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— Franks & Zalev - This Week in Family Law

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Contents

Can You Be Habitually Resident Where You've Never Lived?

Adam v. Kasmani (2021), 55 R.F.L. (8th) 277 (Ont. Div. Ct.) — Swinton, Baltman, and Kristjanson JJ.

This was an appeal from a decision under the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*").

Both parties were born in Kenya. The Father had lived in the United States since 2001. The Mother immigrated to Canada with her family when she was nine years old, and was a Canadian citizen.

The parties married in January 2017, in New York, and lived in Massachusetts for the duration of the marriage. The parties separated in July 2019, when the Mother returned to Ontario, when she was about nine months pregnant. The child, AB, was born in Toronto on August 25, 2019, and had never been to the United States.

In January 2020, the Father commenced a *Hague* application in Ontario for the child's "return" to the United States.

The main question was, of course, one of "habitual residence." Under Article 3 of the *Hague Convention*, the removal or retention of a child is wrongful if it contravenes a person's custody rights under the law of the State where the child was habitually resident immediately before the removal or retention. Article 3 states:

> The removal or the retention of a child is to be considered wrongful where
>
> > a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> >
> > b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Both Canada and the United States are Contracting States. Under Article 12, if a child is being wrongfully retained, then the authority in the State where the child is being retained ***must*** return the child, unless either one year has passed since the date of wrongful removal, or certain other exceptions under Article 13 are met.

In *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) at para. 38, the Supreme Court of Canada established that findings of habitual residence in *Hague Convention* cases are reviewable on the palpable and overriding error standard. The determination of habitual residence is a question of fact or mixed fact and law, and an application judge's determination of habitual residence is subject to deference: *Ludwig v. Ludwig* (2019), 30 R.F.L. (8th) 21 (Ont. C.A.) at para. 33.

Given that AB had never set foot in the United States, the Father had a challenging, but not unprecedented case. In *Harper v. Smith* (2021), 54 R.F.L. (8th) 351 (Ont. S.C.J.), for example, it was determined that a child born in Scotland was habitually resident in Ontario. (There were distinguishing factors, such as a sibling, but it was not an impossible argument.)

The Father argued that:

- Justice MacPherson did not properly apply the hybrid approach in the habitual residence analysis from *Balev*;
- His Honour did not give any weight to the parties' agreement and alleged shared intention that they would raise AB in the United States; and
- His Honour erred in considering post-removal/retention factors linking the child to Ontario — such as the child's birth — a somewhat circular argument as if the court could not consider the child's birth, there was no child to be subject to the *Convention*.

The Divisional Court did not agree with the Father's submissions. It concluded that the Father was effectively relying solely on a "parental intention" analysis to determine habitual residence which, after *Balev*, was no longer appropriate. While *Balev* indicates that parental intention "may" be particularly important in the case of infants, it emphasizes that every case is "unique", and the motion judge must look to the "entirety of the child's situation." In particular, *Balev* requires the court to determine the focal point of the child's life.

According to the Divisional Court, Justice MacPherson considered the appropriate factors and properly determined that neither the focal point of the child's life, nor his habitual residence, could be in a country in which he had never set foot. (Although we again point to *Harper v. Smith*.)

Furthermore, Justice MacPherson had not ignored the parents' intentions:

> [38] In terms of settled intention, while [the Father] intended for the child to be born and raised in the United States, [the Mother], following the parties' separation, moved to Canada a month before the birth of [AB] and has remained here since. **She has, since July 2019 demonstrated a settled intention that is different from that of** [**the Father**]. [emphasis added by Divisional Court]

That is, any common intention that may have existed changed as the marriage deteriorated. And there was evidence to suggest that both parties "saw it coming", as the marriage was in serious peril even before the Mother moved to Toronto.

Finally, Justice MacPherson had correctly determined there was neither a "removal" nor a "retention" in this case. As it is not possible to abduct a fetus, there could not have been a wrongful "removal" under Article 3 of the *Hague Convention*: *F., Re (Abduction: Unborn child)*, [2006] EWHC 2199 (Eng. Fam. Div.). (But, again, that pesky *Harper v. Smith* case . . .). There could also be no "retention" under Article 3 unless AB had been "habitually resident" in the United States immediately before the retention. As AB had never even been to the United States, he could not have been residing there "immediately before" the retention.

