, submits that the respondent's motion for summary judgment should be granted, and the application should be dismissed.

50 Ms. Bombardieri submits that while there is certainly some possibility that an agreement can be set aside on the basis of a *Miglin* analysis in the case of spousal and child support, or under s.56 of the *Family Law Act* in the case of property issues, there are no grounds to set aside the agreement here.

51 Ms. Bombardieri notes that at all times the applicant was represented by very capable family law counsel, and by financial experts of her choosing, as well as competent corporate counsel.

52 Ms. Bombardieri submits that it is clear that the applicant herself put forward her offer to settle the matter on the basis that the Burlington restaurant was worth $579,000. That being the case, there is no concern that the franchisor assumed a notional value of the restaurant that would not exceed $764,000. It was clear that the franchisor has the right to approve the applicant as the operator of the restaurant, and approve any other purchaser who might be interested. She submits that any criteria the franchisor would use in order to determine whether its discretion should be exercised in one way or the other was something for the franchisor to determine. If the applicant, as a well-informed litigant, chose to make no inquiry as to what the criteria were, that is not the concern of the respondent.

53 In this case, the parties made a perfectly rational deal that took into account the interests of both parties, and in which compromises were made on both sides. Both sides were represented by competent advisors, and made their agreement through negotiations over the course of an entire day with the assistance of a mediator. There is no ground for asserting that there was any inequality of bargaining power, mental issues on the part of either party, or any other ground that might give rise to the setting aside of the agreement. Ms. Bombardieri points out that the applicant actually received offers for the restaurant that were in excess of her assumed value of $579,000, and if the applicant chose to not accept them, that again is not the concern of the respondent.

54 In the final analysis, Ms. Bombardieri submits that there are simply no grounds for setting aside the agreement, and the motion for summary judgment should be granted. To require a trial will simply require the expenditure of many additional thousands of dollars by both parties. Instead, the parties should return to Mr. Mamo, the arbitrator, and finish the process of selling the restaurant. While the respondent denies that he has done anything subsequent to the execution of the agreement to frustrate a sale, it is to be noted that parties have agreed, in paragraph 29 of the agreement that "issues of interpretation or implementation of the terms of this agreement shall be summarily arbitrated by Mr. Alfred Mamo." To the extent that it is alleged that the respondent has breached the agreement in any respect, Mr. Mamo as the arbitrator would have jurisdiction to determine the manner.

Analysis

55 There is one issue: Is there a genuine issue requiring a trial as to the enforceability of the agreement? If the answer to that question is no, the motion for summary judgment should be granted, and the application should be dismissed. If the answer is yes, the motion for summary judgment should be dismissed, and the matter should go to trial. It would then be necessary for me to consider the other orders requested by the applicant.

56 At the end of the day, the answer to the question is no, there is no genuine issue requiring a trial. Accordingly, the application should be dismissed. My reasons follow.

57 The provisions of s.16 of the *Family Law Rules*, dealing with summary judgment, are now essentially equivalent to Rule 20 of the *Rules of Civil Procedure*, which was the subject of analysis by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.). Both rules permit the Court to finally dispose of a proceeding where there is "no genuine issue requiring a trial." At para. 49 of her reasons in *Hryniak*, Karakatsanis J. stated:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

58 As noted earlier, both parties have filed voluminous material which, in addition to continuing the name-calling and finger-pointing by each party, consists largely of evidence as to the conduct of the negotiations. Included is evidence about who made what proposal, what material was considered, and what each party intended.

59 In my view, much if not all of this material is of dubious relevance, if it is admissible at all. The agreement has been reduced to writing. Evidence is admissible, in my view, only on the matters that are relevant to the inquiry under s.56 of the *Family Law Act*, and to a *Miglin* analysis. While some evidence as to surrounding circumstances is admissible as an aid to interpretation, evidence of subjective intention is not admissible: see *Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.), at para 50.

60 In my view, having regard to the issues in play, the case can be justly resolved on the basis of the material before me without a trial.

61 The parties are divorced, and this matter is governed, at least in part, by the *Divorce Act*. Accordingly, the issue as to the enforcement of the spousal and child support orders is governed by a *Miglin* analysis.

62 The issue as to the property issues is governed by s.56 of the *Family Law Act*. Section 56(4) of that Act provides as follows:

> **Setting aside domestic contract**
>
> 56. (4) A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

63 As noted earlier, counsel for the applicant relies on s.56(4)(a) and (c). She submits that there was a lack of disclosure on the part of the respondent that should give rise to an order setting aside the Binding Agreement in Principle, and the agreement can be set aside in accordance with the law of contract, namely the law relating to frustration.

64 Under s.56 of the *Family Law Act*, in order to set an agreement aside it must be shown that a party has failed to disclose "significant" assets or debts or liabilities, or that the contract should be set aside in accordance with the law of contract. The ground under the law of contract relied on in this case is frustration.

65 The modern theory of frustration is said to have been formulated in the judgment of Lord Radcliffe in *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (U.K. H.L.), at p.729:

> So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

66 This passage was cited with approval by the Ontario Court of Appeal in *Capital Quality Homes Ltd. v. Colwyn*

Construction Ltd. (1975), 9 O.R. (2d) 617 (Ont. C.A.).

