COURT OF APPEAL FOR ONTARIO

CITATION: Khani v. Araghi, 2025 ONCA 24
DATE: 20250117
DOCKET: COA-23-CV-0048

Roberts, Zarnett and Favreau JJ.A.

BETWEEN

Farhad Agha Baba Khani

Applicant (Respondent)

and

Golbarg Araghi

Respondent (Appellant)

Valois Ambrosino and Amy Voss, for the appellant

Chloe van Wirdum and Hayley Cairns, for the respondent

Heard: July 5, 2024

On appeal from the order of Justice Laura A. Bird of the Superior Court of Justice, dated September 9, 2022, and from the order dated November 30, 2022, the order dated December 20, 2022, reported at 2022 ONSC 6893, and the costs orders, dated January 3, 2023 and March 6, 2023 of Justice George MacPherson of the Superior Court of Justice.

Favreau J.A.:

A. INTRODUCTION

[1] The appellant, Dr. Golbarg Araghi, seeks to appeal a summary judgment order made by Bird J. (the motion judge) and a trial decision made by MacPherson J. (the trial judge).

[2] The motion judge found that Dr. Araghi and the respondent, Farhad Agha Baba Khani, entered into a valid separation agreement. She directed the trial of an issue with respect to whether the escrow condition on the agreement had been met. The trial judge found that the different aspects of the escrow condition were either met or waived, and that the separation agreement was therefore in effect.

[3] Dr. Araghi submits that the motion judge and trial judge made various errors in upholding the separation agreement.

[4] I would dismiss the appeal. As a preliminary matter, I find that Dr. Araghi is out of time to appeal the motion judge's decision. I also see no error in the trial judge's decision.

B. BACKGROUND

(1) The parties' separation agreement

[5] The parties were married for almost 13 years, from 2004 to 2017. They have four children together. Dr. Araghi is a medical doctor. Mr. Khani is a chiropractor. The parties separated on May 31, 2017.

[6] Before the parties separated, they conducted their respective practices out of a shared office building. They owned the building through a corporation, Innova Medical and Rehab Inc. ("Innova"). Mr. Khani owned 51% of Innova's shares and Dr. Araghi owned 49%.

[7] After the parties separated, they disagreed over what to do with the building. Dr. Araghi brought an application in the Commercial Court, and, on January 8, 2019, Penny J. made an order directing Innova to accept an offer made by a third party to purchase the property.

[8] While the litigation over the building was proceeding, the parties were also negotiating a separation agreement through their family law lawyers. Midway through January 2019, they reached a comprehensive separation agreement that covered several issues, including parenting time, child support, the division of assets and spousal support. The agreement also included terms addressing the disposition of the proceeds from the sale of the building.

[9] On January 20, 2019, Dr. Araghi's family law lawyer sent a draft of the agreement to Mr. Khani's lawyer. The correspondence referred to this version of the separation agreement as the "final draft of the Separation Agreement". In his cover email, Dr. Araghi's counsel asked that Mr. Khani's counsel: "Kindly confirm you will be meeting with your client today to execute five clean copies ... [u]pon our receipt ... we will hold the agreement in escrow confirming corporate counsel's review and approval of the commercial components of the agreement."

[10] The parties made a minor amendment to that version of the agreement, and, on January 24, 2019, Mr. Khani signed it and sent it back to Dr. Araghi's counsel.

[11] Dr. Araghi did not return a countersigned copy of the agreement to Mr. Khani's lawyer, nor did she advise whether the escrow condition had been satisfied or waived. However, she took steps that suggested that the agreement was in effect. For example, on January 30, 2019, she texted Mr. Khani stating that "the agreement [had been] signed so [there was] no going back". On January 31, 2019, she sent a copy of the agreement to her corporate counsel that was entitled "2019-01-25 Fully Executed Separation Agreement". That same day, Dr. Araghi's family law lawyer wrote to Mr. Khani's lawyer stating that "the parties [had] finally executed their separation agreement last week", claiming that Mr. Khani was in breach of the agreement, and threatening to "[bring] a court application to take out an order reflecting the terms of this agreement".