In sum:

> [22] Consequently, the Motion Judge correctly held there was no breach of custody rights attributed to a person in the U.S. As he stated at para. 34: "It is noteworthy that at the time of his birth, [AB] was a Canadian citizen, in a Canadian hospital with his mother and medical providers. The focal point of [AB's] life at birth and since is Canada." The Motion Judge

> properly determined that the focal point of AB's life, and therefore his habitual residence, could not be the United States, a country he has never been to. This decision aligns with the purpose of the *Hague Convention*, which is to determine the jurisdiction most appropriate for the resolution of custody and access issues.

It is hard to argue with this logic.

Justice MacPherson also determined that, if he was wrong in concluding that AB's habitual residence was in Ontario, the Ontario Superior Court of Justice should still assume jurisdiction under s. 22(1)(b) of the *CLRA*.

While the Divisional Court addressed this ground of appeal, we suggest it was not necessary. If his Honour was wrong in concluding that AB's habitual residence was in Ontario, then AB's habitual residence would presumably have been in the United States — and if so, he would have had no choice but to order AB's return to the United States. A Court cannot properly have resort to provincial legislation to found jurisdiction over custody/access issues after finding that there has been a wrongful removal or retention under the *Hague Convention*. That would be wholly contrary to the purpose of the *Hague Convention*, which is to ensure that the jurisdiction of habitual residence gets to make custody and access decisions for a child. The fact that the Divisional Court considered the Father's alternate position here will only create uncertainty in future cases.

Family Litigation & Disclosure: The Game the Whole Extended Family Can Play (and a bit about hard drives, too)

Etemadi v. Maali, 2021 CarswellBC 1656 (S.C.) — Master Keighley

This case is a tale of third-party disclosure requests on steroids. While such disclosure requests and production demands of extended family are not often as brazen as the ones in this case, we do find that such requests are becoming increasingly more common. Here, Master Keighley put an end to it.

At the beginning of the decision, Master Keighley reminds us that both non-disclosure and excessive requests for disclosure can create serious problems in family law cases:

> [1] In case of *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93, this Court offered the following, often cited with approval:
>
> > [9] Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done. Non-disclosure also has a tendency to deprive children of proper support.
>
> [2] Restatement of those comments, perhaps a gender-neutral restatement, is equally applicable today. It does seem to this writer, however, that opportunities for abuse arise not only on the "disclosing" side but also on the "requesting" side and this application may be seen, at least in part, is [*sic*] an example of the latter.

[See also *Boyd v. Fields*, 2006 CarswellOnt 8675 (S.C.J.) at paras. 12-14]

Master Keighley also took the opportunity to comment on a request for production of a hard drive.

The parties were in their early 40s. They married on February 28, 2006 in Tehran, and moved to Vancouver in late 2007. The relationship was tumultuous, and they separated on several occasions, finally separating for good in September 2017. This proceeding was commenced less than a week later, and was scheduled for a 15-day trial in February 2022. The wife had added the husband's parents as respondents by counterclaim, and requested *extremely* extensive disclosure from them.

At her examination for discovery, the wife admitted that she had taken a hard drive from the family home. The drive contained thousands of documents. The husband asked that the hard drive be produced. The wife refused on the basis that she had already produced any relevant documents from the hard drive.

Under Rule 9-1 of the *Supreme Court Family Rules*, B.C. Reg. 169/2009, a computer hard drive is not a "document." Rather, a hard drive is a document repository — the digital equivalent of a bookshelf or filing cabinet. And while the court can order the production of relevant documents stored on a hard drive, the *Rules* do not provide for an unrestricted search of a digital storage device.

