CITATION: Serra v. Serra, 2009 ONCA 105
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COURT OF APPEAL FOR ONTARIO

Moldaver, Armstrong and Blair JJ.A.

BETWEEN:

Barbara Anne Serra

Respondent/Applicant

and

Harold Keen Serra

Appellant/Respondent

Philip M. Epstein Q.C. and Nancy J. Iadeluca, for the appellant

James C. Morton and Victor Nikitine, for the respondent

Heard: September 24, 2008

On appeal from the judgment of Justice T. Herman of the Superior Court of Justice, dated February 7, 2007 and reported at (2007), 36 R.F.L. (6th) 66.

R.A. Blair J.A.:

INTRODUCTION

[1] The important issue raised on this appeal is whether, and if so, in what circumstances, a market-driven post-valuation date change in the value of a spouse's assets may be taken into account in determining whether an equalization of family property is unconscionable under s. 5(6) of the *Family Law Act*.[1] This legal question has not previously been decided by this Court. A second issue is whether – if the decline in value of the appellant's principal asset may be taken into account – the equalization of family property would be unconscionable in the circumstances of this case.

[1] R.S.O. 1990, c. F.3.

[2] Barbara and Harold Serra were married in 1976. They separated 24 years later, in November 2000, and were divorced in 2003.

[3] Mr. Serra carried on what had been a very profitable textile business in Ajax, Ontario, known as Ajax Textiles. The success of that business enabled him and his wife to live in what the trial judge described as a "luxurious lifestyle". At the time of separation Mr. Serra's shareholdings in the business – the principal asset in question – were valued at between $9.5 million and $11.25 million. By the time of trial, however, the value had decreased to somewhere between $1.875 million and $2.6 million – a drop of approximately $8 to $9 million. This dramatic change was not due to any fault on the part of Mr. Serra, who has done everything in his power to keep his failing business afloat. The change is attributed entirely to shifting market forces that have adversely affected the Canadian textile industry generally. It pre-dates the economic downturn that is currently bedevilling the Canadian and world economies and is therefore not the product of a temporary recession inevitably followed by an economic rebound.

[4] At trial, Mr. Serra argued that equalizing his and his wife's net family properties on the basis of the separation-date value of his assets would be "unconscionable" as contemplated by s. 5(6) of the FLA. It would require him to make an equalization payment of $4,129,832.50 – an amount that exceeds his total net worth (and on one view of the evidence, could be as much as twice his total net worth). The trial judge ruled, however, that she could not take a market-driven post-separation date decline in the value of a spouse's assets into account under s. 5(6) and ordered the large equalization payment. In my respectful view, she erred in taking this approach, and I would allow the appeal on this ground for the reasons that follow.

[5] Mr. Serra raises other issues on the appeal as well. Chief amongst these is the matter of the respondent's claim for a constructive or resulting trust in the shares Mr. Serra holds in the business. This claim was asserted by Ms. Serra from the outset and was maintained until the eve of trial. It helped to underpin an interim preservation order she obtained, precluding the appellant from dealing with any of his assets without her permission prior to trial.

[6] Mr. Serra initially denied the trust claim, but ultimately delivered a formal admission accepting that he held 1000 common shares in the business in trust for the respondent.[2] Having read the tea leaves herself, Ms. Serra subsequently sought leave to withdraw her trust claim at the beginning of the trial. Justice Herman declined to permit her to do so. However, she also declined to act upon the appellant's admission. She

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[2] Mr. Serra held a total of 3,000 common shares in the business. He had received 1,000 of those shares as a gift from his brother during the marriage. Although Ms. Serra claimed an interest in those shares as well, she did not succeed in that claim and the trial judge held that they were excluded from the calculation of his net family property.

decided to try the issue and found on the evidence that there was no constructive trust. The appellant argues that the trial judge erred in doing so because, he submits, the admission was dispositive of the trust question. He therefore contends that the appeal should be allowed on this additional basis. Although there is much to be said in favour of this argument, I would not give effect to it in the end, for reasons that I will explain.

[7] Three other grounds of appeal were advanced. The appellant submits that the trial judge erred in:

a) failing to provide him with more than four years to make the equalization payment;

b) assessing spousal support on the basis of an imputed annual income of $250,000; and

c) awarding the respondent post-judgment interest on the amount of the equalization payment.

[8] I would not give effect to these three grounds of appeal either, as they are essentially matters involving the exercise of the trial judge's discretionary and fact-finding functions. I see no error justifying interference with her determination of those questions.

FACTS

The Family

[9] Ms. Serra was quite young – 17 years of age – when she first came to work for Ajax Textiles, in 1967. At the time Mr. Serra was still married to his second wife. Ms. Serra married another man and left the workforce when her son, Grant, was born in 1969. When her marriage broke up she went back to work as a single mother, ultimately returning to Ajax Textiles. She and Mr. Serra began to live together sometime in 1974 and were married in 1976 after Mr. Serra divorced his second wife.

[10] Mr. Serra adopted Grant. He has a son, Terry, from a previous marriage. The Serra's own child, Shane, was born in 1973.

[11] Ms. Serra continued to work in the business for some time. She operated her own dress shop from 1977 until 1983. In 1983, the family moved to Orillia and she stopped working outside the home in order to focus on the children. The family lived in a very nice home in Orillia. In the late 1990's they acquired a condominium property in Florida. As the trial judge found:

> Mr. Serra and Ms. Serra had a luxurious lifestyle: they drove expensive cars, went on expensive vacations and ate in expensive restaurants; Ms. Serra had a limousine driver; there was household help; they had a condominium in Florida where Ms. Serra spent six months each year.

[12] Mr. and Ms. Serra separated in November 2000 and were divorced in 2003. At the time of the trial of the property and support issues before Justice Herman, Mr. Serra was 62 years of age and Ms. Serra was 56. He has since remarried again and has a new child, a daughter who was three years old at the time of trial.

[13] Mr. Serra continues to operate the textile business. Ms. Serra has not remarried and has not returned to the workforce. The Florida condominium has not yet been sold and she continues to spend about six months of the year there.

The Textile Business and Mr. Serra's Financial Affairs

[14] As the trial judge found, "Mr. Serra's personal financial situation is intertwined with that of his business." His affairs are complex, but need not be outlined in detail here. They are reviewed at length in the trial judgment.[3] The following factors are pertinent, however.

[15] Mr. Serra is the legal owner of an indirect 75% interest in Ajax Textiles Processing Company Limited (the textile business) and DR Serra Enterprises Limited (the company that owns the land on which the business is located).[4] This interest is held in the form of 3,000 common shares in a holding company, 821129 Ontario Inc.[5] The remaining 25% is held by a family trust for the benefit of the parties' children. One thousand of Mr. Serra's 3,000 common shares were – as the trial judge found – a gift from his now-deceased brother received during the marriage, and were therefore exempt from his net family property. Mr. Serra takes the position that he holds 1,000 of the remaining 2,000 common shares in trust for the respondent.

[16] Ajax Textiles operates as a commission dye and finishing house for knitted fabrics. Once a highly successful venture, it has fallen on hard times, however. The trial judge found:

> [30] The textile division was, at one time, very successful. By 2004, there had been a significant decline in its business.

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[3] (2007), 36 R.F.L. (6th) 66 (Ont. S.C.).

[4] Ajax Textiles also had a Marine Division, operated by the Serra's sons, but that business was wound down and closed in 2005. No issue arises with respect to that turn of events.

[5] He also holds 1,000 preference shares in the numbered company, but these shares are inconsequential to the valuation issues on the appeal.

> This decline was primarily due to two factors: the phased-in removal of tariffs and quotas in the textile industry between 1995 and 2005; and the impact of China's entry into the World Trade Organization (WTO) in 2001. The company's customer base changed from a few customers with large orders to smaller orders, just-in-time business and orders where the products have to be made in Canada. Increased costs and pricing pressure from customers have led to a further decline in profits.
>
> [31] According to valuations conducted by KPMG, the value of the textile division declined by $8-9 million between November 2000 (the date of separation) and November 2004. A chart of earnings of the textile division shows that in the years between 2000 and 2005, the company lost money in every year but 2002. As of August 31, 2006, Ajax showed a net operating loss of $1,200,000.

[17] Canadian policy regarding the textile industry began to change in the mid-1990's, when the members of the WTO, including Canada, agreed to eliminate the system of quotas and import restrictions over a period of years. The admission of China into the WTO in 2001 magnified the damage to the Canadian industry, however, and the situation was exacerbated by the Caribbean Basin Trade Initiative signed by the U.S. in 2000. In 2002, Canada cut duties and restrictions on imports from 48 of the world's poorest countries. All of these developments undermined the domestic textile business because producers found it cheaper to conduct business offshore. The foregoing information, extracted from the KPMG Report tendered on behalf of Mr. Serra, is not contested. It suggests that the wide-ranging and lasting impact of the tariff and WTO changes did not hit the textile industry until the period following the Serra's separation and at a point coinciding more or less with the commencement of Ms. Serra's action.

