IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McMillan v. McMillan,* 2015 BCSC 2177

Date: 20151126
Docket: S149961
Registry: Vancouver

Between:

Bruce Edwin McMillan

Petitioner

And

Milena Maria McMillan

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph [24] where a change was made on December 9, 2015.

Before: The Honourable Mr. Justice Punnett

On appeal from: An order of the Arbitrator, dated 28 October 2014 (*McMillan v. McMillan*, Vancouver S149961).

Reasons for Judgment

Counsel for the Petitioner:	M.L. Smith
Counsel for the Respondent:	T.L. Jackson O. Stoklosa
Place and Date of Hearing:	Vancouver, B.C. August 19-21, 2015
Place and Date of Judgment:	Vancouver, B.C. November 26, 2015

[1] This is an appeal from a family law arbitration under the *Arbitration Act,* R.S.B.C. 1996, c. 55. It relates to damages claimed by the respondent for delay by the appellant (petitioner) in the determination and payment of equalization payments under Minutes of Settlement. The appellant seeks orders that the arbitrator's award of damages and costs against him be set aside with the matter of costs in the arbitration to be referred back to the arbitrator.

Background

[2] The parties are former spouses. They separated in December 2007. The respondent commenced an action against the appellant in the British Columbia Supreme Court.

[3] The matter was set for a six-week trial before Mr. Justice Myers in 2010. After 16 days of trial and before the completion of the trial a mediation was conducted by Dinyar Marzban Q.C. resulting in a settlement agreement. It is dated June 16, 2010 and referred to by the parties and the arbitrator as the Memorandum of Settlement (the "MOS"). Pursuant to the MOS the terms of settlement were incorporated into Consent Court Orders. Any terms not so incorporated were to survive and form "a separate collateral agreement". The essence of the agreement was that the parties would share their assets equally.

[4] The MOS provisions respecting the arbitration proceeding are:

> 82. The parties shall each appoint an accountant of their choosing to work with the other party's accountant with a view to resolving the calculations for the s. 7 expenses, the property expenses and the Financial Equalization Payment as set out in these Minutes.
>
> 83. In the event the parties or their accountants cannot agree on any issue except for [the] paragraphs herein which reference "liberty to apply" the parties agree to refer the dispute to binding arbitration and appoint one of Rod Germaine, Murray Clemens, or Donald Brenner as Arbitrator.

[5] The reference to paragraphs that provided for "liberty to apply" refers to paras. 24, 40 and 68 of the MOS:

> 24. The parties shall use best efforts to immediately list 6805 Crabapple Drive with joint conduct of sale, and with a listing agent selected by the

> Parties. In the event of a disagreement, the Parties shall be at liberty to apply for further directions regarding the sale of 6805 Crabapple Drive.
>
> …
>
> 40. The Parties shall account for and share equally all reasonable expenses incurred to repair, maintain or preserve the following properties from December 13, 2007 until the date of disposal/transfer of each of the following properties, with liberty to apply if the parties are unable to agree upon the expenses:
>
> - …
> - 6805 Crabapple Drive;
> - …
>
> …
>
> 68. Either party shall be at liberty to apply with respect to the tax implications of the terms of these Minutes.

[6] When the parties signed the MOS in June of 2010 it was recognized that the Financial Equalization Payment due from the appellant to the respondent would be substantial. The MOS required the appellant to make an interim payment of $2.5 million to the respondent if the accounting process was not complete by August 1, 2010. The appellant made that payment.

[7] The relevant portions of the MOS were:

> 56. The Parties shall use their best efforts to calculate the "Financial Equalization Payment" by no later than August 1, 2010, which payment is intended to divide equally the **Advances, the Financial Assets and the Shared Liabilities** set out herein.
>
> If the parties have not agreed to the amount of the Financial Equalization Payment by August 1, 2010, then the Defendant shall pay to the Plaintiff on account of the equalization payment, $2.5 million by no later than August 1, 2010, to be adjusted upon the resolution of the amount of the Financial Equalization Payment.

[8] While completing the accounting process by August 1, 2010 was overly optimistic it is clear from the MOS that the parties did not anticipate that completing the process of calculating the Financial Equalization Payment would take a lengthy period of time and certainly not the four years that it did. Responsibility for the delay is at the root of the arbitrator's decision and this appeal.

[9] The arbitration commenced on May 27, 2014 before arbitrator Rod Germaine, however on the second day of the hearing the appellant filed an affidavit with 360 pages of source documents. The arbitration was adjourned to permit the respondent to consider the new documents. The arbitrator noted that "[t]he Claimant's May 27 materials resulted in further adjournments." Eventually the hearing concluded on August 26, 2014. The issues for determination in the arbitration were restricted to:

a) The Financial Equalization Payment;

b) Section 7 expenses to February 28, 2014;

c) Property expenses;

d) Chattels/section 29; and

e) The respondent's reimbursement claim for payments made in relation to the Crabapple mortgage.

[10] Costs in relation to the claims and issues settled by the MOS were reserved for the arbitrator to determine in conjunction with all other issues of costs. The arbitrator resolved all of the above issues. The only issues that are the subject of appeal are the reimbursement claim for payments made in relation to the Crabapple mortgage and costs.

[11] The arbitrator rendered his award on October 28, 2014. The award resolved all outstanding issues under the MOS. However, and this is the subject of this appeal, the arbitrator also awarded the respondent damages in the sum of $383,437.08 for breach of a duty of good faith by the appellant based on his failure "to do all things necessary to carry out the provisions of the MOS and by his failing to use his best efforts to calculate the FEP" [Financial Equalization Payment]. Costs and disbursements of the arbitration in the sum of $235,000 were also awarded to the respondent.

[12] The damage award was calculated with reference to paras. 25 and 28 of the MOS respecting mortgage payments made by the respondent for the period in which

the appellant was found to have failed to carry out the provisions of the MOS. The paragraphs read:

> 25. Subject to **paragraph 28**, and pending the completion of the sale of 6805 Crabapple Drive, the parties shall be equally responsible for all payments to maintain and preserve the property, including but not limited to, the mortgage, the property taxes, property insurance, utilities, water, sewer, garbage, pool repairs and maintenance, house repairs and maintenance, strata fees, gardening, telephone, internet, cable, TV, alarm, snow clearing, and agreed-upon expenses for the Whistler Keyholding Company for 6805 Crabapple Drive, with liberty to either Party to apply if the Parties are unable to agree with respect to these expenses.
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> …
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> 28. Commencing on the first day of the first month following exchange of mutual releases evidencing completion of the accounting, the Defendant shall assume and be solely responsible for the mortgage registered against 6805 Crabapple, including the monthly mortgage payments. The Defendant will pay the monthly mortgage payments and the Defendant shall save harmless and indemnify the Plaintiff with respect to that mortgage. The Defendant shall not allow the mortgage to fall into arrears. The Defendant shall provide to the Plaintiff forthwith upon assumption, a release of liability to the Plaintiff. Upon completion of the sale of 6805 Crabapple, the parties shall share equally the net sale proceeds of sale, subject to the usual adjustments on sale, capital gains tax (if any), and adjustments set out elsewhere in these Minutes and provided that the Defendant shall pay all amounts due and owing on the mortgage upon the sale of 6805 Crabapple from the Defendant's equal share of the net sale proceeds.

[13] The mortgage payments that were to be shared were approximately $20,000 per month.

[14] The parties agreed to a direction to the arbitrator that to avoid any uncertainty the arbitrator had jurisdiction to hear and decide the mortgage claim and to grant equitable remedies such as rectification "in accordance with the law".

Award

[15] The arbitrator summarized the mortgage payments issue and the resulting claim for damages as follows:

> 158 The focus of this claim is the mortgage on the parties' property at 6805 Crabapple Drive (the "Crabapple mortgage"). On June 30, 2010, the outstanding balance was $3,513,759.87. Since then, pursuant to paragraph 25 of the MOS, the parties have contributed equally to monthly payments of

$19,663.44. The Respondent claims reimbursement of her contributions to these payments since July 2010.

…

160 As indicated by the introductory words to paragraph 25, the parties agreed to sell the property. This is set out in more detail in paragraphs 23 and 24. Accordingly, the property has been listed most of the time since 2009. Further, the parties have agreed in this proceeding that publication of this Award will conclude the "completion of the accounting" referenced in paragraph 28 and dispense with the necessity for mutual releases. In other words, the Claimant agrees that he will be solely responsible for the Crabapple mortgage from the date of this Award.

Parties' positions

161 The basis of the Respondent's claim is that the Claimant has delayed the accounting processes contemplated by the MOS. The Respondent contends the Claimant thereby prevented the operation of paragraph 28 under which he must assume the mortgage. The Respondent says the Claimant has thus derived the benefit of "a significant and unintended reapportionment of the family assets in his favour". In effect, the Respondent says the Claimant should have assumed sole responsibility for the mortgage in August 2010.