In refusing production of the hard drive, the Master relied on *Desgagne v. Yuen*, 2006 CarswellBC 1546 (S.C.), in which Justice Myers noted that a similar request for production of a computer hard drive was essentially a request to disclose virtually every element of a person's activities for all of their waking hours. Good point. Just consider for one moment what any tech-savvy person could find out about you by examining your computer hard drive. They would easily uncover the most intimate details of your life. The Supreme Court of Canada, of course in a different context, was of the same view in *R. v. Vu*, 2013 CarswellBC 3342 (S.C.C.), where it was suggested that a hard drive was far more than just a "filing cabinet" — and that it would be hard to imagine a more intrusive invasion of privacy than the search of a personal home computer. See also *R. v. Cole*, 2012 CarswellOnt 12684 (S.C.C.); *R. v. Villaroman*, 2015 CarswellAlta 436 (C.A.); *R. v. Reeves*, 2018 CarswellOnt 20930 (S.C.C.).

Ultimately, filing a claim does not grant free licence to rifle through all private aspects of his/her life which may be recorded electronically: *Laushway v. Messervey*, 2014 CarswellNS 45 (C.A.).

The Master also referred to the British Columbia Court of Appeal case of *Privest Properties Ltd. v. W.R. Grace & Co. - Conn.*, 1992 CarswellBC 373 (C.A.), where Justice Southin noted:

> [40] But these rules do not empower a judge to require a party to give access to his opponent to documents which are neither in his list not in an affidavit required to be made under subr. (4) nor referred to in one of the documents listed in subr. (8).
>
> [41] Subrule (10) confers no power to make the order under appeal which is really an authorization to search.
>
> [42] If the court had power to make this order then it would also have the power to permit a litigant access to all places in which his opponent might keep documents to see if there is anything "relating to any matter in question".
>
> [43] It would require much different rules to give the court such an extraordinary invasive power in circumstances such as these. However, if the fact that the respondents at one time wrongly believed to exist — that is to say, a deliberate concealment of documents — was proven to exist, it may be that an order of the sort made here could be made for the purpose of redressing dishonesty in the course of litigation. That issue can be determined if, as and when it arises.

Therefore, to force production of a hard drive, there must be at least some evidence to suggest that there is a real likelihood that undisclosed documents may exist: *Warman v. National Post Co.*, 2010 CarswellOnt 5920 (S.C.J.); *Innovative Health Group Inc. v. Calgary Health Region*, 2008 CarswellAlta 736 (C.A.). This requires more than speculation or supposition.

By way of analogy, in *Desgagne*, the plaintiff's counsel had visited the plaintiff's home, examined the documents on her computer, and advised defence counsel that nothing relevant was found. This was found to be no different than counsel examining a box of documents provided by the client and advising that all relevant documents had been produced. Good point. There is no manner of disclosure obligation that would require a party to produce all documents that happened to be found with relevant documents. Of course, while theoretically sound, the number of files on a personal home computer today would likely make such a task impossible. But the analogy certainly holds. [See also *Stewart v. Kempster*, 2012 CarswellOnt 16567 (S.C.J.).]

As there was no request for any specific documents on the hard drive (or even any category of documents on the hard drive), or any suggestion that relevant documents had been deleted or not produced, the request smacked of "fishing". The Master was not about to allow the husband to just peruse the wife's digital files to see if there might be something interesting. That is not disclosure. That is a search.

The Master then addressed the wife's request for various disclosure from the husband and essentially his entire extended family.

The wife had joined the husband's parents in the action, and claimed onerous disclosure from them, including a sworn Financial Statement, and details of essentially any property that was owned by the parents or any of their companies. The wife essentially saw the litigation as being against the husband and his family.

The husband's parents acknowledged that they had been very generous with the couple during the marriage and even to the wife after separation. Their generosity, they said, had been repaid by being joined in the litigation and being obliged to defend themselves and their assets against groundless claims by the wife, who seemed to view "family property" as anything owned by the husband or his parents.

However, the wife did not offer any evidentiary foundation for her requests. A party cannot demand documents simply because he or she is suspicious of wrongdoing: *Mossey v. Argue*, 2013 CarswellBC 3462 (S.C.); *Colizza v. Arnot* (2007), 48 R.F.L. (6th) 10 (Man. C.A.); *Hradowy v. Hradowy*, 2011 CarswellMan 132 (Q.B.).

