SUPREME COURT OF CANADA

CITATION: Rick *v.* Brandsema, 2009 SCC 10, [2009] 1 S.C.R. 295

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BETWEEN:

Nancy Rick also known as Nanc Rick
Appellant
and
Berend Brandsema also known as Ben Brandsema and Brandy Farms Ltd.
Respondents
- and -
Women's Legal Education and Action Fund
Intervener

CORAM: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 70) Abella J. (McLachlin C.J. and Binnie, Deschamps, Fish, Charron and Rothstein JJ. concurring)

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Rick *v.* Brandsema, 2009 SCC 10, [2009] 1 S.C.R. 295

Nancy Rick also known as Nanc Rick *Appellant*

v.

Berend Brandsema also known as Ben Brandsema and Brandy Farms Inc. *Respondents*

and

Women's Legal Education and Action Fund *Intervener*

Indexed as: Rick *v.* Brandsema

Neutral citation: 2009 SCC 10.

File No.: 32098.

2008: October 14; 2009: February 19.

Present: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for british columbia

Family law — Family assets — Separation agreements — Unconscionability — Husband knowingly exploiting wife's mental fragility and giving misleading financial information, resulting in negotiated equalization payment that fails to reflect objectives of governing legislation or parties' intention to divide assets equally — Whether separation agreement unconscionable — Role of professional assistance in compensating for vulnerabilities.

Family law — Separation agreements — Duty to make full and honest disclosure of relevant financial information in negotiating separation agreements.

Contracts — Unconscionability — Remedy — Equitable compensation.

The parties married in 1973 and separated in 2000. During their 29 years together, they had five children and acquired a dairy farm in which they were equal shareholders, as well as other real property, vehicles and RRSPs. The parties were intermittently represented by lawyers and also used the services of mediators during their negotiation of a separation agreement. Approximately a year after their divorce, the wife sought to set aside the agreement on the grounds of unconscionability or, in the alternative, a reapportionment order under s. 65 of British Columbia's *Family Relations Act*. The trial judge found that the agreement was unconscionable because the husband had exploited the wife's mental instability during negotiations and had deliberately concealed or under-valued assets. This resulted in the wife receiving significantly less than her entitlement under the Act, despite the fact that it was the parties' express intention to divide their assets equally. As a result, the trial judge made an order awarding the wife an amount representing the difference between the negotiated equalization payment and the amount she was entitled to under

the Act. The Court of Appeal disagreed with the trial judge's conclusions about the extent of the wife's vulnerabilities and concluded that, in any event, they were effectively compensated for by the availability of counsel.

Held: The appeal should be allowed.

The singularly emotional environment that follows the disintegration of a spousal relationship means that the negotiation of separation agreements takes place in a uniquely difficult and vulnerable context. Special care must therefore be taken to ensure that the assets of the former relationship are distributed through a process that is, to the extent possible, free from informational and psychological exploitation. Where exploitation results in an agreement that deviates substantially from the objectives of the governing legislation, the resulting agreement may be found to be unconscionable and, as a result, unenforceable. [1] [44] [47]

While parties are generally free to decide for themselves what bargain they are prepared to make, decisions about what constitutes an acceptable settlement can only authoritatively be made if both parties come to the negotiating table with the information they need to consider what concessions to accept or offer. This requires that there be a duty on separating spouses to provide full and honest disclosure of all relevant financial information in order to help protect the integrity of the negotiating process. This duty not only anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain, it helps ensure the finality of agreements. An agreement negotiated with full and honest disclosure and without exploitative tactics will likely survive judicial scrutiny. [45-49]

Whether defective disclosure will justify judicial intervention, however, will depend on the circumstances of each case, including the extent of the misinformation and the degree to which it may have been deliberately generated. [49]

There is no reason to disturb the trial judge's conclusion that the separation agreement was unconscionable. His findings about the husband's defective disclosure and exploitation of his wife's known mental vulnerabilities, support the conclusion. Although in some cases professional assistance will effectively compensate for vulnerabilities, in this case the trial judge concluded that the wife's mental instability left her unable to make use of such assistance. [2] [6] [27-28] [31] [36] [58-60] [62]

The husband's failure to make full and honest disclosure, his knowledge that the negotiations were based on erroneous financial information, as well as his exploitation of what he knew to be his wife's profound mental instability, resulted in a negotiated equalization payment that was $649,680 less than the wife's entitlement under the *Family Relations Act*. In these circumstances, the trial judge was entitled to award this amount to compensate the wife for the loss caused by the unconscionable bargain. [6] [27-28] [31] [53] [63] [69]

Cases Cited

Applied: *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; **referred to:** *Davidson v. Davidson* (1986),