162 The legal foundation of the claim is twofold: ambiguity and breach of the duty to act in good faith. With respect to the former, it is submitted that the Respondent's obligation under paragraph 25 of the MOS to contribute to the mortgage payments indefinitely is "inconsistent with and repugnant to" the dominant purpose of the MOS, which is plainly to effect an equal distribution of the parties' estate. This ambiguity, the Respondent submits, should be resolved by rejecting paragraph 25: *British Columbia (Public Trustee) v. Somers,* 1979 CarswellBC 300, [1979] 6 W.W.R. 763,15 B.C.L.R. 212 (BCCA); *Skoko v. Chychrun Construction Ltd.,* 1982 CarswellBC 616 (BCCA); *Ginter v. Sawley,* [1967] S.C.R. 452; and, *Gwilliam v. Gwilliam,* 2008 CarswellOnt 417, [2008] W.D.F.L. 1933 (OntSCJ).

163 The second argument is that the Claimant was bound by the duty to carry out his obligations in good faith, a term which is both implied and expressed in the MOS. For the implication of the term, the Respondent cites: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.,* [1978] 2 S.C.R. 1072, 85 D.L.R.(3d) 19; *CivicLife.com Inc. v. Canada (Attorney General),* 2006 CarswellOnt 3769, [2006] O.J. No. 2474 (C.A.); *Nicola Valley Lumber Co. v. Meeker* (1917), 55 S.C.R. 494, 39 D.L.R. 497; and, *BG Checo International Ltd. v. British Columbia Hydro & Power Authority,* [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577. The Respondent argues the duty is expressed in the various MOS terms committing the parties to do everything necessary to carry out the MOS and to use their "best efforts". In the submission of the Respondent, the Claimant, in breach of this duty, acted in bad faith to subvert the equal division intended by the MOS.

164 The Respondent also referenced the principles of unjust enrichment but acknowledged that any claim on this basis would be dependent on her

> ambiguity argument. The argument therefore adds nothing to the Respondent's case.
>
> 165 The Claimant's submission is that he has done nothing to delay resolution of the dispute by the accountants under paragraph 82 of the MOS or determination of the dispute by arbitration under paragraph 83. The Claimant says, in fact, it was the Respondent who caused delay and breached the MOS by declining to appoint an accountant in accordance with paragraph 82, by giving incorrect instructions to her accountant when she finally engaged one, and by making an application to the BCSC in 2013 in contravention of paragraph 83. The Claimant says, further, that Ms. Shearer's initial accounting generated unrealistic demands which rendered meaningful discussion impossible.
>
> 166 The Claimant submits the Respondent's case is actually a request that paragraphs 25 and 28 be rewritten on the ground that they are unfair to the Respondent. The Claimant argues that rectification is not available to correct an error belatedly recognized by a party: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,* [2002] 1 S.C.R. 678. It is submitted the Respondent's subjective intentions are irrelevant and inadmissible: *Elkiw v. Harris,* 1990 CanLII 821 (BCCA). The Claimant adds that, since the MOS was incorporated into court orders which were not appealed, it cannot be modified in any event by reason of the doctrine of *res judicata*.
>
> 167 In the submission of the Claimant, there is no ambiguity in paragraphs 25 and 28 of the MOS. On the contrary, the clearly enunciated obligations in those provisions are capable of only one meaning and it is not inconsistent with any other term of the MOS. Further, the overall context of the MOS must not be construed to contradict the plain meaning of these terms*: Palmar Properties Inc. v. JEL Investments Ltd.*, 2014 BCCA 169.
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> 168 Finally, the Claimant submits the Respondent seeks to imply a term which does not meet the test of necessity: *Canadian Pacific Hotels Ltd. v. Bank of Montreal,* [1987] 1 S.C.R. 711; *Alpine Veneers Ltd. v. Reed Lumber Co.,* 1983 CarswellBC 845 (BCCA), [1983] B.C.J. No. 2289; *Trollope & Calls Ltd. v. North West Metropolitan Regional Hospital Board,* [1973] 2 All E.R. 260 (HL).
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> [Emphasis added.]

[16] The arbitrator made detailed factual findings. Given the grounds for appeal and their reliance on the interpretation of the facts it is necessary to quote those factual findings in full, despite their length. The adjudicator recognized that as well in his introduction to the facts:

> 169 The relevant facts are the chronology of the events related to the implementation of the MOS processes for equalization of expenses and calculation of the FEP. Both parties made extensive submissions in this regard, supported by detailed and elaborate written chronologies of the events from 2010 to 2014. There is little or no dispute over these facts. Regrettably, it is impossible to summarize them succinctly.

- June 16, 2010: The parties entered into the MOS.
- July 29, 2010: Counsel for the Respondent delivered a letter to counsel for the Claimant by courier, together with supporting documents required for the equalization of expenses and calculation of the FEP. The documents included copies of the statements of the accounts retained by the Respondent pursuant to paragraph 49 of the MOS, showing account balances as of June 30, 2010, as well as lists of the Respondent's property and section 7 expenses, supported by copies of source documents carefully organized and summarized for convenient reference. The letter advised the Claimant's list of expenses had not yet been received and confirmed counsel's understanding that, as the FEP would not be concluded by August 1, 2010, the Claimant had arranged to make the $2.5 million payment required by paragraph 56.
- August 4, 2010: Counsel for the Claimant faxed a letter to counsel for the Respondent to confirm the $2.5 million payment had been made, and to advise: "We are in the process of having a financial equalization calculation prepared and will provide an accounting of s. 7 and property expenses once we are in receipt of same, which we expect to arrive shortly". The Respondent relies on the fact that no FEP calculation on behalf of the Claimant was received until 2014.
- August 31 and September 10, 2010: Counsel for the Claimant wrote to counsel for the Respondent to request the name of the accountant appointed by the Respondent.
- September 16, 2010: Counsel for the Respondent delivered a letter to counsel for the Claimant by courier, questioning the need to incur the expense of accountants, and suggesting the Claimant could present his accounting in the manner the Respondent had on July 29. The letter also requested the Claimant's expense accounting and June 30, 2010 statements for the accounts retained by the Claimant under paragraph 50 of the MOS. The Respondent relies on the fact that the Claimant's June 30, 2010 account statements were not produced until February 2012.
- September 21, 2010: Counsel for the Claimant wrote to counsel for the Respondent, reviewing MOS terms, and complaining that the Respondent had still not identified her accountant. The letter referred to "the accounting of your client's s. 7 and property expenses

provided (you say approximately six weeks ago)", and requested confirmation that this was the extent of the Respondent's accounting. The letter also committed the Claimant to delivering the account statements requested by the Respondent: "… we will provide you with a copy of the June 30, 2010 statements so that the financial equalization payment can be calculated". The Respondent relies on this acknowledgement that the FEP could not be calculated until the Claimant's June 30, 2010 account statements were produced.

- September 23, 2010: Counsel for the Respondent wrote to counsel for the Claimant to advise that the Respondent had appointed Ms. Shearer. The letter reiterated the request for the Claimant's expense accounting, supporting documents and account statements, and suggested it would be "wasting money" for the accountants to meet before Ms. Shearer had this information.
- September 27, 2010: Mr. Cender delivered two binders of materials to Ms. Shearer. The binders contained spreadsheets and source documents regarding the Claimant's property and section 7 expenses.
- November 9, 2010: Counsel for the Respondent faxed a letter to counsel for the Claimant to repeat the request for account statements and to respond to Mr. Cender's accounting of the Claimant's expenses. The letter gave reasons why some categories of these expense claims were not accepted. It asserted that other claims were not adequately documented. It also complained that the Claimant was taking advantage of paragraph 28 of the MOS by obstructing calculation of the FEP.
- December 3, 2010: Counsel for the Claimant wrote to counsel for the Respondent to inquire about "the status of the reconciliation of the expenses for the purpose of equalization". The letter stated that Mr. Cender had not heard from Ms. Shearer. The letter made no reference to the letters of July 29 or November 9.
- December 7, 2010: Counsel for the Respondent replied to the letter of December 3, 2010 with a short letter enclosing counsel's letter of November 9.
- May 25, 2011: Counsel for the Respondent wrote to counsel for the Claimant with a summary of the Respondent's section 7 expenses from June 30, 2010 to the date of the letter, together with a summary and supporting documentation. The letter advised that, in the absence of any response to the letter of November

9, 2010, counsel for the Respondent intended to commence arbitration "forthwith".