[18] Ms. Serra's expert did not seriously contest KPMG's valuation of his interest in the business. Significantly as well, Ms. Serra conceded that the decline in the value of the business could not be attributed to any fault or lack of effort on the part of Mr. Serra. In this regard, the trial judge also found:

> There is no suggestion that the decline in the value of the business is other than market-driven. While Ms. Serra questions the extent of the decline, she acknowledges that the decline, to the extent that there is one, results from factors beyond Mr. Serra's control.

[19] Mr. Serra has – or had – other assets as well; however, their significance pales in comparison to his interest in Ajax Textiles at its zenith. The companies owed him substantial amounts on his director's loan account, but these funds, although accounted for in the net family property calculation, have been largely depleted in an effort to keep the business afloat and as the ultimate source of interim support and other payments made to or on behalf of Ms. Serra prior to trial. Mr. Serra had a 50% interest in the matrimonial home in Orillia and has a similar interest in the Florida condominium. A contentious issue at trial concerned the amount of cash he held in a Bahamian bank, the Barrington Bank, and the value of a 2% shareholding interest in that Bank. The trial judge valued the interest at U.S. $200,000 ($308,000 Cdn.). There is no appeal from that finding.

[20] Ms. Serra fought long and hard – and expensively – to establish that Mr. Serra was hiding assets and refusing to disclose his true financial position. This may have been because of what the trial judge acknowledged as the "complex web" of Mr. Serra's "interrelated financial interests." However, the trial judge ruled against Ms. Serra on those issues, holding that "there [was] no direct evidence at the trial of funds or income that Mr. Serra is currently failing to disclose."

[21] The Barrington Bank situation was a central point of contention. However, as the trial judge determined, Mr. Serra's involvement with the Bank arose out of his search for funds for the business in 2000 after the CIBC had advised him to find alternative financing. An acquaintance and former customer was establishing a bank in the Bahamas and needed a third investor for that purpose. Mr. Serra transferred monies from a foreign account to a deposit account in the Bank and took a 2% shareholding position (with 25% of the voting rights) in the Bank. The monies in the account, together with a mortgage on the property where Ajax Textile carried on business, served as security for a $2.3 million loan advanced by Barrington Bank to the business.

[22] Ms. Serra had entered the marriage 24 years before the separation with no assets and little income. She left the marriage in a much different position, as well she should have. She had a one-half interest in both the Orillia matrimonial home and the Florida property, cash and investments of about $358,000, jewellery worth an admitted $150,000, a Mercedes worth $110,000 and a Cadillac limousine which the trial judge valued at $35,000. Her net family property was in excess of $1 million *excluding* her interest in the Florida condominium.

[23] In assessing whether or not Ms. Serra had suffered a deprivation from her contributions to the business – in the context of the constructive trust claim – the trial judge found:

> [82] Ms. Serra was sometimes paid a salary; sometimes she was not. It would appear that the payment of a salary was

> more of an income-splitting device than compensation for work that Ms. Serra performed.
>
> [83] However, Ms. Serra was compensated in ways other than salary. What she received in return was a very comfortable lifestyle. She had full-time staff to help her run the household and look after the children. She had cars: a Mercedes, a limousine and a limousine driver. She had two homes: one in Orillia and one in Florida. She travelled in high style and ate in expensive restaurants. In later years, she resided half of the year in Florida. In short, she led the lifestyle of a wealthy woman.
>
> [84] When Ms. Serra married Mr. Serra, she had very little in the way of assets. *She left the marriage with assets worth a considerable amount*. [Emphasis added.]

The Impact of the Litigation

[24] Both the impetus for Mr. Serra's efforts to keep the business alive, and his ability to take measures designed to have that effect, were shaped by the evolution of the litigation between the parties.

[25] The action was commenced in December 2002. Among other things, Ms. Serra claimed periodic support, a trust interest in her husband's shares in the business, an interim and permanent restraining order prohibiting him from disposing of or otherwise dealing with <u>any</u> of his property and assets, and a preservation order with respect to <u>all</u> of his property and assets.

<u>The Interim Support Order</u>

[26] On December 19, 2002, Sachs J. dealt with an urgent interim motion, made prior to a case conference, seeking interim support and interim restraining and preservation orders. The latter claims were adjourned, to be dealt with finally in August, 2004. However, Sachs J. made an interim order at that time requiring Mr. Serra to:

a) pay interim spousal support of $12,500 per month;

b) maintain the expenses of the Florida condominium, amounting to $60,000 per year; and

c) pay to Ms. Serra a further $7,500 per month to be characterized as either support or capital by the judge hearing the motion for interim relief.

[27] The latter characterization was never made prior to trial. Neither the costs of the Florida property nor the $7,500 payments were deductible in the hands of the appellant. At trial, the payments were determined to be capital and credited to Mr. Serra against his equalization payment.

[28] Prior to the proceedings, the respondent had received a salary and other benefits from Ajax Textiles. In 2001 and 2002 she received a total of $372,230.93. To that point in time, Ajax Textile's historical tax-driven practice had been to bonus its profits out to Mr. Serra, who would immediately lend most of the monies back to the company for operational purposes. Justice Sachs' interim order was therefore based on a high level of "income" for Mr. Serra – $2 million in 1999, for example. Following the order of Sachs J., Mr. Serra began to receive a salary of $250,000 from the company in order to permit him the advantage of deducting the $12,500 monthly support payment. By the time of trial, in 2006, he had paid Ms. Serra $1.75 million in support and capital payments.

[29] These payments could only be made if Ajax Textiles remained in business. Mr. Serra made every effort he could to facilitate this. He testified that in order to keep Ajax Textiles running, he depleted his $2 million loan account with Ajax Textiles, borrowed more than $1 million, laid off employees, rolled back salaries, reduced shifts, closed the Marine Division, sold corporate assets, increased corporate debt, obtained alternate financing after the Chartered Banks declined to lend further funds, mortgaged his own home, cashed in his and his new wife's RRSPs and his life insurance polices, and injected all of the proceeds into Ajax to keep it operational. He is financially strapped and left without any further assets to encumber or sell.

The Trust Claims

[30] From the outset, Ms. Serra claimed a resulting, constructive or implied trust in all of Mr. Serra's assets. The inventory was long – twenty-seven items were listed in the statement of claim, as well as a claim to any other assets he may have. But the principal target was her claim to a 50% interest in all 3,000 of his shares in 821129 Ontario Inc., the company through which he holds his interest in Ajax Textiles.

[31] Ms. Serra maintained these claims until the eve of trial.

The Interim Preservation Order

[32] In August and September, 2004, the interim restraining and preservation orders that were originally before Justice Sachs in December, 2002, were dealt with. On August 26, at the instance of the respondent, the court ordered that Mr. Serra take no steps to sell the Florida property. On September 16, again at the request of the respondent, Justice Karakatsanis granted a preservation order, requiring the appellant (a) to preserve all property in which he had an interest, directly or indirectly, and over which he could

exercise any control, directly or indirectly, and (b) to provide Ms. Serra with at least 30 days notice of any intended disposition. Needless to say, this order had an impact on Mr. Serra's ability to dispose of, preserve, maintain or improve the textile business and hence on the value of his indirect shareholding position in it.

[33] Mr. Serra testified that his shares had no current value at the time of trial on a liquidation basis and that there were no prospective buyers for the textile business. In fact, all but two of the approximately ten dye houses that formerly operated in Ontario have gone out of business. This evidence was undisputed.

No Variation Application

[34] Mr. Morton suggested that Mr. Serra could have applied for a variation of the interim support order and the preservation and restraining orders if they were difficult to comply with or otherwise oppressive to him. That is not the point, however. Mr. Serra does not argue that he was unable to make the payments required or to live with the preservation and restraining orders. He maintains simply that it was necessary for him to keep Ajax Textiles operating – and in Ms. Serra's interests that he do so – in order to be able to meet his obligations, and that the preservation and restraining orders affected his ability to do so.

The Judgment

[35] The trial judge ordered:

> a) that Mr. Serra pay a net equalization payment of $3,283,272.57 (the $4,129,832.50 mentioned above less credit for the capital payments made prior to trial);
>
> b) that Mr. Serra's claims for a variation of the equalization payment pursuant to s. 5(6) of the *Family Law Act* be dismissed;
>
> c) that Ms. Serra's trust claim be dismissed;
>
> d) that either Ms. Serra consent to the sale of the Florida condominium or that Mr. Serra be entitled to transfer his half interest in it to her at 50% of the appraised value[6], and, in either case, that Mr. Serra be entitled to credit the amount against his equalization payment;

[6] The Florida condominium was valued at $2.1-$2.2 million at the time of trial.

e) that the balance of the equalization payments be made in four equal annual instalments commencing September 1, 2007;

f) that Mr. Serra pay spousal support in the amount of $10,000 per month until either the condominium was sold or Mr. Serra's interest transferred to the respondent, following which spousal support was to be reduced to $7,500 per month until the first instalment of the equalization payment is made; thereafter no spousal support was to be payable while the appellant was paying the equalization instalments, except in default; and,

g) that there would be no pre-judgment interest on the equalization payment, but that the order would bear post-judgment interest at the rate of 6% per annum.