67 In the final analysis, the circumstances under which a contract can be set aside pursuant to s.56 of the *Family Law Act* are narrow.

68 Under a *Miglin* analysis, a broader inquiry is required. First, the court must examine the circumstances under which the agreement was negotiated. The court is to inquire as to whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the *Divorce Act*. At the second stage, the court will ask whether, viewed from the time the application is made, it has been established that the agreement no longer reflects the original intention of the parties and whether the agreement is still in substantial compliance with the objectives of the *Divorce Act*.

69 Under both s.56 of the *Family Law Act*, and pursuant to a *Miglin* analysis, the court will consider whether adequate disclosure was made to the complaining party: see *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295 (S.C.C.). Furthermore, in both cases, it is necessary to examine the manner in which the contract was negotiated.

70 In my view, there must come a point where it must be concluded that the level of disclosure and the manner of negotiation of the agreement were satisfactory, regardless of any imperfections that may have occurred. Where an agreement has been negotiated under impeccable circumstances, and each party has had access to competent legal and other expert advice, it should only be a rare case where an agreement will be set aside.

71 In this case, the parties had been in litigation for some considerable period of time. Each party was represented by competent counsel. Each party had access to expert commercial and financial advice. The agreement was negotiated over the course of a full day, with the assistance of an experienced mediator. It is evident that the parties had confidence in the mediator, because they asked him to be the arbitrator with respect to any issues of interpretation or implementation of the agreement.

72 It is quite evident, in my view, that the applicant had a sufficient level of disclosure such that she was confident that she could make an agreement that was in her best interests. The agreement she made was one that she was prepared to live with. Included in that agreement were provisions regarding spousal and child support, which she considered to be adequate for her purposes. This, presumably, took into account the interim child and spousal support that had been paid to that date, as well as the limited amounts that would be paid subsequent to the execution of the agreement. It also presumably took into account the other benefits of the agreement that the applicant had succeeded in negotiating. This included a significant lump sum payment, as well as ownership of or the right to sell one of the restaurants.

73 I am not persuaded that there was any significant amount of disclosure that was omitted, in order to give rise to the setting aside of the agreement based on s.56(4)(a) of the *Family Law Act*. As noted, the applicant was apparently satisfied with the level of disclosure that had been made, and had access to competent legal assistance if it was considered necessary to pursue further disclosure.

74 Nor am I persuaded that the agreement can be set aside on the ground that it has been frustrated.

75 The applicant knew that any transaction involving the restaurant required the approval of the franchisor. Evidently, she made no inquiry of the franchisor at the time as to the criteria it would apply if approval were to be sought. I am not persuaded that the respondent misled her otherwise, and in any event she could have made inquiries herself. It should not have been surprising that the franchisor might place limits on the price to be paid for the restaurant, or an interest in it, nor should have it been a surprise that the franchisor would insist or could insist on renovations being done. These requirements, in my view, do not give rise to a conclusion that the agreement has been frustrated. While they may result in some disappointment to the applicant, they do not give rise to a determination that the result is "a thing radically different from that which was undertaken by the contract."

76 It cannot be said that the current state of affairs is radically different from what was originally undertaken. It is still open to the applicant to sell the restaurant, and to obtain a reasonable price for it. Even if the applicant's anticipated value at the time of negotiation was not $579,000, as contended by the respondent, a cap of $764,000 as stipulated by the franchisor is

not so unreasonable as to result in frustration.

77 As far as a *Miglin* analysis is concerned, there can be no complaint as to the manner in which the agreement was negotiated. As noted, the applicant at all times had access to very competent advice. The negotiations took place over the course of an entire day, with the assistance of an experienced mediator. There is no suggestion, as was the case in *Rick*, *supra*, that the applicant was under any medical disability, nor, as I have explained, was there any significant lack of disclosure, having regard to the advice available to the applicant.

78 Having regard to the provisions of the agreement as a whole, it clearly was consistent with the objectives of the *Divorce Act* at the time the agreement was negotiated. In total, it provides for significant monetary benefits to the applicant, including a continuation of a significant level of spousal and child support for a defined period, in addition to what had been paid on a temporary basis prior the date of execution of the agreement.

79 At this point, I am satisfied that the agreement remains consistent with the objectives of the *Divorce Act*, in that it still provides a significant level of monetary benefits to the applicant. Since the restaurant has not yet been sold, it is impossible to say exactly what those benefits will amount to, but in the aggregate the benefits as a whole seem reasonable.

80 In the result, I am not convinced that a trial is necessary in order to justly determine the matters in issue. Summary judgment should be granted, and the application should be dismissed.

Disposition

81 For the foregoing reasons, the motion for summary judgment is granted and the application is dismissed. The motion brought by the applicant is dismissed.

82 I will entertain brief written submissions with respect to costs, not to exceed three pages together with a costs outline. Ms. Bombardieri will have five days to file submissions, and Ms. **Stanchieri** will have five days to respond. Ms. Bombardieri will have three days to reply.

Motion granted; cross-motion dismissed.

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