- June 29, 2011: Counsel for the Claimant wrote to counsel for the Respondent in reply to the letters of November 9, 2010 and May 25, 2011. The letter asserted that arbitration was premature, and referred to the parties' agreement that their accountants would endeavour to agree on equalization of expenses. The letter advised that counsel's letter of November 9, 2010 had been forwarded to Mr. Cender "for him to follow up with Ms. Shearer" but complained that Mr. Cender had not heard from Ms. Shearer. The letter asserted it was "now up to your client's accountant" to respond to Mr. Cender's September 27, 2010 accounting.
- June 29, 2011: Counsel for the Claimant wrote a second letter to counsel for the Respondent to respond to the May 25, 2011 accounting of section 7 expenses after June 30, 2010. Contrary to the Claimant's insistence that the accountants deal with accounting differences, the letter disputed certain of the Respondent's claims. It rejected health and dental expenses covered by medical insurance. The letter also provided a schedule of the Claimant's section 7 expenses for the same period and enclosed the CIBC money order in the amount of $2,253.14 in favour of the Respondent for the net amount which the Claimant had calculated was due.
- September 19, 2011: Mr. Cender wrote to Ms. Shearer to observe that his letter of September 27, 2010 (which was accompanied by his binders) "remains outstanding", and to ask "if there is any update on this matter". The letter made no reference to the letters from counsel for the Respondent dated July 29 and November 9, 2010.
- October 3, 2011: Ms. Shearer wrote to Mr. Cender in reply to his September 19 letter to advise that she was "awaiting a response" from counsel for the Respondent.
- November 29, 2011: Counsel for the Respondent wrote to Ms. Shearer to instruct her to "work with Mr. Cender" to settle the FEP and equalization of expenses. The letter was accompanied by the relevant materials.
- December 15, 2011: Ms. Shearer and Mr. Cender met for the first time. It was agreed that Ms. Shearer would produce a first draft of the FEP calculation, as well as the Respondent's expenses accounting in response to Mr. Cender's September 2010 accounting of the Claimant's expenses. Ms. Shearer informed

Mr. Cender that she still did not have the Claimant's June 30, 2010 account statements, without which the FEP could not be calculated.

- January 26, 2012: Mr. Cender emailed Ms. Shearer to say that counsel for the Claimant was surprised that counsel for the Respondent did not have copies of the Claimant's June 30, 2010 account statements, and to request Ms. Shearer to specify the accounts for which she required statements.
- January 27, 2012: Ms. Shearer emailed Mr. Cender, identifying the Claimant's June 30, 2010 account statements required "in order to finalize" the FEP. In the same email, she informed Mr. Cender that she would be revising the Respondent's response to the Claimant's expense claims, and would provide a list of the claims to which the Respondent objected within two weeks.
- February 10, 2012: Counsel for the Respondent faxed a letter to counsel for the Claimant to relate that Ms. Shearer had advised the FEP should be finalized by the end of the month and to put the Claimant on notice that if it was not settled by March 1, 2012, the Respondent would proceed to arbitration "forthwith".
- February 13, 2012: Ms. Shearer and Mr. Cender met. Mr. Cender gave Ms. Shearer most of the Claimant's June 30, 2010 account statements. Ms. Shearer presented Mr. Cender with her accounting of the Respondent's expense claims and a preliminary FEP calculation, based on the incomplete information available to her at that time. Mr. Cender agreed to review Ms. Shearer's accounting. The Respondent relies on the fact that no such review was received from Mr. Cender until 2014.
- February 17, 18 and 20, 2012: Ms. Shearer presented Mr. Cender with the following: first, her accounting of the Claimant's expense claims, including explanatory notes to indicate why certain claims were not accepted; second, a reformatted accounting of the Respondent's expense claims; and, third, the supporting documentation for the Respondent's expense claims.
- February 28, 2012: Counsel for the Respondent wrote to counsel for the Claimant, agreeing to extend the time for settling the FEP to March 9, 2012. In the event the FEP was not resolved by that date, the letter proposed an arbitrator not named in the MOS.
- February 28, 2012: Ms. Shearer emailed Mr. Cender to inquire whether he had reviewed her expense

accounting, and was informed that Mr. Cender's office was "still working on it" and that she would be informed when a "list of questions/items needed" had been compiled. Mr. Cender emailed Ms. Shearer to say his office "had only just begun" its accounting. He also asserted the process could have been started "a year and a half ago". The Respondent relies on the fact that no further accounting was received from Mr. Cender until 2014.

- February 29, 2012: Ms. Shearer emailed Mr. Cender a revised FEP calculation, incorporating information that the balance in one of the Claimant's accounts on 30 June 2010 was $7.5 million. The email indicated she had yet to receive the June 30, 2010 statements for two of the Claimant's accounts.
- March 1, 2012: Counsel for the Claimant wrote to counsel for the Respondent in reply to the letter of February 28, asserting that Mr. Cender had been waiting on Ms. Shearer for months: "Mr. Cender tells me that he completed his work months ago, and has been awaiting your Ms. Shearer". The letter suggested that the accountants be given the opportunity to resolve the accounting. The letter also addressed the Respondent's threat to arbitrate: "Please advise how you are going to get to arbitration ... without agreement: (a) as to arbitrator; and (b) as to dates".
- March 9, 2012: Ms. Shearer and Mr. Cender met and discussed the appropriate treatment of the Crabapple mortgage.
- March 12, 2012: Ms. Shearer consulted counsel for the Respondent and presented Mr. Cender with a revised FEP calculation.
- March 29, 2012: Counsel for the Claimant wrote to counsel for the Respondent, asserting that nothing "of any substance" had occurred since Mr. Cender delivered his materials in September 2010. The letter stated that, as the accountants could not agree, the arbitrator proposed by the Respondent had been contacted and he had agreed to accept appointment. The letter requested counsel's available dates so arrangements could be made for the hearing. The letter concluded by giving notice that, if counsel for the Respondent did not reply, counsel for the Claimant would seek directions from the BCSC. The Claimant relies on the fact Counsel for the Respondent did not acknowledge or reply to this letter.
- May and June 2012: Ms. Shearer's work schedule is curtailed by health issues.

- June 2012: Counsel for the Respondent informed Ms. Shearer that counsel's previous position regarding the Crabapple mortgage was not correct.
- July 10, 2012: Ms. Shearer advised Mr. Cender by telephone of her corrected instructions and her intention to forward a revised FEP calculation. Ms. Shearer has averred that Mr. Cender disclosed he had been instructed in April 2012 to stop working on the file.
- July 27, 2012: Ms. Shearer spoke with Mr. Cender by telephone and was informed he had not been instructed to start work on the file again.
- August 9, 2012: Ms. Shearer and Mr. Cender spoke by telephone. He advised that he was back at work on the file, requested the updated FEP calculation and said he would send Ms. Shearer source documents in support of the Claimant's expense claims. Ms. Shearer forwarded her updated FEP calculation to Mr. Cender. The Respondent relies on the fact that no further source documents were received from the Claimant until 2014.
- September 14, 2012: Earlier meetings having been cancelled due to Ms. Shearer's health, she and Mr. Cender spoke on the telephone. Mr. Cender informed Ms. Shearer he was not authorized to work on the file.
- September 17, 2012: Ms. Shearer delivered to counsel for the Respondent her accounting of section 7 and property expenses, and the revised FEP calculation, incorporating information received from Mr. Cender on March 9, 2012, together with a summary of all three equalization calculations in a format not previously provided.
- December 6, 2012: Counsel for the Respondent delivered a letter to counsel for the Claimant in which counsel reported Ms. Shearer's information that the Claimant had instructed Mr. Cender to stop working on the file. The letter also summarized and forwarded Ms. Shearer's comprehensive accounting received in September 2012. The letter requested a response by December 14, 2012 and advised that, upon review of the response, counsel would advise whether "it will be necessary to proceed to court for a resolution".
- December 14, 2012: Mr. Cender wrote to Ms. Shearer, advising that he had received counsel for the Respondent's December 6, 2012 letter and materials. In the letter, Mr. Cender said that, "To clarify, the

communication with you regarding ceasing discussions was not to disengage completely". He explained the Claimant "was not interested in spending money … to chase around figures that were so radically skewed". The letter stated that Ms. Shearer's last FEP calculation "before our conversation showed a discrepancy between the parties of approximately $4M" but the "revised schedules are a step in the right direction" and his office had "started to prepare a detailed response and once complete will forward to you for review and discussion".

- January 25, 2013: Mr. Cender wrote to Ms. Shearer regarding the assets to be referenced in the calculation of the FEP.
- January 30, 2013: Ms. Shearer wrote to Mr. Cender, explaining her view of the assets to be referenced in the FEP calculation and suggesting the matter should be settled between counsel.
- October 9, 2013: The Respondent applied to the BCSC for relief in connection with the MOS. The application was stayed on January 9, 2014.
- November 25, 2013: Ms. Shearer emailed Mr. Cender to advise that she had not been involved since her letter of January 30, 2013 and she was not instructed to meet to continue reviewing differences.
- January 27, 2014: The Claimant initiates this proceeding by issuing the Arbitration Notice.
- March 28, 2014: The Claimant's first submission in this proceeding -- his Statement of Claim, supported by his first Affidavit and Mr. Cender's first Affidavit -- was delivered. Mr. Cender's first Affidavit contained an accounting of section 7 and property expenses, and a calculation of the FEP. The Respondent relies on the fact that this was the first accounting presented by or on behalf of the Claimant since Mr. Cender'[s] two binders on September 27, 2010.
- April 30, 2014: The Respondent's reply included Ms. Shearer's Affidavit # 1, in which she proposed specific treatment of three matters bearing on the calculation of the FEP. One proposal was to treat the June 30, 2010 balance of the Crabapple mortgage as a Claimant liability, thus setting aside the issue for determination here. The Claimant's agreement to these proposals settled the amount of the FEP at $432,707.44.