2 R.F.L. (3d) 442; *T. (T.L.A.) v. T. (W.W.)* (1996), 24 R.F.L. (4th) 51; *Chen v. Liu*, 2008 BCSC 928, [2008] B.C.J. No. 1354 (QL); *W. (C.E.) v. W. (G.D.)*, 2007 BCSC 550, 31 E.T.R. (3d) 101; *Zhu v. Li*, 2007 BCSC 1117, 33 E.T.R. (3d) 281; *Elliott v. Elliott*, 2007 BCSC 98, [2007] B.C.J. No. 108 (QL); *Chepil v. Chepil*, 2006 BCSC 15, [2006] B.C.J. No. 15 (QL); *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550; *Leopold v. Leopold* (2000), 51 O.R. (3d) 275; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920; *Russell v. Russell*, 2002 BCSC 1233, [2002] B.C.J. No. 1983 (QL); *Dowling v. Dowling* (1997), 43 B.C.L.R. (3d) 59; *Starkman v. Starkman* (1990), 75 O.R. (2d) 19; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208; *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325; *Thomsett v. Thomsett*, 2001 BCSC 546, 16 R.F.L. (5th) 427; *Shackleton v. Shackleton*, 1999 BCCA 704, 1 R.F.L. (5th) 459; *Schlenker v. Schlenker* (1999), 1 R.F.L. (5th) 436; *McGregor v. Van Tilborg*, 2003 BCSC 918, [2003] B.C.J. No. 1427 (QL); *Huddersfield Banking Co. v. Henry Lister & Son Ltd.*, [1895] 2 Ch. 273; *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 26 C.P.C. (2d) 164; *R.L.S. v. D.C.M.*, 2002 BCSC 1794, [2002] B.C.J. No. 2890 (QL); *Dusik v. Newton* (1985), 62 B.C.L.R. 1; *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.* (1994), 93 B.C.L.R. (2d) 34; *Treadwell v. Martin* (1976), 13 N.B.R. (2d) 137; *Paris v. Machnick* (1972), 32 D.L.R. (3d) 723; *Junkin v. Junkin* (1978), 20 O.R. (2d) 118; *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

Statutes and Regulations Cited

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2.

Family Relations Act, R.S.B.C. 1996, c. 128, ss. 56, 65, 66(2)(c).

Authors Cited

Bryan, Penelope Eileen. "Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion" (1999), 47 *Buff. L. Rev.* 1153.

Fraser, Peter, John W. Horn, and Susan A. Griffin. *The Conduct of Civil Litigation in British Columbia*, vol. 2, 2nd ed. Markham, Ont.: LexisNexis Canada, 2007 (loose-leaf ed. updated May 2008, release 2).

Lange, Donald J. *The Doctrine of Res Judicata in Canada*, 2nd ed. Markham, Ont.: LexisNexis Butterworths, 2004.

Martin, Craig. "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998), 56 *U.T. Fac. L. Rev.* 135.

McCamus, John D. "Equitable Compensation and Restitutionary Remedies: Recent Developments » in *Special Lectures of the Law Society of Upper Canada 1995: Law of Remedies*. Scarborough, Ont.: Carswell, 1995, 295.

McCamus, John D. *The Law of Contracts*. Toronto: Irwin Law, 2005.

Neave, Marcia. "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994), 44 *U.T.L.J.* 97.

Shaffer, Martha, and Carol Rogerson. "Contracting Spousal Support: Thinking Through *Miglin*" (2003-2004), 21 *C.F.L.Q.* 49.

Waddams, S. M. *The Law of Contracts*, 5th ed. Aurora, Ont.: Canada Law Book, 2005.

APPEAL from a judgment of the British Columbia Court of Appeal (Thackray, Lowry and Chiasson JJ.A.), 2007 BCCA 217, 37 R.F.L. (6th) 352, 281 D.L.R. (4th) 517, 240 B.C.A.C. 31, 69 B.C.L.R. (4th) 56, [2007] B.C.J. No. 767 (QL), 2007 CarswellBC 778, allowing the appeal and dismissing the cross-appeal from a decision of Slade J., 2006 BCSC 595, 26 R.F.L. (6th) 293, [2006] B.C.J. No. 850 (QL), 2006 CarswellBC 934. Appeal allowed.

Philip Epstein, Q.C., Jack Hittrich and *Janette Kovacs*, for the appellant.

Georgialee A. Lang, *Benjamin J. Ingram* and *Heather M. Dale*, for the respondents.

Nitya Iyer and *Joanna Radbord*, for the intervener.