[12] Approximately one month later, Mr. Khani expressed concerns over Dr. Araghi purportedly acting in breach of certain terms of the separation agreement, including those dealing with parenting time. In response, on March 8, 2019, Dr. Araghi took the position that she had not countersigned the agreement. Her lawyer then delivered a new version of the agreement on March 14, 2019, seeking what he referred to as "minimal adjustments". The proposed changes included a term that would require Mr. Khani to pay any fees associated with the transfer of the building and amendments to the division of parenting time.

[13] Mr. Khani did not agree to these proposed changes. On March 15, 2019, he filed an application to enforce the separation agreement he had executed on January 24, 2019.

(2) The motion judge's decision

[14] After initiating his application, Mr. Khani brought a motion for summary judgment under r. 16 of the *Family Law Rules*, O. Reg. 114/99. Following some procedural delays, it proceeded before the motion judge in June of 2022.

[15] As a preliminary matter, she ruled on a motion brought by Dr. Araghi, seeking to prevent Mr. Khani from relying on correspondence their counsel exchanged between January 31 and March 8, 2019, as well as the version of the agreement with proposed changes that her lawyer sent on March 14, 2019, on the basis that these communications were subject to settlement privilege. Relying on the Supreme Court's decision in *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, the motion judge ruled that these communications met the exception to settlement privilege because they were required to determine the existence and scope of the settlement agreement.

[16] On the motion for summary judgment, Dr. Araghi argued the separation agreement was not valid because there was no evidence that she had signed it. In the alternative, she argued that even if she had signed the agreement, it was not

legally enforceable as it was still in escrow pending the review and approval of her corporate counsel, which remained outstanding.

[17] In order to address Dr. Araghi's arguments, the motion judge approached the issue of the agreement's enforceability by engaging in a two-step analysis whereby she first considered whether Dr. Araghi had signed the agreement, and if so, then whether it remained unenforceable pending the satisfaction of the escrow condition. Based on the affidavit evidence before her, the motion judge concluded that Dr. Araghi had signed the agreement and that the parties had entered into a valid "domestic contract".

[18] She also found that Dr. Araghi had placed the separation agreement in escrow pending "corporate counsel's review and approval of the commercial components of the agreement". However, based on the evidence before her, she could not decide if the escrow condition had been met or waived (or neither). After reviewing the evidence available on this issue and stating there was "a solid basis upon which to argue that the escrow condition was satisfied", she went on to hold that this issue nevertheless required a trial:

> I am of the view that the evidentiary record on this issue is not satisfactory. The best evidence on this issue is available from the Respondent's commercial counsel. Neither party produced an affidavit from him on this motion. The Respondent may attempt to argue that any advice given by her commercial lawyer is subject to solicitor client privilege. In my view, this will be a difficult argument to advance since she has sworn affidavits

> claiming that her commercial lawyer never approved of the agreement. In doing so, she has likely waived privilege.

[19] When ordering the trial of an issue, the motion judge directed that the only witness at trial would be Dr. Araghi's "commercial lawyer". She also directed that, if Dr. Araghi took the position that she had not waived solicitor-client privilege, she was to bring a motion dealing with this issue.[1]

[20] Finally, the motion judge directed that the costs of the motion were to be decided by the trial judge.

(3) The trial judge's decision

[21] As anticipated by the motion judge, Dr. Araghi brought a preliminary motion before the trial judge dealing with whether she had waived privilege over her communications with her commercial lawyers. The trial judge held that Dr. Araghi had in fact "waived privilege when she put the issue of communication with her commercial counsel as a defence to the summary judgment motion." On that basis, the trial judge held that:

> The Respondent's commercial counsel will be required to testify as to whether or not the escrow condition was satisfied and, specifically, whether he reviewed and approved of the commercial components of the

[1] By the time proceedings commenced before the trial judge, it had become clear there was not one, but at least two lawyers from the same firm who had advised Dr. Araghi on commercial matters that intersected with her family law proceedings.

