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Please, Sir . . . I Want Some More . . . And Can My Costs Survive Bankruptcy?

***Martin (Re)*, 2024 CarswellAlta 2477 (K.B.) — Lema J.**

Issues: Alberta — Costs Related to Support Surviving Bankruptcy

This is an interesting one.

We know that support orders survive bankruptcy. And we know that, generally, costs orders do not survive bankruptcy. But what about a costs order related to a claim for support?

The issue in *Martin (Re)* was exactly that — whether costs from a family-law arbitration related to support survive bankruptcy (they do!) — and, if so, do they have status as a preferred debt under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") (they do not!). The question was further complicated by the fact that support was not actually *ordered* at the arbitration (it does not matter!).

The parties agreed to arbitrate various family law issues, including parenting time, decision-making, the Father's income, spousal support, child support, and property issues. The Arbitrator issued her Award on March 31, 2022. The Arbitrator concluded that no child support was payable because she found the parties had the same income within a shared parenting regime. Despite mixed success, the Arbitrator subsequently awarded costs in the Father's favour of $78,517.50 (the "Cost Award").

On October 25, 2022, after an unsuccessful consumer proposal, the Mother made an assignment in bankruptcy. A year later, the Father sought an Order from the court instructing the Arbitrator to apportion the Cost Award amongst support claims with the Mother's consent. On January 11, 2024, in a further Arbitral award, the Arbitrator apportioned 40% of the legal costs ($31,407) to support-related issues. The Mother was discharged from bankruptcy on February 6, 2024.

The parties agreed that the legal costs associated with setting child or spousal support survive a payor's discharge from bankruptcy, just as the support itself does. However, the parties disagreed as to whether the costs associated with the Award of *no child support* constituted legal costs associated with support. The Mother argued there was no basis for the costs to survive her bankruptcy because no support was actually awarded in the Arbitration. The Father, on the other hand, claimed that the Arbitrator's award nevertheless constituted an "award related to child support" and, accordingly, the associated costs of that determination survived bankruptcy.

Justice Lema ultimately agreed with the Father, concluding that in the shift from primary parenting by the Mother to shared parenting, the Father became entitled to support from the Mother and the associated costs of this support determination survived the Mother's bankruptcy.

The court first reviewed authority confirming that legal costs related to claims for support survive bankruptcy (not just taking the parties' agreement on it) and the objectives for doing so, namely to avoid dissipating the benefits and incentivizing a support payor to declare bankruptcy to escape costs related to support.

Section 178(1)(c) of the *BIA* specifies that an order of discharge (from bankruptcy) does not release the bankrupt from:

> (c) any debt or liability arising under a **judicial decision . . . respecting support or maintenance**, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt. [**emphasis** added]

The court then turned to s. 9(a) of the *Child Support Guidelines*, O. Reg. 391/97 and noted that s. 9 actually created two distinct obligations for child support, one for each party, and the net-payable amount is simply a "payment shortcut" between the cross-obligations. Set-offs and off-setting claims did not convert the underlying obligations into something else. Accordingly, the court found that the $31,407 in costs apportioned to the "nil" determination of child support payable from the Mother to the Father fell under s. 178 (1)(c) of the *BIA* as a debt related to support or maintenance and was not discharged by the Mother's discharge from bankruptcy.

(Justice Lema also queried whether an arbitrator's decision can be characterized as a "judicial decision" within the meaning of s. 178(1)(c), but neither party addressed that specific issue, so it was left for another day.)

While the Father was successful in establishing that the costs survived the Mother's discharge, his Honour rejected his claim that these costs have preferred status because they are a "lump sum amount that is payable" per s. 136 (1) (d.1) of the *BIA*:

> 136(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
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> (d.1) claims in respect of **debts or liabilities** referred to in paragraph 178(1)(b) or **(c)**, if provable by virtue of subsection 121(4), for **periodic amounts accrued in the year before the date of the bankruptcy** that are payable, plus any lump sum amount that is payable . . . [**emphasis** added]

Justice Lema clarified that para. 136(1)(d.1) provides three requirements for preferred status. **First**, the associated costs of a support order must be a debt or liability referred to in para. 178(1)(c). **Second**, the costs must be provable by virtue of s. 131(4). **Third**, the claim must be for either "periodic amounts accrued in the year before the date of bankruptcy" or "any lump sum amount that is payable."