The judgment of the Court was delivered by

[1] ABELLA J. — This Court has frequently recognized that negotiations following the disintegration of a spousal relationship take place in a uniquely difficult context. The reality of this singularly emotional negotiating environment means that special care must be taken to ensure that, to the extent possible, the assets of the former relationship are distributed through negotiations that are free from informational and psychological exploitation.

[2] After a long and difficult marriage, the parties in this case negotiated and signed a separation agreement. Based on the test outlined by this Court in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, the trial judge determined that the agreement was unconscionable because the negotiation process was severely flawed and the resulting settlement deviated substantially from the objectives of the governing legislation. He found that the wife was mentally unstable at the time the agreement was negotiated and executed, and that the husband took advantage of this "very significant" vulnerability by agreeing to a bargain he knew was based on misleading financial information, due in part to his own deliberate non-disclosure.

[3] The Court of Appeal reversed most of the trial judge's findings, concluding instead that the wife's vulnerabilities were effectively compensated for by the availability of professional

assistance, and that the husband had no obligation to refrain from agreeing to an equalization payment for his wife that was in his own best interests.

[4] This appeal, therefore, attracts a spotlight to the duties owed by separating spouses during the process of negotiating and executing a separation agreement for the division of matrimonial assets. In *Miglin*, based on the inherent vulnerability of spouses during negotiations, this Court stated that in order to safeguard a separation agreement from judicial intervention, a spouse must refrain from using exploitative tactics. It held that the failure to do so, particularly if the agreement fails to materially comply with the objectives of the governing legislation, could well result in the agreement being set aside.

[5] The circumstances of this case move us to consider the implications flowing from *Miglin* for the deliberate failure of a spouse to provide all the relevant financial information in negotiations for the division of assets. In my view, it is a corollary to the realities addressed by this Court in *Miglin* that there be a duty to make full and honest disclosure of such information when negotiating separation agreements.

[6] The husband's exploitative conduct, both in failing to make full and honest disclosure and in taking advantage of what he knew to be his wife's mental instability, resulted in a finding of unconscionability. The trial judge accordingly ordered that the wife be compensated in an amount representing the difference between her negotiated equalization payment and her entitlement under British Columbia's *Family Relations Act*, R.S.B.C. 1996, c. 128. On the facts and law, I see no reason to disturb his conclusion.

Background

[7] Nancy Rick and Berend Brandsema were married in 1973. She was 18 and he was 19. They separated in February 2000 but lived in the same house until late summer or early fall of that year. They were divorced in January 2002. In December 2001, they signed a separation agreement, the validity of which is the subject of this case.

[8] Over the course of their 29 years together, they acquired land and established a dairy farm, Brandy Farms Inc., of which they were equal shareholders. They also acquired vehicles, RRSPs and real property, all of which were part of the family assets. They had five children, one of whom died in early childhood, and two of whom were under the age of 19 at the date of separation. During their lives together, the wife was primarily a homemaker, but also contributed to the operation of the farm.

[9] After their separation, Brandy Farms Inc. provided funds to the wife to purchase a home for $188,000. The husband facilitated this transaction on condition that the wife resign her position as director and officer of the company. Both parties had continued access to funds held by the company until they entered into the separation agreement.

[10] After the separation, the wife retained a lawyer who commenced divorce proceedings on October 17, 2000. Four months later, in February 2001, the parties engaged the services of a mediator. In the course of the mediation, conducted without lawyers, a schedule of Brandy Farms Inc.'s assets and liabilities was provided by the husband.

[11] It was the parties' undisputed intention to divide their assets equally.

[12] The mediator prepared a memorandum of understanding, stating that the husband would keep Brandy Farms Inc. and another dairy farm business, while the wife would retain the house she had purchased and receive the sum of $750,000 "in order to equalize the parties' net family property and assets".

[13] The memorandum also stated that there would be no spousal support.

[14] In May 2001, the wife asked the lawyer she had retained to start the divorce proceedings to review the unsigned memorandum prepared as a result of this first set of negotiations. Between May and August 2001, he made repeated requests of the husband's lawyer for the production of a Form 89 financial statement.

[15] The parties entered into discussions with a new mediator in the fall of 2001, again without lawyers. The husband's Form 89 was provided in late September 2001. The net value for the assets of Brandy Farms Inc. listed by the husband on the Form 89 was approximately $300,000 more than the value he had presented during the February mediation that had resulted in the wife

seeking a $750,000 equalization payment.

[16] A second memorandum of understanding was agreed to and signed on October 10, 2001. With the exception of a provision dealing with child support, it was substantially the same as the memorandum negotiated in February 2001, including the equalization payment to the wife of $750,000.