- May 27, 2014: The Claimant submits materials which include source documents related to property expenses.

[17] The arbitrator concluded:

> 215 … I find the Claimant breached the MOS by refusing to do all things necessary to carry out the provisions of the MOS and by failing to use his best efforts to calculate the FEP. In addition, on my view that the MOS includes an implied term imposing a duty to act in good faith, the Claimant also breached the MOS by not acting in good faith to achieve the equalization objectives of the MOS. Further, the fact the Claimant was the party who initiated these proceedings in 2014 does not alter the nature and effect of his conduct from 2010 to 2013.

[18] He then turned to the issue of damages:

> 216 Turning now to the remedy for this breach, I am not persuaded it is compensation for the Respondent's contribution to the mortgage payments since August 2010. The relevant law was succinctly stated in *CivicLife.com* at paragraph 26: "[t]he general principle governing the award of damages for breach of contract is that the complaining party should, insofar as can be done by money, be placed in the same position as if the contract had been performed". The question, then, is whether the parties would have progressed to the point that paragraph 28 would have been triggered by August 1, 2010. The trigger language in the provision, it will be recalled, is: "Commencing on the first day of the month following exchange of mutual releases evidencing completion of the accounting", the Claimant will assume exclusive responsibility for the mortgage.
>
> 217 It is clear the parties were not going to resolve all of the equalization processes in the MOS and related differences by July 31, 2010. The letter of July 29, 2010 from counsel for the Respondent acknowledged as much. The Claimant was therefore never in danger of being responsible for the mortgage from August 1, 2010.
>
> 218 The further analysis is necessarily speculative to a degree. But I am satisfied that, even with both parties doing all things, using their best efforts and acting in good faith, it would have taken several weeks and perhaps a few months for the Respondent to accept that the Claimant was entitled to insist on the engagement of accountants so that the paragraph 82 process could be followed. It is also unlikely the parties, even with the utmost of good faith, would have been able to resolve all of the issues by agreement. The FEP probably could have been calculated and the expense claims would have been smaller. But the issues surrounding basic child support and section 7 expenses would not have been any less divisive. Given the parties' propensity for conflict in these areas in particular, I am persuaded some form of third-party dispute resolution would have been needed to conclude all of the accounting. I conclude that, had the MOS been performed by the parties in the manner intended, it is likely that it would have taken about a year to

> trigger paragraph 28. Accordingly, the Respondent is entitled to be compensated for the loss she has incurred since August 1, 2011.
>
> 219 To place the Respondent in the position she would have been had the Claimant performed his contractual responsibilities, the damages must compensate her for the continuing monthly loss until and including October 2014. The total is 39 months at $9,831.72 per month or **$383,437.08**, which I hereby award with interest pursuant to the *Court Order Interest Act,* RSBC 1996, c. 79. Pursuant to the parties' agreement that the Claimant shall assume sole responsibility for the mortgage upon publication of this Award, the payment due in November 2014 and all subsequent payments shall be paid in full by the Claimant.

Law

Review of Arbitration Award

[19] This petition raises for the first time for consideration by this Court the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*], and its arbitral provisions along with the corresponding amendments to the *Arbitration Act*.

[20] In *Boxer Capital Corporation v. JEL Investments Ltd.,* 2015 BCCA 24, the British Columbia Court of Appeal recently considered the role of the court when considering an appeal from a commercial arbitration award. Bauman, C.J.B.C. addressed that role in the introduction as follows:

> [3] Commercial Arbitration is intended to provide a speedy and, in the vast majority of cases, final determination of the issue or issues between the parties. The issues between the sophisticated commercial parties in the present case are not terribly complex. They involve the construction of a joint venture agreement. Yet I count two separate arbitrations and nine judicial proceedings to date in this saga. Surely that procedural history is inconsistent with the objectives of commercial arbitration.
>
> [4] This appeal serves as a reminder of the importance of judicial restraint in the review of arbitral awards, at least in the commercial context. When sitting on appeal from an arbitral award, a court's jurisdiction is narrow. The inquiry differs fundamentally from a trial, and even from a judicial review of an administrative decision.
>
> [5] The applicable legislation is the *Arbitration Act*, R.S.B.C. 1996, c. 55 (known as the *Commercial Arbitration Act* until March 2013). Section 31(1) provides that a party may appeal an arbitral award to the Supreme Court on a question of law if all the parties consent or the court grants leave. Leave "may" be granted if the court determines that (s. 31(2)):
>
> > (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the

determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

[6] Parties are afforded such narrow scope to appeal arbitral awards because arbitration is intended to be "an *alternate* dispute mechanism" rather than "one more layer of litigation" (*BCIT (Student Association) v. BCIT*, 2000 BCCA 496 at para. 14, *per* Madam Justice Saunders, emphasis added).

[7] This was recently confirmed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, a decision released shortly after the appellant filed its factum in this appeal. In *Sattva*, Mr. Justice Rothstein for the Court observed that an appeal from an arbitral award "takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal" (at para. 104). In general, parties *choose* to submit their dispute to arbitration; they also choose the number and identity of their arbitrator or arbitrators. This means that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, "is not entirely applicable" to appeals from arbitral awards (*ibid.*). For example, while the *Dunsmuir* framework merely affords deference to an administrative tribunal's factual findings, the *Arbitration Act* "*forbids* review of an arbitrator's factual findings" (*ibid.*, emphasis added).

[8] Like the present appeal, *Sattva* dealt with an issue of contractual interpretation. Mr. Justice Rothstein explained that in most cases, issues of contractual interpretation will be important only to the parties themselves, and will not have a broader impact (at para. 51). However, the role of appellate courts (including the B.C. Supreme Court, when sitting on appeal from an arbitral award) is generally not to provide "a new forum for parties to continue their private litigation" but rather to ensure "the consistency of the law" and decide legal issues of public importance (*ibid.*). Accordingly, "our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application" (at para. 52). In sum, "the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings ... weigh in favour of deference to [arbitrators] on points of contractual interpretation" (*ibid.*).

[9] *Sattva* held that questions of contractual interpretation should almost always be regarded as questions of mixed fact and law (at para. 50). (Historically they were seen as questions of law.) This means that, after *Sattva*, leave will rarely be granted to appeal an arbitral award on a question of contractual interpretation. (If *Sattva* had been decided earlier, leave arguably would not have been granted to appeal the parties' initial arbitral award and this lengthy saga would have been avoided.)

[10] When leave is granted to appeal an arbitral award, the reviewing court is bound by the arbitrator's factual findings (*Sattva* at para. 104). The normal "palpable and overriding error" standard does not apply; the arbitrator's factual findings simply cannot be disturbed. The standard of review on the

> question of law under appeal will "almost always" be reasonableness (at para. 75). Here the *Dunsmuir* framework does apply (at para. 106), so the standard would be correctness if, for example, the question was both centrally important to the legal system as a whole and outside the arbitrator's area of expertise (see *Dunsmuir* at para. 60; *Toronto (City) v. C.U.P.E.*, 2003 SCC 63 at para. 6).
>
> [11] Finally, when leave is granted to appeal an arbitral award, it is important for the reviewing court to strictly honour the boundaries of the question or questions of law on which leave was granted. The appeal is not one at large. The reviewing court must constantly remind itself of the narrow question or questions before it, lest it improperly expand its search for error into areas that go beyond those questions, let alone areas that go beyond the scope of the dispute referred by the parties to the arbitrator. …

[21] The *FLA* introduced provisions that directly addressed in family matters arbitration under the *Arbitration Act*. This is consistent with the *FLA's* emphasis on promoting non-court dispute resolution. Amendments were also made to the *Arbitration Act*.

[22] The *FLA* provisions relating to arbitration and relevant to this appeal are:

Part 1 -- Interpretation

1 …

…

"family dispute resolution" means a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues outside court, and includes

…

(c) mediation, arbitration, collaborative family law and other processes, and

…

"family dispute resolution professional" means any of the following:

…

(e) an arbitrator conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations;

…

…

Part 2 -- Resolution of Family Law Disputes

Division 1 -- Resolution Out of Court Preferred

4 The purposes of this Part are as follows:

(a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;

(b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;

…

…

6 (1) Subject to this Act, 2 or more persons may make an agreement

(a) to resolve a family law dispute, or

(b) respecting

(i) a matter that may be the subject of a family law dispute in the future,

(ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or

(iii) the implementation of an agreement or order.

…

(3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.

…

[23] The relevant *Arbitration Act* amendments and related provisions are:

Definitions

1 …

…

“dispute" includes a family law dispute;

"family law dispute" has the same meaning as in the *Family Law Act*.