> agreement and if he advised the Commercial Court that the agreement was complete, or words to that effect.

[22] At trial, Dr. Araghi called two witnesses who were both identified as her commercial counsel.

[23] The first witness was Kevin Power, Dr. Araghi's commercial litigation counsel. He had not reviewed the whole file before testifying and had no recollection of whether he offered Dr. Araghi any advice on the commercial aspects of the separation agreement. The trial judge drew an adverse inference from Mr. Power's testimony "that he could not recall if he provided advice on the commercial aspects of the agreement and elected not to review his file in its totality".

[24] The second witness was Dr. Araghi's corporate lawyer, Michele Guy. She testified that she had reviewed the separation agreement in late January or early February 2019. She only reviewed the portions of the separation agreement that impacted the parties' business.

[25] When Ms. Guy reviewed the separation agreement, she identified three areas of concern in the commercial aspects of the agreement. One of her concerns was that the agreement stated that Mr. Khani would purchase Dr. Araghi's interest in the office building, but this was impossible because it was Innova that directly owned the building. Ms. Guy was also concerned about whether Innova had any debts, and the tax consequences of those debts. She said that she contacted

Innova's accountant about these issues, and that the accountant advised that he needed Mr. Khani's permission to disclose this information. She never heard anything further from the accountant nor did she follow up. Finally, Ms. Guy had concerns about the financial obligations arising from three cosmetic machines leased by Innova.

[26] Ms. Guy testified that she communicated these concerns to Dr. Araghi sometime between January 31 and February 4, 2019, although she did not have any notes memorializing these discussions.

[27] The trial judge concluded that the escrow condition was satisfied on February 11, 2019, which was the last time Ms. Guy tried to contact Innova's accountant. In reaching this conclusion, the trial judge relied on Ms. Guy's evidence. He also relied on findings made by the motion judge and other evidence that supported the conclusion that, after February 11, 2019, Dr. Araghi conducted herself as though the escrow condition had been fulfilled and the separation agreement was operative. On this basis, the trial judge concluded that the escrow condition was "satisfied and waived".

[28] In the alternative, the trial judge found that it was an "implied condition of the escrow" that, if it was not satisfied within 21 days, the escrow condition would be deemed to be waived. In reaching this conclusion, the trial judge emphasized that the escrow was meant to be temporary:

> Placing this agreement in escrow was meant to be temporary. It was meant to be temporary because there are provisions within the agreement that are time sensitive. Parenting time, as an example, is set out in the Separation Agreement. The commencement date of the agreement is also set out and it was the date the last of the parties signed, in this case January 25, 2019. The parenting provisions were to commence January 25, 2019.

[29] The trial judge's rationale for the 21-day period was as follows:

> [Dr. Araghi] imposed the escrow on January 20, 2019. It is not only necessary, but also reasonable and equitable, for there to be an implied term that [Dr. Araghi] act on the escrow judiciously and within a reasonable period of time. Surprisingly, [Dr. Araghi] advances the position that, almost four years following the execution of the Separation Agreement, it still remains in escrow. There is no doubt in my mind that the parties would have agreed to a time limit on the escrow had it been raised on January 20, 2019.

[30] After the release of the trial decision, the trial judge issued a ruling awarding $5,000 in costs to Mr. Khani for the motion dealing with privilege and another ruling awarding $42,000 in costs to Mr. Khani for the summary judgement motion and the trial. Costs are to be paid out of proceeds held in trust.

C. ISSUES AND ANALYSIS

[31] Dr. Araghi seeks to appeal the motion judge's decision and the trial judge's decision. In the event she is successful on the appeal, she also seeks leave to appeal the costs orders.

[32] As a preliminary matter, I address why it is no longer open to Dr. Araghi to appeal the motion judge's decision. I then move on to consider the appeal from the merits of the trial judge's decision.