[17] After this memorandum of understanding was signed, the second mediator put the wife in touch with another lawyer, who obtained the first lawyer's file. The wife informed the second mediator that her intention had been to proceed in two phases: first to sign a separation agreement to meet her basic needs, and then to obtain "justice".

[18] The trial judge surmised that the second lawyer saw his responsibilities as extending only to seeing that the terms of the memorandum of understanding were incorporated into a binding agreement and that the terms of that agreement were implemented.

[19] Before the signing of the separation agreement, the husband hired accountants to structure the transfer of shares in Brandy Farms Inc. in a way that minimized tax consequences. The resulting transaction involved the transfer by both the wife and the husband of all of their shares to a new company, which was to be indirectly controlled by the husband. The wife was to receive the $750,000 equalization payment less $19,000 for her one-half share of the cost of the accountants' services.

[20] The separation agreement was signed on December 13, 2001. By mutual agreement, the wife's lump sum payment of $750,000 was not mentioned in the agreement. The trial judge found that this payment was most likely omitted because its inclusion would compromise the ability to claim that the share purchase transaction was at arm's length.

[21] On January 17, 2002, the parties were divorced and a consent order, prepared by the wife's lawyer, was granted dismissing the wife's claims against the husband. In February 2002, the paperwork to effect the tax plan and terms of the separation agreement was completed.

[22] On March 6, 2003, the wife sought to set aside the separation agreement and related share transfer agreement on the grounds of unconscionability and misrepresentation. In the alternative, she sought relief under s. 65 of the *Family Relations Act*.

[23] The husband's argument had been that his wife's negotiating tactics were deliberate and manipulative. The trial judge, Slade J., rejected this view (2006 BCSC 595, 26 R.F.L. (6th) 293). After 17 days of trial, he found that at the time of the separation, the wife was a "deeply troubled person", and that her "perception of reality [was] very significantly affected by an unhealthy condition of the mind" (para. 27). In arriving at this conclusion, the trial judge relied in part on the opinion of a psychiatrist that the wife had a "long-standing psychiatric disorder" (para. 26). He found that her "mental condition rendered her vulnerable" during the negotiating process. He concluded that her conduct, including her evidence that she had a two-stage litigation strategy (to secure funds to meet her basic needs and then later to obtain "justice"), was evidence of her "misguided understanding of the legal processes available to her" (para. 112).

[24] The husband himself informed his lawyer of his wife's mental instability, describing her as "paranoid and delusional" (para. 87). The wife's brother also testified that the wife had been "acting differently" for the past four or five years, and that her mental state "was quite a big question mark at times" (para. 86).

[25] It was revealed at trial that a week before the wife vacated the matrimonial home, the husband had written a cheque to himself from the parties' joint account for the sum of $79,954.36. He did not deposit this amount into the account of Brandy Farms Inc. until February 2002, a month after the parties were divorced. He had also advanced $154,000 to the wife's brother, a close friend of his. This money was deposited into term deposits in the brother's name in July and August 2001, then redeemed by the husband and deposited into his own personal bank account in November 2001.

[26] These additional funds totalled almost a quarter of a million dollars. There was no mention of them in the husband's sworn Form 89, nor was their existence ever disclosed to the wife during any of the negotiations.

[27] The trial judge concluded that the husband knowingly presented misleading financial information to his wife at the outset of negotiations by placing values on the assets of Brandy Farms Inc. that were not based on independent valuations; by exaggerating the company's corporate debt figure; by claiming an inappropriate tax liability in connection with the company; by significantly underrepresenting the value of two additional properties in which the parties had a one-half interest; and by failing to divulge either the $154,000 temporarily transferred to the wife's brother or the

cheque for almost $80,000 drawn on the parties' joint account and eventually deposited to Brandy Farms Inc.'s account after the completion of the settlement transactions.

[28] He also found that the husband, whom he described as an "astute and experienced businessman", was, throughout the negotiations, "well aware of [his wife's] disordered thinking" and "impetuous behaviours" (para. 113). He concluded that the husband knowingly took advantage of these vulnerabilities by accepting an agreement based on what he alone knew to be erroneous financial information, resulting in an "equalization payment" that fell $649,680 short of the wife's entitlement under British Columbia's matrimonial property legislation, despite the parties' undisputed intention that the family assets be divided equally, stating:

> In the unique legal context of the negotiations to settle interests in family assets, where there is a presumptive principle of equality, the seizing of an advantage that will lead to the unequal allocation of asset values offends the conscience. [para. 113]

[29] The Court of Appeal reversed most of the trial judge's findings of fact and credibility (2007 BCCA 217, 37 R.F.L. (6th) 352). While conceding that the wife was a troubled woman, the court rejected the trial judge's finding that her mental instability impeded her ability to understand the negotiation process or the legal processes available to her, concluding instead that "it [was] clear that she knew what she was doing" (para. 52). It also concluded that any vulnerability the wife had was adequately addressed and compensated for by the availability of professional assistance. Since the husband was not responsible for the wife's failure to make effective use of the services available to her, he had no "inchoate obligation" to refrain from accepting a proposal that was in his best interests (para. 61). The court accordingly allowed the husband's appeal.