Application of Act

2 (1) Subject to subsection (4), this Act applies to the following:

…

(b) an arbitration under an enactment that refers to this Act, except insofar as this Act is inconsistent with the enactment regulating the arbitration, or with any rules or procedure authorized or recognized by that enactment;

…

(2) A provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce* ***Act*** **Canada**) or the *Family Law Act* has no effect.

(2.1) In relation to an arbitration respecting a family law dispute,

(a) in the event of a conflict between the *Family Law Act* and this Act, the *Family Law Act* prevails, and

…

…

Arbitration agreement respecting family law dispute

2.1 (1) Subject to subsection (2),

(a) an arbitration agreement respecting a family law dispute may be made only after the dispute to be arbitrated has arisen, and

(b) if the requirement under paragraph (a) is not met, the arbitration agreement and any arbitration award arising from it are not enforceable.

(2) Subsection (1) does not apply in relation to

(a) an agreement described in section 6 (b) of the *Family Law Act*,

(b) an order under the *Family Law Act*, or

(c) an award under this Act

that provides for arbitration of a future dispute respecting a matter provided for in the agreement, order or award.

(3) An arbitration agreement respecting a family law dispute, and an award arising from a family law dispute, may be set aside or replaced by the court under the *Family Law Act* if the court is satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need or distress;

(b) a party did not understand the nature or consequences of the agreement;

(c) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) A court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the arbitration agreement with an order that is substantially different from the terms set out in the arbitration agreement.

…

Enforcement of an award

29 (1) With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

(2) Despite subsection (1), leave of the court is not required if the award is in respect of a family law dispute.

Court may set aside award

30 (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may

(a) set aside the award, or

(b) remit the award to the arbitrator for reconsideration.

(2) The court may refuse to set aside an award on the grounds of arbitral error if

(a) the error consists of a defect in form or a technical irregularity, and

(b) the refusal would not constitute a substantial wrong or miscarriage of justice.

(3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

(4) Nothing in this section restricts or prevents a court from changing, suspending or terminating all or part of an award, in respect of a family law dispute, for any reason for which an order could be changed, suspended or terminated under the *Family Law Act*.

Appeal to the court

31 (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.

(3.1) A party to an arbitration in respect of a family law dispute may appeal to the court on any question of law, or on any question of mixed law and fact, arising out of the award.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Extent of judicial intervention

32 Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

Applicable Test on Appeal

[24] The *Arbitration Act* permits the appeal of family law arbitration awards on a question of law or mixed fact and law. Leave to appeal an arbitration award in a family law matter is not required (s. 31(3.1)). In addition as is the case with an appeal of a lower court decision the court hearing the appeal of a family law arbitration award is to apply the *FLA*. Indeed the *FLA* prevails if there is a conflict with the *Arbitration Act*.

[25] It is also clear that an arbitration agreement itself can be set aside taking into account the factors noted in s. 2.1(3) above.

[26] In my opinion the fact that a family arbitration agreement can apply to arbitration of a future dispute respecting a matter provided for in the agreement,

order or award recognizes the intention of the legislature to encourage out of court resolution not only at the time of the agreement but thereafter.

[27] Unlike an appeal of a commercial arbitration award the appeal of a family law arbitration award is not restricted to providing relief on appeal only if the arbitrator made an error of law. Relief is available on a question of law or on a question of mixed fact and law (s. 31 (3.1)). Questions of law "are questions about what the correct legal test is" (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at para. 49, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 [*Southam Inc.*] at para. 35). Questions of mixed fact and law are defined as "applying a legal standard to a set of facts" (*Sattva* at para. 49 citing *Housen v. Nikolaisen*, 2002 SCC 33 at para. 26 and *Southam Inc.* at para. 35).

[28] As the issue of interpretation of the MOS is relevant on this appeal *Sattva* is also of assistance. The Court in *Sattva* determined that the historical approach of treating all issues of contract interpretation as questions of law was no longer correct saying at para. 50:

> [50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[29] While it is possible to identify extricable questions of law from a broader question of mixed fact and law, the courts should be cautious about doing so. (*Sattva* at paras. 53-54).

[30] As a result both questions of law and questions of mixed fact and law are potentially alive on this appeal.

[31] I turn next to the standard of review.

Standard of Review

[32] As this is a case of first instance (a family law arbitration under the amended *Arbitration Act)* I will first consider the appropriate standard of review.

[33] On appeal the standard of review depends on what body is being appealed from and the type of alleged error being appealed. Different standards of review for example apply depending on whether the decision appealed from is that of an administrative tribunal, an arbitrator or a judicial body.

[34] This is of course an appeal from an arbitrator. While the *Arbitration Act* only permits appeals from commercial arbitration decisions on errors of law as noted earlier section 31(3.1) of the *Arbitration Act*, added upon the enactment of the new *FLA* in March 2013, now permits appeals from family arbitrations on errors of law and on errors of mixed fact and law.

[35] The appellant submits that an appeal from an arbitrator's award in a family law arbitration applies the same standard of review as an appeal from a lower court. The respondent disputes that noting that an appeal from a lower court is subject to the correctness standard while an appeal from an arbitrator is subject to the reasonableness standard. That is, if there is a question of law that is not of central importance and does not involve a constitutional issue or there is a question of mixed fact and law then the standard of reasonableness requires that a high level of deference is given to the decision maker. (*Sattfa*, *Dunsmuir v. New Brunswick*, 2008 SCC 9). In *Dunsmuir* the Court described reasonableness as follows:

> [47] … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable out comes which are defensible in respect of the facts and law.

[36] The respondent submits that the greater deference granted to an arbitrator is in keeping with the jurisprudence that highlights the fact that the parties to arbitration select the process and select the arbitrator.

Discussion of Standard of Review

[37] In *Western Forest Products Inc. v. Hayes Forest Services Limited,* 2009 BCCA 316, the British Columbia Court of Appeal summarized the Supreme Court of Canada's approach to determining the appropriate standard of review as follows:

> [34] At para. 62, the majority in *Dunsmuir* provided a two-step path for determining the appropriate standard of review: (1) ascertain whether the jurisprudence has satisfactorily determined the degree of deference to be applied to this type of question, and (2) if the jurisprudence has not done so, determine what standard is appropriate in light of the factors they set down at para. 55:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard *(Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[38] In *Sattva* the Supreme Court of Canada held that in most cases commercial arbitration awards governed by the *Arbitration Act* will be subject to review under the reasonableness standard:

> [104] Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

> [105] Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.
>
> [106] *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

[39] I note that the *FLA* and its regulations set out specific requirements or expertise for arbitrators on family law arbitrations. This invites a greater degree of deference.

[40] In addition the *FLA* clearly anticipates family arbitrations to be part of the alternate dispute mechanism as opposed to one more layer of litigation. The amended *Arbitration Act* remains intact except for the specific family law amendments. As a result the existing jurisprudence remains relevant subject to considerations raised by the family law amendments.

[41] The appellant suggests that if the rights of appeal were as restrictive as in the case of commercial arbitration awards that would discourage the use of arbitration. The respondent submits that the finality of arbitration is what encourages the use of arbitration. I am inclined to agree with the respondent in that respect. Finality is important, particularly in the family law context where emotional considerations often predominate over objective and reasoned positions in such litigation.

[42] It cannot have been intended that previous jurisprudence and interpretation of the *Arbitration Act* is to be ignored. If that were the case presumably a “Family Arbitration Act” providing a clean slate would have been enacted. By incorporating family arbitrations into the *Arbitration Act* surely the intention was to retain the benefits of arbitration. Those benefits include not only the presumed savings in legal fees by avoiding a full trial but the aftermath of arbitration as well, including any appeal. To be otherwise would undermine the whole purpose of alternate dispute resolution, one of which is finality. As noted it should not simply be one more step in the litigation process.

[43] If the appeal questions are characterized as questions of fact is there a review at all? The amendments to the *Arbitration Act* amend s. 31 of the *Arbitration Act* to provide that while a commercial arbitration decision may be appealed on a question of law with leave a family arbitration may be appealed on a question of law or a question of mixed law and fact without leave. In *Sattva* the Supreme Court of Canada noted at para. 104 that the *Arbitration Act* “forbids review of an arbitrator’s factual findings”.

[44] A review on a question of mixed fact and law does not permit review of the arbitrator’s factual findings. Rather it permits a review of mixed fact and law on the standard of reasonableness, not correctness.

[45] With the above in mind I turn to the grounds of appeal.

Grounds of Appeal

[46] The appellant advances five grounds of appeal:

a) Ground 1: The arbitrator failed to follow the rule of contract law that damages cannot be recovered in respect of any part of a loss that could have been avoided by taking reasonable action.

b) Ground 2: The arbitrator failed to follow the rule of causation in contract law.

c) Ground 3: The arbitrator failed to construe the MOS as a whole.

d) Ground 4: The arbitrator impermissibly rectified the contract to override the provisions of paragraph 25 of the MOS.

e) Ground 5: The decision of the arbitrator was patently unreasonable.