(1) Appeal from the motion judge's decision

[33] Dr. Araghi argues that the motion judge erred in finding that the separation agreement was valid. Specifically, she argues that the motion judge erred in limiting her analysis to the issue of whether Dr. Araghi had signed the agreement rather than considering whether the agreement was valid given the evidence that some of its terms were unenforceable. Dr. Araghi further argues that the motion judge erred in limiting the evidence that could be called at trial to the issue of whether the escrow condition was met or waived.

[34] Mr. Khani submits that Dr. Araghi cannot appeal the motion judge's order because she did not initiate her appeal within the time prescribed for doing so. I agree.

[35] Dr. Araghi argues that she is entitled to challenge the motion judge's order because it was in the nature of a mid-trial ruling rather than a final order. I disagree. In my view, the motion judge's order cannot be characterized as a mid-trial ruling. As this court explained in *Harris v. Leikin Group Inc*., 2014 ONCA 479, 120 O.R. (3d) 508, at para. 46, by contemplating that a judge hearing a motion for summary judgment can order the trial of an issue and make directions for the trial, r. 20.05

of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the civil equivalent of r. 16(9) of the *Family Law Rules*) "recognizes the existence of two discrete phases of the proceeding: a pre-trial phase when directions for trial are made and then the trial itself." Accordingly, the motion judge's order, which provided pre-trial directions, does not fall "within the trial proper so as to permit a party to sit on a right of appeal to be used if the party is unsuccessful at trial." Since Dr. Araghi failed to commence her appeal from the motion judge's order within the time prescribed in the *Rules of Civil Procedure*, she is now precluded from challenging that decision.

[36] Even if an appeal from the motion judge's order was properly before this court, the argument advanced by Dr. Araghi before us is inconsistent with the argument that was made before the motion judge. At the hearing before the motion judge, Dr. Araghi took the position that the agreement was not valid because there was no evidence she ever signed it and that, even if she had signed it, the escrow condition had not been met. This led to the motion judge's two-step approach to determining whether the agreement was valid. Dr. Araghi did not make the argument that she now advances on appeal to the effect that the agreement is invalid because some of its terms are unenforceable. Given how the case was argued before her, the motion judge made no error in finding that Dr. Araghi signed the agreement and that the parties therefore entered into a valid domestic contract. These were findings of fact to which our court owes deference. There would be no

basis for finding that the motion judge made a palpable and overriding error on this issue.

(2) Appeal from the trial judge's decision

[37] Dr. Araghi raises several issues with respect to the trial judge's decision, which I summarize as follows:

a. The trial judge erred in finding the escrow condition was satisfied and waived;

b. The trial judge erred in implying a term pursuant to which the escrow condition was to be satisfied within 21 days of the date both parties executed the agreement;

c. The trial judge erred in finding that the exception to settlement privilege applied; and

d. The trial judge erred by failing to find that the agreement was unenforceable or by failing to set the agreement aside on the basis that it is not in the children's best interests and is inconsistent with the *Child Support Guidelines*, O. Reg 391/97.

[38] The analysis below focuses on the first issue, as it is dispositive of the appeal. I nevertheless briefly address the other issues raised by Dr. Araghi.

Issue 1: The trial judge did not err in finding that the escrow condition was satisfied and waived

[39] I see no error in the trial judge's conclusion that the escrow condition was satisfied and waived. The trial judge reached this conclusion based on a careful review of the evidence. I see no palpable and overriding error in his analysis.

[40] Dr. Araghi argues that the trial judge erred in finding that the escrow condition was satisfied and waived. In making this argument, she points out that the escrow condition provided for "corporate counsel's review and approval of the commercial components of the agreement" (emphasis added). She submits that, while Ms. Guy's evidence supported a finding that she reviewed the commercial components of the agreement, it did not support a finding that she approved that aspect of the agreement. On the contrary, Ms. Guy identified three specific elements of the agreement that raised concerns that she said she communicated to Dr. Araghi.

[41] I agree that Ms. Guy did not "approve" the agreement. However, that is not what the trial judge found. He essentially approached the issue of review and approval as a two-part inquiry. First, he considered Ms. Guy's evidence and found that she reviewed the commercial aspects of the agreement. Dr. Araghi does not dispute this finding. Second, he considered the evidence as a whole and concluded that, by her conduct, Dr. Araghi had waived the portion of the escrow

condition that required her corporate counsel to “approve” the commercial aspects of the agreement.