Analysis

[30] It is inherent in disputes generally, and matrimonial conflicts in particular, that parties have inconsistent versions of the underlying events. It is the trial judge's job as judicial historian to sift through the record, watch and listen to the parties, and determine which version of disputed events is the most reliable. Findings of fact and factual inferences made at trial, as a result, are not to be reversed unless there is "palpable and overriding error", or a fundamental mischaracterization or misappreciation of the evidence (*Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10-18; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 52-76).

[31] The trial judge in this case concluded that the wife's "perception of reality" was "very significantly" affected by an "unhealthy condition of the mind" and that she was a "deeply troubled person". He found that her mental instability was not only manifest at the time of separation, but also persisted throughout the negotiation, execution and implementation of the separation agreement. This led him to conclude that the husband, by accepting a settlement offer he knew was based on misleading financial information, knowingly exploited his wife's mental instability at the time the agreement was negotiated and executed.

[32] The Court of Appeal disregarded or rejected the factual underpinnings for the trial judge's legal analysis. In its view, "the extent to which there was a power imbalance . . . [was] questionable" (para. 47), and the wife's vulnerabilities either did not rise to the level of "mental

incapacity" or were effectively compensated for by the availability of counsel and other professionals. As previously noted, its opinion was that the wife "was a troubled woman, but it is clear she knew what she was doing" (para. 52).

[33] These are appellate findings based on a theory of events that had been addressed and squarely rejected by the trial judge in his reasons as follows:

> Counsel for the defendant argues that the facts reveal the plaintiff's plan to separate from the defendant, take what she could in an expedited settlement, then level false charges against him in an effort to have the matter reopened. I reject the defence theory. The plaintiff was, at the time of separation, a deeply troubled person. The evidence before me suggests that she remains so. Her behaviours in the course of the trial did not establish a basis for a contrary opinion. [para. 146]

[34] The trial judge's findings of fact are fully supported by the record. In analysing the legal issues in this case, therefore, I propose to rely on them.

[35] As previously noted, the wife's claim was that the agreement was unconscionable and therefore unenforceable under the common law of contract. No one challenged the availability in British Columbia of the contractual defence of unconscionability. If it was found to be enforceable, the wife's alternative claim was that the agreement was "unfair" pursuant to the lower threshold set out in s. 65 of the *Family Relations Act* and should be varied accordingly.

[36] The trial judge found that the agreement was unconscionable. He was not, therefore, required to address s. 65. This is consistent with the approach taken by British Columbia courts, which have generally proceeded on the basis that s. 65 presupposes the existence of a valid contract.

Only if the agreement is found to be enforceable, is its "fairness" assessed under s. 65 (see, e.g., *Davidson v. Davidson* (1986), 2 R.F.L. (3d) 442 (B.C.C.A.), at para. 29; *T. (T.L.A.) v. T. (W.W.)* (1996), 24 R.F.L. (4th) 51 (B.C.C.A.), at paras. 10-12; *Chen v. Liu*, 2008 BCSC 928, [2008] B.C.J. No. 1354 (QL), at paras. 55-56; *W. (C.E.) v. W. (G.D.)*, 2007 BCSC 550, 31 E.T.R. (3d) 101, at paras. 109-10; *Zhu v. Li*, 2007 BCSC 1117, 33 E.T.R. (3d) 281, at para. 105; *Elliott v. Elliott*, 2007 BCSC 98, [2007] B.C.J. No. 108 (QL), at para. 30; *Chepil v. Chepil*, 2006 BCSC 15, [2006] B.C.J. No. 15 (QL), at para. 47; *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550, at para. 17).

[37] The issue before us therefore revolves around the trial judge's conclusion that, based on the husband's conduct in this case, the negotiated agreement was unconscionable and the wife should be compensated by an amount representing the difference between the negotiated "equalization payment" and her entitlement under the *Family Relations Act*.

[38] The trial judge relied on this Court's decision in *Miglin*. The issue in that case was whether a divorced wife could seek spousal support under s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), several years after signing a separation agreement in which she had released all claims to support.

[39] While *Miglin* dealt with spousal support agreements in the context of a divorce, it nonetheless offers guidance for the conduct of negotiations for separation agreements generally, including negotiations for the division of matrimonial assets.