[47] The respondent submits that the appellant has mischaracterized the questions on this appeal as questions of law in order to decrease the level of deference to be given. If they are questions of fact she submits there is no review and if questions of mixed fact and law then the standard is reasonableness.

[48] In my view each of these grounds is a question of mixed fact and law of limited interest or importance to anyone other than the parties. As a result the proper standard of review in each case is reasonableness. I say this because:

a) the parties agreed to arbitration and to the arbitrator who they presumably accepted as qualified to conduct the arbitration;

b) they assigned to the arbitrator the issues to be resolved as a matter of contractual interpretation;

c) if a question is one of law then under the *Arbitration Act* the standard of review is reasonableness unless the question is one that attracts the correctness standard;

d) none of the questions characterized by the appellant as errors of law fall within categories of importance to the legal system as a whole;

e) the questions raised in any event relate to the interpretation of the specific Minutes of Settlement;

f) the errors claimed and appealed from do not contain any constitutional questions or deal with jurisdictional questions between two or more competing administrative tribunals; and

g) none of the errors alleged rise to the level of a true question of jurisdiction or *vires* as defined in *Dunsmuir* at para. 59.

[49] Before proceeding to consider the grounds of appeal on the standard of reasonableness I turn first to how a reasonableness review is conducted. Assistance is found in *Dunsmuir*, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 and *Sattva*.

[50] In *Dunsmuir* the Court said this:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 286 (quoted with approval in *Baker*, [1999] 2 S.C.R. 817 at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, [2003] 1 S.C.R. 247 at para. 49).

> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
>
> [Emphasis added]

[51] Also, Mr. Justice Bastarache noted in *Dunsmuir* at para. 53:

> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically … We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[52] In *Newfoundland and Labrador Nurses' Union* the Court considered these passages from *Dunsmuir* as follows:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at [pp.] 12:5330 and 12:5510). It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> …
>
> [18] Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221 , explained in reasons upheld by this Court (2011 SCC 57, [2011] 3 S.C.R. 572,) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum -- the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[53] These comments however must be read in the context of an appeal from the finding of an arbitrator as opposed to a judicial review of an administrative tribunal. As noted earlier, under the *Arbitration Act* the findings of fact of the arbitrator are not open to review by the court.

[54] As a result in considering this appeal it is not open to the court to substitute its own findings of fact for those of the arbitrator. In considering any questions of mixed fact and law and whether the arbitrator applied a particular legal standard or test it is to the facts as he found them. In doing so the court must consider whether the arbitrator's conclusions fall within an acceptable range with due deference to the arbitrator's reasoning.

[55] I will now deal with each ground of appeal.

Ground 1: The arbitrator failed to follow the rule of contract law that damages cannot be recovered in respect of any part of a loss that could have been avoided by taking reasonable action.

[56] This ground of appeal is raises the issue of mitigation.

Law on Mitigation

[57] Waddams, S.M. *The Law of Damages*, loose-leaf ed. Toronto: Canada Law Book (updated October 2004, release 13) at para. 15.70 sets out the rule in contract law that there is a duty to mitigate:

> A plaintiff is not entitled to recover compensation for loss that could, by taking reasonable action, have been avoided. This rule rests partly on the principle of causation: losses that could reasonably have been avoided are caused by the plaintiff's inaction rather than by the defendant's wrong and partly on a policy of avoiding economic waste.

[58] This statement was endorsed by the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at para. 97.

[59] The issue of reasonable steps being taken to mitigate was considered by the Supreme Court of Canada in *Engel v. Salyn*, [1993] 1 S.C.R. 306. What is a reasonable effort to mitigation is a question of fact not law. As the Court noted at para. 29 the burden of proving mitigation is on the appellant. Professor Fridman, in his text *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Canada Limited, 2006) at 731 describes this as a heavy burden.

[60] The appellant submits that the respondent could have avoided the 39 months of claimed damages by going to arbitration in November of 2010 when it was clear the negotiation process was not working. He submits she was required to do so by para. 83 of the MOS and failed to do so. Paragraph 83 (which I repeat for convenience) provides:

> 83. In the event the parties or their accountants cannot agree on any issue except for paragraphs herein which reference "**liberty to apply**" the parties agree to refer the dispute to binding arbitration and appoint one of Rod Germaine, Murray Clemens, or Donald Brenner as Arbitrator.

[61] The appellant also submits that the respondent frustrated the arbitration process by refusing to engage in that process in February 2012 when requested to do so by the appellant. This relates to a February 12, 2012 letter from counsel for the respondent to then counsel for the appellant advising that the s. 83 arbitration process would be triggered if the accountants did not agree by March 9, 2012 and requested the appointment of Mr. Craig Neville as arbitrator. On March 29, 2012 then counsel for the appellant requested respondent counsel's available dates so that he could engage Mr. Neville but no reply was received from the respondent's counsel.

[62] The appellant also submits that the decision of the respondent to initiate litigation in 2013 first adverted to in 2010 further delayed matters. This arose when counsel for the respondent wrote to the appellants then counsel by letter of November 9, 2010 advising, "we will apply to the court for an order that Ms. McMillan

shall no longer be responsible for half of the 6805 Crabapple mortgage pending the calculation of the Financial Equalization Payment."

[63] On December 7, 2010 counsel for the respondent wrote again advising that the court application was being prepared. Given the court application was not filed until October 2013 the appellant submits the respondent delayed matters over the intervening years.

[64] This ground of appeal is founded on the appellant's interpretation of the arbitrator's factual findings. That interpretation however is selective and superficial and in my view does not accurately reflect the findings of the arbitrator.

[65] The appellant's argument is that the respondent failed to mitigate and as a result the damages awarded on the basis of a 39-month delay in concluding the determination of the Financial Equalization Payment could have been avoided in full or in part had she complied with the mandatory arbitration process 39 months earlier than she did. As a result the appellant submits it was the respondent who breached the contract.

[66] I note that this ground of appeal is not a claim respecting the test for mitigation but rather its application to the facts in this case. As such it is a question of mixed fact and law. The standard of review is reasonableness.

[67] The arbitrator clearly considered the actions of both parties respecting the implementation of the MOS. In doing so he reached certain conclusions respecting the failure of the appellant to act in good faith and found the appellant to be in breach of the MOS. He considered the efforts of the respondent to engage the accounting process and her attempts to resolve matters in accordance with the agreement. He found her application to the court to be "based on sound legal argument" and "logical" in the circumstances. As a result he concluded, as matters of fact, that she had not breached the agreement and in fact had endeavoured to comply with the terms of the MOS. It is implicit that as a result he did not make findings that the respondent had failed to mitigate.

[68] The appellant submits that the arbitrator failed to consider the duty to mitigate at all. While he did not address the issue directly he did make factual findings that the respondent was engaged in the process throughout in accordance with the MOS. Those findings determine the issue as the respondent was found to have behaved reasonably in her pursuit of resolution in accordance with the MOS. He did not find that the respondent failed to act reasonably or that she should have in retrospect taken other steps.

[69] It is clear from the factual findings of the arbitrator that there was in fact delayed production by the appellant of the required financial information. The whole point of the Financial Equalization Payment was to address the detailed financial adjustments hence the involvement of the parties' accountants. Such calculations were dependent upon disclosure of the necessary financial information. In failing to provide that production (in particular the account figures for June 30, 2010) the appellant breached the terms of the MOS, the latter failing not being remedied until February 2012.

[70] The findings of the arbitrator in this respect are reasonable. He found that the respondent had sought to comply with the MOS and that the delay was the fault of the appellant. I note for example that for the period from August 1, 2010 to the spring of 2012 he concluded that the appellant had failed to produce the necessary information to enable the accountants to prepare their reports and that thereafter he at various times instructed his accountant not to act and that indeed the appellant did not produce his accountant's report until the time of the arbitration in 2014.

[71] In addition the wording of the MOS specifically provides that arbitration was to be invoked only after the accountants could not agree and that did not occur given the appellant's failure to produce required information and his instructions to his accountants to cease work. Indeed the appellant's then counsel in correspondence with the respondent's counsel stated that they would apply to the Court for directions, apparently in recognition of this issue.

[72] The appellant also suggested that the arbitrator erred in law by transferring the duty to mitigate from the respondent to the appellant. However, this argument mischaracterizes the arbitrator's award. The arbitrator's ruling was not based on the appellant's failure to mitigate losses. It was based on the appellant's failure to act in good faith in concluding the terms of the Financial Equalization Payment.

[73] I cannot say he was wrong in that finding nor that his findings and conclusions were not reasonable. As a result Ground 1 of appeal is dismissed.

Ground 2: The arbitrator failed to follow the rule of causation in contract law.

[74] It is not in dispute that contract law in respect of causation is the corollary of the duty to mitigate. As noted above, in Waddams at para. 15.70 the relationship is described as follows:

> A plaintiff is not entitled to recover compensation for loss that could, by taking reasonable action, have been avoided. This rule rests partly on the principle of causation: losses that could reasonably have been avoided are caused by the plaintiff's inaction rather than by the defendant's wrong and partly on a policy of avoiding economic waste.