[42] In his reasons, the trial judge carefully reviewed the evidence that supported a finding that, once Dr. Araghi obtained Ms. Guy’s advice, she proceeded on the basis that the agreement was operative:

> It is also noteworthy that the Respondent obtained the opinion of her accountants. In her affidavit sworn October 7, 2019 she outlines Mr. Power’s receipt of the Separation Agreement on January 31, 2019 and she states: “Thereafter, I also sought the opinion of accountants, Rohit Nayyar and Ken Khosla, who advised me with respect to the tax consequences of transferring my shares in the Applicant’s and my joint business.”
>
> At no time did the Respondent or her counsel set out in writing to the Applicant or his counsel that they were not proceeding with the agreement because, following advice from her accountants and corporate counsel, there were issues. To the contrary,
>
> (a) on February 22, 2019, both parties received an email from the accountant who was going to assist them with the transfer of the Innova shares. The Respondent replied to the email on February 25, 2019 and advised the accountant that the Applicant would be responsible for paying the retainer and fees. Following the advice from the accountants and the corporate counsel, the Respondent was content to proceed with the share transfer as provided for in the Separation Agreement. She just did not want to have to pay the accountant;
>
> (b) on March 14, 2019, Mr. Ambrosino sent Ms. Khanlarbig an email with a third version of a Separation Agreement attached. In the first paragraph of his letter, Mr. Ambrosino stated “it would appear that both parties require some minimal adjustments to their

agreement which has thus far been held in escrow pending consultation with corporate counsel";

(c) Justice Bird carefully reviewed the terms with commercial implications in the second and third versions of the Separation Agreement. There were no meaningful differences between them. Specifically, despite the Respondent's professed concern about the tax consequences of the share transfer, there was no mention of that issue in the third agreement. Justice Bird found that the fundamental terms were identical. Paragraph 15 of both versions dealt with the transfer of the office building. This paragraph is word for word the same in both agreements;

(d) paragraph 16 of the agreements dealt with Innova. Paragraphs (a), (b) and (c) are identical in both versions. Paragraph (d) in the second version is repeated word for word in paragraph (f) of the third version. The third version contains two additional subparagraphs. Subparagraph (d) states that the Applicant will be responsible for all accounting, legal and other professional fees incurred to transfer the Innova shares. Subparagraph (e) adds a deadline for the transfer. The inclusion of a term that the Applicant pay for fees related to the transfer is, as Mr. Ambrosino stated, a "minimal adjustment." It does not impact the substance of the agreement between the parties which was encapsulated in the second version of the agreement; and

(e) paragraphs 17 and 18 of the agreement were identical in versions two and three. In paragraph 19(a), there was a minor change in relation to the cosmetic machines. In the second version of the agreement, the Applicant was required to pay the Respondent $100,000 if the machines had to be returned to the company from which they were leased. If the parties were able to find a third party to assume the lease, the Applicant would have to pay the Respondent half of the total amount paid towards the lease. The third version of the agreement states that because the parties had been unable to find a third-party lessee, the Applicant was required to pay the

> Respondent $100,000. This was a very minimal adjustment to the terms of the agreement. According to both versions, the Applicant owed the Respondent $100,000 in relation to the cosmetic machines.

[43] Based on this evidence, the trial judge concluded that he was satisfied Dr. Araghi "received the advice of her accountants and corporate counsel and elected to proceed" (emphasis added). He further concluded that:

> The escrow condition was satisfied and [Dr. Araghi], through her actions (and inaction) demonstrated that the escrow condition was satisfied and waived. As the escrow condition, unilaterally imposed by [Dr. Araghi], was for her benefit, she could waive it at any time. [Emphasis added.]

[44] I see no error in the trial judge's conclusion that, by her conduct, Dr. Araghi waived the portion of the escrow condition that required approval by her corporate counsel.