ANALYSIS

The Section 5(6) Issue

Recognizing Post-Separation Changes in Value

[36] Mr. Serra relies upon s. 5(6) of the *Family Law Act* in support of his claim that equalizing the net family properties of the parties as at the date of separation would be unconscionable. Section 5(6) states:

> The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) the part of a spouse's net family property that consists of gifts made by the other spouse;
>
> (d) a spouse's intentional or reckless depletion of his or her net family property;

> (e) the fact that the amount a spouse would otherwise receive under subsection (1), (2), or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
>
> (f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
>
> (g) a written agreement between the spouses that is not a domestic contract; or
>
> (h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

[37] The steps to be taken when s. 5(6) is engaged are well-established. The court must first ascertain the net family property of each spouse, by determining and valuing the property each owned on the valuation date (subject to the deductions and exemptions set out in s. 4). Next, the court applies s. 5(1) and determines the equalization payment. Finally – and before making an order under s. 5(1) – the court must decide whether the equalization of net family properties would be unconscionable under s. 5(6), having regard to the factors listed in paragraphs 5(6)(a) through (h). See *Rawluk v. Rawluk* [1990] 1 S.C.R. 70 at pp. 93-94; *Berdette v. Berdette* (1991), 3 O.R. (3d) 513 (C.A.), at pp. 525-526; *Stone v. Stone* (2001), 55 O.R. (3d) 491, at para. 39; *LeVan v. LeVan* (2006), 82 O.R. (3d) 1 (S.C.J.).

[38] Here, steps one and two are not in issue, but the application of s. 5(6) is. The appellant relies in particular upon paragraph 5(6)(h) above. He says that the marked post-separation date decline in value of the textile business and therefore of his common shares in it, in combination with the respondent's trust claims to an interest in those shares, the preservation order she obtained, and the significant interim support and capital payments he was required to make (and which could only be made out of an operating Ajax Textiles), are all circumstances relating to the disposition, preservation and maintenance of Ajax Textiles and, therefore, of his property assets. In these circumstances, it would be "unconscionable" to order an equalization of net family properties based upon a separation-date valuation of his interest in the business; to do so would be to require him to make an equalization payment that exceeds his total net worth, perhaps significantly.

[39] The scope of the exception in s. 5(6) – and, in particular, whether its factors encompass post-valuation date fluctuations in the value of family property assets – has been the subject of considerable controversy amongst family law professionals. This is perhaps because the exception appears to fly in the face of what is seen as the essential

characteristic of present-day family law legislation in Ontario, namely, the promotion of certainty, predictability and finality in the determination of support obligations and property division and the removal of judicial discretion in those areas to the extent possible. The great concern – as Mr. Epstein fairly acknowledged during oral argument – is to dispel any interpretation of the *Family Law Act* that might suggest the courts are empowered to deal with the division of family property on the basis of "discretionary fairness." On this view, expanding the discretion in the hands of the judiciary in family law matters is anathema to Ontario's legislative scheme and the development of any trend in that direction would be worrisome.

[40] In my opinion, however, the concern is overblown, especially on the facts of this case, and misses the distinction between *factors that may legitimately be considered* under s. 5(6) and *a finding of unconscionability* under that provision.

[41] Whereas other provinces have chosen different mechanisms for giving effect to the policy underlying modern family law legislation[7] – that is, the equal division of family property in recognition of equal contributions to marriage – Ontario deliberately chose a fixed valuation date approach. For most practical purposes, that date is the date of separation.[8] There is no discretion in the court to vary the valuation date. Hence the debate about whether courts can vary an equalization payment if the value of the asset has changed significantly after the valuation date.

[42] Judges have tended to limit the application of the s. 5(6) factors to circumstances arising from misconduct on the part of the spouse who owns the asset in question or against whose favour the unequal distribution is to be made. Indeed, the general view to this point appears to be that post-valuation date variations in value are not to be taken into account under s. 5(6).[9] One commentator has gone so far as to suggest that equal sharing

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[7] See for example, s. 65(1) of the British Columbia *Family Relations Act* R.S.B.C. 1996, c.128 which provides greater scope for judicial discretion to remedy unfairness in the division of family property than in Ontario. Manitoba also takes a different approach from Ontario. Prince Edward Island chose to enact family legislation based on Ontario law: *Family Law Act*, S.P.E.I. 1995, c.12. However, P.E.I. incorporated the recommendation of the Ontario Law Reform Commission in 1993 in *Report on Family Property Law* to grant courts the discretion to vary an equalization payment based on post-valuation date changes in the value of an asset (s.6.(6)).

[8] Part I of the *Family Law Act* provides that the assets of each spouse are to be valued at a date determined by statute. Section 4 defines that date as follows:

> "valuation date" means the earliest of the following dates:
>
> 1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation;
> 2. The date a divorce is granted.
> 3. The date the marriage is declared a nullity.
> 4. The date one of the spouses commences an application based on subsection 5(3) (improvident depletion) that is subsequently granted.
> 5. The date before the date on which one of the spouses dies leaving the other spouse surviving.

[9] See the following cases for the view that s.5(6) does not allow for post-valuation date variations to be considered: *Berdette v. Berdette* (1991), 3 O.R. (3d) 513 (C.A.); *Warne v. Warne* (1992), 8 O.R. (3d) 571 (Gen. Div.); *Kelly v.*

of net family property is so clearly the norm in Ontario that some practitioners believe it "might as well be written in stone".[10]

[43] As Borins J.A. noted in *LeVan v. LeVan* (2008), 51 R.F.L. (6th) 237 (C.A.)[11], at paras. 74-75, however, "the courts have not fully rejected the possibility of considering post-separation circumstances under s. 5(6)." He went on to posit that "there does seem to be room within s. 5(6) to consider post-separation circumstances in limited situations, such as where the conduct of one spouse post-separation has resulted in a significant depletion of assets." The court in *LeVan* decided that it was not necessary to resolve the issue because s. 5(6) was not engaged in the circumstances.

[44] At trial in *LeVan*, Justice Backhouse had concluded that the factors in s. 5(6) did not include post-separation changes in value, expressing the opinion (at para. 267) that if "the Legislature [had] intended that post valuation date increases and decreases in value might form the basis of a s. 5(6) application, I think it likely, given the frequency of these events, that it would have included a provision to this effect." Here, the trial judge came to a similar conclusion. At paras. 135-136 she held:

> Turning to the language of s. 5(6)(h) itself, a market-driven decline in value does not appear to come within the "acquisition, disposition, preservation, maintenance or improvement" of a property. This is to be contrasted to a situation in which the conduct of a spouse had an impact on the value of the property.
>
> I conclude that the circumstances in which a court may order an unequal division of net family property under s. 5(6) do not include a market-driven decline in the value of the property.

[45] Respectfully, I disagree.

Kelly (1986), 50 R.F.L. (2d) 360 (Ont. H.C.); *Arndt v. Arndt* (1991), 6 O.R. (3d) 97 (Gen. Div.), *Skrlj v. Skrlj* (1986), 2 R.F.L. (3d) 305 (Ont. H.C.); and *Heon v Heon* (1989) 69 O.R. (2d) 758 (H.C.). However, courts have interpreted s.5(6) as allowing consideration of some post-valuation date circumstances: see *Merklinger v. Merklinger* (1996), 26 R.F.L. (4th) 7 (Ont. C.A.); *Davies v. Davies* (1988), 13 R.F.L. (3d) 278 (Ont. H.C.); *McCutcheon v. McCutcheon* (1986), 2 R.F.L. (3d) 327 (Ont. Dist. Ct.); *Perrin v. Perrin* (1988), 17 R.F.L. (3d) 87 (Ont. Dist. Ct.); and *Macedo v. Macedo* (1996), 19 R.F.L. (4th) 65 (Ont. Gen.Div.).

[10] Berend Hovius, "Unequal Sharing of Net Family Properties under Ontario's *Family Law Act*," (2008) 27 *Canadian Family Law Quarterly* 147, at p. 198, citing Phil Epstein and Lena Madsen, *This Week in Family Law*, Fam. L. News, 2008-15 (2008).

[11] Leave to appeal to the Supreme Court of Canada denied, 2008 CarswellOnt 6207.

[46] In my opinion, a court may take into account a post-separation date change in the value of a spouse's assets, and the circumstances surrounding such a change, for purposes of determining under s. 5(6) of the *Family Law Act* whether equalizing net family properties would be unconscionable. An order for an unequal division of net family properties is exceptional, however, and may only be made on such a basis (i) where the circumstances giving rise to the change in value relate (directly or indirectly) to the acquisition, disposition, preservation, maintenance or improvement of property (s. 5(6)(h)), and (ii) where equalizing the net family property would be unconscionable, having regard to those circumstances (taken alone or in conjunction with other factors mentioned in s. 5(6)).

[47] In this regard, the threshold of "unconscionability" under s. 5(6) is exceptionally high. The jurisprudence is clear that circumstances which are "unfair", "harsh" or "unjust" alone do not meet the test. To cross the threshold, an equal division of net family properties in the circumstances must "shock the conscience of the court": see *Merklinger v. Merklinger* (1992), 11 O.R. (3d) 233 (Ont. Gen. Div.), aff'd (1996), 30 O.R. (3d) 575 (C.A.); *Roseneck v. Gowling* (2002), 62 O.R. (3d) 789 (C.A.); *McDonald v. McDonald* (1988), 11 R.F.L. (3d) 321 (Ont. S.C.); and *LeVan* (S.C.J.).