[75] This ground of appeal is founded on the appellant's submission that the 39-month delay was caused by the respondent in that the respondent could have and should have complied with the MOS if there was a concern about delay in proceeding to arbitration. The appellant submits that "but for the respondent electing to go to court instead of complying with the binding arbitration agreement the final resolution of all issues under the MOS would have been concluded 39 months earlier than it was." As a result he submits the damages were caused by the respondent's delay not any delay by the appellant.

[76] This argument seeks to completely reverse the findings of the arbitrator who found that but for the appellant's failure to act in good faith the parties would have resolved the accounting issues, including the calculation of the Financial Equalization Payment much earlier even though the arbitrator was of the view that arbitration was inevitable given other issues in dispute. He estimated that it would

have taken about a year to do so and as a result refused damages from the summer of 2010 to the summer of 2011. This is something the arbitrator was entitled to do.

[77] In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al.,* 2004 BCSC 1464 at paras. 13 and 14, the Court discussed the application of the “but for” test for causation of damages in relation to breach of contract:

> [13] The parties agree that the "but for" test applies to the question whether there is a causal connection between a contractual breach and the plaintiff's loss.
>
> [14] This test was discussed in ***Gertz v. Meda Ltd.*** (2002), 16 C.C.E.L. (3d) 79, [2002] O.J. No. 24 (S.C.J.) at para. 69, citing from Binnie J.’s reasons in ***Cadbury Schweppes Inc. v. FBI Foods Ltd.***, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577:
>
> > In ***Cadbury Schweppes*** [citation omitted], Binnie J. quoted with approval the following passage from the reasons of McLachlin J. in ***Canson Enterprises Ltd. V. Boughton & Co.*** [1991] 3 S.C.R. 534:
> >
> > > The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, where caused by the breach.
> >
> > In addressing this issue, "the court is free to draw inferences from the evidence as to what would likely have happened 'but for' the breach": ***Cadbury Schweppes*** [citation omitted].

[78] The submission of the appellant ignores the facts as found by the arbitrator and his finding that:

> 212 Had the Complainant complied in good faith with paragraphs 57 and 88 of the MOS in the meantime, the equalization process prescribed in the MOS would have been concluded long before October 2013. It was, by then, too late for the Complainant to escape liability for the breach of his contractual obligations.

[79] In my view the arbitrator applied the rule of causation to the facts as found by him in a reasonable and justifiable manner. Ground 2 of the appeal is dismissed.

Ground 3: The arbitrator failed to construe the MOS as a whole.

[80] Appellant makes several submissions under this ground of appeal.

[81] Firstly, the appellant submits the arbitrator held the appellant to a duty of good faith to carry out the MOS provisions but the arbitrator failed to hold the respondent to the same duty. The appellant submits the arbitrator failed to recognize that the MOS imposed mutual obligations on the parties and that in failing to hold the respondent to her obligations the arbitrator erred in law in failing to give effect to the MOS as a whole. That is, he submits the arbitrator erred in law by imposing a duty on the appellant alone to comply with the MOS and ignored the contractual duty of the respondent to abide by its terms.

[82] In fact the arbitrator did acknowledge that the respondent caused delay by not instructing an accountant until November of 2011. At para. 199 he stated:

> 199 In view of the language of paragraph 82, the Claimant cannot be criticized for insisting that the Respondent appoint an accountant. …

[83] The appellant argues that in acknowledging there was a 15-month delay cause by the respondent it was inappropriate to include that period in the damage assessment. He submits the arbitrator wrongly excused the delay of the respondent on the basis that during that time the respondent was attempting to renegotiate the MOS.

[84] However, that submission ignores the findings of the arbitrator as follows:

> 199 … But the Claimant's argument conveniently ignores several events in 2010 and 2011. First, the Respondent sought to persuade the Claimant to expedite the equalization processes by dispensing with accountants. Counsel communicated this proposal in her letter of September 16, 2010. She supplemented the proposal by linking it with the Respondent's request for the Claimant's documents in her letter of September 23, 2010.
>
> 200 Second, the Respondent retained Ms. Shearer in September 2010. Counsel so advised counsel for the Claimant in the letter of September 23, 2010. This does not answer the complaint that Ms. Shearer was not instructed to start working on the file until November 2011 but it illustrates the propensity for overstatement on the part of the Claimant. It was submitted that the Claimant was unaware of Ms. Shearer's address until December 2010 and then learned of a post office box number only. But Mr. Cender's binders were delivered to Ms. Shearer's office on September 27, 2010.
>
> 201 Third, the Respondent was very much engaged in the accounting process and the attempted resolution of differences prior to November 2011. In fact, she initiated these processes on July 29, 2010 when counsel

> delivered her documents and expense claims to counsel for the Claimant. The Claimant disregarded this presentation. In her letter of September 21, counsel for the Claimant purported to be unfamiliar with it and implied its delivery was being misrepresented. No further reference to the presentation appears in the correspondence. There is no evidence that it was ever referred to Mr. Cender. In my view, the obligation to do all things necessary and the duty to act in good faith required such a referral. The Claimant would have been on firm ground insisting that Mr. Cender's response be forwarded to the Respondent's accountant but, by effectively ignoring the Respondent's July 29, 2010 presentation, the Claimant failed to perform his contractual obligations.
>
> 202. Similarly, on November 9, 2010, the Respondent, through counsel, responded to Mr. Cender's September 27, 2010 expense claims. The positions communicated by this letter were subsequently revised to some extent by Ms. Shearer but the point is that the Respondent was engaged in the equalization processes, even if she preferred to avoid using accountants. This presentation was not acknowledged for six months. By letter dated June 29, 2011, counsel for the Claimant advised that the November 9, 2010 letter had been referred to Mr. Cender. It then seems to have disappeared.
>
> 203 Further, on May 25, 2011, the Respondent, through counsel, presented a claim for contribution to her section 7 expenses subsequent to June 30, 2010. The Claimant's response, through counsel, on June 29, 2011, was to dictate the resolution of these claims.
>
> 204 In sum in this respect, the Respondent initiated the equalization processes in the MOS in July 2010 and attempted to move them along. By ignoring these efforts, the complaint that Ms. Shearer was not instructed until November 2011 is, as counsel has submitted, formalistic. For the same reason, the grumbling by Mr. Cender and counsel for the Claimant a few months later must be seen as mere posturing. I refer to Mr. Cender's email to Ms. Shearer on February 28, 2012 and counsel's letter to counsel for the Respondent on March 1, 2012. Aside from the fact that the Respondent had been attempting to get the expense accounting done, there remains the reality that any earlier engagement in the paragraph 82 process would have been futile because the FEP could not be calculated. The impediment was, as I have already said, the Claimant's failure to produce his account statements for June 30, 2010 and in that regard the reaction to Ms. Shearer's request on December 15, 2011 was also less than forthright. If counsel for the Claimant was surprised, as Mr. Cender said in his email on January 26, 2012, she must have assumed her client had already provided the statements; any surprise was more appropriately expressed to him.

[85] It is clear that contrary to the appellant's submission the arbitrator did not ignore the respondent's obligations but rather, as noted earlier, found that she was on the whole engaged and was trying to move the accounting process along.

[86] The arbitrator considered the allegations raised by the appellant and rejected them. He justified his doing so with clear reasons. He found that the respondent's actions while not always successful were done in good faith while he found the appellant's participation in the accounting process was an exercise in "form over substance". The arbitrator found that the respondent did not breach the MOS but that the appellant did.

[87] Secondly, the appellant notes that the arbitrator found that the respondent gave incorrect instructions to her accountant in February and March of 2012 but did not fault the respondent for that. The submission arises from erroneous instructions given by the respondent's counsel to her accountant Ms. Shearer. They were corrected as soon as they were discovered.

[88] The arbitrator addressed this issue at paras. 205-210 of the Award as follows:

> 205 The Claimant contends the Respondent also caused delay by giving her accountant erroneous instructions which produced excessive claims when Ms. Shearer presented her accounting in February and March 2012. It is submitted these claims "derailed" negotiations between the parties because it was apparent that the Respondent and Ms. Shearer did not intend to engage in meaningful discussions.
>
> 206 The instructions in question concerned the treatment of the Crabapple mortgage in the FEP calculation. The Respondent acknowledges that instructions given Ms. Shearer by counsel were incorrect with the result that Ms. Shearer's FEP calculations in February and March 2012 contained an error. Corrected instructions were given in June 2012, and Ms. Shearer so informed Mr. Cender in a telephone conversation on July 10, 2012.
>
> 207 In his first Affidavit, Mr. Cender averred that, in addition, there were two other "main points of disparity", being "the treatment of income tax on the sale of the Drummond Drive property and the payment of accounting costs for the period before the marriage". Also, the account statements received from Mr. Cender on February 13, 2012, disclosed a balance of $7.5 million in one of the Claimant's accounts on June 10, 2010. These and possibly other factors impacted Ms. Shearer's initial FEP calculations in February and March 2012. Ms. Shearer calculated that the total of funds available to the Claimant exceeded the total available to the Respondent by close to $10 million. On this basis, the Claimant accused the Respondent of claiming an equalization payment of nearly $5 million. The Claimant maintained this position in this proceeding, characterizing the Respondent's claim in 2012 as "outrageous" and "absurd". The Claimant has averred that, although he did everything he could to help Ms. Shearer, the instructions she received, combined with her health issues, caused delay.