[40] There is no doubt that separation agreements are negotiated between spouses on the fault

line of one of the most emotionally charged junctures of their relationship — when it unravels. The majority in *Miglin* concluded that because of the uniqueness of this negotiating environment, bargains entered into between spouses on marriage breakdown are not, and should not be seen to be, subject to the same rules as those applicable to commercial contracts negotiated between two parties of equal strength:

> The test should ultimately recognize the particular ways in which separation agreements generally and spousal support arrangements specifically are vulnerable to a risk of inequitable sharing at the time of negotiation and in the future. . . .
>
> Negotiations in the family law context of separation or divorce are conducted in a unique environment . . . [at] a time of intense personal and emotional turmoil, in which one or both of the parties may be particularly vulnerable. [paras. 73-74]

[41] LeBel J., in his dissenting reasons in *Miglin*, additionally observed that the law must be sensitive to the "social and socio-economic realities" that shape parties' roles in spousal relationships and have the potential to negatively impact settlement negotiations upon marriage breakdown. Wilson J. too noted these inherent vulnerabilities in *Leopold v. Leopold* (2000), 51 O.R. (3d) 275 (S.C.J.), where she said:

> [F]or parties negotiating a separation agreement, one party may have power and dominance financially, or may possess power through influence over the children. . . . The reality . . . is that often both contracting parties are vulnerable emotionally, with their judgment and ability to plan diminished, without the other spouse preying upon or influencing the other. The complex marital relationship is full of potential power imbalance. [para. 128]

(See also M. Shaffer and C. Rogerson, "Contracting Spousal Support: Thinking Through *Miglin*" (2003-2004), 21 *C.F.L.Q.* 49, at p. 70.)

[42] Based on these realities, the Court in *Miglin* stated that judicial intervention would be justified where agreements were found to be procedurally and substantively flawed:

> [W]here the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire 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 Act. [para. 4]

[43] *Miglin* represented a reformulation and tailoring of the common law test for unconscionability to reflect the uniqueness of matrimonial bargains:

> [W]e are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. [para. 82]

[44] Where, therefore, "there were any circumstances of oppression, pressure, or other vulnerabilities", and if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation, the Court in *Miglin* concluded that the agreement need not be enforced (paras. 81-83).

[45] Notably, the Court also stressed the importance of respecting the "parties' right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing" (para. 73). Parties should generally be free to decide for themselves what bargain

they are prepared to make. And it is true that most separating spouses appear to determine their agreements without judicial participation (Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998), 56 *U. T. Fac. L. Rev.* 135, at p. 137).

[46] This contractual autonomy, however, depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so (*Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34; Marcia Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994), 44 *U.T.L.J.* 97, at p. 117; Penelope E. Bryan, "Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion" (1999), 47 *Buff. L. Rev.* 1153, at p. 1177).

[47] In my view, it flows from the observations and principles set out in *Miglin* that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.

[48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an

agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.

[49] Whether a court will, in fact, intervene will clearly depend on the circumstances of each case, including the extent of the defective disclosure and the degree to which it is found to have been deliberately generated. It will also depend on the extent to which the resulting negotiated terms are at variance from the goals of the relevant legislation. As *Miglin* confirmed, the more an agreement complies with the statutory objectives, the less the risk that it will be interfered with. Imposing a duty on separating spouses to provide full and honest disclosure of all assets, therefore, helps ensure that each spouse is able to assess the extent to which his or her bargain is consistent with the equitable goals in modern matrimonial legislation, as well as the extent to which he or she may be genuinely prepared to deviate from them.

[50] In other words, the best way to protect the finality of any negotiated agreement in family law is to ensure both its procedural and substantive integrity in accordance with the relevant legislative scheme.

[51] In British Columbia, the operative legislative presumption for the division of family assets is an equal division, as set out in s. 56 of the *Family Relations Act*:

> **56** (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
>
> (a) a separation agreement,

(b) a declaratory judgment under section 57,

(c) an order for dissolution of marriage or judicial separation, or

(d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part or Part 6, or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after March 31, 1979.

[52] Section 65 of the Act empowers the court to make orders that depart from this presumption where it can be shown, having regard to all the circumstances, that an equal division would be "unfair":

65 (1) If the provisions for division of property between spouses under section 56 . . . or their marriage agreement . . . would be unfair having regard to

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self sufficient, or

(f) any other circumstances relating to the acquisition, preservation,

> maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by . . . the marriage agreement . . . be divided into shares fixed by the court.