Mistrust is a common theme in family law proceedings; but mistrust is not the threshold test for production from third parties. The test for disclosure from third parties is, and must be, an objective one that requires an analysis outside a litigant's own belief system: *Santilli v. Piselli* (2010), 87 R.F.L. (6th) 135 (Ont. S.C.J.); *Kerzner v. Kerzner*, 2013 CarswellOnt 278 (S.C.J.); *Weber v. Merritt* (2018), 11 R.F.L. (8th) 177 (Ont. S.C.J.); *Popat v. Popat*, 2021 CarswellOnt 11311 (S.C.J.).

Ultimately, Master Keighley was concerned that the wife was conducting the matter so as to maximize the cost of the litigation in an effort to lever a more favourable result through emotional and financial attrition. And that was not something he was prepared to help her achieve.

This Friendly Reminder Brought to You by the Law of Repudiation

Ching v. Pier 27 Toronto Inc., 2021 CarswellOnt 11021 (C.A.) — Pepall, Nordheimer and Thorburn JJ.A.

Pier 27 is clearly not a family law case. However, most family law matters do not proceed to trial; most are resolved by way of separation agreement or minutes of settlement. And, as we all know, sometimes people do not meet the obligations imposed on them in their agreements. Thus, it is important for family lawyers to understand contractual remedies.

When the opposing side of a contract breaches it or makes it clear that they are going to breach it, decisions have to be made by the innocent party. Not understanding those decisions can very seriously negatively impact your client — as the general principles of contract law apply to domestic contracts: *Rateja v. Rateja* (2008), 57 R.F.L. (6th) 408 (Ont. S.C.J.); *Zhu v. Li*, 2007 CarswellBC 1745 (S.C.), aff'd (2009), 64 R.F.L. (6th) 6 (B.C. C.A.); *Smith v. Lau* (2004), 8 R.F.L. (6th) 406 (B.C. C.A.); *Owen v. Owen* (2011), 12 R.F.L. (7th) 220 (B.C. S.C. [In Chambers]); *Freake v. Freake* (2004), 50 R.F.L. (5th) 1 (N.L. C.A.).

While reading our comments below, we suggest you think about how these principles might apply in the situation of a domestic contract where, for example, a payor suggests s/he will no longer pay the support or other payments required by the agreement. Or where, one party to a marriage contract suggests they will not abide by the obligation to retain insurance. What would you do in such cases?

In *Pier 27*, Justice Pepall of the Ontario Court of Appeal explains and summarizes the law of repudiation, and the election that the innocent party is put to when the other side repudiates a contract.

The facts are not terribly important, but in *Pier 27*, the appellants appealed from a judgment dismissing their claim for damages arising from the breach of an agreement of purchase and sale of a condominium (and their request for relief from forfeiture of their deposit).

The appellants bought 10 residential properties across Canada. One of those properties was a pre-construction condominium that was the subject of the appeal.

The original Agreement of Purchase and Sale was dated April 23, 2008. The Agreement provided that time was of the essence, with a proposed occupancy date of November 30, 2010, but was stated to be "not firm." The appellants secured mortgage financing of $900,000 for the purchase from CIBC.

The occupancy date was subsequently extended twice by the respondent to October 1, 2013. This was the "confirmed" occupancy date.

The appellants then tried to sell or assign the Agreement of Purchase and Sale. However, they were told that the respondent was not permitting assignments.

The "firm" occupancy date was then extended eight more times by the respondent, and finally to August 20, 2014. In each of the letters extending the "firm" date, the respondent stated that in all other respects, the terms of the Agreement and Purchase and Sale remained unchanged, and time would remain of the essence. The appellants did not complain of any of the delays on receipt of the notices of extension. In fact, they subsequently met with the respondent's décor consultant and selected finishes and upgrades for the unit.

In late 2013, CIBC advised the appellants that the cancellation date for their mortgage approval was approaching, and the mortgage approval was, in fact, cancelled on December 23, 2013. The appellants unsuccessfully applied to other banks for mortgage financing.