In this case, even assuming that the second requirement was met, the associated costs did not meet the third requirement and did not attract preferred status for eight reasons:

> 1. Section 136(1)(d.1) requires an amount to be either periodic or a "lump sum". Many statutes, including the *Divorce Act* (and Alberta's *Family Law Act*) recognize that support may be periodic payments or a lump sum payment. There is no similar duality for costs.
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> 2. The term "lump sum" is not ordinarily used to describe or characterize costs, but refers to the support itself.

3. Had Parliament intended both support and associated costs to be preferred claims, it would have mirrored the wording of s. 178(1)(c) in s. 136(1)(d.1) rather than narrowing the eligible claims from the broader category of debts and liabilities used in s. 178(1)(c).

4. No party cited any case on whether costs fell into s. 136(1)(d.1) either as a "periodic amount" or "any lump sum amount". The court acknowledged that some commentators believe that costs qualify under s. 136(1)(d.1), but they offer no authority for the position.

5. In other parts of s. 136, such as s. 136(1)(b), Parliament *has* expressly recognized and granted preferred status to legal costs. The omission of "costs" from s. 136(1)(d.1) could not have been an "accident".

6. Treating costs as included simply because they are an "amount" would give no meaning or purpose to the "lump sum" phrase.

7. Even if lump sum costs could fall into "any lump sum amount", the Arbitrator did not award the costs as a lump sum but anchored the costs on Schedule C (assessed costs).

8. A review of Hansard excerpts of Parliamentary proceedings leading to the 1997 amendments to the *BIA* reflect a focus on priority for the support itself, rather than the associated costs.

Signed, Sealed, And Confused — Interpreting Consent Orders

***Johnston v. McLean*, 2024 CarswellOnt 16816 (C.A.) — Hourigan, Madsen and Pomerance JJ.A.**

Issues: Ontario — Interpreting Consent Orders and Repudiation of Agreements

In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 CarswellBC 2267 (S.C.C.) at para. 47, the Supreme Court of Canada held that when interpreting a contract, the court's "overriding concern is to determine 'the intent of the parties and the scope of their understanding' . . . [using] a practical, common-sense approach not dominated by technical rules of construction." Accordingly, the contract must be read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."

What *Sattva didn't* deal with, however, was the interesting legal question of whether these same principles of interpretation apply to consent court Orders. That is the question the Ontario Court of Appeal set out to answer in *Johnston*. While not a family law case, as discussed further below, it is a very important case for family law practitioners to be familiar with, and a reminder to give serious thought to how best to paper a settlement.

Margaret Ila Johnston ("Ila") owned a farm near Guelph, Ontario that was worth approximately $1,900,000 when she died in 2020.

Ila had four daughters, and her will provided that her estate would be divided equally among them.

Simple enough so far. But there is an important twist — or this would not be terribly interesting: many years before Ila died, she had to move into a long-term care facility, and a dispute arose among her four children as to how to manage her assets, including the farm.

Years of bitter litigation ensued between the siblings, but in 2015 an agreement was finally struck. In addition to setting out terms to ensure funds would be available to meet Ila's needs for the rest of her life, two of her daughters, Mary and Karen (the "Appellants"), agreed to pay the other two, Lauren and Elizabeth (the "Respondents"), a total of $422,750 ($211,375 each) based on the farm's appraised value in 2014 ($890,000, less real estate commission), and that title to the farm would be transferred to the Appellants.

The parties' agreement was incorporated into Minutes of Settlement that were ultimately approved by the court. In addition to approving the terms of the settlement, the court issued a consent Order dismissing the proceeding, and incorporating some, but not all, of the provisions of the Minutes. Notably, for our purposes, none of the provisions of the Minutes that dealt with the farm were incorporated into the consent Order. The Minutes were also not attached as a schedule to the Order.

Although the Minutes provided that the $422,750 would be paid and ownership of the farm transferred by February 2016, this did not happen in a timely manner and, in fact, still had not happened by the time of Ila's death in 2020.

In 2018, the Respondents advised the Appellants that they expected to complete the transfer of the farm immediately, and that if they did not do so, they would, "understand that you do not intend to fulfil the Minutes of Settlement/Judgment and will take the appropriate course of action." The Appellants did not provide a meaningful response to the Respondents, and they never completed the transfer or made the payment required by the Minutes.