> 208 The help to which the Claimant refers is unclear. Putting that aside, the hyperbole used to characterize the Respondent's claim is more appropriately applied to the Claimant's reliance on the characterization. Ms. Shearer's numbers were preparatory to a final calculation of the FEP. For example, the numbers did not credit the Claimant for his $2.5 million payment to the Respondent on August 1, 2010. This adjustment and others were required in order to translate Ms. Shearer's numbers into the Claimant's final claim. It is inconceivable that Mr. Cender, an accountant, genuinely understood the claim to be one-half of the discrepancy Ms. Shearer had tabulated. It is equally inconceivable that Mr. Cender would have so advised the Claimant. But, more fundamentally, if Mr. Cender and his client actually entertained a belief that the Respondent was making a claim of nearly $5 million, the MOS did not authorize them to disengage from the equalization processes.
>
> 209 In paragraph 82, the parties agreed to authorize their accountants to resolve any such differences over the calculations. The provision specifies that the accountants would "work with" one another to this end. The work contemplated by this language required, at a minimum, an exchange of positions and some effort to discuss and challenge those positions. This did not occur in 2012. Despite earlier assurances that Mr. Cender's office was working on a response, Mr. Cender ceased to participate in the paragraph 82 process after the March 9, 2012. He was not drawn back into the process even when Ms. Shearer informed him that she had received new instructions regarding the Crabapple mortgage. As Ms. Shearer's August 2012 FEP calculation formed the basis of the parties' eventual agreement, it appears in retrospect that some effort in 2012 would have resolved the FEP. But no such effort was expended by or on behalf of the Claimant. Instead, Mr. Cender informed Ms. Shearer that the Claimant had instructed him to stop working on the file. It was not until December 14, 2012 that Mr. Cender replied to Ms. Shearer's August FEP calculation, at which time he again promised a "detailed response". No such response was produced until the Claimant delivered his Statement of Claim materials in this proceeding on March 28, 2014.
>
> 210 Mr. Cender's defensiveness in his letter of December 14, 2012 tends to corroborate Ms. Shearer's evidence that the Claimant had instructed him to stop working on the file. If that is what occurred, the Claimant's breach of contract is obvious. Unlike the period when Ms. Shearer was not instructed, in 2012 the accountants had most of the materials they needed to resolve the expense accounting and the FEP. Even if the Claimant did not so instruct Mr. Cender and simply allowed him to withdraw from the paragraph 82 process, the Claimant failed to do all things necessary to carry out the MOS and use his best efforts to calculate the FEP, as well as his duty to act in good faith to ensure the attainment of the objectives of the MOS. I find that the delay caused by the instructions given Ms. Shearer and the delay, if any, caused by her health issues, were minor by comparison with the delay which resulted from the Claimant's breach of contract.

[89] The findings of the arbitrator and the conclusions he drew are reasonable. I see no errors as alleged. This ground of appeal is dismissed.

<u>Ground 4: The arbitrator impermissibly rectified the contract to override the provisions of the MOS.</u>

[90] It will be recalled that para. 25 of the MOS required the respondent to make half of the mortgage payments until all outstanding issues were settled. The arbitrator found that he would not rectify the contract. However the appellant submits he did just that when he relieved "the respondent of the obligation under paragraph 25 of the MOS to make half the mortgage payment on the Crabapple Drive property" as stated in the appellant's written argument.

[91] He submits the arbitrator in effect re-wrote the contract "under the guise of a breach of good faith by the appellant". He argues that the arbitrator refunded to the respondent payments she was required to make under the MOS.

[92] In my view this is a mischaracterization of the claim and the arbitrator's decision. The claim of the respondent was for breach of contract based on the appellant's breach of his duty of good faith. The arbitrator found that the appellant had breached the contract and as a result he was liable in damages.

[93] In doing so the arbitrator at para. 216 set out the test for assessment of those damages as follows:

> 216 … the complaining party should, insofar as can be done by money, be placed in the same position as if the contract had been performed". …

[94] The award of damages was not a "refund" but rather a calculation of damages caused by the appellant's breach. In doing so the arbitrator found that but for the breach the parties would have proceeded to arbitration by August 1, 2011. He therefore calculated her damages as the total mortgage payments made by the respondent after August 1, 2011. That is her damages were the difference between the payments she did make up to the date of the arbitration award and the lesser sum she would have paid if there had been no breach and the arbitration had occurred in 2011.

[95] In doing so the arbitrator was drawing from the facts the necessary inferences to determine what would have occurred but for the breach of contract and the resulting damages awarded.

[96] As a result what occurred was not a rewriting of the contract, did not involve rectification, and did not raise issues respecting the jurisdiction of the arbitrator in equity. I therefore decline to address those latter issues raised by the appellant.

[97] The fourth ground of appeal is dismissed.

Ground 5: The decision of the arbitrator was patently unreasonable.

[98] The appellant submits that the arbitrator could not forgive the sins of the respondent while at the same time punishing the appellant for not comporting strictly with the terms of the MOS. He asserts that in doing so the arbitrator exceeded his mandate and failed to decide the mortgage claim in accordance with the law. This ground goes to the issue of jurisdictional error.

[99] It is jurisdictional error for an arbitrator to exclude relevant considerations, to consider irrelevant considerations or to render a decision that is patently unreasonable. In *TWU v. British Columbia Telephone Co.*, [1988] 2 SCR 564, the Supreme Court of Canada confirmed that it is an error in law for an arbitrator to fail to comply with such principles.

[100] The Supreme Court of Canada also adopted the reasons of Lambert J.A. in the decision appealed from, *British Columbia Telephone Co. v. Telecommunication Workers Union* (1985), 20 D.L.R. (4th) 719 at 726, 65 B.C.L.R. 145 (C.A.), that an arbitrational tribunal will lose jurisdiction by failing to act in a rational way:

> … A tribunal of limited “jurisdiction” must start out within its jurisdictional envelope, and it must stay there, on all aspects of its tasks, until the task has been completed. If there is an express or implied term of its “jurisdiction” that it will do its task in a rational way, as there always is with a statutory tribunal and usually is with a consensual tribunal, then the tribunal goes outside its jurisdictional envelope if it reaches a decision in a way that is patently unreasonable.

[101] The appellant also relies on *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (C.A.) at para. 40 for the principal that taking into account irrelevant considerations amounted to a denial of procedural fairness, that is a failure to observe the rules of national justice. Likewise a failure to take into consideration relevant considerations will lead to a quashing of an arbitral decision (*Nova Scotia Teachers Union v. Nova Scotia (Minister of Education)* (1998), 170 N.S.R. (2d) 284, aff'd 1999 NSCA 38).

[102] The appellant's arguments repeat certain of his arguments considered under Grounds 3 and 4. He submits that there was no rational basis for the award of the arbitrator on the mortgage issue given he found arbitration was inevitable and then ordered that the appellant pay damages for the period of time it took to complete the arbitration. He submits that the appellant did not delay the arbitration process and that no claim was advanced for such delay and that at a minimum he was denied due process by being denied the right to know the case to be met in respect of causing a delay in the hearing of the arbitration.

[103] He then argues that the respondent not instructing an accountant until November of 2011 in part caused the delay and that the arbitrator failed to take into account that 15-month delay caused by the respondent. He also submits that the delay was due to the respondent and as a result the decision reached was not rational and was patently unreasonable.

[104] The difficulty with this argument has been alluded to earlier. The arbitrator set out the facts and has not been shown to have failed to consider relevant factors or to consider irrelevant factors. His decision was not patently unreasonable. The evidence supported his conclusions.

Costs on Arbitration and on Appeal

The Short Leave Application before Master Taylor

[105] During the course of submissions the issue of costs relating to the short leave application arose. The parties did not agree on what Master Taylor had ordered nor

was it clear from the clerk's notes. As a result at my request the parties appeared before Master Taylor who confirmed that he had ordered that each party was to bear their own costs for the short leave application. That is therefore no longer in issue.

[106] The appellant sought that the appeal be allowed with costs and that the matter of costs in the arbitration proceeding be referred back to the arbitrator to be decided in accordance with the decision of the Court on this appeal. This was contingent on the appeal being successful. The respondent seeks to uphold the award of costs on the arbitration and for costs of this appeal.

[107] The submissions of the appellant were confined to the issue of the arbitrator's costs being reconsidered by the arbitrator if the appeal was successful. As it was not the arbitrator's award of costs stands.

[108] The appeal is dismissed.

[109] As the respondent has been successful on this appeal she is entitled to her costs at Scale B.

"Punnett J."