[48] I note, for example, the following comments of Backhouse J. in *LeVan*, and of Jennings J. in *Merklinger*:

> *LeVan*, at para. 258:
>
> "Unconscionability" is a much more difficult test to meet than "fairness" and as a result, the courts have only minimal discretion to order anything other than an equal division of family property. Unconscionable conduct has been defined as, among other things, conduct that is harsh and shocking to the conscience, repugnant to anyone's sense of justice, or shocking to the conscience of the court. [Citations omitted].
>
> *Merklinger*, at para 54:
>
> Section 5(6) of the *Family Law Act, 1986* permits me to order an unequal allocation of value if to do otherwise would be unconscionable. The legislature deliberately chose to strictly define the severity of the result of the application of s. 5(1) which must pertain before there can be any judicial intervention. *The result must be more than hardship, more than unfair, more than inequitable. There are not too many words left in common parlance that can be used to describe a result more severe than unconscionable*. [Emphasis added].

[49] However, it does not follow that because the threshold is exceptionally high the factors to be taken into account in assessing whether that threshold has been crossed should not include post-separation changes in the value of a spouse's assets and the circumstances surrounding that change. In an article published after the trial decision in *LeVan*, but before the argument on appeal, Professor Bala stated:[12]

> It is submitted that while the outcome in *LeVan* may well be correct, the courts should interpret the vague, general words of s. 5(6)(h) to include the factor of a post-separation decline in property values that renders an equalizing of net family properties as evaluated on separation date to be unconscionable. It seems inappropriate for there to be judicial recognition only of post separation increases in property values, with post-separation declines ignored, even in situations of "unconscionability." While in some circumstances it is appropriate to expect the titled spouse to dispose of the assets after separation or bear the full risk of not doing so, there are circumstances when such a disposition would be unreasonable.

[50] I agree. This is precisely one of those situations.

[51] Elmer E. Driedger first articulated what is now accepted as the guiding principle of modern statutory interpretation when he said:[13]

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This principle has been adopted as the standard by the Supreme Court of Canada on numerous occasions. See, for example, *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26**.**

[52] The rationale behind the statutory direction in s. 5 of the *Family Law Act* that net family property is to be shared equally – with the rare exception provided in s. 5(6) – is set out in s. 5(7) of the *Act*:

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[12] N. Bala, *Case Comment on LeVan v. LeVan: Overreaching in the Formation of a Pre-nuptial Contract*, 32 R.F.L. (6th) 374, at p. 388.

[13] Elmer E. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p. 67, as cited in Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths Canada Ltd., 2002), at p. 1.

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, *subject only to the equitable considerations set out in subsection (6).* [Emphasis added.]

[53] This rationale is affirmed in the preamble of the *Act*, which states:

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; *and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership,* and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children; [Emphasis added.]

[54] There is a jurisprudential theme running through the cases to the effect that relief may only be granted under s. 5(6) where there has been fault-based conduct on the part of the asset-owning spouse, that is, that the word "unconscionable" embraces factors relating to "unconscionable conduct" only: see, for example, *von Czieslik v. Ayuso* (2007), 86 O.R. (3d) 88 (C.A.); *LeVan*; and *Merklinger*. In *von Czieslik*, for instance, Lang J.A. noted in *obiter*, "the legislative restriction of s. 5(6)'s application to certain enumerated circumstances, none of which have to do with ownership, *but all of which relate to fault-based conduct on the part of the other spouse*" (at para. 29).

[55] Respectfully, I do not think this proposition is correct. First, it is clear that *not all* of the enumerated circumstances in s. 5(6) relate to fault-based conduct on the part of a spouse. Three of them – 5(6)(a), (b) and (d) – do. Four of them – 5(6)(c), (e), (f) and (g) – do not. One – 5(6)(h), the general basket clause at issue here – may or may not arise in conduct-related circumstances. Accordingly, there is no basis for concluding that the general basket clause in the list must take its colour and meaning from a previous list of specific conduct-based factors and, therefore, that the "circumstances" referred to must themselves embody fault-based conduct. That is not the case.

[56] Secondly, neither the purpose or object of the s. 5 equalization payment scheme, the s. 5(6) exception, nor of the *Act* itself call for such an interpretation. The design of the

legislation is to promote the goals of certainty, predictability and finality in the resolution of property matters following the breakdown of marriage. This, in turn, is founded on the central premise articulated in s. 5(7) that "inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of [their joint] responsibilities, entitling each spouse to the equalization of the net family properties, *subject only to the equitable considerations set out in subsection (6)*." (emphasis added)

[57] Thus, to ensure adherence to the policy choices made by the Legislature, and reflected in s. 5(7) and the preamble of the *Act*, equalization of net family properties is the general rule. As with most rules, however, there are exceptions – in this case, the high-threshold unconscionability provisions of s. 5(6). This exception is expressly contemplated by the caveat "subject only to the equitable considerations set out in subsection (6)" set out in s. 5(7). Judicial discretion with respect to equalization payments is therefore severely restricted, by statutory design, but it is not eliminated altogether since there is discretion to order an unequal payment where "the court is of the opinion that equalizing the net family properties would be unconscionable": see, for example, *Skrlj v. Skrlj* (1986), 2 R.F.L. (3d) 305 at p. 309 (Ont. S.C.).

[58] There is no principled reason that I can see, given the language of the *Act* and its purpose or objects, to confine the word "unconscionable" in s. 5(6) only to circumstances arising from fault-based conduct on the part of one of the spouses. Although unconscionable *conduct* is obviously an appropriate consideration in determining whether equalizing the net family properties would be unconscionable, in my opinion the true target of the limited exception to the general rule is a situation that leads to an unconscionable *result*, whether that result flows from fault-based conduct or not.

[59] I do not read this Court's decision in *von Czieslik* as requiring anything to the contrary. That case evolved out of pre-separation misconduct on the part of the husband. He had "gifted" a large portion of his assets to a friend just prior to the separation, thus reducing his net family property and frustrating his former wife's right to share in what had been accumulated during the marriage. It was in this context that Lang J.A., understandably, focussed on the "fault-based conduct" of the husband. However, the s. 5(6) issue in the case was whether, in making a s. 5(6) award, courts are restricted to the difference between the parties' net family properties (the court held it was not). The issue was not, as here, whether post-separation circumstances that do not involve misconduct on the part of the asset-owning spouse may be taken into account.

[60] The marked downturn in the textile industry is a "circumstance relating to" (at least) the "disposition, preservation [and] maintenance" of Ajax Textiles - the shares of which are Mr. Serra's major asset - within the meaning of s. 5(6)(h). So, too, are several other factors characterizing this case: the preservation order obtained by Ms. Serra, her

ongoing claim for a trust interest in the assets, and the significant interim payments Mr. Serra was ordered to make and which could only be made if he kept Ajax Textiles operating as a viable business. Eight of the existing ten comparable businesses in Ontario had gone out of business. There were no buyers for Ajax Textiles, and Mr. Serra testified that the company's liquidation value was zero by the time of trial. This is not a case, then – like *LeVan*, for instance – where the owner of the diminishing asset could have sold it in a falling market in order to preserve at least some of its value. Nor, I emphasize, is it a case of a temporary decrease in the value of an asset resulting from a temporary economic recession; the difficulties in the domestic textile industry were well embedded before the onset of the current economic downturn.

[61] The sale of Ajax Textiles was not a workable solution in the circumstances of this case for other reasons as well. Ms. Serra claimed an interest in the company. She consistently refused to agree to the disposition of the Florida condominium which was costing Mr. Serra $5,000 each month pursuant to the order of Sachs J. In addition he was required to pay Ms. Serra monthly support of $12,500 and an additional $7,500 per month (support or capital – to be determined later) by the same order. His only source of income to comply with those obligations was what he could derive from the continued operation of the business. He therefore engaged in the assiduous attempts outlined above (para. 29) to preserve and maintain the business, depleting whatever other assets he may have had in the process. Even in these efforts he was affected by the preservation order that had been obtained because he required the prior permission of Ms. Serra for any actions he planned to take in relation to those assets.

[62] In my respectful view, therefore, the trial judge erred in refusing to take into account the market-driven downward impact on the value of Mr. Serra's interest in Ajax Textile, in combination with the other factors mentioned above, in considering the application of s. 5(6) of the *Family Law Act*. These are all factors to be considered in the s. 5(6) analysis.

[63] Do these factors mean that this is one of the cases where an equalization of net family property would be "unconscionable" in the circumstances, however? I turn to that question now.

Unconscionability

[64] It is worth emphasizing that the *legal issue* in question here is whether a market-driven decline in value of a spouse's assets post-separation *may be considered as a factor* in determining whether an equalization of net family property is unconscionable under s. 5(6). Concluding that it may be considered as a factor does not lead necessarily to a *finding on the facts* that an equalization order would be *unconscionable*. This is an

important distinction, in my view, and may sometimes be overlooked in the heat of the debate over finality and certainty versus discretionary fairness.