[53] The trial judge found that the agreement was unconscionable for a number of reasons. It represented a significant departure from the relevant legislative objectives and from the parties' undisputed intention to have an equal division of assets, resulting in an amount for the wife that was $649,680 less than her presumptive entitlement under the *Family Relations Act*. He also found that by accepting a settlement amount that he alone knew was based on the misleading financial information he had provided at the very outset of negotiations, the husband had taken advantage of a mental instability of which he was "well aware". This was "compounded" by the husband's complete non-disclosure of the $233,000 he had temporarily advanced to the wife's brother and had drawn on the parties' joint account. Finally, the trial judge concluded that the "presumptive equality" of the deal was further undermined "by the implementation of a plan to avoid the very tax consequences that were initially presented to support a reduction in his initial estimate of the value of the company" (para. 117).

[54] Before this Court, the husband disputed the trial judge's finding in connection with the effects of the tax plan. There was considerable disagreement between the parties about whether a deduction for contingent tax should have been made from the value of Brandy Farms Inc. and, if so, the appropriate amount of the deduction. The husband contended that the deduction for tax in his initial valuation of Brandy Farms Inc. was entirely appropriate, and that he should not have been faulted by the trial judge for claiming the tax liability. Further, he claimed that when contingent

taxes are taken into account, as they should have been, the wife did in fact receive an equal share of the value of the business.

[55] In my view, the trial judge was entitled to exercise his discretion by not making the deduction. In circumstances where it is not clear when, if ever, a property will be sold and taxes incurred, courts have held that entirely speculative disposition costs need not be taken into account in calculating an equalization payment. This was explained by Davies J. in *Russell v. Russell*, 2002 BCSC 1233, [2002] B.C.J. No. 1983 (QL), at para. 107: "[A spouse] should not suffer a present diminution of [his or] her asset base in circumstances where [the other spouse] may never suffer a corresponding and quantifiable loss" (see also *Dowling v. Dowling* (1997), 43 B.C.L.R. (3d) 59 (C.A.); *Starkman v. Starkman* (1990), 75 O.R. (2d) 19 (C.A.); *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.)).

[56] Both the deduction made by the husband in his initial valuation of Brandy Farms Inc. and the one presented by his expert witness at trial reflected the high tax consequences of an immediate sale, a sale which was not contemplated at the time. In fact, the husband tendered *no* evidence as to the likelihood or date of an eventual sale. While it is true that at some point capital gains tax may become payable, in the absence of evidence from the husband of an imminent or eventual sale so as to justify *any* deduction, the trial judge's decision not to make a deduction was completely supportable.

[57] However, it is not clear that the husband's projected deduction should have been part of the package of conduct the trial judge included in his "unconscionability" finding. At trial, both

the husband's and the wife's experts made deductions for disposition costs in connection with Brandy Farms Inc. The estimated cost by the wife's expert was $252,500. The husband's expert's estimate was $601,230, almost the same amount the husband had deducted in his initial valuation. But even if it can be said that the deduction by the husband should not, in fairness, be characterized as misleading information, there remain the $233,000 in hidden cheques and the $195,000 by which the husband undervalued two additional properties, totalling almost half a million dollars.

[58] Moreover, it is worth remembering that in addition to the husband's failure to provide his wife with the information she needed to decide what bargain would best reflect their mutual intention to divide their assets equally, the trial judge also based his finding of unconscionability on the fact that the husband deliberately exploited his wife's known mental fragility.

[59] The Court of Appeal overturned these findings about exploitative conduct. It relied on *Miglin* in concluding that the wife's access in this case to professional advice and assistance cured her vulnerabilities:

> *Miglin* tells us that where vulnerabilities effectively are compensated by the availability of professional assistance of which a party does not take advantage, "the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions". (Para. 83). Although the judge correctly declined to blame the husband for the wife's failure to take advantage of available professional assistance, he did not consider the legal effect of her conduct on her vulnerability. In my view, it was an error for him not to do so and this led directly to his conclusion that the husband's acceptance of the wife's offer offended the conscience.
>
> . . .
>
> This was not a case of mental incapacity, undue influence or duress. The

> wife was a troubled woman, but it is clear that she knew what she was doing. [paras. 50 and 52]

[60] It may well be that in a particular case, professional assistance will effectively compensate for vulnerabilities. But the Court of Appeal appears to have assumed that the mere presence of professional assistance automatically neutralized vulnerabilities in this case. This interpretation does not, with respect, accord with a plain reading of para. 83 of *Miglin*, which states:

> Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions.