[45] In *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597, 296 O.A.C. 218, at para. 63, this court explained the principle of waiver and confirmed that waiver "may be inferred from conduct":

> Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one

> party communicated a clear intention to waive a right to the other party. [Emphasis added.]

[46] While waiver may be inferred from conduct, in *Rabin v. 2490918 Ontario Inc*., 2023 ONCA 49, 165 O.R. (3d) 498, at para. 28, this court emphasized that the "stringent test" outlined in the quoted excerpt above must still be met before making a finding of waiver.

[47] Accordingly, in this case, to find that Dr. Araghi waived the approval component of the escrow condition, the trial judge had to be satisfied that her conduct unequivocally showed she: (1) had full knowledge of her corporate counsel's concerns and her right to insist on revising the agreement before it could become legally enforceable; and (2) communicated an unequivocal and conscious intention to abandon that right. While the trial judge did not explicitly refer to this test, I am persuaded that this analysis of the evidence satisfies the test and supports his conclusion that Dr. Araghi, by her conduct, waived her right to have her corporate counsel approve the commercial aspects of the agreement.

[48] As set out above, the trial judge carefully reviewed the evidence demonstrating that Dr. Araghi had full knowledge of Ms. Guy's advice. He then reviewed the evidence of Dr. Araghi's conduct that showed she intended to proceed in acting pursuant to the commercial aspects of the agreement, without seeking to amend the agreement, despite the fact that Ms. Guy had not given her approval. This evidence included the fact that Dr. Araghi never advised Mr. Khani

or his counsel that she was not prepared to proceed with the agreement because of advice she received from her corporate counsel. To the contrary, Dr. Araghi took several steps that supported a finding that she intended to proceed with the commercial aspects of the agreement despite Ms. Guy's reservations. For example, based on an email Dr. Araghi sent on February 25, 2019, it is evident that she communicated with her accountants that she intended to proceed with a share transfer to effectively sell her interest in the building to Mr. Khani, as provided for in the agreement. Also, the third version of the agreement that Dr. Araghi's lawyer sent on March 14, 2019 did not propose any significant changes to the commercial aspects of the agreement.

[49] In my view, this constituted sufficient evidence to find that Dr. Araghi waived her right to rely on the escrow condition. There is no doubt that Dr. Araghi had full knowledge of her right to insist on revising the agreement based on the problems identified by Ms. Guy. Yet, even after being notified of the problems arising out of the commercial terms of the agreement, Dr. Araghi acted consistently with having received Ms. Guy's approval in that she did not disclose any of Ms. Guy's concerns to Mr. Khani and instead communicated her intent to proceed with the transfer of her interest in the office building as provided for in the agreement. The only revisions to the agreement that she proposed when she sought to resile from the agreement on March 14, 2019 did not arise from Ms. Guy's review.

[50] In addition, the escrow condition cannot reasonably be interpreted as allowing Dr. Araghi to renege on the agreement for any reason until she obtained the approval of her corporate counsel. The basis for imposing the condition was to identify and address issues that arose from the terms with commercial implications. Insofar as Dr. Araghi did not raise any issues of that nature at any point before Mr. Khani applied to enforce the agreement, her conduct can be taken as unequivocally waiving her right to rely on the escrow condition for the purpose for which it was intended.

[51] Accordingly, I see no error in the trial judge's conclusion that the escrow condition was satisfied and waived, and that the agreement between the parties is therefore in effect and operative.

Issue 2: It was not necessary for the trial judge to impose a 21-day deadline to satisfy the escrow condition

[52] As an alternative to finding that the escrow condition was satisfied and waived, the trial judge held that it was an implied term of the escrow condition that it was temporary and that it would only remain in effect for 21 days. This finding was not necessary for the trial judge to dispose of the issue before him, and it is therefore not necessary to decide whether this aspect of the trial judge's decision was correct.