[65] Although a purely market-driven decline in the value of Mr. Serra's principal asset is at the heart of these proceedings, this case is not about whether a significant post-separation drop in the value of an individual's stock portfolio, precipitated by a deep but temporary recession, will amount to unconscionability. Such an occurrence may well be a factor for consideration under s. 5(6)(h), but whether it would be sufficient by itself to constitute "unconscionability" is quite another matter. Each case must be determined on its own facts. In the circumstances here, however, I am satisfied that an equalization of net family property would be unconscionable, given the dramatic downward turn in Mr. Serra's fortunes and the factors giving rise to, and surrounding, it.

[66] This is not a situation where any of the other factors listed in clauses (a) through (g) of s. 5(6) come into play to be weighed in the analysis against the market-driven decrease in value. For example, there is no fault-based conduct on the part of Mr. Serra that could – if it existed – be evaluated in the s. 5(6) analysis against the market-driven factors affecting his assets, as there was in such cases as *LeVan*, *von Czieslik* and others.[14] As the trial judge noted, "[t]here is no suggestion that the decline in the value of the business is other than market-driven." Nor – for reasons mentioned above – is this a situation like *LeVan* where Mr. Serra could have disposed of the business (or of his shares in it) as a hedge against their downward trend in value, another factor that could otherwise be considered in the mix. It was necessary to keep Ajax Textiles afloat to enable him to continue to meet the interim support and capital obligations he had been ordered to pay.

[67] In these circumstances, an equalization of net family property that requires Mr. Serra to pay *more than his total net worth* (and arguably as much as twice his net worth) because of a marked decline in the value of his major asset post-separation – over which he had absolutely no control and in spite of his best efforts to save the business in the face of Ms. Serra's trust claims, the preservation order and the need to comply with his support obligations – is, in my view, unconscionable. In so concluding, I have taken into account that Ms. Serra is not a woman without means. The trial judge found she left the marriage "with assets worth a considerable amount." She has net family property of about $1 million in addition to her interest in the Florida property. She has lived, and continues to live, a life of relative luxury, 6 months in Canada and 6 months in Florida. The trial judge found she had been "very well compensated" for her contributions to the business during the course of the marriage.

What is the Appropriate Way to Craft a Remedy?

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[14] See also, for example, *Merklinger* and *Macedo*.

[68] The next question is: what is the appropriate way to craft a remedy to rectify the situation?

[69] Since the threshold for an unequal division of net family property is unconscionability, some would argue that the appropriate disposition in such circumstances is simply to roll back the award in favour of the recipient spouse to the point where it is just shy of "unconscionable". Justice Backhouse adopted this position at trial in *LeVan* and Mr. Epstein initially advanced that argument before us. Backhouse J. said (at paras. 272-274):

> The virtue of this approach is that the court adheres as closely as possible to the statutory scheme and does not engage in a value driven exercise which the Legislature clearly intended should not apply.
>
> England's *Matrimonial Causes Act 1973*, 27 Halsbury's Statutes, (4th ed.), provides a different scheme for division of property. The division is determined on the exercise of judicial discretion. The court seeks to do fairness as between the parties. The challenges of this approach are commented on by Lord Nicholls of Birkenhead in a recent decision in the House of Lords, *Miller v. Miller*; *McFarlane v. McFarlane*, [2006] U.K.H.L. 24, [2006] 1 FLR 1186. At p. 6, para. 4, he states:
>
> > Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.
>
> I think that it is unfair to refer to this approach as "palm tree justice". (Heon v. Heon (1989), 69 O.R. (2d) 758, [1989] O.J. No. 1457, 22 R.F.L. (3d) 273 (H.C.J.)). Nevertheless, it is clear that the Legislature rejected this approach. Conferring a general discretion based on a judge's evaluation of the

> marriage and who contributed what is exactly what the *Act* does not contemplate. In my respectful opinion, Mr. Epstein's submission is more consistent with the Act. Instead of imposing one's own assessment of fairness, the court determines when unconscionability ends. In this way, the basic principle of equal division is only departed from to the extent necessary to avoid unconscionability. Many equal divisions may be unfair. But, unless unconscionable, these are operative.

[70] I concede that this approach – clearly and well articulated as it has been by Backhouse J. – has a certain attraction. Respectfully, however, I do not agree with it. I say this for two reasons. First, I do not accept that it represents an interpretation of s. 5(6) that is more consistent with the *Act*. Secondly, an order that is just shy of unconscionable remains – by jurisprudential definition – an order that is at least unfair, unjust and inequitable, if not worse. Courts do not make orders deliberately, in the exercise of their discretion, that are unfair, unjust and inequitable; it is the antithesis of what courts stand for.

[71] Section 5(6) does not call for an award that is just short of unconscionable. It provides that the court may award a spouse "an amount that is more or less than half the difference between the net family properties" *if* "*equalizing* the net family properties *would be unconscionable*". (emphasis added) In short, the threshold that an applicant must cross in order to open the door to an unequal division is – as I have said earlier in these reasons – exceptionally high. That is because of the policy underlying the *Act* encouraging finality, predictability and certainty and minimizing the exercise of judicial discretion to the extent possible, also referred to earlier. Once the threshold has been crossed, however, and the rare resort to judicial discretion under the *Act* is in play, the court should exercise its discretion as it normally does: by doing what is just, fair and equitable in the circumstances. Such an approach, in my opinion, is (a) true to the language of s. 5(6) itself, (b) reflective of the wording in s. 5(7) establishing that the presumed equal contribution of the spouses leading to the normal equal division of net family property is subject only to the "equitable" considerations set out in s. 5(6); and (c) consistent with the call in the preamble of the *Act* for "the orderly *and equitable* settlement of the affairs of the spouses upon the breakdown of the partnership."

What is the Appropriate Award in this Case?

[72] What, then, is the fair, just and equitable result in this case?

The Amount

[73] On this issue, the appellant submits that the appropriate award in the circumstances of this case would be to require Mr. Serra to make an equalization payment of $1.5 million which, after credit for the capital payments he has already made, nets out to a payment due now of $656,000. This is arrived at by taking Mr. Serra's net family property at the date of trial as $4.5 million (after taking into account the decreased value of the textile business, based on the KPMG valuation as of November, 2004) and valuing Ms. Serra's at $1.5 million.[15] The difference between the two net family properties is $3 million, one-half of which is $1.5 million. From that amount must be deducted credit for capital payments already made by Mr. Serra. The balance is $656,000 – a far cry from the net of almost $3.3 million ordered by the trial judge.[16]

[74] The respondent does not seriously quarrel with the numbers themselves but argues, of course, that there should be no variation in the equalization payment ordered by the trial judge.

[75] Having regard to all the circumstances, and bearing in mind that the court is exercising a fairness function in this narrow context, I have concluded that the net outstanding equalization payment should be fixed at $900,000. I say this for the following reasons.

[76] I accept that the amount of Mr. Serra's net equalization payment must be reduced substantially from the amount ordered by the trial judge. However, I would not reduce it mechanically to the suggested $656,000 by simply applying the reduced trial-date valuation of Ajax Textiles. Instead, I would make an upward adjustment of approximately $250,000 in that amount. I do so to give better effect in particular to these considerations: (i) the possibility, however remote, of a modest turn around in the fortunes of the Ajax Textiles business; (ii) the length of the Serra's marriage; (iii) the principle of dividing matrimonial property in a way that recognizes the equal contribution of spouses to the accumulation of wealth during a marriage; and, (iv) a desire not simply to substitute a trial-date valuation for the separation-date valuation in the circumstances of this case.

[77] The Legislature chose the date of separation, principally, as the valuation date for purposes of establishing the equalization of net family property in Ontario. In doing so, it gave effect to the "equal contribution to the marriage" tenet by measuring the accumulation of wealth during the marriage as the difference between the value at separation and the value of property brought into the marriage. The same theory does not apply to post-separation date valuations because what happens to an asset after that point – whether its value goes up or down – is not related to contributions within the marriage

[15] These figures include the Florida condominium, which the parties own jointly. It was valued at $2.2 million at the time of trial.
[16] These are rounded amounts presented during argument.

context. In addition, a trial-date valuation is somewhat random in that it depends upon the time it takes the parties to get ready for trial and the vagaries of the trial scheduling system. As well, it may be open to manipulation by parties seeking the most advantageous timing. I note that there is no suggestion on the record here that Mr. Serra sought to manipulate the timing of the trial for these purposes. Notwithstanding this, and while there may be cases where it would be appropriate to apply a straight trial-date valuation approach in these kinds of circumstances, I do not think this is one of them.

[78] Mr. and Ms. Serra had a long-term marriage of over 24 years. While it seems unlikely that Ajax Textiles will ever return to its highly profitable heydays, Mr. Serra testified that he was optimistic he could make the business profitable once again. It seems unfair – particularly given the length of the marriage, the principles underlying the *Family Law Act*, and Ms. Serra's sometimes role in the business – to saddle her with the entire downside of the business' decline while Mr. Serra retains at least the possibility, however remote, of enjoying some upside in the future. At the time of trial, Mr. Serra's shareholdings in the business were valued at between $1.875 million and $2.6 million. The adjustment I propose represents roughly 10%-15% of that range – depending on where one settles on the spectrum – and is designed to reflect the foregoing factors while still recognizing the dramatic negative impact of the decline in the textile business on Mr. Serra's net worth.