The appellants did not take possession of the unit, and the transaction did not close. Without mortgage financing, the appellants could not pay the closing price. The appellants, through counsel, then tried to force the respondent to return their deposits. They took the position that the respondent did not have the right to unilaterally extend the occupancy date beyond the 24 months permitted by the Agreement, and that by failing to provide occupancy as originally agreed (after the first extension), the respondent had breached the Agreement of Purchase and Sale, thereby entitling the appellants to terminate the Agreement and have the deposits returned.

Understanding the law of repudiation, the respondent's counsel responded that the appellants were in default of the Agreement as they had failed to complete the transaction, but as a courtesy and without prejudice, the respondent would permit the appellants to complete the transaction.

The appellants did not complete the transaction, and the respondent's lawyer wrote to the appellants' lawyer confirming that the Agreement was terminated due to the appellants' failure to complete the transaction. The respondent kept the deposit funds.

The appellants sued for breach of the Agreement and sought the return of their deposit of $214,238.85, the increase in value of the unit as of the date the Agreement was terminated, and punitive damages of $100,000 for dishonest performance of the Agreement. In the alternative, they sought relief from forfeiture of their deposit.

The trial judge found that the respondent had breached the Agreement of Purchase and Sale by unilaterally (and arbitrarily) extending the occupancy date. But that was not important for the appeal. The trial judge also found that the appellants terminated the Agreement on August 7, 2014. That was also not important for the appeal.

The important issue was whether or not the appellants had accepted the respondent's repudiation of the Agreement of Purchase and Sale. That is, had the appellants accepted the repudiation or not. And this is the important question, the answer to which different remedies can flow.

The governing legal principles were set out in *Ali v. O-Two Medical Technologies Inc.*, 2013 CarswellOnt 17092 (C.A.), at para. 24:

> Once the counterparty shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages — in which case, the innocent party must "clearly and unequivocally" accept the repudiation to terminate the contract: Brown, at para. 45. Alternatively, the innocent party

> may choose to treat the contract as subsisting, "continue to press for performance and bring the action only when the promised performance fails to materialize"; by choosing this option, however, the innocent party is also bound to accept performance if the repudiating party decides to carry out its obligations: S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book 2010), at para. 621.

That is, in the face of the respondent's breach, the appellants could have accepted the breach and sued for damages. However, in order to do so, they had to "clearly and unequivocally" accept the repudiation to terminate the Agreement. But the appellants did not do that. Instead of clearly and unequivocally accepting the repudiation, they continued to press for performance. The appellants, for example, attended the respondent's premises to select finishes and upgrades. They also tried to assign the Agreement many times.

This is the mistake counsel sometimes make when dealing with a breach/repudiation, or an anticipatory breach. They do not clearly signal whether they want to affirm the contract, or accept the repudiation. One cannot do both. Absent clear and unequivocal acceptance of the repudiation, the contract is still in force.

On the appeal, the appellants argued that the trial judge had erred in his repudiation analysis. In dismissing the appeal, with reference to *Brown v. Belleville (City)*, 2013 CarswellOnt 2605 (C.A.) (another leading case on repudiation) and Professor Fridman in *The Law of Contracts in Canada*, Justice Pepall very clearly set out the legal principles applicable to repudiation of a contract, be that contract an Agreement of Purchase and Sale, another commercial contract, or a domestic contract. In summary:

> 1. A repudiatory breach does not, on its own, terminate a contract. If the "innocent party" does not accept the repudiation, then the repudiation has no legal effect.
>
> 2. There is no such thing as unilateral repudiation. Just as making a contract requires the joint participation of both parties, the discharge of a contract, even where the discharge is by repudiation, in advance of the time for performance, also requires the conformity and acquiescence of both parties.
>
> 3. Therefore, the consequences of a repudiation *depend on the election made by the innocent party* — again, this is the important part. *If the innocent party accepts the repudiation, the contract is terminated* (sometimes referred to as "**disaffirmation**"). Alternatively, *the innocent party may treat the contract as subsisting* (sometimes referred to as "**affirmation**"). [*Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CarswellOnt 3171 (S.C.C.), at para. 40].