[53] I would simply comment that it was no doubt correct for the trial judge to find that the parties intended the escrow condition to be temporary. As this court has held, "[w]here there is no express reference in an agreement to the time of performance, the law requires performance within a reasonable time. What is reasonable will be determined upon the facts of the individual case": *Ju v. Tahmasebi*, 2020 ONCA 383, 447 D.L.R. (4th) 349, at para. 20, citing *Illidge v. Sona Resources Corporation*, 2018 BCCA 368, 16 B.C.L.R. (6th) 268, at para. 61. In this case, some terms of the agreement, especially those related to the parties' children, were meant to come into effect soon after the parties signed the agreement, which supports a finding that the parties expected the agreement to come into effect soon after it was signed.

[54] However, neither party relied on an implied deadline, nor did they make submissions on this issue at trial. It was therefore arguably inconsistent with trial fairness for the trial judge to imply a 21-day deadline in the absence of any submissions on the issue: see *Rabin*, at para. 24. I would therefore not endorse the 21-day deadline implied by the trial judge as a basis on which the issue before him could have been decided. In fact, even if he had disposed of the matter on the basis that the escrow condition had been waived by the time Mr. Khani applied to enforce the agreement because a reasonable amount of time had passed, it would not have been necessary to identify a specific date or defined timeframe. What

mattered was that a reasonable amount of time had already passed before Dr. Araghi first sought to rely on the escrow condition: see *Ju*, at para. 20.

Issue 3: The trial judge did not err in finding that the exception to settlement privilege applies

[55] In her factum, Dr. Araghi submits that the motion judge and the trial judge erred in finding that the exception to settlement privilege applied to certain communications between her counsel and Mr. Khani's counsel. Dr. Araghi's counsel did not pursue this argument in oral submissions. In any event, I see no merit to this argument.

[56] It was the motion judge who made a ruling regarding the admissibility of the communications between counsel, and my determination that Dr. Araghi is out of time to appeal the motion judge's decision also applies to her ruling on the privilege issue. As reviewed above, the motion judge found that the exception to settlement privilege identified in *Union Carbide* applied to these communications because they were necessary and relevant to confirming that Dr. Araghi signed the agreement.

[57] To the extent that Dr. Araghi takes the position that the trial judge erred in relying on these communications as evidence that she waived the escrow condition, there is again no merit to this position. The motion judge had already determined that the exception to settlement privilege applied to these

communications. The same reasoning applies in the context of the trial judge's analysis. In determining whether Dr. Araghi waived the escrow condition that she had imposed on the agreement, it was necessary for the trial judge to examine the parties' course of conduct, which included their communications regarding the formation and implementation of the agreement, and Dr. Araghi's efforts to resile from the agreement. The motion judge made no error in relying on these communications.

Issue 4: The trial judge did not err in deciding not to set aside the agreement

[58] In her factum and in oral argument, Dr. Araghi's lawyer urged this court to find that the agreement was invalid because its terms are unenforceable, or that it should be set aside because it is out of date, does not comply with the *Child Support Guidelines* and is not in the children's best interests. However, these issues are not properly raised on appeal. As directed by the motion judge, the only issue before the trial judge was the question of whether the escrow condition had been complied with or waived. The enforceability of specific terms or advisability of the agreement – which both parties signed with the benefit of advice from experienced legal counsel – were not issues before the trial judge. Accordingly, it would not be appropriate for this court to address these issues, especially given that, as addressed above, Dr. Araghi is out of time to challenge the motion judge's direction regarding the scope of the trial.

[59] Ultimately, if there has been a material change in the parties' circumstances that would justify altering the terms of the agreement, the proper mechanism for addressing such an issue is in accordance with the terms of the agreement and the *Family Law Rules*. As the trial judge directed in his order, "[t]he next step, should there be a material change in circumstances related to decision-making/parenting time, is to attempt to resolve the dispute through negotiation as is set out in the Separation Agreement."

D. DISPOSITION

[60] I would dismiss the appeal. As agreed between the parties, the respondent is entitled to $12,500 in costs for the appeal, all inclusive.

Released: January 17, 2025 "L.B.R."

"L. Favreau J.A."
"I agree. L.B. Roberts J.A."
"I agree. B. Zarnett J.A."