Options to Satisfy the Obligation

[79] As an alternative mechanism for the satisfaction of his equalization payment obligation, the appellant sought an order reducing the amount of that payment to an amount equal to the value of his 50% interest in the Florida condominium. By this I take him to mean that he is willing to transfer his interest in that property to Ms. Serra in full satisfaction of his equalization payment obligation whatever the value of his interest might be. He is simply willing to let her have the Florida condominium to end the dispute over both the property and the equalization payment.

Equalization Payment/Florida Condominium

[80] A resolution that would involve the satisfaction of Mr. Serra's equalization payment obligation, in whole or in part, through some form of disposition of the Florida condominium is attractive at a number of levels. Such a resolution could be accomplished either through the transfer of Mr. Serra's one-half interest in the property to Ms. Serra or through the sale of the property and the distribution of some or all of Mr. Serra's share of the proceeds in full or partial satisfaction of his obligation.

[81] Either solution would have the benefit of addressing two outstanding issues between the parties: resolution of the equalization payment obligation and the problem of

joint ownership of the Florida condominium. A transfer of interest would in effect secure payment of all, or at least a significant portion, of the equalization payment due to Ms. Serra, while at the same time enabling her – if she so wishes – to retain the Florida property which she continues to enjoy. At the same time it would permit Mr. Serra to satisfy his equalization payment obligation without further depleting his other remaining assets or the business. On the other hand there are problems, as I see it, with any solution tying satisfaction of the equalization payment to the Florida property, with one exception.

[82] The exception entails granting Ms. Serra the option of accepting a transfer of Mr. Serra's interest in full satisfaction of his equalization payment obligation. This alternative is appealing because it would resolve both the equalization payment and condominium problems cleanly. It would not require a joint valuation, or competing valuations, of the property – a source of potential friction and further legal proceedings between the parties. Ms. Serra can make the call with or without her own valuation. She can decide whether she wishes to keep the property and whether Mr. Serra's one-half interest is presently adequate to satisfy her equalization claim or whether she should bank on it becoming adequate, or more than adequate, in the future.

[83] But what if she decides not to accept this alternative, as she may well do either because of her view of the Florida real estate market or for liquidity reasons?

[84] The trial judge's decision permits Mr. Serra to transfer his interest in the Florida property and to receive credit for the value of that interest as against his equalization payment obligation. Another possibility would be to allow Ms. Serra to require him to do so, again preserving for her the option of keeping the property if she so desires. There are practical problems in relation to both of these options, however. Neither can fairly be forced onto the non-consenting party without an acceptable or binding valuation of the interest. As noted above, valuations are undoubtedly a potential source of further conflict, cost and delay.

[85] On the other hand, absent Ms. Serra's acceptance of a transfer in full satisfaction of the claim, no other solution involving the Florida property avoids the potential of continuing conflict between the parties. A sale of the property – whatever the use of the proceeds – will require a valuation process too and some interplay between the parties with respect to the procedure for such an exercise in Florida. In the end, I am satisfied that the only workable alternative tying satisfaction of the equalization payment to the Florida condominium is the one providing Ms. Serra with the option of accepting a transfer of Mr. Serra's interest in full satisfaction of his equalization payment obligation. Any other such solution runs the risk of the court imposing a disposition that may require the parties to make choices that are complicated by disadvantageous foreign law or other implications of which we cannot be aware.

[86] I recognize that, absent the exercise by Ms. Serra of that option, the parties are left in the position of being joint beneficial owners of the Florida condominium, with no resolution of the problems arising from that relationship in this proceeding. The parties are not deprived of whatever remedies they may have in that regard, however.

Transfer of Shares

[87] There is a further alternative option that warrants consideration in terms of a fair and equitable disposition of the s. 5(6) problem. Could the equalization payment be satisfied – as Mr. Serra proposed on the appeal, albeit in the context of the constructive trust issue – by way of the transfer to Ms. Serra of 1,000 common shares in 821129 Ontario Limited together with a smaller payment of approximately $623,000? Such an option, again, would be reflective of the potential for a positive turnaround in the Ajax Textiles business. This option could potentially be an alternative to the options above involving the Florida condominium. In the end, however, I do not believe that this alternative option is preferable.

[88] It was Mr. Serra's first position on the appeal that this Court should overturn the trial judge's finding that there was no constructive trust and order that he holds 1,000 common shares of 821129 Ontario Limited by way of a resulting and/or constructive trust for Ms. Serra, thereby reducing the outstanding amount of the equalization payment from the trial judge's determination of approximately $3.3 million to approximately $623,000. For reasons explained elsewhere in this judgment, I do not propose to interfere with the trial judge's disposition with respect to the trust claims. However, it could be argued that Mr. Serra cannot complain about the inequities of permitting the very option he sought to have granted on the appeal in the exercise of the court's limited fairness jurisdiction under s. 5(6). And it would provide Ms. Serra with more than two-thirds of her equalization payment in cash and, as noted above, afford her some prospect of participating in a possible upswing in the value of the Ajax Textile business.

[89] This potential solution poses its own difficulties as well, however. If forced on Ms. Serra, it would require her to accept at least partial satisfaction of her equalization claim in a form that she may not want, and would place her in a minority shareholder position that she may not want. If forced on Mr. Serra, it would leave him with his former wife as a minority shareholder in the business – a situation that would open the potential for further friction between them. I am not aware of anything in the record that would enable us to assess the value of a minority interest, if one were to apply a minority discount. Moreover, what restrictions, if any, would need to be imposed if Ms. Serra were subsequently to sell that interest in what is a family run business? Would Mr. Serra be entitled to a first option to purchase them? Would a "shotgun" provision be required for such a transaction? These and many other commercial considerations make it unwise

for a court – which is not equipped to do so in my view– to seek to construct or impose such an arrangement on the parties.

[90] For these reasons, I would not adopt a solution that involves the transfer of shares to Ms. Serra.

> Conclusion With Respect to Options for Satisfying the Equalization Payment

[91] At the end of the day, then, the viable options with respect to the satisfaction of Mr. Serra's equalization payment are reduced to two:

> a) Ms. Serra is to have the option of accepting a transfer of Mr. Serra's one-half interest in the Florida condominium in full satisfaction of Mr. Serra's equalization payment obligation, regardless of the value of that interest. She is to notify Mr. Serra of her decision in this regard on or before the close of business, 5 p.m. E.S.T., on March 6, 2009.
>
> b) Failing the exercise of that option, Mr. Serra is to pay to Ms. Serra the equalization payment of $900,000 in three instalments of $300,000, on March 31, 2009, December 31, 2009 and September 30, 2010.

[92] The equalization payment is to bear post-judgment interest in accordance with the order of the trial judge.

> Conclusion with respect to Section 5(6)

[93] In conclusion, the market-driven decline in the value of Mr. Serra's interest in Ajax Textiles – his major and only significant income-producing asset – and the circumstances surrounding it, are factors to be considered under s. 5(6)(h) of the *Family Law Act* because, on the facts of this case, they relate to the disposition, preservation and maintenance of that asset. The trial judge erred in holding that "the circumstances in which a court may order an unequal division of net family property under s. 5(6) do not include a market-driven decline in the value of the property." To the contrary, in combination with other relevant considerations in this case – Ms. Serra's claim to a trust interest in the assets, the preservation order obtained, the need to preserve and maintain the business in order to satisfy Mr. Serra's interim payment obligations, and the fact that Ms. Serra is not without means – those factors point compellingly to the conclusion that

the equal division of Mr. and Ms. Serra's net family properties would lead to an unconscionable result.

[94] Such a result would not give proper effect to the purpose and language of s. 5(6) the *Family Law Act*, in my view. I would therefore allow the appeal on this ground and reduce the amount of the equalization payment remaining to be made by Mr. Serra from $3,283,272.57 – as ordered by the trial judge – to the amount of $900,000, to be satisfied by way of one of the alternative mechanisms outlined above. I consider this disposition to be fair, just and equitable in the circumstances.

[95] I turn now to the trust issues.

The Trust Issues

[96] Mr. Serra submits that the trial judge erred in failing to find that he held one-half of his non-gifted shares in the textile business in trust for Ms. Serra, given the withdrawal of his Answer defending those claims and his formal admission to that effect.

[97] Until just prior to trial Ms. Serra claimed an interest by way of constructive, resulting, or implied trust in all 3,000 of Mr. Serra's shares in the holding company, 821129 Ontario Inc.[17] The existence of this claim reinforced the preservation order she obtained and, as pointed out earlier in these reasons, compromised Mr. Serra's ability to deal with his textile business assets. Although Mr. Serra initially denied the trust claims, he ultimately delivered a formal withdrawal of his answer on this issue with respect to his non-gifted 2,000 shares, under Rule 12 of the *Family Law Rules* O. Reg. 114/99, and an admission accepting that he holds 1,000 shares in the business in trust for Ms. Serra.

[98] Rule 12(1) of the *Family Law Rules* provides that:

> A party who does not want to continue with all or part of a case may withdraw all or part of the application, answer or reply by serving a notice of withdrawal (Form 12) on every other party and filing it.