[61] This passage indicates that when vulnerabilities have been compensated for by the presence of professionals, the agreement should be respected. This is an important observation. Given that vulnerabilities are almost always present in these negotiations, the parties' genuine wish to finalize their arrangements should, absent psychological exploitation or misinformation, be respected. One way to help attenuate the possibility of such negotiating abuses is undoubtedly through professional assistance. But exploitation is not rendered anodyne merely because a spouse has access to professional advice. It is a question of fact in each case.

[62] In this case, the trial judge found that the wife's vulnerabilities were *not* compensated for. On the contrary, he concluded that her emotional and mental condition left

her unable to make use of the professional assistance available to her. Moreover, and significantly, he found that her mental instability was well known to her husband.

[63] The combination in this case, therefore, of misleading informational deficits and psychologically exploitative conduct led the trial judge to conclude that the resulting, significant deviation from the wife's statutory entitlement rendered the agreement unconscionable and therefore unenforceable. This conclusion is amply supported by the evidence.

[64] This makes it unnecessary to deal with the effect of the consent order since, as Osborne J.A. observed in *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (Ont. C.A.), at para. 19, "it is well established that a consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment". This approach was explained by James G. McLeod as follows:

> This rule reflects the reality 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.
>
> (Annotation to *Thomsett v. Thomsett*, 2001 BCSC 546, 16 R.F.L. (5th) 427, at pp. 428-29)

(See also *Shackleton v. Shackleton*, 1999 BCCA 704, 1 R.F.L. (5th) 459, at para. 12; *Schlenker v. Schlenker* (1999), 1 R.F.L. (5th) 436 (B.C.S.C.), at para. 21; *McGregor v. Van Tilborg*, 2003 BCSC 918, [2003] B.C.J. No. 1427 (QL), at para. 16; *T. (T.L.A.) v. T. (W.W.)*, at para. 18; *Huddersfield Banking Co. v. Henry Lister & Son, Ltd.*, [1895] 2 Ch. 273 (C.A.),

at p. 280; *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.), at pp. 165-66; Donald J. Lange, *The Doctrine of Res Judicata in Canada* (2nd ed. 2004), at p. 329; *R.L.S. v. D.C.M.*, 2002 BCSC 1794, [2002] B.C.J. No. 2890 (QL), at para. 43; and G. Peter Fraser, John W. Horn and Susan A. Griffin, *The Conduct of Civil Litigation in British Columbia* (loose-leaf), vol. 2, at p. 32-11.)

[65] The trial judge's remedy for unconscionability was to order the husband to pay the wife an amount representing the difference between the negotiated "equalization payment" and the wife's entitlement under the *Family Relations Act*.

[66] Historically, rescission was the remedy when a contract was found to be unenforceable because of unconscionability. Increasingly, however, when rescission is unavailable because restitution, as a practical matter, cannot be made, damages in the form of "equitable compensation" are imposed to provide relief to the wronged party. This is because, as the British Columbia Court of Appeal said in *Dusik v. Newton* (1985), 62 B.C.L.R. 1: "Where rescission is impossible or inappropriate, it would be inequitable for the defendant to retain the benefits of the unconscionable bargain" (p. 47).

[67] Professor John D. McCamus noted in *The Law of Contracts* (2005), at p. 403, that Canadian and other Commonwealth courts have approached the concept of "equitable compensation" with "renewed vitality" in recent years (see also J. D. McCamus, "Equitable Compensation and Restitutionary Remedies: Recent Developments" in *L.S.U.C. Special Lectures 1995: Law of Remedies* (1995), 295; *S-244 Holdings Ltd. v. Seymour Building*

Systems Ltd. (1994), 93 B.C.L.R. (2d) 34 (C.A.); *Treadwell v. Martin* (1976), 13 N.B.R. (2d) 137 (S.C.); *Paris v. Machnick* (1972), 32 D.L.R. (3d) 723 (N.S.S.C.); *Junkin v. Junkin* (1978), 20 O.R. (2d) 118 (H.C.J.); *Dusik*).

[68] Professor S. M. Waddams explained the basis for this development as follows:

> [A] rational legal system should surely permit the party complaining to receive a financial adjustment in lieu of rescission . . . .
>
> . . . The search for appropriate remedies, as for justice in other matters, requires a flexible and developing system.

(*The Law of Contracts* (5th ed. 2005), at p. 302; see also pp. 391-92; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at pp. 847-48, *per* Dickson J.)

[69] The trial judge's award in the amount of $649,680 was made as damages or, in the alternative, as a compensation order under s. 66(2)(c) of the *Family Relations Act*. Given the conclusion that damages are appropriate as equitable compensation, it is unnecessary to comment on the availability of a remedy under s. 66(2)(c) in this case.

[70] I would therefore allow the appeal with costs throughout and restore the trial judge's order.

Appeal allowed with costs.

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