In 2022, the Appellants commenced a proceeding against the Respondents and requested Orders confirming that the Minutes and consent Order were binding and enforceable, and requiring Ila's estate to transfer the farm to them upon payment of the $422,750.

In response, the Respondents requested an Order that the farm be sold, and the proceeds divided equally amongst the four children in accordance with Ila's will (which would have resulted in the Respondents receiving significantly more for their respective interests given that the farm had more than doubled in value since the Minutes were signed in 2015). In support of their position, the Respondents argued that the Appellants had repudiated the agreement by acting "in a way that evinces an intent to no longer be bound by the contract", thereby allowing the Respondents to "elect to terminate the contract": *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, 2007 CarswellOnt 8195 (S.C.C.) at para. 20.

The Application judge found that because the provisions of the Minutes dealing with the transfer of the farm and payment between the Appellants and the Respondents were not in the Consent Order, these terms were merely contractual, and were not enforceable as a court order in their current form. In reaching this conclusion, the Application judge rejected the Appellant's argument that the court should apply the principles for interpreting contracts that were established by the Supreme Court of Canada in *Sattva*:

> [19] **I do not accept that the principles of contractual interpretation apply when interpreting a judgment. Court orders must be read in consideration of the plain dictionary meaning of the words reflected in the order.** Notably, the first element for a finding of civil contempt is that the order alleged to have been breached must state clearly and unequivocally what should and should not be done: *Carey v. Laiken*, 2015 SCC 17, [2015] 2 SCR 79 at paras. 33-35. **An order must be interpreted based on its wording, and not on intent or surrounding circumstances.**
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> [20] The applicants submit that the terms of the Minutes of Settlement dealing with the transfer of the farm property actually form part of the Judgment; that the court should read the Minutes of Settlement and the Judgment together; and that it is apparent that the Judgment gives effect to the Minutes of Settlement. The applicants also argue that the use of the word "approved," specifically in para. 7 of the Judgment, incorporates the Minutes of Settlement into the Judgment.
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> [21] I do not accept these submissions. As noted above, the Judgment must be interpreted by reading its plain language. **The terms regarding the transfer of the farm property are not part of the Judgment. If the parties wanted to make every term of the Minutes of Settlement enforceable under the Judgment, they should have repeated every term in the Judgment. At the very least, the parties could have attached the Minutes of Settlement as a Schedule. They did not do so.** In addition, the word "approved" is vague and insufficient to establish that the terms of the Minutes of Settlement are incorporated into the Judgment. [**emphasis** added]

Although not expressly stated in the Application judge's decision — it seems the reason why it mattered whether the portion of the Minutes dealing with the farm formed part of the Consent Order was because, unlike a contract (to which the doctrine of

repudiation unquestionably applies), the doctrine of repudiation does not apply to a consent Order. Once a consent becomes an Order, it is no longer just an agreement — it is an order of the court; and parties cannot repudiate a court order.

As the Ontario Court of Appeal explained in *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (Ont. C.A.) at para. 19, while a consent Order can be set aside "on the same grounds as the agreement giving rise to the judgment", those grounds relate "to the formation of the agreement, not to its subsequent performance." See also *Monarch Construction Ltd. v. Buildevco Ltd.*, 1988 CarswellOnt 369 (C.A.); *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.); *Shackleton v. Shackleton* (1999), 1 R.F.L. (5th) 459 (B.C. C.A.); *Pond v. Pond*, 2017 CarswellBC 1956 (B.C. C.A.); *Ruffudeen-Coutts v. Coutts* (2012), 15 R.F.L. (7th) 13 (Ont. C.A.).

While the Court of Appeal noted in *McCowan* that subsequent non-performance could, in some circumstances, help to establish that "the underlying agreement was so tainted in its formation that it should be invalidated", that is quite different from giving the innocent party a legal right to terminate a consent Order for non-performance.

See also *Ross v. Pinaymootang First Nation*, 2015 CarswellOnt 7991 (S.C.J.) at para. 80, where Justice Diamond (relatively) recently relied on *McCowan* to conclude that "[t]he fact that the party in default does not continue to make required payments cannot, on its own, lead to the conclusion that a consent order, or any part of it, should be set aside."

After reviewing the evidence before her, the motion judge found that the Appellants had repudiated the agreement about the farm "as a result of their extreme delay", and that the Respondents had accepted the repudiation in 2018 when they advised the Appellants that if the transfer was not completed immediately, they would understand that the Appellants did not intend to proceed with the agreement.