[99] In his formal Notice of Withdrawal, dated May 8, 2006, Mr. Serra stated:

> 2. The Respondent Harold Serra withdraws part of his denial of Barbara Serra's claim for a declaration that she is the

[17] See footnote 2. The success of this claim in full would have given Ms. Serra a 37½% interest in the common shares of the business. As previously noted, Mr. Serra holds a total of 3,000 shares in the business. He claimed to have received 1,000 of those shares as a gift during the marriage, a claim the trial judge accepted. Consequently Ms. Serra's trust claim remained for half of his remaining 2,000 common shares.

> beneficial owner in respect of the common shares of 821129 Ontario Inc, and states as follows:
>
> a. Harold Serra owns directly 1000 common shares representing 25% interest in 821129 Ontario Inc by reason of a gift from his brother Carl Serra and Harold confirms that he owns these shares absolutely;
>
> b. Harold Serra owns directly a further 2000 common shares representing a 50% interest in the common shares of 821129 Ontario Inc *of which he is holding one half in trust for Barbara Serra as of the date of separation* (being the November 2000 valuation date).
>
> …
>
> 5. *The Respondent admits for the purposes of this proceeding that he is holding in trust for the Applicant as of valuation date, one half of his 2000 common shares [in] 821129 Ontario owned directly by him* that was not acquired by way a gift from his brother, and consents to judgment accordingly. [Emphasis added]

[100] Ms. Serra continued to assert her trust claims until October 2006 when, on the eve of trial, she sought leave from the trial judge to withdraw them, without resorting to Rule 12(1).

[101] In taking these steps, both parties no doubt recognized that a successful trust claim by Ms. Serra would lead to her sharing in the decline in value of the business.

[102] The trial judge addressed the request to withdraw, and the issue of Mr. Serra's formal admission, in separate reasons.[18] She declined to permit Ms. Serra to withdraw her trust claims. At the same time, she declined to act upon Mr. Serra's formal admission. She felt it was unfair for either position to prevail at that stage. The trial judge proceeded to try the issue and found on the evidence that there was no constructive trust, principally because, in her view, Ms. Serra had been "very well compensated" overall for her contributions to the business, and had not suffered any deprivation as a result. She did not deal with the resulting trust claim.

[103] In the current family law regime, the proper way to withdraw all or part of a claim is to file a formal Notice of Withdrawal under Rule 12(1) of the *Family Law Rules*. It

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[18] (2006), 32 R.F.L. 401.

would appear that this can be done unilaterally at any stage of the proceedings, unlike under the comparable provision in civil cases where leave of the court is necessary once the pleadings are closed.[19] But there are cost consequences. Under Rule 12(3) the withdrawing party is liable for the costs in relation to the withdrawn claim "unless the court orders or the parties agree otherwise." Thus, if the withdrawing party seeks to avoid the cost consequences flowing from the withdrawal, that party must persuade the court to make an order avoiding or minimizing the costs. Perhaps with this in mind, Ms. Serra did not resort to the Rule but simply applied to the trial judge for leave to withdraw.

[104] Parties should be encouraged to comply with the Rules. However, I do not think the existence of Rule 12(1) deprived the court of jurisdiction to deal with Ms. Serra's request. I am satisfied that the trial judge had a residual discretion, pursuant to the court's inherent jurisdiction to control its own process, to consider Ms. Serra's application. She did so after considering all the circumstances – essentially on the basis that "it would… be unfair… to permit Ms. Serra to prevent a determination of this [trust] issue now that there [had] been a decline in the value of the company" – and I can find no error in the exercise of her discretion in that regard.

[105] More problematic is her decision not to accept Mr. Serra's withdrawal of his defence and his admission that he holds 1,000 common shares of 821129 Ontario Inc. in trust for Ms. Serra. Rule 12(1) permits a party to withdraw all or part of an answer at any time, without leave.[20] Mr. Serra took advantage of this Rule. Moreover, he not only withdrew his defence to the trust claims in his answer; he coupled the withdrawal with an unequivocal admission that he holds 1,000 common shares of 821129 Ontario Inc. in trust for Ms. Serra. Is a court at liberty simply to cast aside that withdrawal and admission? The answer to that question is not as straightforward as it might seem at first blush.

[106] There is ample authority for the proposition that a "formal admission is conclusive as to the matter admitted, and cannot be withdrawn except by leave of the court or the consent of the party in whose favour it was made": *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.), at para. 77, citing Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 3rd ed. (Toronto: Butterworths, 1999). In that text, the authors state, at p. 1051:

> A formal admission in civil proceedings is a concession made by a party to the proceedings that a certain *fact or issue* is not in dispute. *Formal admissions* made for the purpose of dispensing with proof at trial *are conclusive as to the matters*

[19] Rule 23.01 of the *Rules of Civil Procedure*.

[20] Withdrawal is subject to the cost consequences that may follow, but those consequences were not pursued here and became irrelevant in view of the trial judge's disposition.

> *admitted*. As to these matters, *other evidence is precluded* as being irrelevant but, if such evidence is adduced, the court is bound to act on the admission even if the evidence contradicts it. [Emphasis added; footnotes omitted.]

[107] Here, however, Mr. Serra does not seek to withdraw his admission. Indeed, the contrary is the case: he seeks to rely upon it. The trial judge nonetheless deprived him of the benefit of it. Was she entitled to do so?

[108] After some consideration, I have concluded that the trial judge retained the authority to require the trial of the trust issue in spite of the withdrawal of Mr. Serra's defence to it and his admission. While I might not have arrived at the same decision, she exercised her discretion in this regard and I cannot say that she erred in the circumstances.

[109] Just as parties are generally bound by the admissions they make, as against the party or parties in whose favour they are made, they should generally be entitled to rely on those admissions as well. Under Rule 12(1) parties are entitled to withdraw all or part of a claim or an answer, without leave, and they should generally be entitled to rely upon such a withdrawal as well. Were this not the case, the useful practice of obtaining and providing admissions and of narrowing the issues in dispute for purposes of trial would be rendered ineffectual. The purpose of this practice is to dispense with proof at trial, and to minimize the cost of litigation and the areas of dispute between the parties. For legitimate policy reasons, these objectives are to be encouraged.

[110] That said, the withdrawal of an answer or defence does not necessarily lead to judgment. The facts as pleaded, or as otherwise found in the record, must support the judgment sought. In this regard, the trial judge found the provisions of Rule 19.06 of the *Rules of Civil Procedure* helpful by way of analogy. Rule 19.06 states:

> A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

[111] In addition, admissions are not irrevocably cast in stone. While conclusive as long as they stand – at least as to the facts involved – they can in some circumstances be withdrawn. Sopinka, Lederman and Bryant say at pp. 1051-1052 that a formal admission of fact, as distinct from an admission of law, cannot be withdrawn except by leave of the court or on consent, whereas an admission relating solely to a question of law can be withdrawn at any time. See also, *Highley v. C.P.R.* (1930) 64 O.L.R. 615 (C.A.); *Henderson v. Tudhope* (1930), 65 O.L.R. 238 (C.A.). *Phipson* on *Evidence*, 15th ed.

(London: Sweet & Maxwell, 2000), at para. 28-11 states, with respect to admission of law and mixed fact and law, that:

> Admissions are receivable to prove matters of *law*, or mixed law and fact, though (unless amounting to estoppel) these are generally of little weight, being necessarily founded on mere opinion. (Footnotes omitted).

[112] On a running scale, then, admissions of fact would appear to be well-entrenched once freely made, admissions of mixed fact and law less so, and admissions of law the most easily displaced. Here, Mr. Serra's admission that he holds 1,000 common shares in trust for Ms. Serra is an admission of mixed fact and law.

[113] In substance, the trial judge refused to be bound by Mr. Serra's admission because she thought it was unfair to take the trust issue off the table at that stage in the proceedings but, at the same time, that the issue should be determined at trial rather than by either permitting Ms. Serra to withdraw the claims altogether or by permitting Mr. Serra simply to admit them. At para. 61 of her reasons for judgment – referring back to her separate reasons on Ms. Serra's motion for leave to withdraw her trust claims – she said:

> Citing the cases of A*rshinoff v. Arshinoff*, [1993] O.J. No. 1546 (Ct. J. – Gen. Div.) and *Amsterdam v. Amsterdam*, [1991] O.J. No. 101 (Ct. J. – Gen. Div.), I ruled that it would be unfair to permit Ms. Serra to prevent a determination of the issue now that there was a decline in the value of the company. At the same time, it would be unfair to permit Mr. Serra to prevent the issue from being heard on its merits by filing an admission that Ms. Serra did, indeed, have such an interest. *In the result, I decided that the issue should be resolved on its merits, after having heard evidence at trial.* [Emphasis added.]