An innocent party faced with repudiation or anticipatory repudiation, therefore, has three options.

Disaffirmation (Acceptance of the Repudiation of a Contract)

An election to *disaffirm* a contract — that is to accept the repudiation — must be clearly and unequivocally communicated to the repudiating party within a reasonable time. This communication can be done orally or in writing, or may be inferred from the conduct of the innocent party in the circumstances. The contract is at an end if the innocent party accepts the repudiation, and while the innocent party can sue for damages, both parties are relieved of future performance.

Affirmation (Treating the Contract as Subsisting)

To be clear, failing to accept a repudiation does *not* necessarily mean that the innocent party has affirmed the contract. As with disaffirmation, the affirmation may be express or inferred from conduct. But a party who continues to press for performance will be found to have affirmed the contract: *Ali v. O-Two Medical Technologies Inc.*, 2013 CarswellOnt 17092 (C.A.) at para. 24. The test is objective: what would the repudiating party reasonably understand from the words or conduct of the innocent party.

However, as noted by Justice Pepall, this creates a problem. What happens if the innocent party neither clearly affirms or disaffirms? (Again, a unilateral repudiation without acceptance of that repudiation does not terminate the contract.) To deal with this problem, Justice Pepall suggests that, rather than asking whether the evidence is "clear", the proper question to ask is whether, in the circumstances, a person in the shoes of the repudiating party reasonably would have understood that the innocent

party was electing to keep the contract alive until the date of performance. If the innocent party treats the contract as still being in full force and effect, the contract remains in force for both sides.

The Middle Way ("No-Man's Land")

Justice Pepall then takes some time to discuss the "middle" ground (or, more appropriately, the time immediately after which a party gives notice of repudiation but before an election is made). She noted that the innocent party need not make its election immediately and may be given a reasonable period of time to decide whether to affirm the contract or accept the repudiation. She also noted that, "at least until that reasonable period of time has elapsed, a court should be slow to treat equivocal statements or acts as affirmations of the contract."

She then cites *Chitty on Contracts* to note the "danger" to the innocent party of not taking any action or giving clear notice of their elections:

> [40] . . . There is a sense in which there is a middle way open to the innocent party in that he is given a period of time in which to make up his mind whether he is going to affirm the contract or terminate. This point was well-expressed by Rix L.J. in *Stocznia Gdanska SA v. Latvian Shipping Co. (No. 2)* when he stated: "In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. **If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing 'writ in water' until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract — such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract.**" [citations omitted] [emphasis added]

The question on this appeal was whether the trial judge had erred in finding that the appellants had affirmed the Agreement.

Each time the respondents breached the agreement by extending the closing date, the appellants had options:

- They could have (as they are found to have done) affirmed the Agreement and insisted on the proper closing date.
- They could have accepted the repudiation, which would have terminated the Agreement.
- They could have taken some time to consider their options.

Here, the Court of Appeal agreed with the trial judge. The appellants did not accept any of the successive repudiations by the respondent. Each time, they acted as if the Agreement continued in force by, for example, attending to select fixtures, etc. and by looking to assign the Agreement. Therefore, the Agreement remained in force between the parties, and the Court of Appeal dismissed the appeal. The appellants lost their deposit.

Here, the appellants erred strategically in not accepting the respondent's repudiation when they had the chance, knowing they could not secure alternative mortgage financing. That was the time to clearly accept the repudiation.

These sorts of situations arise in family law regularly. Above, we gave the example of a payor refusing to meet the payment terms of a separation agreement; or a party to a marriage contract breaching the obligation to maintain insurance. Or, perhaps a party refusing to make agreed-upon property transfers. Or, maybe a party trying to vary terms that were agreed to be "fixed." Examples abound, but do remember that "repudiation" is not evinced by the minor breach of a contract. Rather, a repudiation deprives the party of substantially the whole benefit of the contract. And in the face of repudiation or anticipatory breach, counsel and parties must understand the available elections, the advantages and disadvantages of each election — and the cost and risk of doing nothing.

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