The Appellants appealed to the Ontario Court of Appeal, and argued that the Application judge had erred by: (a) not relying on *Sattva* when interpreting the consent Order (thereby erring in finding that the terms of the Minutes about the farm transaction did not form part of the consent Order); and (b) finding that the Respondents had accepted the Appellant's repudiation of the Minutes.

The Court of Appeal agreed with the Appellants that the Application judge had erred in law in finding that *Sattva* did not apply to the interpretation of consent Orders. Instead, the Court of Appeal confirmed that *Sattva does*, in fact, apply when a court is trying to interpret a consent Order, and thus it can be appropriate to look beyond the wording of the Order to consider the circumstances known to the parties at the time the consent was signed:

> [14] In my view, **consent judgments should be interpreted according to the principles of contractual interpretation because they are a species of contract**. It must be borne in mind that, "a consent judgment is not a judicial determination on the merits of a case but only **an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances"**: James G. McLeod in his annotation in the Reports of Family Law to *Thomsett v. Thomsett*, 2001 BCSC 546, 16 R.F.L. (5th) 427 at pp. 428-29.
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> [15] Thus, it is the contractual nature of consent judgments that distinguishes them from regular judgments and drives the requirement to determine the intention of the parties. **Therefore, there is no principled reason why the analytical approach to them should differ from other contracts**. This approach has been adopted by the British Columbia Court of Appeal: see *Shih v. Shih*, 2017 BCCA 37, at para. 34.
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> . . . . .
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> [17] Based on the principles of contractual interpretation, **the court should read consent orders as a "whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract"**: *Sattva*, at para. 47. [**emphasis** added]

Unfortunately for the Appellants, the Court of Appeal found that this legal error did not change the outcome of the case. After considering *Sattva*, the Court of Appeal was satisfied that the evidence showed that the parties had specifically chosen to only

include certain provisions of the Minutes into the consent Order. Accordingly, it was reasonable to conclude that the remaining terms of the Minutes, including the ones relating to the farm, had purposely not been incorporated into the consent Order. Those terms were left as contractual terms between the parties — terms to which the doctrine of repudiation *did*, in fact, apply.

The Appellants also argued that while they were not challenging the Application judge's finding that they had repudiated the agreement, they claimed that the Respondents' acceptance of the repudiation was not sufficiently clear (as required in *Brown v. Belleville (City)*, 2013 CarswellOnt 2605 (C.A.)), and that the Application judge had failed to consider subsequent communications where the Respondents indicated they still wanted to complete the transaction. The Court of Appeal wholly rejected this argument, and concluded that the Application judge had been entitled to make the findings she did — of repudiation and communicated acceptance thereof — on the record before her.

Accordingly, the appeal was dismissed.

And, at this time, it behooves all of us to have another read of *Brown v. Belleville (City)*, 2013 CarswellOnt 2605 (C.A.). It offers an excellent review of repudiation and anticipatory repudiation. And if you don't know repudiation, you don't know contract law.

Johnston also provides an important reminder that deciding whether to incorporate all or part of a settlement into a court Order can be extremely important, and should not be approached in a cookie-cutter or haphazard manner. Instead, different situations and circumstances can and should be dealt with differently.

For example, as we discussed in our comment on *Assayag-Shneer v. Shneer* (2023), 81 R.F.L. (8th) 7 (Ont. C.A.) in the March 20, 2023 (2023-11) edition of TWFL ("Change in the Law Alert: To Enforce a Penalty Clause an Order is in Order!"), while penalty clauses in a contract are likely unenforceable, they can become enforceable if they are incorporated into a consent Order. Similarly, while a court can only award spousal support in the face of a contractual release if the applicant is able to meet the onerous test from *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.), a consent dismissal of a claim for spousal support can be varied under the much lower test of a material change in circumstances (or at least it can in Ontario — see *Tierney-Hynes v. Hynes*, 2005 CarswellOnt 2632 (C.A.)).

So, when you are deciding on how a settlement should be papered, you need to give some serious thought to the potential risks and benefits associated with the various options, and discuss them with your client so that they can make an informed decision. Furthermore, be careful about what terms you agree to incorporate into a consent Order, because if you happen to include a term that a court likely can't or shouldn't Order (e.g. a penalty clause like the one that was used in *Assayag-Shneer*) and the judge reviewing the materials happens to miss it, you could be creating a significant problem for your client down the road.

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