[114] In adopting this stance, the trial judge remained true to a theme running through the jurisprudence relating to the withdrawal of admissions of mixed fact and law: an admission may be withdrawn if, in all the circumstances, there is a triable issue that ought to be tried in the interests of justice rather than left to an admission of fact: see *Norlympia Seafoods Ltd. v. Dale & Co.* (1982), 141 D.L.R. (3d) 733 (B.C.C.A.), at pp. 735-737; *Gardiner v. Minister of National Revenue*, [1964] S.C.R. 66 (*per* Cartwright J. in Chambers), at p. 68; *Zellers Inc. v. Group Resources Inc.* (1995), 21 O.R. (3d) 522 (Gen Div.), at pp. 531-533. In *Abacus Cities Ltd. v. Port Moody* (1981), 26 B.C.L.R. 381, at p. 383 (C.A.) Chief Justice Nemetz observed:

> It seems to me that … a judicial admission[21] should be allowed to be withdrawn if, in the circumstances, the court is satisfied that it is in the interest of justice to withdraw same.

[115] While the principles cited above have evolved in circumstances where it is the person making the admission who seeks to withdraw it or to lead evidence contradicting the admission, I see no reason why they are not applicable to situations like the case at bar. Mr. Serra is not seeking to withdraw his admission or to resile from the withdrawal of his answer to the trust claims. The principle remains valid nonetheless: although the fact of the admission and the circumstances surrounding it may influence the court's determination of what effect to give to it, the court is not bound to give effect to an admission of law, or of mixed fact and law, if in all the circumstances the interests of justice dictate that the issue should be determined at a trial rather than by way of admission.

[116] The court must control its own process, particularly in family law matters and particularly when it comes to the granting of equitable remedies. The declaration of a constructive trust or a resulting trust is an equitable remedy. Here, then, it was open to the trial judge, in the exercise of her residual discretion, to require the trust issue to be determined at trial, as she did.

[117] The trial judge reviewed the evidence carefully and ultimately concluded that it did not support the finding of a constructive trust. While there was ample evidence of Ms. Serra's contribution to the business, and therefore of Mr. Serra's indirect benefit from that contribution, Ms. Serra did not suffer a corresponding deprivation as a result of her contributions because she was "well compensated for her efforts" throughout by reasons of the salary she received, the very comfortable – indeed, luxurious – lifestyle she enjoyed, and the considerable increase in her assets during the marriage. The criteria for a constructive trust – namely an unjust enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment – had not been satisfied: *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 at p. 97; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38. This finding was open to the trial judge on the evidence. There is no basis for interfering with it.

[118] The result would not differ, even if one were to take the view that Mr. Serra's admission should remain intact at least to the extent that the facts underlying it, and pleaded in Ms. Serra's statement of claim, must be taken as true, and that evidence beyond the admission and pleading should not have been considered: see *The Law of Evidence*, p. 1051. The facts relied on by the trial judge in concluding that there was no constructive trust were in substance set out in the statement of claim.

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[21] "Judicial admissions" is a phrase sometimes used to describe formal admissions made by a party: see Sopinka, Lederman & Bryant, at p. 1051, footnote 1.

[119] The trial judge did not apply her mind to the resulting trust issue. I do not think this matters in the end. Although Ms. Serra claimed a declaration that she was entitled to a proprietary interest in Mr. Serra's assets "by way of a resulting, implied or constructive trust", her claim as pleaded was either a constructive trust claim or it was not a constructive trust claim. It was not pleaded on the basis that there was a common intention to share the assets and, as a consequence, a resulting trust.

[120] I would not give effect to the trust claims ground of appeal.

OTHER GROUNDS OF APPEAL

[121] I turn, finally, to the three other grounds of appeal advanced on behalf of Mr. Serra. They take on a diminished significance in view of the foregoing determinations. Mr. Serra submits that the trial judge erred in:

a) failing to provide him with more that four years to make the equalization payment, given that all of his assets have been encumbered in attempting to keep the business operating and that the business has lost significant amounts since the date of separation;

b) assessing spousal support on the basis of an imputed annual income of $250,000; and

c) awarding the respondent post-judgment interest on the amount of the equalization payment.

Staggered Equalization Payment Instalments

[122] The result of the foregoing determinations is that Mr. Serra is obliged to make a total equalization payment to Ms. Serra of approximately $1.75 million, of which $900, 000 remains to be paid. As provided for elsewhere in these reasons, I would require Mr. Serra to pay his equalization obligation in instalments, unless the payment is wholly satisfied by way of the transfer of his one-half interest in the Florida condominium at the option of Ms. Serra, as discussed above. Given the lower equalization obligation that he now has outstanding, there is no need in the circumstances for an order that he be entitled to make that payment by way of four annual instalments.

Spousal Support

[123] Mr. Serra argues that the trial judge erred in law and committed a palpable and overriding error in concluding that he has the ability to pay spousal support based on an income of $250,000 per year. He says that the evidence is clear he lacks the ability to pay spousal support at all.

[124] I disagree.

[125] It is true that the value of Mr. Serra's interest in Ajax Textiles has been decimated since the date of separation, and it may well be that there are no buyers for the business and that the business would have little net value after payment of its liabilities on a liquidation basis. But that situation has existed for some time.

[126] The trial judge found that Mr. Serra's true income was difficult to determine because it depended upon the combination of a complicated series of factors involving what he takes out of the company (whether by salary, bonus, expenses paid by the company or withdrawals from his director's loan account) and the amount of income the business can bear. She accepted that, given the reverses in his business, he was unable to support the lifestyle that he supported prior to separation. She concluded, however, that:

> [208] Mr. Serra has shown a remarkable ability through the years to manage his financial affairs. He has done so through a variety of mechanisms, including the establishment of a complex corporate structure, trust funds, a Swiss bank account, bonus payments, payments from his advance account, salaries declared to himself and to his spouses, loans and mortgages. While his ability and flexibility have been affected by the losses incurred by his business, he has, nonetheless, been able to manage his affairs, support his family, and make various payments, including spousal support payments, even in the years when the company was losing money. He was able to buy out Ms. Serra's interest in the home in Orillia at a time when the company was losing money and is able to live in a house worth more than $1,000,000.
>
> [209] In these circumstances, it is reasonable to impute Mr. Serra's annual income at $250,000.

[127] Before he and Ms. Serra separated, Mr. Serra's primary source of income was from bonuses derived from the profits of his business. He kept a portion of the bonus and returned the bulk of it to the company by way of a director's loan. That loan has currently been exhausted in an effort to keep Ajax Textiles afloat and satisfy his support obligations. After the commencement of these proceedings, and the interim support order of Sachs J., however, Mr. Serra began taking a salary from the company in order to take the tax benefits in relation to those payments. The evidence shows that from January 2003 to May 2006 (when he ceased paying spousal support to Ms. Serra), his annual salary from the company was about $250,000. It fell to $135,000 when his payments ceased. His current wife receives a salary of $29,000 per year for income-splitting purposes.

[128] Given these circumstances, I see no error in the trial judge's decision to impute an annual income of $250,000 to Mr. Serra for purposes of determining his support payments. I would not interfere with the support order in this regard.

Post-Judgment Interest

[129] The post-judgement interest ground of appeal was based on the premise that, having ordered Mr. Serra to pay an equalization payment and spousal support that he has no ability to pay, the trial judge erred in law by awarding post-judgment interest. The complaint is therefore of little moment, given the above determination with respect to the equalization payment.

[130] In any event, post-judgment interest is a matter of discretion. I would not interfere with the trial judge's decision, particularly in view of the level of payments Mr. Serra will now be required to make.

DISPOSITION

[131] For the foregoing reasons, I would allow the appeal in part and order that the net equalization payment to be made by Mr. Serra be reduced from $3,283,272.57, as ordered by the trial judge, to $900,000.00. This obligation may be satisfied in one of the following ways:

a) Ms. Serra shall have the option of accepting the transfer of Mr. Serra's one-half interest in the Florida condominium, and of requiring him to transfer it to her, in full satisfaction of her equalization payment claim. She is to notify Mr. Serra of her decision in this regard by 5 p.m. E.S.T. on March 6, 2009. The costs of the transfer are to be shared equally.

b) Failing the exercise of the foregoing option, Mr. Serra shall pay to Ms. Serra an equalization payment of $900,000 payable in three instalments of $300,000 each, on March 31, 2009, December 31, 2009 and September 30, 2010, together with post-judgment interest in accordance with the order of the trial judge.

[132] Some changes are required in the support payments provided in the trial judge's order as a result of the foregoing. Her order is therefore varied to provide that Mr. Serra shall pay to Ms. Serra spousal support in the amount of $10,000 per month until the earlier of either of the following: (a) Mr. Serra's interest in the Florida Condominium is transferred to Ms. Serra in satisfaction of his net equalization payment, or (b) the net equalization payment is otherwise satisfied by payment of the full amount outstanding. Thereafter, Mr. Serra shall pay Ms. Serra spousal support of $7,500 per month for a further period of two years from the triggering event above noted, after which either party may apply for a review of spousal support, to be determined on a *de novo* basis.

[133] The judgment of Justice Herman, dated February 7, 2007, is varied in accordance with the disposition set out in paragraphs 131 and 132 above, but in other respects remains in full force and effect.

[134] The parties may make brief written submissions as to costs within 30 days of this order.

"R.A. Blair J.A."
"I agree M.J. Moldaver J.A."
"I agree R.P. Armstrong J.A."

RELEASED: February 4, 2009